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ABBREVIATIONS EXPLAINED.

Reports.

All. or A.	...	Indian Law Reports, Allahabad **Series.**
A. L. J.	...	Allahabad Law Journal.
1922 All. or 1922 A.	...	All-India Reporter, Allahabad.
B. R. or B. D,	...	Decision of the Board of Revenue, Mad. (N. R. K. Tatachariar).
Bom. or B.	...	Indian Law Reports, Bombay **Series.**
Bom. L. R.	...	Bombay Law Reporter.
1922 Bom.	...	All-India Reporter, Bombay.
Bur. L. T.	...	Burma Law Times.
Bur. L. J.	...	Burma Law Journal.
Cal. or C.	...	Indian Law Reports, Calcutta **Series.**
C. L. J.	...	Calcutta Law Journal.
C. W. N.	...	Calcutta Weekly Notes.
1922 Cal.	...	All-India Reporter, Calcutta.
Cr. L. J.	...	Criminal Law Journal.
I. A.	...	Law Reports, Indian Appeals.
I. C.	...	Indian Cases.
Lah. or L.	...	Indian Law Reports, Lahore **Series.**
1922 Lah.	...	All-India Reporter, Lahore.
Lah. L. J. or L. L. J.	...	Lahore Law Journal.
L. B. R.	...	Lower Burma Rulings.
L. R. (P. C.)	...	The Law Reporter, Privy Council Section.
L. R. (A.)	...	" Allahabad Section.
L. R. (O)	...	" Oudh Section.
Mad. or M.	...	Indian Law Reports, Madras **Series.**
M. L. J.	...	Madras Law Journal.
M. L. T.	...	Madras Law Times.
L. W.	...	Madras Law Weekly.
M. W. N.	...	Madras Weekly Notes.
1922 Mad.	...	All-India Reporter, Madras.
Mys. L. J.	...	Mysore Law Journal.
N. L. J.	...	Nagpur Law Journal.
N. L. R.	...	Nagpur Law Reports.
1922 Nag.	...	All-India Reporter, Nagpur.
O. & A. L R.	...	Oudh and Agra Law Reporter.
O. C.	...	Oudh Cases.
1922 Oudh	...	All-India Reporter, Oudh.
O. L. J.	...	Oudh Law Journal.
P. R.	...	Punjab Record.
P. L. R.	...	Punjab Law Reporter.
P. W. R.	...	Punjab Weekly Reporter.
Pat or P.	...	Indian Law Reports, Patna **Series.**
1922 Pat. or 1922 P. H. C. C.	...	Patna Supplement to C. W. N.
1922 P.	...	All India Reporter, Patna.
1922 P. C.	...	All-India Reporter, Privy Council Section.
Pat. L. R.	...	Patna Law Reporter.
Pat. L. J.	...	Patna Law Journal.
Pat. L. W.	...	Patna Law Weekly.
R. or Rang.	...	Indian Law Reports, Rangoon **Series.**
S. L. R.	...	Sind Law Reporter.
1922 S.	...	All-India Reporter, Sind.
U. B. R.	...	Upper Burma Rulings.
U. P. L. R.	...	U. P. Law Reporter.
1922 U. B.	...	All-India Reporter, Upper Burma.
1922 R.	...	All-India Reporter, Rangoon.

Other Abbreviations.

Appl.	...	**Applied.**	
Appr.	...	**Approved.**	
Dist.	...	**Distinguished.**	
Disc.	...	**Discussed.**	
Diss.	...	**Dissented from.**	
Expl.	...	**Explained.**	
Foll.	...	**Followed.**	
F. B	...	**Full Bench.**	
P. C.	...	**Privy Council.**	
Ref.	...	**Referred to,**	

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CIVIL PROCEDURE CODE (V of 1908).

——O. 1, R. 1.

BENAMIDAR.
CO-MORTGAGEES.
CO-PLAINTIFFS.
CO-SHARER.
EASEMENT SUIT.
JOINT FAMILY.
NECESSARY PARTIES.
PARTITION SUIT.
PARTNERSHIP.
RECEIVER.
RENT SUIT.
REVERSIONER'S SUIT.
SCHEME SUIT.
SHEBAIT.
SPECIFIC PERFORMANCE.
TENANTS
TRUST SUIT.
VENDOR AND PURCHASER.

Benamidar.

——O. 1, R. 1—*Benamidar.*

A person who is an avowed agent or a benamidar for another in a transaction need not be joined in a suit in respect of such transaction. (*Twomey*, J.) MAUNG BYA *v.* MAUNG SAN THU. 10 I.C. 779=4 Bur. L.T. 74.

Co-mortgagees.

——O. 1, R. 1—*Co-mortgagees—Suit for Sale by one—Others refusing to join, to be added as defts.—Form of decree to be passed.*

Where a property is mortgaged to two persons as tenants in common and there is no covenant to repay each separately a moiety of the amount, the right of either mortgagee who desires to realise, failing the consent of his co-mortgagee, is to sue for a mortgage decree in respect of the whole sum secured, joining his co-mortgagee as a deft. In such a case

the decree should provide for all necessary accounts and payment, except that there can be no judgment for a sum of money entered as between the mortgagee-deft. and the mortgagor. (*Lord Buckmaster.*) SUNITABALA *v.* DHARA SUNDARI. 46 I.A. 272=37 M.L.J. 483=17 A.L.J. 997=(1919) M.W.N. 821=22 Bom. L.R. 1=24 C.W.N. 297=53 I.C. 131=11 L.W. 227 (P.C.).

Co-plaintiffs.

——O. 1, R. 1—*Co-plaintiffs—Joint appeal by plaintiff and defendant No. 2 against defendant No. 1, maintainable.*

The trial Court dismissed the suit as against defendant No. 1 but decreed the claim in full as against the former defendant No. 2 on the ground that he had admitted the receipt of the consideration and had not contested the plaintiff's claim. The plaintiff and the defendant No. 2 preferred a joint appeal against this decree. *Held* that the rule contained in O. 1, R. 1, applies to appeals also and the joint appeal is maintainable. (*Campbell and Motisagar*, JJ.) BULAQI MAL *v.* ABDUL RAHIM. 75 I.C. 950=1923 Lah. 638.

——O. 1, R. 1—*Co-plaintiffs—Alternative claims.*

Suits by different sets of plffs. claiming in the alternative is maintainable provided there is a common question of law or fact. (*Rattigan and Shah Din*, JJ.) RUKMAN DEBI *v.* SHILE DEBI. 10 P.R. 1916=69 P.L.R. 1917=32 I.C. 526=204 P.W.R. 1915.

——O. 1, R. 1—*Co-plaintiffs—Death of one—Widow brought on record—Widow's right time barred—Decree in favour of other if can be given.*

Where in a suit by the members of a joint family for recovery of debt, one of the plffs.

C. P. CODE (V of 1908), O. 1, R. 1—Co-plaintiffs.

died and his widow was brought on record but the rights of the widow were declared to be time-barred in another litigation, a decree cannot be passed in favour of the surviving plffs. alone without the widow's name being struck off; and a joint decree should be passed in favour of the widow also allowing the parties to adjust their claims separately. 15 B. 145, rel. on. (*Johnstone and Ratligan, JJ.*) NICHALDEVI *v.* KISHOR CHAND.
51 P.R 1912 = 13 I C. 564 = 139 P.W.R. 1912.

———**O. 1, Rr. 1 and 3**—*Co-plaintiffs—Different causes of action—Joinder of—All defendants not interested in relief—Effect of.*

The effect of the change of language of O. 1, Rr. 1 and 3 of the new C. P. Code is to permit different causes of action to be joined even in respect of several plaintiffs or defendants provided they satisfy the conditions of O. 1, R. 1 or O. 1, R 3 as the case may be. (*Ramesam, J.*) ALLU RAMALINGIER *v.* SUBRAMANIA PILLAI, **32 M L.T. (H C) 46 = 17 L.W. 25 = 69 I.C. 402 = 1923 Mad. 331 (2).**

———**O. 1, Rr. 1 and 2**—*Co-plaintiffs—Alternative relief—Suit by two sets of plaintiffs.*

Where the plffs. 1 and 2 claimed the entire subject-matter and their sisters plffs. 3 and 4 claimed a portion of the subject-matter of the suit in a certain contingency and the suit was prayed on the ground that the defendant was unlawfully detaining the moneys due to the plaintiffs. *Held*, that the suit was not bad for misjoinder of parties and causes of action. The right to relief claimed was in respect of or arose out of the same act (*i.e.*), the act of the unlawful detention of the moneys by the defendant. The right to relief was alleged to exist in the alternative in the first or second set of plffs. in regard to a portion of such relief. There was a common question of fact to be tried and decided, the unlawful withholding of the moneys. The case therefore fell within O. 1, Rr. 1 and 2, C. P. Code. (*Venkatasubba Rao, J.*) VELAPPA NADAR *v.* CHIDAMBARA NADAR. **43 M.L J. 277 = 16 L W. 186 = (1922) M.W.N. 316 = 70 I.C. 684 = 1922 Mad. 174.**

———**O. 1, R. 1**—*Co-plaintiffs — Rival claims.*

The Code does not warrant the joinder of rival claimants as plffs. where each of them denies the right of the other. Each plff. should be in harmony with his co-plff. (*Stanyon, A.J.C.*) AMBADASS *v.* PANDU. **57 I.C. 784.**

———**O 1, Rr. 1 and 9**—*Co-plaintiffs—Dismissal of suit on plea not raised.*

Where the deft. raises no objection to the frame of the suit on the ground of non-joinder of a lessor as co-plff. the Court should not dismiss the suit on that ground but should raise an issue for plff. to meet or to amend the plaint. (*Kanhaiya Lal, A.J.C.*) PANDIT KEDAR NATH *v.* TULSHI. **21 I.C. 182.**

C. P. CODE (V of 1908), O. 1, R. 1—Co-sharer.

———**O. 1, Rr. 1 and 3**—*Co-plaintiffs—Causes of action.*

The claim of the plaintiff No. 1 was based upon an agreement alleged to have been entered into by and between the defendants Nos. 3 and 20 and himself for sale of a land and colliery. The claim of the plaintiff No. 2 was based upon the purchase of September 1919 from the defendants Nos. 10 to 20. The plaintiff No. 1 had absolutely nothing to do with the claim of the plaintiff No. 2 so far as the possession and partition of the plaintiff No. 2's share was concerned. Similarly the plaintiff No. 2 has no concern with the relief claimed by the plaintiff No. 1. If the two plaintiffs had brought the suits separately there would not be any question of law or fact which would be common to the suits. The rights to the reliefs claimed by the two plaintiffs did not arise out of the same act or transaction, or series of acts or transactions. *Held* that the joinder of the two plaintiffs and the causes of action alleged by them was not authorised by any law or principle (*Mullick and Kulwant Sahay, JJ.*) RAMJAS AGARWALLA *v.* LINTON MOLESWORTH AND CO., LTD. **73 I.C. 71 = 1923 P. 411.**

Co-sharer.

———**O. 1, R. 1**—*Co-sharer landlords.*

The co-sharer landlords can sue the tenants collectively even if they collect rent separately and the rent refers to different periods (*Holmwood and Teunon, JJ.*) BHOLANATH *v.* BELOHAMBER. **10 I.C. 891 = 14 C.L.J. 373**

———**O. 1, R. 1**—*Co-sharer landlords—Suit against trespassers for injunction.*

A co-owner of immoveable property can sue for injunction against intending trespassers without joining the other co-owners as parties if he was in sole possession when the trespass was threatened and the suit was brought. (*Sadasiva Aiyar and Bakewell, JJ.*) SELAMBAYI *v.* SANGU PANDITHAN.
35 I.C. 147 = 3 L.W. 842.

———**O. 1, Rr. 1 and 8**—*Co-sharer landlords—Rent suit.*

Two out of five trustees of temple properties, can sue the tenants of the property for rent; the suit is not bad for misjoinder. (*Wallis, C.J. and Phillips, J.*) PONNAMBALA PILLAI *v.* MUTHU CHETTIAR. (1916) **1 M.W N. 181 = 33 I.C. 52 = 30 M.L.J. 619.**

———**O. 1, R. 1**—*Co-sharer landlords—Suit for profits from lambardar.*

No suit against a lambardar for accounts in respect of one item of village property by one of the co-sharers interested in a portion of the village is maintainable unless all the other persons jointly interested are joined either as plffs. or as defts. (*Mitra, Offg. J.C.*) HARIDAS CHATTERJEE *v.* GAHENABAI.
66 I.C. 761.

C. P. CODE (V of 1908), O. 1, R. 1—Co-sharer.

———**O. 1, R. 1**—*Co-sharer landlords—Declaration of right of tenant.*

A suit by the owner of one half of the village to declare that the deft. is neither a superior nor an inferior proprietor, is good, if the mortgagee in possession of the remaining half, is impleaded as a deft. in the case. (*Lindsay*, J.C. *and Stuart*, A.J.C.) RAM AUTAR *v.* ABDUL HASAN KHAN.
28 I.C. 807=2 O.L.J. 181.

———**O. 1, Rr. 1 and 9**—*Co-sharers landlords.*

In a suit for profits for *jerait* land held by defts. in addition to their shares, all co-sharers are necessary parties. (*Chamier*, C.J. *and Kingsford and Sharfuddin*, JJ.) RAM ASRAY SINGH *v.* SHEONANDAN SINGH.
1 Pat L.J. 573=1 Pat. L.W. 35=
35 I.C. 868=(1917) Pat. 21 (F.B.).

Easement Suit.

———**O. 1, R. 1**—*Easement suit — Minor defendants not represented—Suit, dismissal of.*

Where one of the defendants in a suit for a declaration of a right of way is a minor and is not represented in the suit, the suit ought to be dismissed as no effective decree can be made in the absence of one of the persons jointly interested in the alleged servient tenement. (*Chatterjea and Panton*, JJ.) SADHU CHARAN *v.* INDRA MOHUN MISTARI, 64 I.C. 90.

———**O. 1, R. 1**—*Easement suit—Necessary parties—Suit for a declaration of right of way.*

A person having a right of way to his land over successive tenements is, in case of an obstruction to his right caused by one of servient owners only, not required to join all the servient owners as parties to a suit but he might sue only the obstructing owner to declare his right of way. (*Chatterjee*, J.) MADAN MOHAN *v.* SASHI BHUSAN. 31 I.C. 849=
19 C.W.N. 1211.

Joint Family.

———**O. 1, R. 1**—*Joint family—Suit by manager—Other members not necessary parties.*

Where the deft. passed a promissory note in favour of plff. who was the eldest member of the joint family for money due to the joint family and the plff. sued as the manager, *held*, that as the deft. dealt with the plff. alone though he knew that the loan was from joint family funds the other members of the family will not be necessary parties. 36 All. 383 P.C. and 33 All. 272 P.C., Expl. (*Fawcett*, J.) RAMNATH v. RAMDEO. 23 Bom. L.R. 1135=
64 I.C. 956=46 Bom. 358=
1922 Bom. 281.

———**O. 1, R. 1**—*Joint family—Manager—Contract by joint family manager—Suit on.*

A manager of a joint family can sue on a contract entered into by him, in his own name without impleading the other members as

C. P. CODE (V of 1908), O. 1, R. 1—Necessary Parties.

parties to the suit. (*Ratligan and Shah Din*, JJ.) KIRPAL SINGH *v.* SANT SINGH.
71 P.R. 1911=13 I.C. 305=30 P.L.R. 1912=
205 P.W.R. 1911.

———**O. 1, R. 1**—*Joint family—Manager—Mortgage suit by manager on behalf of all members—Maintainability.*

In a mortgage suit by successor of a deceased Zamindar assuming that the property in question is common to all the descendants of the original mortgagee Zamindar, the plff. as the managing member of the family can sue on behalf of all the members without joining them as plffs. 38 I.A. 45; 35 M. 685, Fol. (*Spencer and Phillips*, JJ.) ANNAMALAI PATHAN *v.* MUTHUVIJAYA RAGUNATH. 39 I.C. 427=
5 L.W. 120.

———**O. 1, R. 1**—*Joint family—Manager.*

A Hindu manager can sue for debts due to the joint family, without joining other members as partners to the suit. (*Benson and Sundara Aiyar*, JJ.) SHEIKH IBRAHIM *v.* RAMA AIYAR. 33 Mad 685=10 I.C. 874—
21 M.L.J. 808=(1911) 1 M.W.N. 442.

Necessary Parties.

———**O. 1, R. 1**—*Necessary parties—Proper parties—Distinction.*

The distinction between necessary and proper parties rests on two conditions (1) a necessary deft. is one against whom there is some right to relief and (2) whose presence is necessary for complete and effective adjudication of all questions involved in the suit. It is a general rule that a person remotely or indirectly interested is not a necessary party. (*Mookerjee and Holmwood*, JJ.) JOGENDRA NATH SINGH *v.* SECRETARY OF STATE.
17 C.W.N. 833=17 I.C. 921=
16 C.L.J. 383.

———**O. 1, R. 1**—*Necessary parties—Alienees as parties—Lease.*

The transferee of property sold in execution is a necessary party to reverse the sale if the proceedings have been commenced after the transfer. A landlord sublet a field purchased in execution of his decree for arrears to the deft. The deft. was not a party to the plff.'s application for the reversal of the sale. *Held* despite the reversal of the sale, the plff. did not get any title as against the deft. as he was not a party to the reversal proceedings. (*Mookerjee and Carnduff*, JJ.) MEN AJUDDI BISWAS *v.* TOAM MANDAL 15 I.C. 176=39 Cal. 881.

———**O. 1, R. 1**—*Necessary parties—Several persons jointly entitled to sue for trespass.*

In an action for damages for trespass and cutting of trees, all the persons aggrieved are not necessary parties and so any one who has been damnified may maintain an action singly. (*Mookerjee and Teunon*, JJ.) FATIK CHANDRA BAI *v.* ATLAS BIBI.
1 I.C. 478=15 C.L.J. 225.

C. P. CODE (V of 1908), O. 1, R. 1—Necessary Parties.

———**O. 1, R. 1**—*Necessary parties—One deft. absent on field service—Suit involving land of the remaining defts. only—Dismissal.*

The proprietor of a village sued to eject three persons who were brothers from *Shamilat* land. One brother being on field service, the plff. withdrew his claim as against him and reduced it to two-thirds of the land. The suit is not bad for non joinder. (*Scott-Smith*, J.) BHURA *v.* MATU. **60 I.C. 6.**

———**O. 1, R. 1**—*Necessary party—Irrigation.*

In a case of dispute about the right of irrigation from a private water-course of a canal where no relief is asked against Government the latter is not a necessary party. (*Martineau*, J.) KAINA LAL *v.* NARAIN SINGH.

50 I.C. 299=177 P.W.R. 1918.

———**O. 1, R. 1**—*Necessary parties—Suit to declare marriage of Hindu minor invalid.*

A suit by a relative other than the father of a minor cannot sue for a declaration that the marriage of the latter is invalid without making both the parties to the marriage, parties to the suit. (*Leslie Jones*, J,) LAL CHAND *v.* MANGTAMAL.

119 P.L.R. 1917=42 I.C. 420=158 P.W.R. 1917.

———**O. 1, R. 1**—*Necessary parties—Co-executors—Suit by some of them on behalf of the estate—Non-joinder of others—Objection by defendant—Second appeal—Addition of other parties if allowed.*

Where several executors have been appointed under a will and have entered on their duties as such, it is not open to some of them to sue on behalf of the estate without impleading the others. If a defendant is sued by one only of two persons who have a cause of action against him, he has a right to have the action dismissed unless the other is joined. 6 Cal. 815, referred to. Where in spite of the objection of the defendant in his written statement that the suit as constituted was bad for non-joinder of the other executors, the plaintiffs proceeded with the case without taking steps to add the other executors either in the trial Court or on appeal the High Court would not, on second appeal allow the addition of the necessary parties (*Schwabe*, C.J. *and Wallace*, J.) MOHANAVELU MUDALIAR *v.* ANNAMALAI MUDALIAR.

17 L.W. 241=44 M.L.J. 249=72 I.C. 63=(1923) M.W.N. 89=1923 Mad. 337.

———**O. 1, R. 1**—*Necessary parties—Transferee pendente lite is not such.*

In a suit for setting aside an alienation of properties belonging to a religious endowment a person to whom plaintiff had conveyed a portion of the properties at a time when he had neither title nor cause of action to sue, need not be joined as co-plaintiff in the action. Nor is a transferee *pendente lite* a necessary party to the suit. (*Das and Bucknill*, JJ.) MAHANT RAMRUP *v.* LAL CHAND MARWARI.

1 Pat. 475=3 Pat. L.T 352=67 I.C. 401=1922 P. 243.

C. P. CODE (V of 1908), O. 1, R. 1—Partnership.

———**O. 1, R. 1**—*Necessary party—Remote interest.*

As a general rule a person who is only indirectly or remotely interested in the subject-matter of the suit need not be made a party thereto. (*Jwala Prasad*, J.) GAJENDRA SINGH *v.* AKAL KOER. **39 I.C 292.**

———**O. 1, Rr. 1 and 3**—*Necessary parties—Suit regarding property.*

All persons interested in the property are parties to the suit but if the parties, not added, will have no defence whatever, they need not be joined by amending the plaint and delaying the disposal of the suit. (*Maung Kin*, J.) MAUNG SHWE LA *v.* MA KIN. **42 I.C. 92.**

Partition Suit.

———**O. 1, Rr. 1 and 9**—*Partition suit.*

In a partition suit, persons who according to the plff. have no interest whatsoever in the suit properties, need not be made parties, though in suits for the recovery of property it may be necessary or proper sometimes to add strangers against whom plff. may not ask for any relief. (*Srinivasa Aiyangar*, J.) SITARAMAYA *v.* RAMAPPAYA.

39 I.C. 160=5 L.W. 207.

———**O. 1, R. 1**—*Partition suit.*

In a suit for partition it is an inflexible rule that all the interested parties should be joined as parties either as plffs. or as defts. (*Lindsay*, J.) MAHOMED AHMAD *v.* ANSAR MOHAMMED. **23 O.C. 62=56 I.C. 304=7 O.L.J. 158.**

Partnership.

———**O. 1, R. 1**—*Partnership—Accounts.*

In a suit for accounts of the partnership on the death of a partner all the representatives of the deceased partner should join. Limitation Act, S. 7 applies to the case. (*Bakewell and Phillips*, JJ.) PUTHENPURAYIL BAVACHUTTY *v.* PUTHENPURAYIL KUNHI.

33 I.C. 565.

———**O. 1, Rr. 1 and 9**—*Partnership—Dormant partner—Suit by firm.*

A dormant partner is not a necessary party, in a suit on a contract either with the firm or with one of its members. 33 A. 272 (P.C.) fol. *Sadasiva Aiyar*, J.) GUZZU PAYIDAYYA *v.* VENKADARU VENKATA REDDI.

31 I.C. 913 (2)=(1915) M.W.N. 864.

———**O. 1, R. 1**—*Partnership—Promissory note—Parties to suit on a pro-note.*

All the members of a firm are proper parties to a suit on a pro-note in favour of the firms when the obligation on it was contracted; the fact that one of them has retired would make

C. P. CODE (V of 1908), O. 1, R. 1—Receiver.

no difference. He is still a proper party to join in the suit unless before suit, there has been a due and valid assignment of the chose in action from the partners to one of them. (*Wallis*, J.) RAMAN CHETTY *v.* NAGARATHNA NAICKER. **15 I.C. 380=11 M.L.T. 246.**

Receiver.

——**O. 1, R. 1**—*Receiver—Property in the possession of Receiver—Suit by real owner against creditor.*

Where at the instance of the creditor of an insolvent certain property which the creditor alleged to belong to the insolvent was taken possession of by the Receiver, and on objection by the real owner, was restored to him and the real owner brought a suit against the creditor for damages and wrongful seizure, *held*, that the Receiver was not a necessary party and that the suit was maintainable. (*Tudball and Rafique*, JJ.) BINDA PERSHAD *v.* RAM CHANDER. **43 All. 452= 3 U.P.L.R. (All.) 42=60 I.C. 821= 19 A.L.J. 277.**

——**O. 1, R. 1**—*Receiver—Insolvency proceedings—Creditors—Appeal.*

In an appeal by a secured creditor or an insolvent debtor where the Receiver is a party, it is not necessary to join all the creditors. (*Mookerjee and Panton*, JJ.) EAST INDIA CIGARETTE MANUFACTURING CO., LTD. *v.* ANAND MOHAN BASAK. **58 I.C. 10= 24 C.W.N. 401.**

——**O. 1, R. 1**—*Receiver — Partnership—Receiver, whether necessary party — Suit against partnership.*

A Receiver, appointed in a suit for dissolution of partnership, is not a necessary party in a suit by a third person against the partnership. The test is to see whether the object of the suit is to interfere with the possession of the Receiver or the jurisdiction of the Court appointing him. (*Raymond*, A.J.C.) ASUDAMAL DWARKA DAS *v.* CHOITHRAM GOPAL DAS. **60 I.C. 273=14 S.L.R. 171.**

Rent Suit.

——**O. 1, R. 1**—*Rent suit—Suit against tenant's heirs—Non-joinder.*

In a suit for arrears of rent against only those heirs of a tenant who are in actual possession of the holding and for the period that they were in possession, the rest of the heirs are not necessary parties. (*Teunon and Newbould*, JJ.) MEAGAN MONDAL *v.* JOGENDRA NATH. **63 I.C. 949=48 Cal. 518.**

——**O. 1, R. 1**—*Rent suit—Tenancy not represented in its entirety.*

Where in a suit for arrears of rent, some of the tenants who are necessary parties are not before the Court, the plff. cannot get a decree against such of them as are before the Court. (*Mookerjee*, A.C.J. *and Fletcher*, J.) SURENDRA NATH *v.* AGHORE NATH. **62 I.C. 464= 25 C.W.N. 525.**

C. P. CODE (V of 1908), O. 1, R. 1—Scheme Suit.

——**O. 1, Rr. 1 and 10**—*Rent suit—Addition of party—Stranger's title to rent.*

When the deft.'s tenants in a rent suit plead the title of a third person, the third person is not a necessary party to the proceedings. (*Sharfuddin and Teunon*, JJ.) PARSHAD SINGH *v.* NOUKHU MOD. **32 I.C. 553.**

——**O. 1, R. 1**—*Rent suit—Necessary parties—Non-joinder—Effect.*

If all the tenants of a holding are not made parties to a rent suit, the decree obtained will not be rent decree but will be a money decree. 1 P.L.J. 190; 22 C.W.N. 289; (1920) Pat. 9, Foll. (*Sultan Ahmed*, J.) RAM NANDAN RAM KUNDU *v.* HARNANDAN PRASAD. **56 I.C. 463.**

Reversioner's Suit.

——**O. 1, R. 1 and O. 2, R. 3**—*Reversioner's suit—Joinder of parties—Embarrassment.*

A suit for declaration that plffs. were entitled as reversioners to a deceased Hindu, was instituted by 59 plffs, and nearly 20 other parties in addition to the parties in possession were added as *pro forma* defts. as being members of the family though they advanced no claims. Even if the case were proved some one or few persons standing in the same degree of propinquity to the deceased would succeed. The scheme of the action was to bring into Court a large number of persons more or less akin in blood in the hope of ousting the defts. by a mass attack and afterwards to assign the fruits of victory to the parties entitled by further litigation *inter se*. *Held*, that the procedure was condemnable, as it tended to embarrass the opposite party and obscure the issues. (*Lord Sumner*). MEWA SINGH *v.* BASANT SINGH. **9 L.W. 416=24 M.L.T. 429=28 C.L.J. 530= 1 P.W.R. 1919=21 Bom. L.R. 232= 48 I.C. 540=28 P.L.R. 1919 (P.C.).**

——**O. 1, R. 1**—*Reversioner's suit—Co-plaintiffs—Joinder of parties.*

Where in a suit by reversioners the 2nd plaintiff was joined as a co-plaintiff in fear that the 1st plaintiff's right as nearest reversioner would be questioned; *held*, that the suit is not bad for misjoinder of plaintiffs and the plaintiffs could not be made to elect which of them should proceed with the suit. (*Batten*, A.J.C.) SHANKAR *v.* SONOO. **63 I.C. 419= 4 N.L.J. 58.**

Scheme Suit—Parties.

See also C. P. CODE, S. 92.

Scheme Suit.

——**O. 1, R. 1**—*Scheme suit—Alienee of trust property.*

It is doubtful whether alienees or trespassers on trust property can be joined as parties to a suit under S. 92. (*Tyabjee and Spencer*, JJ.) PRASANNA VENKATACHELLA *v.* COLLECTOR OF TRICHINOPOLY. **33 I.C. 45=38 Mad. 1064.**

C. P. CODE (V of 1908), O. 1, R. 1—Shebait.

Shebait.

———O. 1, Rr. 1 and 8—*Shebait—Right to sue on behalf of idol.*

A shebait has every right to litigate for the protection of property dedicated to an idol and not vested in the idol itself; hence it is not necessary to join the idol as party in any suit which the shebait may launch. 32 Cal. 129 and 31 I.A. 203, foll. (*Chatterjee and Richardson, JJ.*) DINA BANDHU NANDI *v.* CHAMIRADDI MIJI. **34 I.C. 548.**

Specific Performance.

———O. 1, Rr. 1 and 9—*Specific performance—Suit.*

If there is no agreement to give possession of the lands contracted to be sold, strangers to the contract claiming adverse possession are not proper parties to a suit for specific performance of the contract. (*Oldfield and Sadasiva Aiyar, JJ.*) NARASINGA RAO *v.* RANGASWAMI.
(1916) 2 M.W.N. 191=33 I C. 871=4 L.W. 397.

Tenants.

———O. 1, R. 1—*Tenants—Under-raiyats.*

The under-raiyats of plff. in a suit for declaration of his status as tenant are proper though not necessary parties. (*Teunon and Chandavarkar, JJ.*) SECRETARY OF STATE *v.* JADAY CHAUDHURI MISRA.
39 I.C. 409=21 C.W.N. 452

Trust Suit.

———O. 1, R. 1—*Trust suit—Religious endowment—Co-trustees.*

A trustee of temple properties cannot sue singly for rent without making other co-trustees, parties to the suit. (*Wallis and Sadasiva Iyer, JJ.*) VAVUTTU NAICKEN *v.* VENKATA SESHA IYER. **24 I.C. 806.**

———O. 1, R. 1—*Trust suit—Religious endowment—Committee—Two out of three members, suing to dismiss trustee—Non-joinder.*

Two out of three members of a committee appointed under the Act, cannot sue for the removal of the person acting as the trustee of the endowment. 39 C. 304; 22 M. 481, ref. (*Mullick and Atkinson, JJ.*) MUHAMMAD HASAN *v.* KAZI NAZAR MUHAMMAD.
1 Pat. L.J. 437=38 I.C. 13=3 Pat. L.W. 31.

Vendor and Purchaser.

———O. 1, R. 1—*Vendor and purchaser—Suit in vendor's name after sale.*

After sale of the landlord's interest in land with all claim for arrears of rent, a suit can be instituted in the vendor's name as plff. if the document of sale authorises the purchaser with irrevocable authority to institute such suits. (*Fletcher and Newbould, JJ.*) MOHENDRA NATH MADAK *v.* PARESH CHANDRA GHOSH.
40 I.C. 806.

C. P. CODE (V of 1908), O. 1, R. 3—Government—Fishery.

———O. 1, R. 8.

CONSPIRACY.
DEFAMATION SUIT.
EJECTMENT.
GOVERNMENT—FISHERY.
JOINDER OF PARTIES AND CAUSES OF ACTION.
LANDLORD AND TENANT.
MISJOINDER OF CAUSES OF ACTION.
MORTGAGE SUIT.
MULTIFARIOUSNESS.
PARTNERSHIP.
RENT SUIT.
SCOPE OF.
SPECIFIC PERFORMANCE.
SUIT TO SET ASIDE ALIENATION.
TORT—JOINT TORT FEASORS.
TRUSTEE—SUIT.

Conspiracy.

———O. 1, R. 3—*Conspiracy—Misjoinder of causes of action—Removal of crops by each individual tenant—Conspiracy neither alleged nor proved.*

Where every one of the several tenants removes crops on the land and conspiracy is neither alleged nor proved, there are as many causes of action as there are tenants and a single suit against all of them is bad for misjoinder of causes of action, even if the cause of action alleged in the plaint, is the implied denial of landlord's title. 14 C. 435; 14 C. 681, Foll.; 24 C. 831; 33 B. 293, Dist. (*Ayling and Seshagiri Aiyar, JJ.*) RAMANATHAM CHETTY *v.* MALLAKA ANJAPPAN.
24 I.C. 813=4 L.W. 399.

Defamation Suit.

———O. 1, R. 8—*Defamation suit—Suit against several persons making defamatory statements.*

Where a number of persons defame the plff., a suit against all of them to recover damages therefor will not lie, unless it is proved that the defts, defamed, acting together. (*Fletcher and Newbould, JJ.*) DIGAMBAR DAS *v.* BISWESWAR CHOWDHURY. **41 I.C. 12.**

Ejectment.

———O. 1, R. 3—*Ejectment—Different parties.*

A suit for declaration of title, mesne profits and possession of the property purchased by different sets of defts. in different lots in auction sale which was fraudulently brought by the judgment-debtor is bad for multifariousness. (*Piggott and Walsh, JJ.*) AFZAL SHAH *v.* G. LACHMI NARAIN. **40 All. 7=42 I C. 856=15 A.L.J. 809.**

Government—Fishery.

———O. 1, R. 3—*Government—Fishery—Village right.*

In a suit for declaration by mirasdars that the right of fishery leased out by Government to

C. P. CODE (V of 1908), O. 1, R. 3—Joinder of Parties and Causes of Action.

Gramattars of the village, belonged to them, it was held that Government was a necessary party. (*Sadasiva Aiyar and Spencer*, JJ.) PARTHASARATHY AIYANGAR *v.* AUTHARI PERIA KUPPA NAICKEN. 38 I.C. 100.

Joinder of Parties and Causes of Action.

——O. 1, R. 3—*Joinder of parties and causes of action.*

A suit is not bad for misjoinder of parties and causes of action if the right to relief against the defendants arises out of the same transaction and a common question of fact would arise, if separate actions had been brought, (*Mookerjee and Buckland*, JJ.) KRISHNA JIBAN *v.* MAHAMMAD. 63 I.C. 244= 38 C.L.J. 369.

——O. 1, Rr. 3 to 10—*Joinder of parties—Creditors.*

Creditors are proper parties to a suit by sons against a Hindu father for partition and for declaration that the debts contracted by the father were not valid and binding on the family. (*Oldfield and Ramesam*, JJ.) SHANMUKA NADAN *v.* ARUNACHALAM. 14 L W. 642= (1921) M.W.N. 799=42 M.L.J. 97= 30 M.L T. 172=69 I.C. 961=45 M. 194= 1922 Mad. 332.

——O. 1, R. 3—*Joinder of causes of action—Suit for rent—Single suit against different persons in respect of different holdings.*

The recovery of rent in respect of different and distinct liabilities with regard to separate holdings cannot be claimed in one suit. (*Atkinson*, J.) MAHIPAT NARAIN SINGH *v.* KIRAT SINGH. 1 Pat. L.R. 488 (Civ.).

Landlord and Tenant.

——O. 1, Rr. 3 and 8—*Landlord and Tenant—Occupancy holding — Suit between rival claimants—Landlord if necessary party.*

The landlord is not a necessary party to a suit between rival claimants to an occupancy holding, one of whom is the mortgagor and the other is a successor to the mortgagee who took a usufructuary mortgage, who (the rival claimant) somehow got his name entered in the village papers as occupancy-holder, to which proceeding the mortgagor was not a party. (*Kanhaiya Lal*, J.) MT. DURGA DEVI *v.* GIRWAR SINGH. 70 I.C. 958=1923 All. 11 (2).

——O. 1, R. 3—*Landlord and tenant—Ghatwali tenure—Necessary parties.*

In a suit by a tenant of *Ghatwali* land against his landlord (*Ghatwal*), the Secretary of State is not a necessary party. (*Fletcher and Teunon*, JJ.) KAILASH MAI *v.* DWARIKANATH MAJHI. 38 I.C 788.

Misjoinder of Causes of Action.

——O. 1, Rr. 3 and 5—*Misjoinder of causes of action—Suit for possession—Different persons in possession of different plots.*

C. P. CODE (V of 1908), O. 1, R. 3—Multifariousness.

A plaintiff suing for recovery of possession of a single plot of land can join as defendants three different persons who claim to be in possession of three different portions of the property. The plaintiff is entitled only to claim the recovery of possession of his land as a whole and not in fragments and it matters little to him upon what grounds the different defendants in possession may seek to justify the wrongful dispossession of his property. 29 C. 871, foll. (*Batten*, J.C.) LAXMI NARAYAN *v.* RAM RATAN. 19 N.L.R. 178=77 I C. 761= 1924 Nag. 55.

Mortgage Suit.

——O. 1, R. 3—*Mortgage suit—Claim of redemption on a particular mortgage does not entitle plff. to redemption on separate prior mortgages.*

A claim of redemption in a suit against two persons on a particular mortgage does not entitle the plff. on failure in the suit, to redeem property in the suit on the basis of other prior mortgages to the defts. separately. (*Jwala Prasad*, J.) GOVIND KANDU *v.* WAJID ALI. 37 I.C. 976.

Multifariousness.

——O. 1, R. 3—*Multifariousness—Distinct reliefs.*

Where after the death of a Muhammadan, his widow under a compromise with A remained in possession of 1/8 of the estate as her share, and the 7/8 as dower, and she gifted the whole to P who mortgaged it to Q and after her death A sued P for possession while P had sold the property to Q, and Q applied to be joined as deft. in the suit by A against P; *held*, that he could not be joined, as no relief was sought against him and the case against him was not the same as that against other defts. (*Knox and Rafique*, JJ.) CHIMANLAL *v.* SIKANDAR KHAN. 17 I.C. 641=10 A.L J. 387.

——O. 1, R. 3—*Multifariousness — Suit for accounts and for negligence.*

The plaintiffs brought a suit against the defendant No. 1 who was their cashier and defendant No. 3 who was the Sadar Naib. It was alleged that money was due by Defendant No. 1 on account being taken against him that the Sadar Naib was responsible for any loss which the plaintiffs might have sustained through the action or omission of their cashier which loss had been occasioned by his negligence, his duty being amongst others to supervise the work and to sign the accounts of the Treasurer. *Held*, that the suit was bad for misjoinder of parties and causes of action. (*Woodroffe and Ghose*, JJ.) CHANDRA KUMAR BASU *v* SASHI MUKHI DEBI. 71 I.C. 324= 1924 Cal. 511.

——O. 1, R. 3—*Multifariousness—Cause of action against some of the defendants arising out of the jurisdiction—Effect of.*

C. P. CODE (V of 1908), O. 1, R. 3—Multifariousness.

The plaintiff had distinct and separate causes of action against the first and second defendants. The cause of action against the first defendant arose within the jurisdiction and that against the second defendant and arose outside the jurisdiction of the court in which plff. sued both the first and second defendants, *Held*, that the court had no jurisdiction to try the suit as against the second defendant and that the joinder of both the defendants in the same suit was not permitted by O. 1, R. 3, C. P. Code. O. 1, R. 3, C.P.C., relates to a joinder of parties and it assumes the existence of a suit in a proper *forum*, the court having jurisdiction to try the suit. If the Court has such jurisdiction, then O. 1, R. 3 might come into play. (*Woodroffe and Richardson*, JJ.) BENGAL AND NORTH-WESTERN RAILWAY CO., LTD. *v.* SADARAM BHAIRODAN.

49 Cal. 895=27 C.W.N. 82=70 I.C. 229=1922 Cal. 500.

———O. 1, R. 3—*Multifariousness.*

R. 3 of O. 1 is not limited to joinder of parties but it applies to joinder of causes of action too. The determination as to whether or not the suit as framed is open to objection on the ground of misjoinder of parties and causes of action, depends upon the allegations in the plaint. (*Woodroffe and Mookerjee*, JJ.) RAMENDRA NATH RAY *v.* BROJENDRA NATH DAS. **45 Cal. 111=21 C.W N. 794=41 I.C. 944=27 C.L.J. 138.**

———O. 1, R. 3—*Multifariousness—Test of.*

Under O. 1, R. 3 the test is not whether the decree awarded to the plff. against the deft. is joint but whether it is alleged in the plaint that there is against the said defts. any right to relief in respect of the same act or transaction. (*Kincaid and Kemp*, A.J.Cs.) KHEMOMAL *v.* FIRM OF PESSUMAL.

53 I.C. 32=13 S.L.R. 133.

Partnership.

———O. 1, R. 3—*Partnership—Dissolution—Suit for a dissolution of partnership.*

Neither under the common law nor under the provisions of O. 1, R. 3, C.P.C., nor on the ground of avoidance of multiplicity of proceedings, are sub-partners necessary parties and any provision in the decree concerning them is unenforceable. (*Oldfield and Srinivasa Aiyangar*, JJ.) CHIDAMBARAM CHETTY *v.* KARUTHAN CHETTY. **(1916) 2 M.W.N. 18=4 L.W. 10=34 I.C. 343=20 M.L.T. 134.**

Rent Suit.

———O. 1, R. 3—*Rent suit—Landlord and tenant—Necessary parties.*

In a suit between landlord and tenant for rent, a third person, who once claimed to be the rightful owner need not be made a party. (*Fletcher*, J.) JOTIRMOY MAULIK *v.* KHUDI RAM SADHU KHAN. **50 I.C. 908.**

C. P. CODE (V of 1908), O. 1, R. 3—Specific Performance.

———O. 1, R. 3—*Rent suit—Causes of action—Suit for share of rent by co sharer landlord against tenant and other co-sharers—Maintainability of.*

The owner of a share of an estate sued the tenants making his co-sharers *pro forma* defts., with a prayer to recover his share of the rent from the tenant defts. or in the alternative from the *pro forma* defts. in case the latter had realised the share of the rent due to the plff. *Held*, that the prayer for the relief against the *pro forma* defts. could be joined with the prayer for the recovery of the rent against the principal defts. (*Newbould and Panton*, JJ) ISWAR DALIN *v.* GIRINDRA KUMAR NAG.

48 I.C. 726.

———O. 1, R. 3—*Rent suit—Tenant defts.—Co-sharer landlords.*

In a suit for arrears of rent, a plff. could claim alternative reliefs either against tenant defts. for arrears or against the co-sharers of plffs. for a money decree, if they have relinquished the rights to entire rent from the tenants. (*Mookerjee and Beachcroft*, JJ.) BINODE LAL *v.* PREO NATH. **40 I.C. 178.**

Scope of.

———O. 1, R. 3 and O. 2, R. 3—*Scope of.*

Rule 3 of O. 2 must be so read as not to clash with the provisions of R. 3 of O. 1. (*Drake-Brockman*, J.C.) MAHADEO *v.* NAGO. **12 I.C. 357=7 N.L.R. 130.**

———O. 1, r. 3—*Scope of.*

If there are persons against whom jointly or severally, any right of relief in respect of or arising out of the same act is alleged to exist and if it is found that any common question of law or fact, would arise in case of separate suits against them, all such persons must be joined as defendants as required by O. 1, R. 3, C.P.C. (*Kanhaiya Lal*, J.C.) HAUSHA BAKHSH SINGH *v.* RAJ BAKSH SINGH.

4 U.P.L.R. (O.C.) 47.

Specific Performance.

———O. 1, R. 3—*Specific performance—Specific Relief Act, S. 27—Rights of the contractees under the agreement.*

Per Wallis, C.J. and Srinivasal Aiyangar, J. and Abdur Rahim, J., dissenting.) In a suit for specific performance of a contract by a member of an undivided Hindu family to sell his share, other members of the family cannot be joined as defts. merely with a view to obtaining partition and possession of the alleged vendor's share as against them unless a fraudulent partition, allotting to the others the property agreed to be sold is alleged when the others may be treated as subsequent transferees with notice and would consequently be proper parties to the suit. The right to sue for partition does not arise till after the legal title is

C. P. CODE (V of 1908), O. 1, R. 3—Suit to set aside alienation.

transferred. Per *Srinivasa Aiyangar, J.*—If there was an existing cause of action for partition on the date of the suit, the question whether the two causes of action, the one for specific performance and the other for partition and possession can be joined in one suit, would depend not only on the provisions of O. 1, Rr. 3 and 5 which primarily regulate the joinder of parties but also of O. 2, Rr. 3 and 4 which provide for joinder of causes of action. By Division Bench, Per *Oldfield and Sadasiva Aiyar, JJ.* A purchaser of a specified portion of joint family property is entitled to a conveyance by that member of the family of that item and such conveyance entitles him to demand a partition of the family properties and entitles him either to the specified property or to its equivalent from other properties falling to the share of that member. Where a plff. is directed to amend his plaint and plff. fails to obey, the plaint should not be rejected, but the court itself should exercise its powers under O. 6, Rr. 16 and 17 to strike and amend all matters which tend to prejudice, embarrass or delay the fair trial of the suit and in such manner and on such terms as may be just. (*Wallis, C.J., Abdur Rahim and Srinivasa Aiyangar, JJ.*) RANGAYYA REDDY *v.* SUBRAMANIA AIYAR.
32 M.L.J. 575=40 M. 366=5 L.W. 797=40 I.C. 429=21 M.L.T. 385 (F.B.).

Suit to set aside Alienation.

———**O. 1, R. 3**—*Suit to set aside alienation —Several transferees of properties from widow —Multifariousness.*

A reversioner's suit for possession of properties from several alienees of a widow is not untenable for multifariousness. (*Tudball and Chamier, JJ.*) BALAKRISHNA DAS *v.* HIRA LAL. **36 All. 406=24 I.C. 98=12 A.L.J. 509.**

———**O. 1, R. 3**—*Suit to set aside alienation —Suit to set aside alienation to different alienees on different dates.*

Where an alienor (who is dead) alienated property to various alienees on different occasions a suit to set aside these alienations can be brought against any one of such alienees or all the alienees may be made co-defts. (*Batchelor and Hayward, JJ.*) SONU KHUSHAL KHADAKE *v.* BAHINIBAI KRISHNA.
40 Bom. 351=33 I.C. 950=18 Bom. L.R. 95.

———**O. 1, R. 3**—*Suit to set aside alienation —Several alienations.*

O. 1, R. 3 is very wide and even if there is only one question common to all the cases that is sufficient to justify a joint trial. Where in a suit for a declaration that certain alienations shall not affect the plff.'s reversionary rights, the plff. impleaded all the alienees as defendants *held*, that the suit was not bad for misjoinder of parties. (*Shadi Lal, C.J. and Le Rossignol, J.*) JIWAN SINGH *v.* GARBHA SINGH.
59 I.C. 522=25 P.W.R. 1921.

C. P. CODE (V of 1908), O. 1, R. 6.

———**O. 1, R. 3**—*Suit to set aside alienation —Several alienees—Suit to set aside—Not bad for misjoinder.*

In a suit for a declaration that the alienations of family lands made by plff.'s father in favour of several alienees were without consideration and necessity and did not affect their reversionary rights. *Held*, the suit was not bad for misjoinder of parties, and the plffs. were competent to bring one suit against the vendees and the prior mortgagees. (*Shadi Lal and Wilberforce, JJ.*) RALI RAM *v.* MULK RAJ.
54 I.C. 512=2 U.P.L.R. (L.) 29=17 P.L.R. 1920.

———**O. 1, R. 3**—*Suit to set aside alienation —Several alienees from last owner—No misjoinder.*

A suit for possession on the ground of inheritance can proceed against a number of different alienees. The question is purely one of convenience. 33 B. 298, 29 C. 871, Foll. (*Leslie Jones, J.*) LAL CHAND *v.* MANOHARI.
59 P.R 1918=44 I.C. 549=64 P.W.R. 1918.

———**O. 1, R. 3**—*Suit to set aside alienation —Punjab.*

The heir of a deceased agriculturist can attack all alienations of ancestral property to different alienees in one suit for possession as his right to sue for possession accrues when succession opens on the death of the alienor. (*Chevis, J.*) FAZUL HUSSAIN *v.* AMIR HAIDER. **76 P.L.R. 1911=9 I.C. 588=73 P.W.R. 1911.**

Tort—Joint Tort Feasors.

———**O. 1, R. 3**—*Tort—Joint tort feasors.*

Three persons attached certain property and the proceeds of the execution were distributed between them. The plff. sued one of them for damages for wrongful attachment. The other two were not necessary parties as the cause of action against each was separate and distinct. (*Parlett and Twomey, JJ.*) C. T. M. R. M. MEYAPPA CHETTY *v.* MAUNG POHNYIN.
12 I.C. 866=4 Bur. L.T. 145.

Trustee—Suit.

———**O. 1, R. 3**—*Trustee—Suit—Accounts —Damages.*

A claim to direct a trustee to render accounts of trust property for a certain period may be joined with a claim against the trustee and others to render accounts of trust property for another period. 27 M. 80; 29 M. 50; 31 M. 252, ref. (*Benson and Sundara Aiyar, JJ.*) MAHOMED ALI SULTAN *v.* ABDUL KHAELVI ROWTHER. **9 M.L.T. 238=9 I.C. 565=(1911) 2 M.W.N. 302.**

———**O. 1, R. 6**—*Hundi, suit on—Drawer, necessary party.*

The drawer is a necessary party to a case based on a Hundi. (*Rattigan, J.*) JAGANNATH NATHU MAL *v.* RAM DAS BRIJ DAS.
140 P.W.R. 1914=26 I.C. 881=243 P.L.R. 1914.

C. P. CODE (V of 1908), O. 1. R. 8.

——O. 1, R. 8.

COMMUNAL RIGHT AND PROPERTY.
COMPANY.
COMPROMISE OF SUIT.
DAMAGES.
DECREE.
EJECTMENT SUIT.
LEAVE TO SUE.
NOTICE.
PUBLIC RIGHT.
RELIGIOUS ENDOWMENT.
REVERSIONER'S SUIT.
SCHEME SUIT.
SCOPE OF.

Communal Right and Property.

——O. 1, R. 8—*Communal rights—Representative capacity—Consent.*

Where there were two factions in a community and members of one, sued on behalf of the other faction, rules of equity and good conscience forbid the inference, that the consent of members of a community obtained privately after the institution of a suit purporting to be on their behalf, is on the same level, as the open casting of votes at a public meeting. (*Batchelor and Hayward*, JJ.) HARKISON DAS v. CHAGAN LAL. 40 Bom. 188= 33 I.C. 264=18 Bom. L.R. 1.

——O. 1, R. 8—*Communal propery—Fluctuating body of persons—Right to one property—Suit to recover property.*

The Dhobi Community of Narainada had been owning the *akhra* and its properties from time immemorial, through panchayats. Certain of its members sued under O. 1, R. 8 for declaration of title. *Held*, that the Dhobi Community of Narainda had the right to hold and manage the property and maintain suits with respect thereto through panchayats and that the present suit which was properly constituted under O. 1, R. 8, C. P. C., should succeed. (*Chatterjee and Panton*, JJ.) PROBHAT CHANDRA SEN v. HARI MOHAN DHUPI. 34 I.C. 742=24 C.W.N. 206.

——O. 1, R. 8—*Communal property—Fluctuating body—Promise to pay money—Enforceability—Suit to enforce payment.*

A person can make himself liable to a community (like the Vysia community of a particular place) by agreeing to pay a certain sum of money to it; and a suit to recover the sum may be brought by a member of that community with leave of Court obtained under O. 1, R. 8, C. P. C. (*Krishnan*, J.) BUDAVARAM NARASIMHULU CHETTY v. NOOTA IBBUNDRUM NAGASAM VARU. 44 M.L.J 240= (1923) M.W.N. 237=72 I.C. 93= 1923 Mad. 434.

——O. 1, R. 8—*Communal property—Members of a Community—Suit for declaration that property is waqf property.*

It is competent to certain persons alleging themselves to be members of the Shia community to institute a suit for a declaration that certain property in the possession of the defendants is *waqf* property over which the defendants had no proprietary right. To such a suit the sanction of the court under O. 1, R. 8, C.P.C., is not required. 7 All. 188; 32 All. 631: 24 Cal. 385; 35 All. 197, Ref. (*Kanhaiya Lal*, J.C. *and Daniels*, A.J.C.) SADIQ HUSAIN v. KHAN BAHADUR HAKIM MIRZA NAZIR HUSAIN KHAN. 9 O.L.J. 111= 4 U.P.L.R. (J.C.) 25= 66 I.C. 90=1922 Oudh 1.

——O. 1, R. 8—*Communal property—Waqf—Right of beneficiaries to sue—Remedies open to worshippers.*

A beneficiary of a trust in respect of a Muhammadan *waqf* interested in the maintenance of a mosque or other charitable institution may, without having recourse to the provisions of Rule 8, Order 1, Civil Procedure Code and without suing in a representative capacity on behalf of the other beneficiaries, sue for recovery of possession of property wrongfully alienated by the trustee and for the incidental declaration that the subject of trust cannot be alienated. The trust property vests in God and the right of a Muhammadan who is entitled to use a mosque to bring a suit for the recovery of property belonging to it is comparable to a right of suit in respect of a private road which many persons have a right to use. Every Musalman who derives any benefit from such a *waqf* is entitled to maintain an action against the *mutwalli* to establish his right thereto or against a trespasser to recover any portion of the *waqf* property which has been misappropriated, without joining any other person who may participate with him in the benefit. It is clear that if the *mutwalli* himself is the offender or if he is unwilling to act, the beneficiary must have the power to recover the property. (*Mullick and Ross*, JJ). MAULAVI MAHOMED FAHIMUL HUQ v. JAGAT BALLAV GHOSH. 2 Pat. 391=4 Pat. L.T. 675= 74 I.C. 403=1923 P. 475.

——O. 1, R. 8—*Communal property—Dedication to temple by community—Arpointment of* pujari*—Claim of private right—Decree, form of.*

When land is bought and dedicated to a temple by a community and is conveyed to a person as *pujari*, the members of the community can sue the *pujari* or his heir if he attempts to set up his own title thereto, for a declaration that the property belongs to them. In such suit the proper decree will be to declare the property to be a public, religious and charitable trust and that the defts. had no title thereto but he is a mere trespasser and to restrain the defts. from interfering with the property; decree for the removal of the *pujari* from his office cannot be granted. (*Atkinson and Kingsford*, JJ.) SUKHDEO PRASAD v. GOPAL MISRA. 36 I.C. 976.

C.P. CODE (V of 1908), O. 1, R. 8—Company.

Company.

———O. 1, R. 8—*Company—Unregistered.*

An officer of an unregistered or unincorporated body or society can file a suit on behalf of the body only with the special permission of the Court under the rule. (*Maung Kin, J.*) MA GYI v. PAT LON. 38 I. C 572= 9 Bur. L. T. 247.

Compromise of Suit.

———O. 1, R. 8 and O. 23, R. 3—*Compromise of suit—Whether binding on the putlic.*

Where a plff. is allowed to represent the public, a judgment by consent will not bind the public, even if the consent was not purchased and *a fortiori* if such consent was purchased. (*Sadasiva Aiyar and Tyabji, JJ.*) SUNDARAMBAL AMMAL v. YOGAVANA-GURUKKAL. 1 L.W. 276=23 I.C. 72= 26 M.L J. 318=(1914) M.W.N. 286.

———O. 1, R. 8 and O. 23, R. 3—*Compromise of suit—Compromise pending appeal—If binds the class represented.*

Persons suing in a representative capacity with the leave of the court under S. 30, C.P.C., (1882) can compromise so as to bind those whom they represent, provided the compromise was not unreasonable, fraudulent or dishonest. (*Benson and Sundara Aiyer, JJ.*) KRISHNAMACHARIAR v. CHINNAMMAL. 24 M,L J. 192=18 I C. 369= 13 M.L.T. 181=(1913) M.W.N. 194.

Damages.

———O. 1, R. 8—*Damages—Suit for—Other reliefs—Scheme of management.*

Leave to file a suit may be granted on behalf of a whole community or body of persons, though some persons object to it. Leave to file a representative suit cannot be granted if the only relief asked for is damages, but if damages are coupled with other reliefs, then leave may be granted, provided the damages are not claimed in a representative capacity but by each individual. A scheme of management may also be prayed for in the suit, subject to objections when the scheme is finally settled. (*Oldfield and Sadasiva Aiyar, JJ.*) KATHA PILLAI v. KANAKASUNDARAM PILLAI. 24 M.L.T. 20=45 I.C. 423= 8 L.W. 160=(1918) M.W.N. 791.

Decree.

———O. 1, R. 8—*Decree in suit—Effect of.*

A decree in a suit where one person is allowed to represent another or others as deft. in a representative capacity binds the other only with respect to their property which he represents in law although the parties on record may be made personally liable. An injunction in cases falling under O. 1, R. 8 does not bind persons not parties on record. (*Benson and Sundara Iyer, JJ.*) SAHIB THAMBI v. HAMID. 36 Mad. 514= 22 M.L.J. 109=12 I.C. 1006= 10 M.L.T. 515=(1911) 2 M.W.N. 534.

C. P. CODE (V of 1908), O. 1, R. 8—Leave to sue.

Ejectment Suits.

———O. 1, R. 8—*Ejectment suit—One of several jointly interested persons suing on behalf of all.*

Any one of several jointly interested persons can bring a suit on behalf of all, and in the absence of any law to the contrary, all will participate in the fruits of the success in the suit. Thus a suit against trespassers for recovering land can be brought by one of several co-owners on behalf of all. (*Roe and Jwala Prasad, JJ.*) RAGHURAJ SINGH v. BISHEN TEWARY. 37 I.C. 384.

Leave to sue.

———O. 1, R. 8—*Leave to sue—Trust—Waqf property.*

A *mutwalli* of a *waqf* in respect of a mosque, need not obtain the permission of Court to maintain a suit on behalf of the trust. (*Stuart, J.*) BENARSI v. ALTAF HUSAIN. 63 I.C. 171.

———O. 1, R. 8—*Leave to sue—Granted after suit—Representative suit.*

The permission under O. 1, R. 8, C.P.C. may be given even after the filing of the suit. This is a matter analogous to the addition of powers and amendment of pleadings. Notice under O. 1, R. 8, C.P.C., is required to be given and the provisions of the Rule are mandatory. (*Mulla, J.*) NARIMAN v. MUNICIPAL CORPORATION OF BOMBAY. 47 Bom. 809= 25 Bom. L.R. 689=1923 Bom. 305.

———O. 1, R. 8—*Leave to sue—When should be obtained.*

Before instituting a suit under O. 1, R. 8 leave of the Court must be obtained and the requirements of the rule must be complied with before the suit can be proceeded with and unless this is done the suit must be dismissed. But the Court has discretion to grant leave under O. 1, R. 8 and its provisions may be complied with subsequent to the filing of the suit and when that has been done the suit cannot be dismissed. 21 B. 784; 25 M. 399; 23 M. 28; 22 A. 269, rel. on. 8 C. 32; 11 C. 33; 21 C. 180; 11 C. 213, dist. 9 C. 604, diss. (*Chatterjea and Richardson, JJ.*) AHMED ALI v. ABDUL MAJID. 44 Cal. 258= 39 I.C. 773=21 C.W.N. 1144.

———O. 1, R. 8—*Leave to sue—Not necessary in suits to restrain injury to the right vested in a particular section of the public.*

In case of a threatened injury not to the rights of the general public but to the rights of the people of a particular Mohalla, it is not necessary for the persons wishing to sue to obtain leave of the Court under O. 1, r. 8, C.P.C. to sue on behalf of the other residents of the Mohalla, as they are entitled to sue in their own rights. (*Martineau, J.*) POKHAR DAS v. RAGHU RAM. 62 I.C. 888.

C. P. CODE (V of 1908), O. 1, R. 8—Leave to sue.

———**O. 1, R. 8**—*Leave to sue—Appeal.*

Once the permission of the Court had been obtained to the bringing of a suit in a representative capacity under O. 1, R. 8, further permission in the Court of appeal is not necessary. (*Scott-Smith and Martineau*, JJ.) RAM DIYAL *v.* MAHOMED RAJU SHAH.

51 I.C. 437=46 P R. 1919.

———**O. 1, R. 8**—*Leave to sue—Caste dispute—Suit by some members—Sanction of majority.*

Where numerous members of a caste seek to enforce rights as against strangers or as against certain other members of the caste O. 1, R. 8, C. P. Code, applies to the case. It is not necessary for the persons asking for leave under O. 1, R. 8, C. P. C., to obtain formally beforeh and the authority of those whom they are seeking to represent. Nor need they summon a caste meeting before bringing the suit. Per *Napier, J*: *Semble*. If the plaintiffs are unable to prove that they have got a support of the majority of the caste they cannot succeed in getting the relief which they seek. Such a plea may be taken in defence. (*Napier and Krishnan*, JJ.) SIVATHAL PERIYAVA NADAR *v.* NANA CHUNA VELMURUGA NADAR.

64 I.C. 618=30 M.L.T. (H.C.) 47.

———**O. 1, R. 8 and O. 6, R. 17**—*Leave to sue—Subsequent grant of—Suit as Headman—Amendment of plaint—Representative suit.*

Where in the original plaint, the plffs. asked for a declaration, as headmen of their community that they were entitled to march in procession through the public streets, the cause of action is the infraction of their individual rights but this defect will be cured by subsequent permission of the Court to sue in a representative capacity under O. 1, R. 8. A suit instituted without obtaining sanction can be validated subsequently. (*Seshagiri Aiyar and Kumaraswamy Sastry*, JJ.) ANDI MOOPAN *v.* MUTHUVIRAMMA REDDY. **29 M.L.J. 91=29 I.C. 248=17 M.L.T. 453.**

———**O. 1, R. 8**—*Leave to sue—Personal sanction.*

In the event of a voter's death pending a suit for declaration with sanction under O. 1, R. 8, that an elected member's election was void and for an injunction to restrain him from exercising his office, another voter can be brought on record, and continue the suit. O. 1, R. 8, C.P.C., applies not only to concurrent interests but also to similar ones, though distinct, and the personal sanction for his personal interest is not bad. The order of revival should not be set aside simply on the misdescription of the proper party as the legal representative. (*Abdur Rahim*, J.) SIVAGURUNATHA CHETTIAR *v.* RAMASWAMI AIYANGAR. **11 M.L.T. 267=15 I.C. 399=(1912) M.W.N. 105.**

———**O. 1, R. 8**—*Leave to sue—Grant of—Consent of defendants.*

C. P. CODE (V of 1908), O. 1, R. 8—Public Right.

The consent of the defts. on the record is not necessary to enable a Court to allow a plff. to sue persons as representing themselves and others, having the same interest in the subject-matter of the suit. (*Benson and Sundara Aiyar*, JJ.) AMBALAM PAKKIYA *v.* BATHE. **36 Mad. 418=(1912) M.W.N. 152=13 I.C. 599=24 M.L.J. 630.**

Notice.

———**O. 1, R. 8**—*Notice—Omission to issue notice and advertisement—Effect.*

The court in granting permission to sue two plaintiffs on behalf of all the residents of a locality directed the plffs. to advertise and give notice to all the residents of the locality as regards the suit. But the notice and advertisement were not issued. *Held* that (1) the omission to issue notice was not fatal to the suit and would not result in the dismissal of the suit; (2) that the publication of notice was peremptory and must be complied with under O. 1, R. 8 (3) and that the case should be remanded to the trial court for issuing of notice and retrial of the suit. (*Banerji, Piggott and Walsh*, JJ.) SHYAM LAL v. MT. LALLI.

44 A. 231=20 A.L.J. 73=65 I.C. 259=L.R. 3 A. 75=1922 All. 16.

———**O. 1, R. 8**—*Notice—President of community when authorised cannot sue in his own name.*

A president of a community authorised to file suits cannot sue in his own name and notice under O. 1, R. 8 to all the members of the community must be given. Permission also was necessary under R. 8. (*Macleod*, C.J. *and Shah*, J.) ATMARAM *v.* NARAYAN.

23 Bom. L.R. 972=64 I.C. 555=46 Bom. 132=1922 Bom. 109.

Public Right.

———**O 1, R. 8**—*Public right—Right of way for cattle.*

A plff. suing for declaration on behalf of himself and other inhabitants of the village of their right to take their cattle through the jungle of another village cannot get a declaration unless leave of the Court obtained and proclamation issued as provided by R. 8 of O. 1. (*Rafique and Piggott*, JJ.) LAL BAHADUR *v.* RAMESHWAR DAYAL.

43 All. 345=60 I.C. 990=19 A.L.J. 126.

———**O. 1, R. 8**—*Public right—Suit for declaration of public right of way—Nature of special damage.*

A suit for a declaration that a certain pathway was public one, can be maintained with the permission of court under O. 1, R. 8, C. P. Code. If permission is granted, recourse need not be had to S. 92 of the Code. Such a case is *per se* actionable proof of special damage. (*Panton*, J.) HARISH CHANDRA SAHA *v.* PRAN NATH CHAKRABARTHY.

69 I.C. 910=26 C.W.N. 557.

C. P. CODE (V of 1908), O. 1, R. 8—Public Right.

———O. 1, R. 8—*Public right—Representative suit.*

Where a suit is not properly a representative suit, a court cannot adjudicate upon a public right claimed on behalf of a community. (*Fletcher and Newbould*, JJ.) SHARUDDIN *v.* JYARUDDIN. **42 I C. 543.**

———O. 1, R. 8—*Public right—Infringement of—Suit for.*

A private individual cannot obtain a declaration that a right is a public one, but he can sue for damages for injury sustained by him in the exercise of his privileges connected with a public right. (*Seshagiri Aiyar and Napier*, JJ.) KHAJI SAYYID YUSUF SAHIB *v.* EDIGA NARSIMHA APPA. (1918) **M.W.N. 175 = 44 I.C. 367 = 8 L.W. 377.**

———O. 1, R. 8—*Public right—Dismissal of suit—Declaration of right of individuals.*

If the alleged common right in a representative suit is negatived by the Court, the suit should be dismissed. In such a suit, a Court cannot declare the rights of individuals who are quite distinct in legal conception from the class of persons on whose behalf the suit is brought though it is open to pass a decree in favour of persons forming a small number out of a large class. 9 M.L.J. 355, dist. (*Sadasiva Aiyar and Spencer*, JJ.) KRISHNAMACHARLU *v.* APPAN GOVINDA RAMANUJA. **42 I.C. 275.**

———O. 1, R. 8—*Public right—Easement—Declaration—Suit for decision when binding on public.*

In a suit for a declaration that plff. is the owner of a piece of land free from any right of highway, plff. need not proceed by way of O. 1, R. 8 of the C.P. Code. But the decree in the suit would bind only the defts. to the suit. Where, however, the plff. chooses to bind the public and gives a public character to his suit he must sue under O. 1, R. 8 and must observe the conditions on which permission is given by the Court under that rule. (*Manuk*, J.) HARBANS NARAIN SINGH *v.* BHAJOO NONIA. **49 I.C. 796.**

Religious Endowment.

———O. 1, R. 8—*Religious endowment—Mahomedan mosque — Right of individual worshipper to sue.*

An individual worshipper can sue anybody interfering with his right to worship in a Mahomedan mosque, though the court might in its discretion refuse a declaration in the absence of all the parties. (*Griffin and Chamier*, JJ.) RAMACHANDAR *v.* ALI MUHAMMAD. **35 All. 197 = 18 I.C. 797 = 11 A.L.J. 233.**

———O. 1, R. 8—*Religious endowment—Suit by worshippers—Mahomedan mosque—Unlawful alienation by* Mutvalli—*Declaration that alienation is void.*

A suit brought by two worshippers of a mosque for themselves and as representing other worshippers in the locality, for a declaration that a permanent lease granted by the *Mutvalli* is void and inoperative, is maintainable under O. 1, R. 8, without sanction under S. 92, C. P. C. No special damage need be alleged or proved for the maintainability of such a suit, since worshippers living in the vicinity of a mosque have rights to it as daily worshippers over and above those possessed by the Mahomedan public and have a more direct interest in its maintenance and in the proper administration of the properties endowed for its benefit. (*Chatterjee and Huda*, JJ.) ASHRAF ALI *v.* MUHAMMAD NUROJJAMA. **49 I.C. 355 = 23 C.W.N. 116.**

C. P. CODE (V of 1908), O. 1, R. 8—Religious Endowment.

———O. 1, Rr. 8 and 10—*Religious endowment—Addition of plaintiffs after decree is competent.*

In a suit by three persons under S. 14 of the Religious Endowments Act, a decree for damages was passed in favour of the plaintiffs. The plaintiffs neglected to execute the decree whereupon the Court added the trustees of the temple as plaintiffs to enable them to execute the decree. *Held* that as the suit was brought by the plaintiffs in a representative capacity it was competent to the Court under O. 1, R. 8, C P. Code, to add parties even after the passing of a decree. 24 M.L.J, 192; 33 M. 483; 20 M.L.J. 546; 28 Mad. 319, followed. (*Spencer and Venkatasubba Rao*, JJ.) SWAMINATHA MUDALIAR *v.* KUMARASWAMI CHETTIAR. **17 L.W. 422 = (1923) M.W.N, 239 = 72 I.C. 284 = 32 M.L.T, (H. C.) 212 = 44 M.L.J. 282 = 1923 Mad. 472 (2).**

———O. 1, R. 8—*Religious endowment—Suit by worshippers— Sanction of Court—Necessity for.*

With the permission of the Court when there are numerous persons having the same interest in the same suit one or more such persons may sue on behalf of or for the benefit of all persons so interested. (*Schwabe*, C.J. *and Wallace*, J.) RANGASWAMI *v.* KRISHNASWAMI. **44 M.L.J. 116 = 17 L.W. 147 = (1923) M.W.N. 84 (2) = 32 M.L.T. 133 = 71 I.C. 463 = 1923 Mad. 276 (2).**

———O. 1, R. 8—*Religious endowment.*

Under O. 1, R. 8 of the Code of Civil Procedure, it is competent to the worshippers of a temple to bring a suit for the declaration that a permanent lease granted to the Archakas in possession is invalid. (*Abdur Rahim and Ayling*, JJ.) RAMASWAMY *v.* PITCHAYYA. (1920) **M.W.N. 393 = 38 M.L.J. 226 = 58 I.C. 588 (1) = 43 Mad. 410.**

———O. 1, R. 8—*Religious endowment—Disciples of mutt—Representative suit.*

The devotees of a mutt have a sufficient interest under O. 1, R. 8 of C.P. Code to maintain a representative suit, not only for declaration of the invalidity of an alienation by the

C. P. CODE (V of 1908), O. 1, R. 8—Reversioner's Suit.

head of the mutt, but also a decree directing possession to be given to the head for the time being, whether the head is a trustee or life tenant does not matter. (*Wallis*, C.J., *and Seshagiri Aiyar*, J.) CHIDAMBARANATHA THAMBIRAN *v.* NALLASWAMI MUDALIAR.
41 Mad. 124=33 M.L.J. 357=22 M L T. 218=42 I.C. 366=6 L.W. 666.

Reversioner's Suit.

——O. 1, R. 8—*Reversioner's suit—Death of plaintiff—Addition of next reversioner.*

A suit brought by a Hindu reversioner is really brought on behalf of the entire body of reversioners and if the p'ff dies it is open to the next reversioner to come in and continue the conduct of the suit as he is already a party thereto. A representative suit brought by a person on behalf of himself and another or others is different from a suit in a representative capacity, *i.e.*, as executor, guardian, trustee, for some other person having the legal or beneficial interest. (*Sadasiva Aiyar and Spencer*, JJ.) KRISHNASWAMI AIYAR *v.* SEETHALAKSHMI AMMAL. **25 M L.T. 116=49 I.C. 268=9 L W. 166=(1918) M.W.N. 888.**

——O. 1, R. 8—*Reversioner's suit*— *'Representative suit.'*

A reversionary suit to set aside an alienation is a representative suit. (*Stanyan and Hallifax*, A.J.Cs.) RAM DIN *v.* RAJ RAM.
17 I.C. 101=8 N.L.R. 113.

Scheme Suit.

——O. 1, R. 8 and S. 92—*Scheme suit—Death of plaintiff—Addition of parties.*

When one of the two persons who have instituted a suit with the sanction of the A. G. under S. 92, C. P. C., dies, the death of one of them does not cause an abatement of the suit, as all the worshippers are parties to the representative suit and the Court has power to add another worshipper as plff. under O. 1, R. 10, Cl. 2, C. P. C., without any further sanction by the A. G. 28. I. C. 681, Dist. (*Sadasiva Aiyar and Moore*, JJ.) PARAMESHWARAN MUNPU *v.* NARAYANAN NAMBOODRI.
(1916) 1 M.W.N. 402=31 M L J. 279=34 I C. 384=40 Mad. 110=3 L. W 305.
[The same view has been taken in (1921) M.W.N. 21 (P.C.)]

Scope of.

——O. 1, R. 8—*Scope of.*

O. 1, R. 8 is merely permissive and is intended to provide a remedy for cases in which it might be difficult or impossible to implead all the persons it is sought to affect. But it does not bar a suit to establish a right possessed by an individual. (*Robinson*, O.C.J. *and Mac, Gregor*, J.) SAKLAT *v.* BELLA. **63 I C. 983=18 Bur. L.T. 183.**

C. P. CODE (V of 1908), O. 1, R. 9—Applicability.

——O. 1 R. 9.

ADDITION OF PARTIES.
APPLICABILITY.
CO-HEIRS.
DISMISSAL OF APPEAL.
DISMISSAL OF SUIT.
JOINT HINDU FAMILY.
JOINT PROMISORS.
MISJOINDER.
MORTGAGE SUIT.
NECESSARY PARTY.
NON JOINDER.
PARTITION SUIT.
REJECTION OF PLAINT.
RENT SUIT.
RIGHT TO OBJECT.

Addition of Parties.

——O. 1, Rr. 9 and 10—*Addition of parties.*

Rules 9 and 10 of O. 1 should be construed together. The words "questions involved in the suit" in O. 1, R. 10 do not mean all claims which may possibly be put forward by anybody to the property involved in the suit. Where a court directs the addition of parties under O. 1, R. 10, the plff. must obey the order of Court, and cannot proceed with the suit as originally constituted. (*Srinivasa Aiyangar*, J.) SITARAMAYA *v.* RAMAPPAYA. **39 I.C. 160=5 L.W. 207.**

——O. 1, Rr. 9 and 10—*Addition of parties—Necessary and proper parties—Distinction between limitation.*

The court cannot, by its decree, affect the rights of those who are not parties to the suit. If therefore no decree can be passed without affecting the rights of absent parties, the suit cannot proceed in their absence and should be dismissed. If however the rights of the parties actually before it can be determined in the suit bearing the rights and interests of others unaffected, there is no reason why, even if other parties might properly have been added, the Court should not determine the matters in controversy between the parties actually present. There is a distinction between necessary and proper parties to a suit. Two conditions must be satisfied in order that a defendant may be considered a necessary party, namely, first, there must be a right to some relief against him in respect of the matter involved in the suit, and secondly, his presence is necessary in order to effectually and completely adjudicate upon and settle all the questions involved in the suit. 16 C.L.J. 358, Rel. (*Miller* C.J. *and Mullick*, J.) SITAL PRASAD ROY *v.* ASHO SINGH. **(1923) Pat. 326=2 Pat. 175=69 I.C. 677=4 Pat. L.T. 698=1922 P. 651.**

Applicability.

——O. 1, R. 9—*Applicability of.*

Rule 9 is confined to cases where the Court can deal with the matter in controversy with

C. P. CODE (V of 1908), O. 1, R. 9—Applicability.

regard to the rights and interests of the parties actually before it. (*Richards*, C.J., *and Rafique*, J.) MADHO RAM *v.* JAGAT SINGH.
52 I.C. 18 = 1 U.P.L.R. (H.C.) 7.

——**O. 1, R. 9**—*Applicability of—Hindu suing on mortgage executed in father's name without joining brothers on allegation of partition—Suit whether bad for non-joinder.*

Where a Hindu governed by *Mitakshara* law brought a suit on a mortgage executed in his father's name without joining his brothers on the allegation of partition, *held*, that the suit failed not for mere non-joinder but because "the rights and the interests of the parties actually before the court" cannot be decided. (*Mitra*, O.A J.C.) NAGO RAO *v.* NAGO.
24 I C. 831 = 10 N.L.R. 72.

Co-heirs.

——**O. 1, R. 9**—*Co-heirs—Non-joinder of parties.*

In a suit by one of the several heirs of a deceased Muhammadan to recover her share in the property left by the deceased, the other heirs are not necessary parties. (*Tudball and Rafique*, JJ.) MUHAMMAD AFZAL KHAN *v.* KARIMAN BIBI. 20 I.C. 638 = 11 A.L.J. 619.

——**O. 1, R. 9**—*Co-heirs—Suit for mortgage-debt by one of several heirs—Non-joinder.*

When a right accruing to a single person from a covenant in his favour, devolves on his death on two or more heirs, no question arises as to whether the covenant is joint or separate and the only difference caused by the death is that the cause of action in one person is by operation of law transferred to a number of persons. If a necessary party is not on record the proper course is to apply to have him joined. If he is not brought on record or if, when brought on record the suit as against him is barred, the suit will be dismissed. O. 1, R. 9 applies, when relief can be given if the necessary parties are joined and the application is within time. If barred, the action must be dismissed. (*Atkinson and Jwala Prasad*, JJ.) BHAGELA KOER *v.* ABDUL RAHMAN.
36 I.C. 77.

Dismissal of Appeal.

——**O. 1, R. 9 and S. 99**—*Dismissal of appeal—Non-joinder of parties.*

Under the C.P. Code, an appeal cannot be dismissed for non-joinder of parties. (*Chapman and Mullick*, JJ.) BHAGBAN *v.* PALTURAM.
32 I.C. 749.

Dismissal of Suit.

——**O. 1, Rr. 9 and 10**—*Dismissal of suit—Necessary party not added after being required to do so.*

Where a plaintiff is ordered to take a necessary step such as to add necessary parties

C. P. CODE (V of 1908), O. 1, R. 9—Joint Hindu Family.

and he refuses to do so the Court can dismiss the suit. (*Tudball and Sulaiman*, JJ.) BAGWATI PERSHAD *v.* BABULAL.
63 I.C. 548 = 19 A.L.J. 525.

——**O. 1, R. 9, and O. 6, R. 17**—*Dismissal of suit—Suit against executors as such and personally whether maintainable—Amendment.*

If the alternative claims of the plff. arise out of the same transaction, the plff. could maintain a suit as a *shebait* or in the alternative in his own right as owner. A Court should not dismiss a suit for non-joinder or misjoinder where plff. by amendment can remedy the defect. (*Chatterjee and Smither*, JJ.) NRIPENDRANATH ROY *v.* BIRENDRA NATH ROY.
41 I.C. 615 = 21 C. W. N. 939.

——**O. 1, R. 9, and O. 2, R. 6**—*Dismissal of suit—Misjoinder and non-joinder—Effect.*

A suit is not to be defeated by reason of non-joinder or misjoinder of parties and causes of action. (*Coxe and Chatterjee*, JJ.) GUR PROSAD SINGH *v.* GUR PROSAD LAL.
25 I. C. 438 = 19 C L J. 316.

——**O. 1, R. 9**—*Dismissal of suit—Ejectment suit against persons jointly interested—Withdrawal against some—Effect of.*

Where the proprietors of a village sued to eject three persons, from a piece of land alleged to be *shamilat* and finding it difficult to serve one of them with notice of suit withdrew their claim as against that defendant, the trial court passed a decree for two-thirds of the lands sued for. But the appellate court dismissed the suit on the ground of the non-joinder. *Held* in second appeal that the claim having been expressly limited to the interests of the defendants on record the suit could not be dismissed on the ground of the non-joinder. (*Scott-Smith*, J.) BHURA *v.* MATU. 60 I C. 6.

——**O. 1, R. 9**—*Dismissal of suit—Multifariousness.*

A suit bad for multifariousness should not be dismissed without allowing the plff. an opportunity to amend it. (*Skinner*, J.C.) BANSIDHAR *v.* RAGHUBIR. 10 I.C. 737 = 7 N.L.R. 48.

——**O. 1, Rr. 9 and 10**—*Dismissal of suit—Court's power to add parties.*

A Court should not dismiss a suit for non-joinder of necessary parties but should add them, of its own motion, as parties to the suit or direct the plaintiff to do so. (*Lyle*, A.J.C.) GUR PRASAD *v.* MUHAMMAD TAQI.
63 I.C. 548 = 8 O.L.J. 310.

Joint Hindu Family.

——**O. 1, R. 9**—*Joint family—Manager.*

A suit by a manager of a joint Hindu family does not necessarily fail, because of his omission to implead other members of the family in the suit. (*Richards*, C.J., *Banerji*, *Tudball and Chamier*, JJ.) MADAN LAL *v.* KISHEN SINGH. 34 All. 372 = 15 I C. 136 = 9 A.L.J. 344 (F.B.).

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C. P. CODE (V of 1908), O. 1, R. 9—Joint Hindu Family.

———O. 1, R. 9—*Joint Hindu family—Suit on mortgage—Some of the members of joint family not impleaded—Whole suit if to be dismissed—Limitation.*

Where in a suit on a mortgage against the members of a joint Hindu family, some of them were not made parties and when the objection as to non-joinder was first taken, the suit as against them was barred, the Court cannot proceed under O. 1, R. 9, because the interests of the members are not distinct and separable, so that the only way to dispose of the suit is to dismiss it as time-barred. (*Karamat Hussain and Chamier*, JJ.) GENDAN LAL *v.* BABU RAM. **13 I.C. 197=9 A.L.J. 86.**

———O. 1, R 9—*Joint family—Mortgage suit—Sons of mortgagor not impleaded in time—Effect of.*

A suit against the mortgagor cannot be dismissed simply because the sons of the mortgagor had not been impleaded in time. (*Karamat Hussain and Chamier*, JJ.) BALA PROSHAD *v.* PARTAB SINGH. **13. I.C 38.**

Joint Promisors.

———O. 1, R. 9 and O. 41, R. 33—*Joint promisors—Appeal against some only of deft.*

A plaintiff whose suit against promisors has been dismissed, cannot appeal against some only of them, and the plaintiff cannot be awarded in appeal the shares of the respondents on record. (*Chatterjee and Beachcroft*, JJ.) JOGESH CHANDRA *v.* BAMA SUNDARI DEBI. **34 I.C. 138**

Misjoinder.

———O. 1, R. 9 — *Misjoinder of parties—Appeal.*

Appellant was first deft. in a suit and the suit had been decreed against him. The lower Appellate Court, finding that the appellant was not a necessary party to the suit, and was wrongly joined as a deft., struck off the appellant's name from the record and dismissed his appeal. *Held*, that the proper order which should have been made was to set aside the order of the primary court and to dismiss the suit against the appellant with costs. (*Fletcher and Walmsley*, JJ.) THE SECRETARY OF STATE FOR INDIA *v.* CHATURBHUJ NANDIA. **48 I.C. 963.**

———O. 1, R. 9—*Misjoinder—Non-joinder—Decision of Court.*

A Court can decide question of misjoinder or non-joinder in so far as the parties are actually before it. (*Mookerjee and Carnduff*, JJ.) LAKHI CHOWDURI *v.* AKLOO JHA. **18 I.C. 123=16 C.W.N. 639.**

———O. 1, R. 9—*Misjoinder of parties and causes of action.*

The mere fact that there is a misjoinder of parties and causes of action or non-joinder of parties does not justify a Court in rejecting a plaint. (*Shah Din and Chevis*, JJ.) SHAHB-UD-DIN *v.* ANJUMAN-I-NAUMANIA. **132 P.L.R. 1911=10 I.C. 212=248 P.W.R. 1911.**

C. P. CODE (V of 1908), O. 1, R. 9—Necessary Party.

Mortgage Suit.

———O. 1, R. 9 and O. 34, R. 1—*Mortgage suit—Non-joinder.*

O. 1, R. 9, C.P.C., is subordinate to O. 34, R. 1, C.P.C. This makes it imperative that in a mortgage suit all persons interested in the mortgage should be made parties. A mortgage is indivisible and if all the parties entitled to the mortgage money are not brought upon the record, the suit will be dismissed. In a suit for recovery of joint property, if plff. omits to join all the parties and during trial, it is found that the rights of those who ought to be added as parties are barred by limitation, the suit will be dismissed. (*Roe and Jwala Prasad*, JJ.) GIRWAR NARAIN MAHTON *v.* MAKBULMITTA. **36 I.C. 542=1 Pat. L.J. 468.**

Necessary Party.

———O. 1, Rr. 9 and 10—*Necessary parties—Non-joinder—Adding party—Limitation Act, S. 22.*

O. 1, R. 9, C. P. C., does not do away with the obligation to bring a necessary party on the record. The remedy is to apply under O. 1, R. 10, for the addition of the party, and if the addition cannot be made without the suit being barred thereby, the suit will fail. (*Richardson and Newbould*, JJ.) JAGAT NARAIN SINGH *v.* UDIT NARAIN SINGH. **20 I.C. 262.**

———O. 1, R. 9—*Necessary party—Non-joinder of.*

If a necessary party is not joined he should be joined. If he is not brought on record or when brought, the suit is barred against him, the whole suit will be dismissed. In a partnership suit all partners are necessary parties. (*Richardson and Newbould*, JJ.) AMBIKACHARAN GUHA *v.* TARINI CHARAN CHANDA. **19 I.C. 963=18 C.W.N. 469.**

———O. 1, R. 9—*Necessary parties—Land recorded as* Gairmazrua Am—*Suit for declaration of title to—General public, not necessary parties.*

A suis for declaration of title to land entered in the Survey Khatian as *Gairmazrua Am* is not bad for non-joinder of parties, if the general public are not made parties to it. (*Coutts and Das*, JJ) BABU TRILOKE PRASAD SINGH *v.* LALA UMANAND LAL. **72 I.C. 634=1922 P. 457.**

———O. 1, R. 9—*Necessary party—Suit and appeal.*

Under O. 1, R. 9, C.P. Code, a person who is a necessary party to the suit is a necessary party to the appeal. (*Ross*, J.) JITENDRANATH CHATTERJEE *v.* JHAKU MANDAR. **3 Pat. L.T. 456=66 I.C. 780=1922 P.**

Non-joi nder.

———O. 1, R. 9—*Non-joinder.*

O. 1, R. 9, provides that no suit shall be defeated by reason of non-joinder of parties and the court may, in every suit, deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The notion that a decree-holder can seize property which belongs to a stranger and hold it by reason, for example, of the fact that one of his judgment-debtors is keeping out of the way so as to prevent any possibility of service being effected upon him in the suit after an order of dismissal of the claim by the execution court, is so contrary to one's sense of justice, that one would decline to accept it as being the law. The failure to join such a party is covered by O. 1, R. 9. (*Walsh*, J.) MT. MARYAM BIBI *v.* RAM DAS. **70 I.C. 613=1922 All. 404.**

———O. 1, R. 9—*Non-joinder—Effect of.*

The intention of the legislature is that a suit shall not be defeated for non-joinder of parties. (*Griffin and Chamier*, JJ.) NATH LAL *v.* LALA. **14 I.C. 35=9 A.L.J. 410.**

———O. 1, R. 9—*Non-joinder—Test of—Court not to travel beyond claim made in the suit.*

In determining the question of non-joinder the court must confine itself to the claim before it. The present deft. No. 2, had filed a suit against P. in which he obtained a decree against him. At that time the defence was that the present deft. No. 1 had really paid rent to H. which was then claimed as being payable to P. but the defence was not believed and a decree was passed in favour of H. Thereafter the present plaintiff P. and his daughter, the mulgenidars of a Dewasthan, filed the present suit in the same court to recover the rent that would be payable by deft. No. 1 to them. The court found that the rent was due by deft. No. 1 to the plaintiffs and passed a decree against him. But as it appeared from the evidence that as a matter of fact deft. No. 1 paid this amount previously to H, the court directed H to be joined as defendant No. 2 and after impleading him as a deft. the court held that deft. No. 1 had paid the rent to deft. No. 2, and the ultimate decree was passed by the court in favour of deft. No. 1 against deft. No. 2. *Held* that the procedure of the lower court was irregular: that the only question appropriate to the suit was whether deft. No. 1 was liable for the amount claimed by the plaintiffs; and that the questions as between deft. No. 1 and deft. No 2 were not appropriate to the suit. (*Shah*, A.C.J. *and Crump*, J.) HARICHANDRA *v.* HUMMA VITHOBA.
24 Bom. L.R. 1318=1922 Bom. 454.

———O. 1, R. 9—*Non-joinder—Suit in ejectment by manager—Denial of title—Joinder of other family members.*

In a suit by plaintiff, as representing the senior branch of a jagirdar family to eject the defendants who had executed a lease in favour

of the plff. the defendants denied the plaintiff's title and pleaded non-joinder of the members of the junior branch, *Held* the defendants were in no way prejudiced by the plaintiff suing alone and in no case could there be any chance of their being troubled by any other suit filed by the other members of the family; consequently there was no substance in the plea of non-joinder and the appellate court could not interfere on that ground. (*Macleod*, C.J. *and Coyajee*, J.) GANGARAM BHIKU MAHADEV *v.* BAPUSAHEB DAULATRAO MAHADEV.
46 B. 1022=24 Bom. L.R. 826=1922 Bom. 354.

———O. 1, R. 9—*Non-joinder—Effect—Form of decree.*

If two parties contract with a third party, a suit by one of them making the other co-defendant, ought not to be dismissed, merely because the plaintiff has not proved that the defendant had refused to join as a co-plaintiff, (*Mookerjee and Rankin*, JJ.) KAMINI MOHAN BASU *v.* NIBARAN CHUNDRA MITRA.
76 I C. 577=1923 Cal. 506.

———O. 1, R. 9—*Non-joinder—Interested party not joined.*

Where in a suit for a declaration of a right of way and for removal of an obstruction, the person interested in the servient tenement is not made a party, the Court cannot make a decree, as, a decree passed would be infructuous and in such a case the suit cannot be entertained in spite of O. 1, R. 9. (*Mookerjee*, A.C.J. *and Fletcher*, J.) HARAN SHEIKH *v.* RAMESH CHANDRA.
62 I.C. 425=26 C.W.N. 249.

———O. 1, R. 9—*Non-joinder—Co-sharers—Dismissal.*

A suit instituted by the plff. before the Code of 1908 came into force, for a declaration of exclusive title to a property without impleading all the co-sharers, is governed by S. 31 of the old Code and is rightly dismissed for non-joinder. (*Jenkins*, C.J. *and Mookerjee*, J.) FAIZU *v.* DOMAN. **25 I.C. 536=19 C.L.J. 455.**

———O. 1, R. 9 and O. 2, Rr. 1 and 2—*Non-joinder—Parties and causes of action.*

O. 2, R. 1 has reference mainly to joinder of causes of action rather than to joinder of parties; and even O. 2, R. 2 does not involve a dismissal of the suit. A suit cannot be defeated for non-joinder of parties. (*Johnstone and Rattigan*, JJ.) SHIB NATH *v.* ALLIANCE BANK OF SIMLA, LTD., LAHORE.
110 P.W.R. 1914=215 P.L.R. 1914=25 I.C. 480=3 P.R. 1915.

———O. 1, R. 9—*Non-joinder—Objection—Procedure.*

As regards non-joinder, the objection as to procedure to be followed is disposed of by the application of the present Sec. 99 of C. P. C.

C. P. CODE (V of 1908), O. 1, R. 9—Non-joinder.

(*Spencer and Ramesam*, JJ.) THINA SHANMUGA MOOPPANAR *v.* SUBBAYYA MOOPPANAR. **42 M L.J. 133=70 I C. 645=15 L.W. 283=(1923) M.W.N. 106=31 M.L.T. 266=1922 Mad. 317.**

——**O. 1, R. 9**—*Non-joinder of parties—Objection—Effect of—Suit for declaration of the right to dam up a stream.*

In a suit for a declaration of an easement right to dam up a stream, the riparian proprietors are proper parties; but, if the objection as to non-joinder was taken too late, *held Per Sankaran Nair*, J :— The declaration ought to be given. *Per Sadasiva Aiyar*, J :— In the absence of the other riparian proprietors, the suit should be dismissed. (*Sankaran Nair and Sadasiva Aiyar*, JJ.) MUKKASSA NAIR VEETIL *v.* SECRETARY OF STATE.
15 M.L.T. 247=1 L.W. 307=26 M.L.J. 385=24 I.C. 647=(1914) M.W.N. 521.

——**O. 1, Rr. 9 and 13**—*Non-joinder—Objection on appeal—Procedure.*

If an objection as to non-joinder of parties, is taken for the first time in appeal, the appellate court should add the necessary parties to the appeal and dispose of it, or remit the suit to the first court for retrial, but should not dismiss the suit. (*Sankaran Nair and Ayling*, JJ.) GOTELI VENKANNA *v.* GOTETTI CHINNA SUBBA RAO. **(1911) 1 M.W.N. 321=10 I.C. 392=9 M.L.T. 503.**

Partition Suit.

——**O. 1, R. 9**—*Partition Suit—Misjoinder—Prejudice to deft.*

A right to the partition of a residuary *Mahal*, and a right to the division of a part of a *taluq*, which was formerly incapable of partition, are different causes of action and where the parties concerned in a claim under the first right are less numerous than those concerned in the second one, a suit against them is bad for misjoinder of parties and causes of action. But that fact alone would not be enough to set aside the decree in the suit particularly when the misjoinder has not prejudiced the deft. (*Stephen and Chatterjee*, JJ.) SARODA PROSAD ROY *v.* KAILASH BASHINI GUHA.
18 I.C. 117=17 C.W.N. 128.

——**O. 1, R. 9**—*Partition suit—Grandsons not necessary but proper parties.*

There is a distinction between the non-joinder of proper persons but not necessary parties and nonjoinder of parties whose presence is essential. In a suit for partition in a joint Hindu family, the grandsons are not necessary parties and are represented by their own father. At the same time, they may be proper parties and on an appeal, the appellate Court can direct the lower Court to bring them on record and give them separate allotments if they so desire. (*Das and Adami*, JJ.) DIGAMBAR MAHTON *v.* HANSRAJ MAHTON. **1 P. 361=67 I.C. 156=3 P.L.T. 238=1922 P. 95.**

C. P. CODE (V of 1908), O. 1, R. 10—Addition of Parties.

Rejection of Plaint.

——**O. 1, R. 9 and O. 7, R. 10**—*Rejection of plaint—Misjoinder of parties and causes of action.*

Where there is a misjoinder of either plffs. or causes of action, the proper course is to return the plaint for amendment, and not to reject it. In the latter case the order is appealable. O. 1, R. 2 and O. 2, R. 6, C.P.C., merely refer to procedure, and do note apply when there is misjoinder of either plffs. or causes of action. (*Parlett*, J.) KRISHNAPPA CHETTY *v.* MAUNG HMAN.
18 I.C. 181=5 Bur. L T. 234.

Rent Suit.

——**O. 1, R. 9**—*Rent suit—Mortgagee if a necessary party to a rent suit.*

The dismissal of a suit, for arrears of rent on the ground that the mortgagee from the tenant of an occupancy holding is not made a party, is a gross and palpable error of law which vitiates the decision. An occupancy tenant is the only person liable and his mortgagee is not a necessary party. (*Abdur Rahim and Spencer*, JJ.). SHANMUGHAM ASARI *v.* SAIYID NATHADHU SAHIB. **31 I.C. 457.**

Right to object.

——**O. 1, R. 9**—*Right to object—Who can plead non-joinder.*

Plea of non-joinder of others as plffs, can be raised only by the defts. who have an interest in the subject-matter of the suit and not by those, found subsequently not to have any interest therein. (*Sabonadiere and Kanhaiya Lal*, A. J. Cs.) CHHOTELAL *v.* BADRI SINGH.
22 I.C. 129.

——**O. 1, R. 10.**

ADDITION OF PARTIES.
APPEAL.
CO-PLAINTIFF.
LANDLORD AND TENANT.
LEGAL REPRESENTATIVES.
LIMITATION.
MISTAKE.
PRO FORMA DEFENDANT.
RENT SUIT.
SCHEME SUIT.
SCOPE OF.
STRIKING OFF PARTIES.
SUIT.
TRANSPOSITION OF PARTIES.
WITHDRAWAL.

Addition of Parties.

——**O. 1, R. 10 and O. 41, R. 20**—*Addition of parties—Second appeal.*

The High Court cannot make any person a party in second appeal, when he was not a party in the lower Appellate Court. 16 A. 5, Foll. (*Chamier and Piggott*, JJ.) PACHKAURI RAUT *v.* RAM KHELAWAN CHAUBEY.
37 All. 57=26 I.C. 28=12 A.L.J. 1277.

C. P. CODE (V of 1908), O. 1, R. 10—Addition of Parties.

———**O. 1, Rr. 10 and 1**—*Addition of parties—Power of Court.*

No person can be added as plff. unless his presence before the court is necessary; where a suit is instituted by a person having no cause of action to sue, no order can be passed directing the addition of the right person as a party so as to give the original plff. any such right. (*Knox*, J.) ABDULLAH BEG *v.* ABUL HASAN. **11 I.C. 228.**

———**O. 1, R. 10**—*Addition of parties—Redemption suit.*

In a suit for redemption, by some of the heirs of the mortgagor where the other heirs are not impleaded as defendants, the Court has power to add them as defendants under O 1, R. 10. (*Macleod*, C. J. *and Fawcett*, J.) SHIVUBAI RAJARAM *v.* SIDESHWAR.
45 Bom. 1009=61 I.C. 590=23 Bom.L.R. 405.

———**O. 1, R. 10, S. 107 and O. 41, R. 33**—*Addition of parties—Appeal—Power of Court.*

On an appeal by a person not aggrieved by an order in insolvency, the Court acting under powers given by S. 107 and O. 1, R. 10, cls. (2) and (3) and O. 41, R. 33, added a person really aggrieved as a party to the appeal. (*Scott*, C.J. *and Batchelor*, J.) MAHOMED HAJI ESSAK *v.* SHAIK ABDUL RAHAMAN. **40 Bom. 461=31 I.C. 607=17 Bom. L.R. 989.**

———**O. 1, R. 10**—*Addition of party—Inherent power.*

Under O. 1, R. 10, C. P. C., the court may at any stage of the proceedings, order the addition of any person as party to the suit, where such an addition is necessary for an effectual and complete adjudication upon the questions at issue in the suit; nothing in the Code of 1908 affects the inherent power of Court to make such orders as may be necessary for the ends of justice. (*Scott*, C. J., *and Batchelor*, J.) LAKHMICHAND *v.* KACHUBHAI.
35 Bom. 393=11 I.C. 559=13 Bom. L.R. 517.

———**O. 1, R. 10 (2)**—*Addition of parties—Person against whom indemnity is asked for.*

A person who promised indemnity to deft. against plff., may be added as a party at defts'. instance unless plff. objects and serious embarrassment or inconvenience is caused to him. (*Chaudhuri*, J.) BALMUKUND RUIA *v.* BISSENDOYAL. **50 I.C. 51=46 Cal. 48.**

———**O. 1, R. 10 and S. 107**—*Addition of parties—Appeal—Rival claimants.*

Plff. sued the tenant for rent claiming to be sole landlord and another man sued the same tenant for the entire rent to which suit, plff. was a party deft. Both suits were tried together and trial court found that plff. was entitled to 10 annas share and the other plff. to the remaining share. The decree in the first suit alone was appealed against, in which it was held that appellant was entitled to the entire rent. On second appeal, it was held

C. P. CODE (V of 1908), O. 1, R. 10—Addition of Parties.

that the decree in the second suit was not *res judicata* upon the question of the appellant's right to rent but under O. 1, R. 10 read with S. 107, the plff. in the second suit, in substance, contested the first suit though not a party and should be made a party to the appeal which should then be determined. (*Chatterjee and Smither*, JJ.) JAFAR ALI *v.* HAR GOVIND. **41 I.C. 65.**

——**O. 1, R. 10**—*Addition of parties—Suit against dead person*—Bona fide *mistake—Amendment not allowed.*

In a suit brought against a deceased defendant, the Court has no jurisdiction to allow the plaint to be amended by substituting the names of the representatives of the deceased even when the suit was instituted *bona fide* and in ignorance of the death of the defendant. (*Shadi Lal*, C. J. *and Lumsden*, J.) MT. BOONDU *v.* MOTI CHAND.
1923 Lah. 652 (1).

——**O. 1, R. 10**—*Addition of party—Appeal—Parties if can be impleaded at final stage.*

A person, if he is not made plff. or deft., in the Courts below, cannot claim to be made a party in appeal. (*Rattigan and Shadi Lal* JJ.) SUNDAR SINGH *v.* GURUDEVI.
31 I.C. 27=163 P.W.R. 1915.

———**O. 1, R. 10, Cl. (2)**—*Addition of parties—Court can add persons whose presence is necessary effectually and completely to adjudicate upon and settle all questions involved in the suit.*

A person who would be represented by a party on the record and bound by the decision against that party is entitled to be impleaded under O. 1, R. 10, Cl. (2), C. P. Code, to protect his interests. The plaintiff, claiming to be the son of an adopted son of S, the last male owner of the suit property, sued for the recovery of possession of the same from 1st defendant, the widow of the last male owner. Plaintiff's case was that his father had been adopted by the 1st defendant, and that he (plaintiff) had been unlawfully excluded from the plaint properties by the 1st defendant on account of an invalid agreement between her and the 2nd defendant. Certain persons, claiming to be the nearest reversioners to the last male owner, applied to be made defendants in the suit and were made defendants by the Court below. One question, and probably the most important question, in the suit was whether the plaintiff's father's adoption to the last male owner was true and valid. *Held*, that the presence of the nearest reversioners to the last male owner before the Court was necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, and that the Court below was competent to make them defendants. (*Oldfield*, J.) RAJARATNAM AIYAR *v.* HALASYASUNDARAM AIYAR. **44 M.L.J. 322=72 I.C. 156=17 L.W. 329=1923 Mad. 521.**

C. P. CODE (V of 1908), O. 1, R. 10—Addition of Parties.

——**O. 1, R. 10**—*Addition of parties.*

The Court has no power for addition of plaintiffs after the passing of the decree. (*Spencer, J.*) SWAMINATHA MUDALIAR v. KUMARASAWMI CHETTIAR. **44 M L.J. 282=72 I.C. 284=17 L.W. 422=32 M.L.T. 212=(1923) M.W.N. 239=1923 Mad. 472 (2).**

——**O. 1, R. 10 (2)**—*Addition of parties—Court, powers of.*

O. 1, R. 10 (2) is wide enough to give a Court power to add *any person*, i.e., whether already a party or not, so as to enable it effectually and completely to adjudicate upon and settle all the questions involved in the suit. (*Sadasiva Aiyar and Odgers, JJ.*) MAHOMED SIRAJUDDIN v. GHULAM JAILANI. **59 I.C. 233=12 L.W. 25.**

——**O. 1, R. 10: S. 107, Cl. (2)**—*Addition of party—Appeal.*

A necessary party to an appeal should be added before deciding it; hence a decree for sale passed in a suit without necessary parties being added in appeal, cannot stand. (*Sadasiva Aiyar and Napier, JJ.*) VELAMMAL v. LAKSHMU AMMAL. **31 I.C. 814.**

——**O. 1, R. 10**—*Addition of parties—Preliminary decree passed in the case—Transferee before suit—Addition of.*

O. 1, R. 10 of the Code of Civil Procedure gives wide powers to the Court at any stage of the proceedings to direct that the name of any person who ought to have been joined, or whose presence before the Court may be materially necessary in order to enable the Court to effectively and completely adjudicate upon the questions in issue, may be added. But that power can ordinarily be exercised only in proceedings not concluded by a decree, unless the person to be added is a subsequent transferee. In a suit on a mortgage after the preliminary decree had been passed, a person who is alleged to be interested cannot be impleaded at such a late stage. Scope of O. 1, R. 10 considered. The law gives a wide discretion to add as a party to a proceeding a person interested in it, so as to affect his prospective rights but not with retrospective effect. (*Kanhaiya Lal, J.C.*) BENI MADHO v. YUSUF HUSAIN KHAN.
26 O. C. 317=72 I.C. 1031=10 O.L.J. 282=9 O. & A.L.R. 826=1924 Oudh 33.

——**O. 1, R. 10**—*Addition of parties—Grounds for—Plaint—Allegations to be specific.*

A plff. impleading a person as a party must state the facts on which he imputes a liability to the person so cited. No one is liable to be called before a court, to make an answer unless definite allegations of fact have already been made against him which would justify such an order. (*Stuart, A.J.C. and Lindsay, J.C.*) ALLAHABAD BANK v. MUHAMMAD RAZA-KHAN. **16 I.C. 592=16 O.C. 304.**

——**O. 1, R. 10**—*Addition of parties Court's power.*

C. P. CODE (V of 1908), O. 1, R. 10—Co-plaintiff.

A Court has, under O. 1, R. 10, power to bring on record any person as a party at any stage. (*Das and Ross, JJ.*) JOHN SOLONO v. RAM NARAIN. **61 I.C. 378.**

——**O. 1, R. 10**—*Addition of parties—Appeal.*

Where only one of several co-mortgagees brings a suit on a mortgage, without joining the other mortgagees as plffs. or defts., and alleges an assignment in his favour by them, but produces no document, he may be allowed in appeal to join the other co-mortgagees as plffs. or defts. (*Fox, C.J. and Twomey, J.*) ANA PANA NATHER SHA v. ANNAMALAY CHETTY. **10 I.C. 776=4 Bur. L.T. 71.**

——**O. 1, R. 10**—*Addition of parties—Original plff. having no cause of action.*

When a suit is instituted in the name of a wrong person as plff. by a *bona fide* mistake, the Court has power to substitute the name of the right persons as plffs. and this power is not excluded in cases where the person originally had no right to institute the suit. The words of O. 1, R. 10 "where a suit has been instituted in the name of a wrong person as plaintiff" are comprehensive enough to include cases where the original plff. had no cause of action and their interpretation must not be restricted to cases where the plff. has some right to sue. 30 M. 419; (1902) 2 K.B. 485, Rel. (*Raymond, J.C.*) FIRM OF GEBIMAL HARIRAM v. FIRM OF RAGUNATH KALIANJI. **66 I.C. 878.**

Appeal.

——**O. 1, R. 10 (2), O. 22, R. 10 and O. 43, R. 1 (e)**—*Appeal—Order under O. 1, R. 10.*

An application of plff. to be added as co-plff. cannot be treated as an application under O. 22, R. 10, C. P. Code. An order passed under O. 1 is not appealable. An application to be added as co-plffs. cannot be treated as one under O. 22, R. 10, C.P.C. (*Fletcher and Newbould, JJ.*) BIBIJAN BIBI v. ABDUL JABBAR DAFTARY. **36 I.C. 919.**

——**O. 1, R. 10**—*Appeal.*

Order under O. 1, R. 10 does not come within the definition of "decree" in S. 2 (2) there can be no appeal. (*Oldfield and Ramesam, JJ.*) SHANMUKA NADAN v. ARUNACHALAM. **14 L.W. 642=1921 M.W.N. 799=42 M.L.J. 97=30 M L.T. 172=69 I.C. 961=45 M. 194=1922 Mad. 382.**

Co-plaintiff.

——**O. 1, R. 10 (3)**—*Co-plaintiffs—Addition of parties—Consent.*

No person (including a corporate body) can be made a plff. without his consent expressly given. (*Rattigan and Shah Din, JJ.*) RAM NARAIN v. RAM KISHEN. **46 P.R. 1911=108 P.W.R. 1911=10 I.C. 515=179 P.L.R. 1911.**

C. P. CODE (V of 1908), O. 1, R. 10—Co-plaintiff.

———**O. 1, Rr. 10 and 8**—*Co-plaintiffs—Who could be joined.*

Neither R. 10 nor R. 8 empowers the court to join a person as plff. who could not have been originally joined. (*Stanyon*, A J.C.) AMBADASS *v.* PANDU. **57 I.C. 784.**

———**O. 1, R. 10**—*Co-plaintiff—Adding a new co-plaintiff without paying additional court-fees and with inconsistent pleas—Illegal.*

A new co-plff. having an inconsistent cause of action and who has not paid court-fees on the new claim, cannot be introduced into the case after original plff. is proved to be incompetent. (*Twomey and Ormond*, JJ.) MAUNG SHWE PAW *v.* MA PANZI. **8 Bur. L.T. 283 = 31 I.C. 332 = 8 L.B.R. 302.**

Landlord and Tenant.

———**O. 1, R. 10**—*Landlord and tenant—Under-raiyats.*

The plff. sued for a declaration that he was not a tenure-holder as described in the Record of Rights, but a *raiyat*. The Court added *suo motu*, as defts., the persons recorded in the Record of Rights as *raiyats* of the land under the plff. as tenure-holders. The plff. contended that those persons were mere tenants at will; as the law made the status of the tenants under the plff to depend on his status, they were as vitally interested in the Record of Rights as he himself was and were proper parties to suit. (*Coxe and Teunon*, JJ.) DIGAMBAR NANDA *v.* SECRETARY OF STATE. **17 I.C. 917 = 16 C.L.J. 381.**

Legal Representatives.

———**O. 1, R. 10 and O. 22, R. 4**—*Legal representatives—Application to bring on record legal representative of deceased deft. in his individual capacity.*

R. 10 covers the case of an application made to implead as parties to a suit the legal representatives of a deceased deft. (wrongly impleaded as such) in their individual capacity and not as such legal representatives. The fact that such application was once made under O. 22, R. 4, and rejected, does not bar an application made under this rule. (*Kumaraswami Sastri*, J.) JAGATH GURU CHANDRA SEKHARA BHARATHI SWAMIGAL *v.* KOMARASWAMI GOUNDEN. **32 I.C. 320.**

Limitation.

———**O. 1, R. 10 (1)**—*Limitation — Suit by mother as administratrix—Subsequent addition of sons as plaintiff—Suit if barred—Limitation Act, S. 22*—Bona fide *mistake.*

Where by a *bona fide* mistake, it is erroneously supposed that a plff. is represented in a particular way, and subsequently the plff. is permitted to rectify the mistake and appear personally, this does not amount to the addition of a new plff. within S. 22 of the Limitation Act. In matters of this kind the substance

C. P. CODE (V of 1908), O. 1, R. 10—Pro forma Defendant.

is to be looked to, rather than the form. (*Chatterjee and Chapman*, JJ.) NISTARANI DASSAYA *v.* SARAT CHANDRA. **22 C.L.J. 279 = 29 I.C. 680 = 20 C.W.N. 49.**

———**O. 1, R. 10**—*Limitation—Substitution of party.*

An amendment of the plaint, by leave of the Judge, that the plff. is suing in a representative capacity as a *shebait*, does not amount to an addition or substitution of a new plff. within the section. (*Fletcher and Teunon*, JJ.) KAURMANI SINGHA *v.* WASIF ALI MURZA. **28 I.C. 818 = 19 C.W.N. 1193.**

———**O. 1, R. 10 (3)**—*Limitation—Joinder of additional trustees.*

In a suit to enforce rights of trust by persons interested in the trust, addition of more representatives out of time, does not bar the suit. 33 A. 272; 25 M.L.J. 452; 22 C.L.J. 279; 17 B. 413, Foll. 43 I.A. 113, Dist. (*Seshagiri Aiyer and Phillips*, JJ.) KANDA PONNAPPA NAICKEN *v.* VENKATASESHA AIYER. **9 L.W. 377 = 30 I.C. 353 = 1919 M.W.N. 433.**

———**O. 1, Rr. 10 and 3**—*Limitation—Change of capacity of plff.*

Where a person filed a suit in his name, but after the period of limitation had expired, was allowed to amend the plaint as being instituted on behalf of a company, there was no case of adding a new plff. (*Abdur Rahim and Spencer*, JJ.) MUTHUKRISHNA PILLAI *v.* RAJAM AIYANGAR. **33 I.C. 357 = 30 M.L.J. 57.**

Mistake

———**O. 1, R. 10**—*Mistake—Addition of parties.*

Plff. sued for possession of certain property which was found to have been exchanged with defts. 2 and 3 but which, plff. alleged, was made contingent on defts. not giving up possession of plot No. 1. *Held*, on the finding, that there was a valid unconditional exchange, there was no *bona-fide* mistake on his part and the defts. 2 and 3 could not be transferred as plffs. so as to sustain the suit. (*Carnduff and Chatterjee*, JJ.) GANENDRA NATH ROY *v.* SURAJ KANTA ROY. **15 I.C. 39 = 17 C.W.N. 462.**

———**O. 1, R. 10**—*Mistake—Addition of party.*

The court can exercise the power of adding or substituting new plffs. if satisfied that the suit was instituted through *bona fide* mistake. In the case of *benami* transfer, it is possible to have doubts as to the person entitled to sue. (*Scott-Smith*, J.) GUSANN MAL *v.* RAM RAKHA MAL. **50 I.C. 128.**

Pro forma Defendant.

———**O. 1, R. 10**—Pro forma *deft.—Person added as party on his own application—Decree against.*

A court cannot pass a decree against a person, against whom the plff. does not seek relief,

C. P. CODE (V of 1908), O. 1, R. 10—Pro forma Defendant.

and who is joined as a deft. on his own application. His position and that of a person who is joined without any such application are very different, in that the former has to make out a *prima facie* case before the plff. can be asked to meet it. (*Findlay*, A.J.C.) RAMKRISHNA *v.* NARAIN. **86 I.C. 845.**

——— **O. 1, R. 10**—Pro forma *deft.*

A *pro forma* deft. is not known to law. (*Mullick and Jwala Prasad*, JJ.) NAND LAL PAL *v.* NARESH CHANDRA DEB. **41 I.C. 468=2 Pat. L.W. 108.**

Rent Suit.

——— **O. 1, R. 10 (2)**—*Rent suit—Suit for rent against one of the heirs of a tenant—Other heirs added.*

In a suit for recovery of arrears of rent against one of the heirs of the original tenant whose name was recorded in the landlord's *sherist*, the remaining heirs of the tenant were on their application added as parties. *Held*, that although the added defts. were not strictly necessary parties to the adjudication of the question arising between the plff. and the original deft., yet they were not improperly added as parties to the suit. 12 C.L.J. 267, Foll. (*Teunon and Newbould*, JJ.) GURU PROSANNA LAHIRI *v.* SAMIRUDDIN SARKAR, **44 I.C. 465.**

——— **O. 1, R. 10**—*Rent suit—Plea of—Payment of rent to third party—Joinder of.*

On deft's plea of payment of rent of a house with owner's consent to a third party, the Court should make him a party especially where plffs. are not owners but lessees from owner of the same house. (*Scott-Smith*, J.) ALTAFUL RAHAMAN *v.* AGHA JAN. **106 P.W.R. 1913=19 I.C. 473= 168 P.L.R. 1913.**

Scheme Suit.

——— **O. 1, R. 10**—*Scheme suits—Addition of party.*

The rule applies to suits under S. 92. The son of a hereditary trustee can be made a party to a suit for the removal of a hereditary trustee. (*Ayling and Seshagiri Aiyar*, JJ., VAITHILINGAM *v.* RAMALINGAM PILLAI. **6 L.W. 9=38 I.C. 133=(1917) M.W.N. 550.**

Scope of.

——— **O. 1, R. 10**—*Scope of—Addition of parties—Suit having reached the stage of decree—Court if empowered to add parties.*

There is considerable doubt as to whether S. 32 of the C. P. Code of 1882 authorises the addition of a party to a suit after decree. 10 All. 97, Ref, (*Lord Parker.*) RAGHUNATH DAS *v.* SUNDAR DAS KHETRI. **42 Cal. 72=41 I.A. 251=18 C.W.N. 1058= 24 I.C. 304=1 L.W. 567=27 M.L.J. 150= 16 M.L.T. 353=(1914) M.W.N. 747= 16 Bom. L.R. 814=20 C.L.J. 555= 13 A.L.J. 154 (P.C.).**

[Reversing 15 I.C. 288.]

C. P. CODE (V of 1908), O. 1, R. 10—Suit.

——— **O. 1, R. 10 (1)**—*Scope of—Institution of suit by person not entitled to continuance by proper persons.*

A suit might be continued even where the original plaintiff had no right to sue, provided that the defective institution was due to a *bona fide* mistake. 30 M. 419; 43 M. 707 Rel. (*Spencer and Venkatasubba Rao*, JJ.) PANICHIKKAL *v.* EDATHIL. **16 L.W. 826= (1922) M.W.N. 817=69 I.C. 413= 1923 Mad. 180 (1).**

——— **O. 1, R. 10**—*Scope of—Major suing as minor—Suit instituted by next friend—Procedure.*

The rule covers a case where a major is wrongly assumed as a minor and the suit is brought by a next friend. The proper procedure is to return the plaint to be presented after making necessary amendments. 20 A. 90, Diss, 21 C. 866. foll. (*Abdur Rahim*, O. C. J. *and Burn*, J.) SHUNMUGA CHETTI *v.* NARAYANA AIYAR. **41 I.C. 810=40 Mad. 743.**

——— **O. 1, R. 10**—*Scope of.*

O, 1, R. 10 refers to any stage short of decree. Therefore a court cannot ignore a preliminary decree in a mortgage suit and try the suit over again by joining a new deft, nor can a new deft. be joined with an existing decree binding on him, though he was not a party to the proceedings which ended in the decree. (*Mittra*, A.J.C.) RAGHUNATH *v.* SHEO LAL. **39 I.C, 849=13 N.L.R. 69.**

Striking off Parties.

——— **O. 1, R. 10**—*Striking off parties—Jurisdiction of Court—Plff.'s right of election.*

It is not irregular for a court to order a plff, to choose which of the defts. he wishes to proceed against, as it is open to the court to strike out parties improperly joined or make any other order. (*Miller, J.*) RAMANATHAN CHETTY *v.* KADIRESAN CHETTIAR. **(1913) M.W.N. 993=21 I.C. 604= 14 M.L.T. 511.**

Suit.

——— **O. 1, R. 10**—*Suit by wrong person—Right person added—Discretion.*

Where a suit was brought by a person for an injunction and demolition of a construction put up by the deft. and it afterwards turned out that the person suing was not the owner of the property in respect of which the injunction was sought and the Court added another as plff. who in fact was the owner, *held*, that the discretion of the Court was properly used under O. 1, R. 10. (*Richards*, C.J. *and Banerjee*, J.) ABDULLAH BEG *v.* ABDUL HASSAN. **13 I.C. 250.**

—— —— **O. 1, R. 10**—*Suit against dead man—Application to add his legal representatives as parties—Procedure.*

Application to add his legal representative as parties in an appeal against a dead man is

C. P. CODE (V of 1908), O. 1, R. 10—Suit.

covered by S. 153 and O. 1, R. 10, (*Oldfield and Venkatasubba Rao*, JJ.) GOVINDA KAVIRAJ PUROHITA *v* GOWRANGA SAW.
18 L.W. 54=46 M.L.J. 231=75 I.C. 739=(1923) M.W.N. 408=1924 Mad. 56.

———**O. 1, R. 10**—*Suit against dead persons—Addition of party.*

A suit against a dead person is a nullity and no question of adding a party arises. 31 M. 86 foll. (*Abdur Rahim and Kumaraswami Sastri*, JJ.) UNNAMALAI AMMAL *v.* MATHAN.
6 L.W. 339=(1917) M.W.N. 643=42 I.C. 530=33 M.L.J. 413=22 M.L.T. 388.

———**O. 1, R. 10**—*Suit against dead person—Addition of representative.*

A plff. cannot claim the benefit of the institution of a suit against a dead person for the purpose of extending the period of limitation against his heirs. (*Kanhaiya Lal*, A.J.C.) NAO NIHALSINGH *v.* D. C. ONAO.
47 I.C. 895=6 O.L.J. 546.

Transposition of Parties.

———**O. 1, R. 10**—*Transposition of parties—Suit for money—Contesting claimant made defendant—If can be made plff.*

Where A the plff. claims to have a sole right to a certain sum of money due from a deft. and makes B, a third person, who claims as against A, a party to the suit, B cannot be made a plff. in the place of A in the course of the suit and no decree can be passed in his favour as against a co-defendant. (*Tudball and Sulaiman*, JJ.) JARAO KUNWAR *v.* BAGWAN KUNWAR. **3 U.P.L.R. (A) 182=63 I.C. 773=19 A.L.J. 833.**

———**O. 1, R. 10**—*Transposition of parties.*

In a partition suit, the Court can make a defendant, a plaintiff and continue the suit. (*Macleod*, C.J. *and Fawcett*, J.) VISHNU NARHAR SAPRE *v.* SHIRAM.
23 Bom. L.R. 391=61 I.C. 398=45 B. 983.

———**O. 1, R. 10**—*Transposition of parties—New case.*

In a second appeal pending in the High Court, the plaintiffs-appellants applied to transfer defts. Nos. 4 and 5 with their consent to the category of plffs. for continuing the suit for their benefit as well as defts. 4 and 5. *Held* that the application could not be granted as if granted it would be necessary for the added plaintiffs to discard the entire evidence on the record and succeed on a case which was contradictory to the evidence put forward. (*Mookerjee and Cuming*, JJ.) JAGATBANDHU SAHA *v.* HARIS CHANDRA SIL.
36 C.L.J. 92=1922 Cal. 459.

———**O. 1, R. 10**—*Transposition of parties—Power of Court.*

O. 1, R. 10 authorises the court to make an order for transfer of a party from the category of deft. to that of plff. at any stage of the proceedings. The power of the Court depends on the question whether the case is *sub judice*.

C. P. CODE (V of 1908), O. 1, R. 10—Transposition of Parties.

The Courts have always been reluctant to place a narrow construction upon this provision of the law, and to restrict the exercise of the discretionary power. (*Mookerjee and Panton*, JJ.) DEBENDRA *v.* NARENDRA.
24 C.W.N. 110=64 I.C. 636=30 C.L.J. 417.

———**O. 1, R. 10 (2)**—*Transposition of parties.*

According to R. 10 (2) a Court can make a transposition of the parties. The provision in S. 532 of Act XIV of 1882 that the Court might make a plff., a deft. or a deft., a plff. is omitted in the present Code to avoid redundancy. (*Chatterjee and Beachcroft*, JJ.) BROJENDRA KUMAR DAS *v.* GOBINDA MOHAN DAS.
34 I.C. 186=20 C.W.N. 752.

———**O. 1, R. 10**—*Transposition of parties.*

Where in a suit by one of several mortgagees to enforce a part of his security, the other mortgagees are made defts., it is open to the latter, if anything was due to them, to transpose themselves to the category of plffs. (*Mookerjee and Beachcroft*, JJ.) RAMCHANDRA MARWARI *v.* DHADHAI SINGH.
25 I.C. 440=19 C.L.J. 327.

———**O. 1, R. 10 (2)**—*Transposition of parties—Madras Estates Land Act, S. 55.*

A suit under S. 55, Madras Estates Land Act, should not be dismissed for the sole reason of non-joinder of a rival claimant. In such case of non-joinder, the Court should add such a claimant as a party deft. (*Ayling and Krishnan*, JJ.) RAMANATHAM CHETTIAR *v.* ARUNACHELLAM CHETTIAR.
44 Mad. 48=60 I.C. 316=39 M.L.J. 474.

———**O. 1, R. 10**—*Transposition of parties—Withdrawal of claim as to part.*

Where in a suit for partition of immoveable and moveable property the Court passes a preliminary decree with respect to immoveable property and the party withdraws his claim as to moveable, the suit does not come to an end but the Court may transpose parties and continue the suit. (*Odgers*, J.) SURAMPALLI RAMAMURTHI *v.* SURAMPALLI REDDI.
60 I.C. 144=12 L.W. 863.

———**O. 1, R. 10**—*Transposition of parties.*

In administration suits, a person originally arraigned as a defendant can be made a plaintiff to claim his share. (*Krishnan*, J.) BHIMANAGOUD *v.* ESWARAGOWD.
(1918) M.W.N. 929=9 L.W. 79=49 I.C. 139=26 M.L.T. 140.

———**O. 1, R. 10**—*Transposition of parties—Defendant when added as plaintiff.*

The circumstances under which a person can be added as plff. in a suit are limited and a deft. cannot ask to be made a plff. merely on the ground that he would have brought a suit if he had thought of doing so. (*Batten*, A.J.C.) AMALAKSAO *v.* GOVINDRAO.
49 I.C. 35=15 N.L.R. 21

C. P. CODE (V of 1908), O. 1, R. 10—Withdrawal.

Withdrawal.

——**O. 1, R. 10**—*Withdrawal of a part of claim by the plaintiff—Transposition of some of the defendants as parties.*

Where plaintiff withdrew his claim for moveables the court could allow some of the defendants to be transposed as plaintiffs and to proceed with the suit regarding the part withdrawn. (*Odgers*, J.) SURAMPALLI RAMAMURTHI *v.* SURAMPALLI REDDI. **12 L.W. 563.**

——**O. 1, R. 11**—*Suit by one trustee—Death of plaintiff.—Co-trustee made plaintiff.*

One of two trustees brought a suit in respect of the trust and his co-trustee was made a deft. The plff having died during the pendency of the suit, the Court transferred the co-trustee from the position of deft. to that of plff. *Held* that Court had general power to do so. (*Abdur Rahim and Sadasiva Aiyar*, JJ.) SAMINATHA PILLAI *v.* RAJAGOPALA MUDALIAR.

(1921) M.W.N. 108=40 M.L.J. 208=62 I.C. 360=13 L.W. 148=29 M.L.T. 151.

——**O. 1, R. 13.**

MISJOINDER.
MULTIFARIOUSNESS.
NON-JOINDER.

Misjoinder.

——**O. 1, R. 13, and O. 2, R. 7**—*Misjoinder—Suits Valuation Act, S. 11.*

Objection as to misjoinder and jurisdiction owing to under-valuation, when not raised in the Court of first instance are no ground for reversing a decree when they do not affect the merit of the case. 36 C. 780; 17 I.C. 97; 22 M.L.J. 25; 7 M.L.T. 78; 9 M.L.T. 173, Foll. (*Sadasiva Aiyar and Tyabji*, JJ.) NARAYANA NAMBUDRIPAD *v.* NARAYANA NAMBUDRIPAD. **25 I.C. 25.**

Multifariousness.

——**O. 1, R. 13**—*Multifariousness—Objections to.*

Objections to misjoinder of parties and causes of action should be taken at the earliest possible opportunity and where no such objection is taken in the written statement, it should not be allowed to be taken for the first time in appeal. (*Lindsay*, J. C.) PARTAB BAHADUR SINGH *v.* NAURANG SINGH. **18 I.C. 744.**

Non-joinder.

——**O. 1, R. 13**—*Objections to non-joinder—Waiver.*

When parties without objection join issue and go to trial upon the merits, the deft. cannot subsequently dispute any irregularities in the initial procedure leading to the defect of jurisdiction. (*Choudhuri and Newbould*, JJ.) JOY CHANDRA DUTTA *v.* SARAUBALA DEBI.

55 I.C. 251=23 C.W.N. 876.

——**O. 1, R. 13**—*Non-joinder—Objection as to.*

An objection as to non-joinder cannot be taken for the first time in revision before the

C. P. CODE (V of 1908), O. 2, R. 1.

High Court. (*Richardson and Beachcroft*, JJ.) NILMONI DE *v.* SOORENDRA NATH MITRA.

46 I.C. 648.

——**O. 1, R. 13**—*Non-joinder or misjoinder—Objection—If can be taken in appeal for the first time.*

Deft. cannot take any objection as to non-joinder for the first time in appeal if he has not done it at the trial Court. (*Mookerjee and Carnduff*, JJ.) LAKHI CHOWDHURY *v.* AKLOO JHA. **13 I.C. 128=16 C.W.N. 639.**

——**O. 1, R. 13**—*Non-joinder—Objection—When to be taken.*

An objection as to non-joinder of parties should be taken before the settlement of issues. The rule applies even in cases where the plff. claims a joint right along with others but does not make the latter parties to the suit. 9 C.L.J. 623; 25 Bom. 433, Dist.; 25 I.C. 122, foll. (*Abdur Rahim and Napier*, JJ.) KASIYANA KOUNDAN *v.* THIMA NAICKEN. **41 I.C. 527.**

——**O. 1, R. 13**—*Non-joinder—Objection to.*

After the issues have been settled an objection of non-joinder cannot be taken except only when the ground of objection itself arises subsequent to such settlement. (*Sadasiva Aiyar and Napier*, JJ.) KOLLICHINNA VENKATRAMAYYA *v.* GUDAVALLI SUBBARAYUDU.

25 I.C. 122.

——**O. 2, R. 1**—*Mortgage—Suit for redemption and ejectment.*

A suit, seeking possession by redemption against one set of defts. and possession by ejectment against other defts. could not be allowed. (*Richards and Banerji*, JJ.) ANAND SARUP *v.* ASADALI.

28 I.C. 602=13 A.L.J. 342.

[On appeal from 27 I.C. 85.]

——**O. 2, R. 1**—*All causes of action need not be joined.*

A suit should include the whole claim arising out of the same cause of action but it is not necessary to include all causes of action in the same suit. (*N.R. Chatterjee and Duval*, JJ.) MANMATHA NATH BOSE *v.* JAGAT RAM ROY. **59 I.C. 517.**

——**O. 2, R. 1**—*Defendants not in possession of debtor's property—Cause of action.*

Where the defendants pleaded in clear terms that the debtor left no property as he died in the lifetime of his father, and that the plaintiffs could have no cause of action against them without establishing that such property of the deceased was in their possession, and the plaintiffs failed to mention any such property; *held* according to no rule of law could plaintiff's claim be decreed on the ground that they may be able to indicate in execution proceedings, the property, if any, left by the deceased debtor. This would amount to giving them further opportunities to harass the defendants. (*Broadway and Jafar Ali*, JJ.) FIRM OF BHAG MAL *v.* GARIMJEE MAL.

1923 Lah. 571.

C. P. CODE (V of 1908), O. 2, R. 1.

———O. 2, Rr. 1 and 2—*Cause of action—Difference—Suit by person claiming title as* Karnavan—*Dismissal—Subsequent suit as successor to* tarwad.

The plff. sued to redeem a mortgage claiming title as *karnavan* of a *tarwad* and on failure of that suit brought his present suit to redeem as successor to the *tarwad*. *Held*, that the plff. ought to have alleged to his present title in the previous suit and made it a ground of attack so as to afford room for final decision upon the subject in dispute and that the second suit was barred. 31 Mad. 385 and (1916) M.W.N. 286, Foll. (*Bakewell and Phillips*, JJ.) GOVINDA MENOKKI *v.* GOVINDA KURUP. **10 L.W. 170=32 I.C. 785=(1919) M.W.N. 677.**

———O. 2, R. 2.

See also C.P. CODE, S. 11.

ABANDONMENT OF CLAIM.
ACCOUNTS.
APPLICABILITY.
CAUSE OF ACTICN.
CONTRACT.
DAMAGES.
DECLARATION.
DEFENCES.
DEK. AGR. RELIEF ACT.
DISMISSAL OF PRIOR SUIT.
DOWER.
EASEMENT, RIGHT OF WAY.
EXECUTION PROCEEDINGS.
FRESH SUIT.
INSTALMENT BOND.
LIMITATION.
MESNE PROFITS.
MINOR.
MORTGAGE.
OBJECT OF.
OMISSION OF CLAIM.
OPTION TO SUE.
PARTITION.
PARTNERSHIP.
PLEA OF.
PRINCIPAL AND INTEREST.
PROMISSORY NOTE.
RENT SUIT.
RESTITUTION.
REVENUE COURT.
SAME PARTIES.
SPECIFIC PERFORMANCE.
SUIT FOR POSSESSION.
TORT.
WIAVER.
WITHDRAWAL OF SUIT.

Abandonment of Claim.

———O. 2, R. 2—*Abandonment of claim—Different titles.*

O. 2, R. 2 bars only those suits where the causes of action and defts. are the same. The dispossession of plff. from two properties held under different titles gives rise to two causes of action. (*Richards*, C. J. *and Banerjee*, J.) BINDO BIBI *v.* RAM CHANDRA.
7 A.L.J. 658=30 I.C. 905=1 U.P.L.R. (H C) 78.

C. P. CODE (V of 1908), O. 2, R. 2—Cause of action.

———O. 2, R. 2—*Abandonment of claim.*

Casual omission to include some items of property from the schedule to the plaint, does not mean abandonment of claim by plff. with respect to those items. (*Fletcher and Walmsley*, JJ.) ROMESH CHANDRA *v.* KALA GANJI. **30 I.C. 331.**

———O. 2, R. 2—*Abandonment of claim—Pendente lite—Effect of, on jurisdiction.*

The relinquishment by a plff. of a portion of the claim under O. 2, R. 2 (1), C.P.C., applies primarily to relinquishment before institution of the suit. The rule has no application to any part of a dismissed claim abandoned in appeal. No such abandonment can affect the jurisdiction of the appellate court. (*Stanyon*, A.J.C.) SHEIKH NUR KHAN *v.* SHAIKH RAHIM. **34 I.C. 655.**

Accounts.

———O. 2, R. 2—*Accounts—Adjustment of accounts—Suit on.*

Every adjustment of account is a new cause of action. (*Jenkins*, C.J. *and Woodroffe*, J.) JALIM SINGH *v.* CHOONEE LAL. **11 I.C. 340=13 C.W.N. 882.**

Applicability.

———O. 2, R. 2—*Applicability.*

The rule does not contemplate claims under separate causes of action as well as claims affecting different defts. (*Batchelor and Hayward*, JJ.) SONU KHUSHAL KHADAKE *v.* BAHINIBAI KRISHNA. **40 Bom. 351=33 I.C. 950=18 Bom. L.R. 45.**

———O. 2, R. 2—*Applicability of—Amendment of plaint.*

O. 2, R. 2, C.P.C., does not apply to the case of an amendment of the plaint (*Le Rossignol*, J.) FATEH KHAN *v.* MUHAMMAD ISA. **6 P.L.R. 1919=52 I.C. 464=84 P.R. 1919.**

———O. 2, R. 2—*Applicability—Parties different.*

O. 2, R. 2, C.P.C., has no application where the parties to the two suits are not the same. (*Abdur Rahim and Sundara Aiyar*, JJ.) GOPALASAMI VASTAD *v* GOVINDASWAMI VASTAD. **17 I.C. 484=(1912) M.W.N. 1071.**

Cause of Action.

———O 2, R. 2—*Cause of action—Different—Suit on promissory note—Subsequent suit on original consideration—Ceylon C. P. Code, S. 34.*

O 2, R. 2 of the C. P. Code (corresponding to S. 34 of the Ceylon Code) is directed to securing the exhaustion of the relief in respect of a cause of action and not to the inclusion in one action of different causes of action even though they arise from the same transactions. Plff. sued on promissory notes executed by deft. on a settlement of accounts but the action failed owing to a material alteration in the notes. He subsequently sued to recover the consideration for which the notes had been given. *Held*, that though the claims arose in

C. P. CODE (V of 1908), O. 2, R. 2—Cause of action.

respect of the same transaction, they were based on different causes of action and that the second suit was not barred. (*Lord Moulton.*) SAMINATHAN CHETTY *v.* PALANAIAPPA CHETTY. **41 I.A. 142=(1914) A.C. 618=26 I.C. 228=110 L.T. 913=18 C.W.N. 617=17 New Law Reports, 56=83 L.J. P.C. 131 (P.C.).**

———O. 2, R. 2—*Cause of action—Different—Buddhist law—Suit for divorce on misconduct—Subsequent suit for partition—Maintainability.*

Ss. 42 and 43 of the C.P. Code of 1882 (O. 2, R. 2) are aimed against a multiplicity of suits in respect of the same cause of action. An objection founded on the sections must be treated as a preliminary point and the deft. cannot raise it for the first time in the court of appeal except on terms which would indemnify the other side for the omission to raise it at the proper time. A suit for divorce based on the wife's misconduct does not bar a subsequent suit for partition of the common properties of the husband and wife. The cause of action in the first suit was matrimonial misconduct; in the other, the divorce consequent thereon. (*Lord Robson.*) MAUNG PE *v.* MA LON MA GALE. **38 Cal. 629=15 C.W.N. 766=11 I.C. 497=8 A L J. 739=13 Bom. L.R. 464=14 C.L J. 15=(1911) 2 M.W.N. 397=4 Bur. L.T. 153=6 L B R. 18=10 M.L.T. 479 (P.C.).**

———O. 2, R. 2—*Cause of action—Identity of—Test of—Different evidence.*

A person's cause of action can be defined as consisting of every fact which would be necessary for the plaintiff to prove if traversed in order to support his right to the judgment of the Court. One test which is valuable in considering whether the causes of action are identical is whether the evidence which would suffice to enable the plaintiff to obtain a decree in both suits is the same. 16 A. 165; 40 B. 351, referred to. (*Ryves and Daniels, JJ.*) MAHOMED UMAR KHAN *v.* AMTUL RAHIM BIBI. **45 A. 376=21 A.L J. 267=L.R. 4 A. 169=71 I.C. 965=1923 All. 311.**

———O. 2, R. 2—*Causes of action—Identity of—Test.*

The question whether there is a bar by O. 2, R. 2, C. P. Code, has to be decided with reference to the identity of the causes of action in the two suits and that question has to be determined with reference to the allegations made by the plff. in either suit. In determining this question the Court is not in any way concerned with the defences which were raised in the suits or with the character of the relief which was sought. (*Lindsay and Kanhaiya Lal, JJ.*) SHAIKH ABDUL RASHID *v* MT. QUDRAT UN NISSA. **L.R. 3 A. 587; 1922 All. 510 (2).**

———O. 2, R. 2—*Causes of action—Different—No bar.*

A suit for proprietary profits against a *lambardar* does not bar a subsequent suit for

C. P. CODE (V of 1908), O. 2, R. 2—Cause of action.

mesne profits against the same *lambardar* and other trespassers. (*Piggott and Walsh, JJ.*) SHEOBARAN SINGH *v.* BHAGWAN SAHAI. **41 All. 286=30 I.C. 953=17 A.L.J. 313.**

———O. 2, R. 2—"*Cause of action*"—*Meaning of.*

The "Cause of action" for a suit is the sum total of the facts and circumstances which the plff. has to prove in order to entitle him to the relief claimed. (*Piggott and Walsh, JJ.*) RAM HARAKH *v.* RAM LAL. **38 All. 217=33 I.C. 124=14 A.L.J. 267.**

———O. 2, R. 2—*Cause of action—Several suits barred.*

Where a litigant who is fully aware of the fact which constituted his cause of action, mismanages his litigation and has failed through his own mismanagement to obtain from the courts the full reliefs to which he is entitled, neither he nor his transferees are entitled to maintain any further suit upon the same cause of action. (*Piggott, J.*) RAMUJAGAR PANDE *v.* BHAGIRATHI. **27 I.C. 808.**

———O. 2, R. 2—*Cause of action—Fresh invasion of right—Mutation of names—Subsequent suit for profits.*

Where A sold to B in 1897 and mutation of names was effected shortly after in B's name and B's son sued in 1910. C sued A's brother (who was no party to the mutation proceedings) for profits and obtained the decree. *Held*, that for a suit by C for a declaration that the sale in favour of B was invalid, the cause of action arose in 1910 as there was a fresh invasion of his right then. (*Rafique, J.*) MELAP CHAND *v.* MEHARBAN SINGH. **18 I.C. 226.**

———O. 2, R. 2—*Causes of action—Suit for profits—Subsequent suit for partition—Co-sharers.*

So long as a tenancy-in common continues it is open to one tenant to file a suit for partition irrespective of any suit or suits which had been filed between them for a share of the profits during the continuance of the tenancy in common. The cause of action for the suit for partition subsists so long as the co-tenancy continues. (*Macleod, C.J. and Crump, J.*) TIMMAPPA *v.* MANJAYA. **25 Bom. L.R. 491=73 I.C. 424=1923 Bom 440.**

———O. 2, R. 2—*Causes of action—Splitting of—Prior suit for redemption of portion of mortgaged property—Subsequent suit for possession of remainder.*

Where in a suit for redemption of a portion of the mortgaged property the plaintiff succeeds and obtains a decree he is debarred from bringing a fresh suit for recovery of possession of the remaining portion of the mortgaged property. (*Shah, A.C.J. and Crump, J.*) BHAN DAJI KHADE *v.* PATLU MALU SABLE. **24 Bom. L.R. 1157=73 I.C. 862=1923 Bom. 63.**

C. P. CODE (V of 1908), O. 2, R. 2—Cause of action.

——— **O. 2, R. 2** — *Cause of action — Different—Purchases at Court sale.*

Purchaser at a court sale can recover separate lots of property purchased from different sets of defts. in separate suit. (*Shah and Hayward*, JJ.) RAMACHANDRA VITTAL BHAT *v.* GAJANAN NARAIN DESHMUKHI. **44 Bom. 352=66 I.C. 349=22 Bom. L.R. 295.**

——— **O. 2, Rr. 2 and 3**—*Cause of action—Test of.*

Whether the causes of action in two suits are different or identical can be ascertained by the test whether the same evidence will maintain both actions. (*Batchelor and Hayward*, JJ.) SONU KHUSHAL KHADAKE *v.* BAHINIBAI KRISHNA. **40 Bom. 381=33 I.C. 950=18 Bom. L R. 45.**

——— **O. 2, R. 2** — *Cause of action—Rent Cesses—Separate suits for—Maintainability.*

In a prior suit the lessor had sued the lessee for rent and obtained a decree. Subsequently the lessees had neglected to pay the cesses due on the land and the lessor was compelled to pay the same. In a subsequent suit by the lessor for recovery of the cesses so paid. *Held* that the subsequent suit was not barred by O. 2, R. 2, C.P. Code. (*Chatterjee and Cuming*, JJ.) MAHENDRA NATH BOSE *v.* ABINAS CHANDRA BOSE. **27 C.W.N. 521=77 I.C. 364=1923 Cal. 615.**

———**O. 2, R. 2**—*Cause of action—Different causes of action—Successive suits not barred.*

Under O. 2, R. 2, every suit must include the whole of the claim arising from one and the same cause of action and it is not necessary that every suit shall include every claim or every cause of action which the plaintiff might have against the defendant. The test is, whether the cause of action in the subsequent suit is different from the cause of action in the earlier suit. If the answer be in the affirmative, the subsequent suit is not barred, even though it might have been open to the plaintiff to unite the cause of action with the cause of action in the prior suit. 8 M. 520; 23 C. 821, followed. (*Mukerjee and Chotener*, JJ.) KULADA PROSAD CHATTERJEE *v.* KHUDIRAM MISRA. **37 C.L.J. 545=27 C.W.N. 673=70 I.C. 187=1923 Cal. 371.**

———**O. 2, R. 2**—*Cause of action—Suit need not include every cause of action.*

If the cause of action in the subsequent suit is different from that in the first suit the subsequent suit is not barred by O. 2, R. 2 of the C. P. Code. What the rule requires is that every suit shall include the whole of the claim arising from one and the same cause of action and not that every suit shall include every claim or every cause of action which plff. may have against deft. 8 Mad. 520, foll. (*Mookerjee and Panton*, JJ.) H. H. MAHARAJAH OF COOCH BEHAR *v.* RAJA MAHANDRA RANJAN. **66 I.C. 923=34 C.L.J. 465.**

C. P. CODE (V of 1908), O. 2, R. 2—Cause of action.

——— **O. 2, R. 2**—*Cause of action.*

The mere fact that the title to the property in dispute in both suits is the same and that the property is the same does not necessarily show that the cause of action is the same. The cause of action in a suit by a reversioner for a declaration of his right and for possession after setting aside a gift deed is distinct from that in a subsequent suit for possession as reversionary heirs of the estate on the ground that they were in possession and were dispossessed and the mere fact that the cause of action in the latter suit arose before the institution of the previous suit did not make it obligatory on the plff. to include the claim in the previous suit. (*N.R. Chatterjea and Duval*, JJ.) MANMATHA NATH BOSE *v.* JAGAT RAM ROY. **59 I.C. 517.**

———**O. 2, R. 2**—*Cause of action—Meaning of.*

A cause of action has no relation to the defence set up by the deft. nor does it depend on the character of the relief prayed for by the plff. It refers entirely to the grounds, set forth in the plaint as the cause of action or, in other words, to the media upon which the plff. asks the Court to arrive to a conclusion in his favour. (*Newbould and Duval*, JJ.) HARDAS GOSWAMY *v.* EKKARI KONUR. **52 I.C. 929.**

———**O. 2, R. 2**—*Cause of action—Lease by mortgagee to mortgagor—Prior suit for rent—Subsequent suit for mortgage money not barred.*

The defendants executed a usufructuary mortgage and a lease of the same property on the same day and in the lease it was stated that the defendants took the mortgaged property from the plaintiffs on a rent of Rs. 187-8-0 per mensem for six months. Plaintiff first sued for rent and then for mortgage money and it was contended that the second suit was barred by O. 2, R. 2. *Held*, that although the mortgage-deed and the lease were executed on the same day and rent was equal to the amount of interest yet in view of the facts that the mortgage-deed contained no reference to the lease and that the mortgagees were not restricted in their choice of tenants the mortgage and the lease were two distinct transactions and the institution of the former suit, which was based on the lease, is therefore no bar to the subsequent mortgage suit. 3 Lah. 1, Foll. (*Martineau and Campbell*, JJ.) RALIA RAM *v.* AMIR CHAND. **4 Lah. 52=6 Lah. L.J. 259=74 I.C. 122=1923 Lah. 203.**

———**O. 2, R. 2**—*Cause of action—Prior suit for possession—Subsequent suit for redemption.*

Where mortgagors have obtained a decree for redemption and have failed to execute it, another suit to redeem will lie for the same reason that the cause of action is not the same. In 1904 the plaintiffs sued for possession ignoring a mortgage to which the plaintiffs objected *ab initio*. In that suit they were attempting to avoid it and had they prayed for redemption

C. P CODE (V of 1908), O. 2, R. 2—Cause of action.

they would have *ipso facto* admitted their liability to redeem the mortgage; in other words, such a prayer would have cut at the roots of their claim. Subsequently they sued for redemption. *Held* that the cause of action in the present suit was the mortgage now admitted as binding on the plaintiffs plus a refusal of the mortgagees to accept redemption on the terms offered by the plffs. The second suit was not barred. (*Le Rossignol and Martineau*, JJ.) JAIMAL *v.* GANESHI MAL. **4 Lah. 187 = 5 Lah. L J. 296 = 75 I.C. 528 = 1924 Lah. 143.**

——**O. 2, R. 2**—*Cause of action—Mortgage and lease—Suit for rent—Subsequent suit on mortgage bar.*

Where deft. mortgaged certain properties to plff. with possession directing him to set off the rent against the interest due on the mortgage, and the plff. sued the deft. as lessees for arrears of rent and obtained a decree, a subsequent suit on the mortgage for recovery of the mortgage money and interest for the remaining period is not barred. 19 A, 496; 26 M. 662, ref. (*Le Rossignol and Campbell*, JJ.) MAHOMED HUSSAIN *v.* ABDUL GHAFUR KHAN. **3 Lah. 1 = 65 I.C. 102 = P.W.R. 1922 = 1922 Lah. 111.**

——**O. 2, R. 2**—*Cause of action—Mortgage and lease—Suit for rent—Suit on mortgage not barred.*

Where at the time of the execution of a mortgage deed a lease is granted in favour of the mortgagor under which the latter is to continue in possession on payment of a monthly rent, in default of which payment the mortgagor was to be ejected, the mortgage and lease do not form part of the same transaction. Consequently a suit for recovery of the rent due does not debar a suit for the principal amount of the mortgage though the rent was to be applied towards the interest on the mortgage. 69 P. R. 1918; 19 P.R. 1910, Ref. (*Abdul Raoof*, J.) BHAGWAN DAS *v.* JALAL DIN. **69 I C. 34 = 1924 Lah. 190.**

——**O. 2, R. 2**—*Cause of action—Suit by mortgagee for possession—Second suit for possession.*

Where a mortgagee obtains a decree for possession on the basis of the mortgage, no further suit for possession could be maintained unless it could be shown that possession had been taken under the decree and the judgment-creditor has been subsequently dispossessed. (*Leslie Jones and Dundas*, JJ.) HAR CHAND SINGH *v.* NARAIN SINGH. **67 I.C. 281 = 2 L.L.J. 678.**

——**O, 2, R. 2**—*Cause of action—Right to eject tenant and right to rent are different causes of action.*

The right to recover arrears of rent and the right to eject the tenant on default of payment of rent arise out of different causes of action and a suit to recover arrears of rent is not barred by reason of an earlier suit for ejectment. (*Broadway and Harrison*, JJ.) KHUSHI RAM *v.* ABDUL GHAFER. **63 I.C. 978.**

C. P. CODE (V of 1908), O. 2, R. 2—Cause of action.

——**O. 2, R. 2**—*Cause of action—Mortgage and lease—Suit for rent—Subsequent suit for principal and interest is barred.*

Where a person executed a mortgage and a lease simultaneously to another person and the lease provided that the rent would be appropriated for the interest due under the mortgage and on the rent falling into arrears the mortgagee brought a suit and recovered the arrears, *held*, that the mortgage and lease must be treated as one transaction and that a subsequent suit by the mortgagee to recover principal and interest under the mortgage was barred by O. 2, R. 2. (*Leslie Jones and Broadway*, JJ.) BALA RAM *v.* DIWAN CHAND. **63 I.C. 928 = 36 P.W.R. 1921.**

——**O. 2, R. 2**—*Cause of action—Suit for ejectment—Subsequent suit for redemption will lie.*

The relationship of owner and trespasser and that of mortgagor and mortgagee are different and the dismissal of a suit for ejectment is no bar to a suit to enforce a right to redeem as mortgagor. (*Scott-Smith*, J.) CHUNI LAL *v.* GANDA SINGH. **63 I C. 684.**

——**O. 2, R. 2**—*Causes of action—Different—No bar.*

The second suit is not barred by O. 2, R. 2, C.P. Code, when the former suit was one for an injunction and value of fodder taken away and the present suit is one for a refund of money advanced and damages for breach of contract. 25 M. 669, Foll. (*Broadway*, J.) MANI SINGH *v.* ALLAH DITTA. **2 Lah. L.J. 304.**

——**O. 2, R. 2**—*Cause of action—Different—Spliting of claim—Mortgaged property leased to mortgagor—First suit for rent—Second suit for principal money.*

The mortgagee sued the mortgagor first for recovery of rent of mortgaged property leased to the mortgagor, and next for recovery of mortgage money which he had advanced to the mortgagor. *Held*, the subsequent suit was not barred by R. 2, O. 2 of the C.P. Code, for the cause of action on the two suits was different. (*Shadi Lal and Le Rossignol*, JJ.) PINDI DAS *v.* LAL CHAND. **102 P.L.R. 1916 = 36 I.C. 209 = 177 P.W.R. 1916.**

——**O. 2, R. 2**—*Causes of action—Different—No bar—Suit by reversioner — Cause of action.*

A second suit will not be barred by the provisions of the rule unless the same cause of action is to be found in the four corners of the plaint in the first suit. A Hindu widow sold her husband's house to deft. and her husband's brother sued for and obtained a decree declaring that the sale could not affect his reversionary right to one half of the house after the widow's death. He subsequently brought a

C. P. CODE (V of 1908), O. 2, R. 2—Cause of action.

suit for possession of the other half. *Held*, that the second suit was not barred by the rule, because though the act of widow's selling the house was a single act, it gave rise to two distinct causes of action. (*Scott-Smith*, J.) MAHOMED ALI *v.* MIR HAIDAR.
223 P.W.R. 1915=28 I.C. 301=82 P.L.R. 1915.

——**O. 2, R. 2**—*Cause of action—Arising subsequently.*

Where at the time of a previous suit, the plff. had no cause of action for a particular relief, a subsequent suit for that relief will not be barred under O. 2, R. 2. (*Rattigan and Scott-Smith*, JJ.) KHAN BAHADUR *v.* ALI AKBAR. **255 P.L.R. 1913=20 I.C. 22=163 P.W.R. 1913.**

——**O. 2, R. 2**—*Cause of action—Different sale of two plots under one deed.*

Two plots were sold to plff. under one sale-deed and he filed separate suits for the purchase-money in respect of one and for possession of the other. *Held*, that the causes of action were different and the latter suit for possession was not barred. (*Reid*, C.J.) LAKSHIMI DAS *v.* BALAK RAM. **104 P.R. 1912=182 P.L.R. 1912=16 I.C. 24=156 P.W.R. 1912.**

——**O. 2, R. 2**—*Cause of action—Breach of contract.*

It is only when the party, complaining of the breach of contract suffers damage, that a cause of action is said to arise and till then only a term of the contract is broken. (*Seshagiri Aiyar and Moore*, JJ). KOLAVA KOLAM SEETANNA *v.* PODDRI NARAYANA MURTHI SOMAYAJULU.
57 I.C. 982=38 M.L.J. 470.

——**O. 2, R. 2**—*Cause of action—Different—Suit on.*

Where a suit is brought either on a non-existent cause of action or upon a false cause of action it will not disable a plff. from filing a fresh suit on the true cause of action because there is no identity of causes of action between the two suits. A right which a litigant possesses without knowing or ever having known that he possesses it cannot be regarded as a portion of his claim under O. 2, R. 2. (*Ayling and Seshagiri Aiyar*, JJ.) DASARATHI NAIDU *v.* PALALA KUMARAMULL.
7 L.W. 557=(1918) M.W.N. 427=45 I.C. 989=24 M.L.T. 311.

——**O. 2, R. 2**—*Causes of action—Difference—"Claim for a portion does not bar another claim for balance."*

O. 2, R. 2, C. P. C., prohibits only the splitting of claims arising out of the same cause of action. A customer buying articles from a merchant on different occasions has a distinct cause of action for each purchase unless an agreement or settlement of accounts consolidating all these into one account is reached. A claim for a balance after one portion of

C. P. CODE (V of 1908), O. 2, R. 2—Cause of action.

claim had been sued on in a Village Munsif's Court is not barred under O. 2, R 2. (*Sadasiva Aiyar and Napier*, JJ.) AGUSTUS BROTHERS *v.* FERNANDEZ.
2 L.W. 890=29 M.L.J. 474=18 M.L.T. 377=31 I.C. 59=(1915) M.W.N. 765.

——**O. 2, R. 2**—*Cause of action—Different defts.*

A plff. whose suit has been dismissed as against some of the defts. because the cause of action against them was not established, is not precluded from bringing a new suit on the true cause of action against them. (*Sadasiva Aiyar and Napier*, JJ.) VASUDEVA RAVI VARMA *v.* ATHI KOTTIL EZHUVAN KUNANUR. **26 I.C. 51.**

——**O. 2, R. 2**—*Cause of action—Different trespassers—Bar of second suit—Test.*

Where there are two trespassers the question whether the second suit is barred or not depends upon the question whether the two trespasses might be considered as a single transaction forming one and the same cause of action. "Cause of action" in O. 2, R. 2 is used more comprehensively than in S. 17, C.P.C. (*Sadasiva Aiyar and Spencer*, JJ.) JAGATHAMBA AMMAL *v.* RAMASWAMI AIYANGAR.
25 I.C. 579.

——**O. 2, R. 2**—*Cause of action—Purchase of shares of two members of undivided family—Separate sale-deeds—Suit on first sale-deed—Right to bring suit on other, barred.*

Plff. after purchasing the shares of two members of an undivided family under separate sale-deeds, instituted a suit to recover the share purchased under one sale-deed. *Held*, he was barred from instituting a suit to recover the share under the other sale-deed, as he was bound in the first suit to claim the shares of both the sale-deeds. The plff. had a single cause of action for partition against the family of the vendors and the existence of two sale-deeds would not affect it. (*Miller and Tyabji*, JJ.) MANONMANI AMMAL *v.* VAITHILINGA NAICKER. **14 M.L.T. 341=(1913) M.W.N. 881 21 I.C. 402=25 M.L.J. 481.**

——**O. 2, R 2**—*Cause of action—Every alienation by Hindu widow gives a separate cause of action to reversioners.*

A Hindu reversioner's right to challenge the validity of one alienation made by a Hindu widow is different from his right of impeaching the validity of a separate and independent alienation though both the rights may arise out of one and the same title. Each alienation by the widow gives rise to a separate and distinct cause of action and a suit to impeach one is no bar under O. 2, R. 2, C. P. C., to a subsequent suit to impeach another alienation. (*Wasir Hasan*, A.J.C.). BAHADUR SINGH v. SULTAN HUSAIN KHAN. **8 O.L.J. 535=66 I.C. 455=3 U.P.L.R. (J.C.) 83=1922 Oudh 171.**

C. P. CODE (V of 1908), O. 2, R. 2—Cause of action.

———**O. 2, R. 2**—*Cause of action—Difference in.*

Where the causes of action for a prior and a subsequent suit in respect of the same property are different, the rule does not apply. (*Lindsay*, J.C.) RATIPAL *v.* BIPIN CHANDRA CHATTERJEE. **41 I.C. 80=4 O.L.J. 334.**

———**O. 2, R. 2 and O. 22, R. 2**—*Cause of action—Different Hindu Law—Succession.*

A widow, with two daughters, mortgaged the house of her husband. After her death one of the daughters sued for her half share and got the possession of it. The other daughter who had attested the mortgage, then sued for her share, but died during the pendency of the litigation. Then the surviving sister applied as her representative. It was contended on behalf of the deft. that the applicant failed to sue on the whole in her previous suit and the deceased plff. had represented the whole share. *Held*, that the applicant acquired the right to sue on the death of the deceased plff.; and when she sued for her half share, she did not represent the whole estate. (*Lindsay*, J.C.) BUDHU CHAUDHURI *v.* HARDEI. **18 I.C. 833.**

———**O. 2, R. 2**—*Causes of action—Different—No bar.*

O. 2, R. 2, C. P. C., requires that every suit shall include the whole of the claim arising from the one and the same cause of action and not that every suit shall include every claim and every cause of action which the plaintiff may have against the defendant. Consequently if the cause of action in the subsequent suit is different from that in the first suit, the subsequent suit is not barred. The whole question for investigation, therefore is, whether the cause of action in the subsequent suit is the same as that in the first suit. (*Coutts and Das*, JJ.) MT. BHAGJOGNI *v.* SAKHI MAHTON. **(1923) Pat. 284=77 I.C. 500=1923 P. 575.**

———**O. 2, R. 2**—*Cause of action—Meaning.*

The expression refers entirely to the media upon which the plff. asks the Court to arrive at a conclusion in his favour. (*Das*, J.) HARDEO *v.* BHAWANI. **60 I.C. 496=(1921) Pat. 125.**

———**O. 2, R. 2**—*Cause of action—Difference of—Prior suit on mortgage—Inconsistent claim in later suit.*

Where the prior suit was based on the ground that the mortgaged property had been sold in execution of a simple money decree free of the mortgage, it does not bar a subsequent suit on the same mortgage on the allegation that the land was sold subject to the mortgage in execution of the money decree. (*Brown*, A.J.C.) MAUNG KYIN PEIN *v.* MA PWA ME. **4 U.B.R. (1921) 62; 64 I.C. 953=1922 U.B. 1.**

C. P. CODE (V of 1908), O. 2, R. 2—Contract.

———**O. 2, R. 2**—*Cause of action—Difference in—No.*

The dismissal of a suit for redemption according to the terms of a mortgage is no bar to suit for redemption on a subsequent agreement. (*Twomey*, J.) MAUNG KYAW *v.* MA GAUK. **27 I.C. 732=8 Bur. L.T. 101.**

Contract.

———**O. 2, R. 2**—*Contract — Delivery of goods by instalments—Breach.*

A contract for the supply of goods by monthly instalments providing that each monthly instalment is to be treated as a separate contract contains distinct causes of action and separate suits will lie for damages. (*Jenkins*, C.J., *and Woodroffe*, J.) MANDAL AND CO. *v.* FAZUL ELLAHIE. **26 I.C. 209=41 Cal. 825.**

———**O. 2, R. 2**—*Contract — Breach—Damages—Injunction.*

A subsequent suit for recovery of money advanced as damages for breach of contract can be brought after a suit for injunction to cut or remove certain things from land is withdrawn or is dismissed for default. (*Broadway*, J.) MANI SINGH *v.* ALLAH DITTA. **55 I.C. 630=2 Lah. L.J. 304.**

———**O. 2, R. 2**—*Contract—Breach—Vendee agreeing to deliver certain things towards half the price due and to pay the balance in instalment—Single contract—One cause of action.*

When the deft. bought a thing for a sum named and agreed to deliver certain things at once towards half the price and to pay the balance in instalments and where he committed default in respect of both the promises there is only one cause of action, that being a single contract. But where a vendee agreed to deliver certain things for half the purchase-money and promised to pay the balance subsequently and where by subsequent agreement, provision was made for any breach of the former part of the contract, causes of action for the first and second part are different. (*Johnstone and Shadi Lal*, JJ.) NARAIN DAS *v.* MANGHA RAM. **183 P.L.R. 1914=23 I.C. 845=129 P.W.R. 1914.**

———**O. 2, R. 2**—*Contract—Separate contract in one instrument—Separate suit—No bar.*

When one instrument contains two separate contracts and the performance of each is secured in a different manner each gives rise to a separate cause of actions, although they may be joined in the same suit. O. 2, R. 2 would not prevent separate suits being instituted on them. 21 Bom. 267, foll. (*Mitra*, A.J.C.) RAIBHAN *v.* RAOJI. **58 I.C. 18=16 N.L.R. 136.**

———**O. 2, R. 2**—*Contract—Breach—Suit.*

The plff. got by virtue of an oral agreement a certain sum of money and a share in a house, in the event of his being successful in a litigation, and brought a suit in the Small Cause.

C. P. CODE (V of 1908), O. 2, R. 2—Contract.

Court to recover the money omitting the claim for the house. After obtaining decree for the money he brought another suit for the house. *Held*, the suit for the house was barred under O. 2, R. 2. (*Lindsay*, J.C.) SHARFUDDIN *v.* NIAMAT ALI. **15 I.C. 296.**

———O. 2, R. 2—*Contract—Distinct causes of action—Contract for sale of Goods—Delivery by instalments—Effect of—Distinct contracts.*

Prima facie each order and delivery of goods is a separate transaction and a separate cause of action if not they are successive claims which arise under the same obligation within the explanation at the end of O. 2, R. 2, C. P. Code. The question is really dependent on the contract between the parties. If all the goods were delivered under a *single contract* it would be within the explanation unless there was an express stipulation that each delivery or each month's deliveries would be considered as a separate contract. The validity of such a clause has been recognised. There are numerous definitions of the expression "Cause of action" and courts have held that the meaning of the expression as used in S. 20, C. P. C., must be gathered from the previous legislation in India and not from the definitions of the expression adopted in certain English decisions. Likewise the meaning of the expression as used in O. 2, R. 2, should be gathered from that rule and the authorities on that rule or on the sections of the previous Code replaced by that Rule, and it should not be assumed that the expression has the same meaning in that rule as it has either in English decisions or in decisions on questions relating to the law of Limitation. (*Heald and Lentaigne*, JJ.) K.E.A.K. AHMED SAHIB AND CO. *v.* M.K. PAKIR MAHOMED ROWTHER. **2 Bur. L.J. 169 = 1 Rang. 694 = 1924 Rang. 145.**

———O. 2, R. 2—*Contract—Separate covenants, breach of, whether one cause of action—Suit based on one—Subsequent suit based on other whether maintainable.*

Where a contract contains two covenants a breach of both of them constitutes one cause of action. If a suit is brought in respect of one of them only, a subsequent suit in respect of the other is barred under O. 2, R. 2. (*Maung Kin*, J.) SHWE HMAN *v.* MAE MYA. **10 L.B.R. 111 = 66 I.C. 653 = 12 Bur. L.T. 251.**

Damages.

———O. 2, R. 2—*Damages—Possession.*

A decree for possession was passed in favour of the plaintiffs for land already contracted to be sold. In this suit the plaintiff sued for damages. The suit was held to be barred as he should have joined this claim in the former suit for possession. (*Scott*, C. J., *and Rao* J.) ALI SAHIB BABA DIWAKER *v.* MOHEEDIN SADIM PATIL. **12 I.C. 375 = 13 Bom. L.R. 875.**

C. P. CODE (V of 1908), O 2, R. 2—Declaration.

———O. 2, R. 2—*Damages — Wrongful attachment—Prior suit for declaration.*

A person whose property had been wrongly attached sued for a declaration that the property was not liable to attachment and obtained a decree. Subsequently he sued to recover damages for wrongful attachment. *Held*, that the subsequent suit was not barred by O. 2, R. 2 though he could have joined a claim for damages with his suit for declaration. (*Stuart*, J.C.) MAIKU *v.* NAZIR AHMAD. **58 I.C. 657 = 7 O.L.J. 310.**

———O. 2, R. 2—*Damages — Continuing wrong—Obstruction to water-course.*

Plff. obtained a decree in a previous suit for the removal of obstruction to a water-course and subsequently sued the defts. for damages accruing after the institution of the former suit. *Held* that plff.'s right to apply for that order was in existence for the whole period for which damages were claimed and the present suit was not barred by O. 2, R. 2. (*Chapman and Mullick*, JJ.) RAGHUNATH SINGH *v.* ACHUTANAND. **43 I.C. 374 = 3 Pat. L.W. 283.**

Declaration.

———O. 2, R. 2—*Declaration—Subsequent suit for possession.*

A suit for possession of property will not be barred under O. 2, R. 2, C. P. C. by reason of the dismissal of a previous suit for declaration and injunction restraining deft. from disturbing plff.'s possession, on account of the failure of the plff. to prove possession. (*Spencer and Krishnan*, JJ.) AIYANAR RAJA *v.* ALAGAR RAJA. **52 I.C. 434.**

———O. 2, R. 2—*Declaration—Suit for possession—Distinction.*

The causes of action in a suit for a declaration and in a suit for possession are different inasmuch as in the former, no interference with possession need be alleged, whereas in the latter, title and deprivation of possession have both to be alleged. (*Sankaran Nair and Oldfield*, JJ.) SILIMAN SAHIB *v.* BONTALA HAMAN SAHIB. **38 Mad. 247 = 20 I.C. 418 = (1913) M.W.N. 554 = 25 M.L.J. 125.**

———O. 2, R. 2—*Declaration—Subsequent suit for possession—Maintainability.*

Where a person entitled to claim a share in an estate sued for and obtained a mere declaration of his right and did not ask for possession, a subsequent suit for possession is barred by O. 2, R. 2 and S. 11, Expl. IV, C. P. C. (*Hallifax and Prideaux*, A.J.C.) SUBHAN ALI *v.* IMAMI BEGAM. **65 I.C. 194 = 1922 Nag. 129.**

———O. 2, R. 2—*Declaration—Dismissal of suit—Subsequent suit for possession.*

A dismissal of declaratory suit by reason of the plaintiff not being in possession at the time

C. P. CODE (V of 1908), O. 2, R. 2—Defences.

of suit does not bar his subsequent suit for recovery of possession. (*Fox*, C.J. *and Twomey*, J.) MAUNG BA THAUNG *v.* MA SHIN MIN.
9 L.B.R. 37=37 I.C. 15=10 Bur. L.T. 189.

Defences.

——**O. 2, R. 2**—*Defences.*

The provisions of the order do not apply to a plea raised in defence. (*Shadi Lal and Broadway*, JJ.) AKBAR HUSAIN *v.* RAGNANDAN DASS. **57 I.C. 348=2 U.P.L.R. (Lah.) 130.**

——**O. 2, R. 2**—*Defences—Not barred.*

O. 2, R. 2 does not apply to defences though it may bar a suit. (*Le Rossignol*, J.) MUSAMMAT KARMON BAI *v.* RAM. **50 I.C. 909.**

Dek. Agr. Relief Act.

——**O. 2, R. 2**—*Dekkhan Agriculturists, Relief Act—Suit on one of several simultaneous mortgages—Account taken out in respect of one mortgage—Subsequent suit on another mortgage.*

The secure the balance arrived at, as due by the defts. to the plffs. in several transactions between them, the defts. executed simultaneously three mortgages to plff. and the latter brought a suit on one of the mortgages and the account taken therein was limited to the particular mortgage sued on and subsequently the plff. brought a suit on the second mortgage, *Held*, that an account taken by the Court under S. 13 of the Dekkhan Agriculturists' Relief Act is taken from the earliest of the preceding transactions between the parties to the suit and is continued right up to the date of the suit and that the suit was barred under O. 2, R. 2, C.P.C. (*Macleod* C.J. *and Heaton*, J.) DALUCHAND BALARAM *v.* APPI KHEMA.
45 Bom. 55=59 I.C. 347=22 Bom L.R. 1093.

Dismissal of Prior Suit.

——**O. 2, R. 2 (2)**—*Dismissal of prior suit—Two suits filed on same date—Suit bearing subsequent number filed later.*

Two suits presented on the same day must be presumed to be presented and admitted in the order in which their numbers appear on the register. (*Duckworth and Po Han*, JJ.) STANDARD ELECTRIC AND MOTOR WORKS *v.* PICTURE PALACE. **2 Bur. L.J. 218=1 Rang. 682=76 I.C. 791=1924 Rang. 161.**

Dower.

——**O. 2, R. 2**—*Dower—Separate suit for share of inheritance—Maintainability of.*

Per *Lindsay*, J. (*Kanhaiya Lal*, J., *dissenting.*) A suit by an heir of a deceased Mahomedan Lady for a share of the inheritance of certain Zemindari estate is a bar to a subsequent suit against the lady's husband for a share of the dower due to the deceased. (*Lindsay and Kanhaiya Lal*, JJ.) SHEIKH ABDUL RASHID *v.* MT. QUDRAT-UN-NISSA. **L.R. 3 A. 587=70 I.C. 817=1922 All. 510.**

C. P. CODE (V of 1908), O. 2, R. 2—Fresh suit.

——**O. 2, R. 2**—*Dower—Suit for—Prompt and deferred.*

A suit for recovery of portion of the dower as prompt when there was no stipulation at the time of the marriage does not bar the subsequent suit for the balance, as for deferred dower. (*Stanley*, C.J., *and Banerji*, J.) UMDA BEGAM *v.* MUHAMMADI BEGAM. **33 All. 291=9 I.C. 200=8 A.L.J. 27.**

Easement, Right of Way.

——**O. 2, R. 2**—*Easement—Right of way.*

A claim for right of way included in a title suit as an alternative prayer, may be separated from it and left to a second suit. The fact that a right of way was not claimed in a previous title suit does not bar a subsequent suit for declaration of a right of way either by way of *res judicata* or under O. 2, R. 2. (*Teunon and Huda*, JJ.) KALACHAND MUKHAPADHYA *v.* JOTINDRA NATH CHAKRABARTI.
57 I.C. 852.

Execution Proceedings.

——**O. 2, R. 2 and S. 11**—*Execution proceedings.*

Previous application for restitution of a sum of money recovered in execution does not bar a subsequent application for interest due on the said sum either under S. 11, Expl. 4 or O 2, R. 2, C.P. Code. The principle of constructive *res judicata* does not apply to execution proceedings unless the decision of the question subsequently sought to be agitated was expressly or by necessary implication given in the previous proceedings. (*Ayling and Seshagiri Aiyar*, JJ.) SOMASUNDARAM PILLAI *v.* CHOKKALINGA PILLAI. **40 Mad. 780=38 I.C. 806=5 L.W. 267.**

——**O. 2, R. 2**—*Execution proceedings.*

The rule does not apply to proceedings in execution of decree. (*Fawcett*, J. C. *and Raymond*, A. J. C.) IBRAHIM *v.* GHULAM HUSSAIN. **62 I.C. 507=15 S.L.R. 11.**

Fresh Suit.

——**O. 2, R. 2**—*Fresh suit—Return of plaint.*

Where a plaint in a suit for profits of one year was not represented after being returned, a subsequent suit for accounts is not barred under O. 2, R. 2. (*Abdur Rahim and Srinivasa Aiyangar*, JJ.) SUBBA RAO *v.* RAMARAO.
40 Mad. 291=30 M.L.J. 341=32 I.C. 899=19 M.L.T. 134=(1916) 1 M.W.N. 188=3 L.W. 192.

——**O. 2, R. 2 and O. 34, R. 14**—*Fresh suit—Money decree on personal covenant—Second suit for sale of property—Bar.*

Where a personal covenant in a mortgage provides that if the mortgaged property went out of the possession of the mortgagee, the mortgagor shall be liable to pay the money and the former on being dispossessed obtained

C. P. CODE (V of 1908), O. 2, R. 2—Fresh Suit.

a decree against the mortgagor, the execution of which was disallowed in objection proceedings, *held*, that a suit for sale of property is not barred by O. 2, R. 2 in the presence of O. 34, R. 14. (*Jwala Prasad and Adami*, JJ.) PUNIT DEO NARAYAN SINGH *v.* BHAGWATI SARAM. **63 I.C. 303.**

———**O. 2, R. 2**—*Fresh suit—Different causes of action in one and the same transaction, need not be joined.*

R. 2 does not compel a plff. to include in one and the same action different causes of action though they arise out of the same transaction. If the plaintiff on the allegations made in the plaint, can make a claim, which he does not put forward in his suit, he cannot put forward that claim in a subsequent suit. But if on the allegations he cannot put forth a claim, that claim he can put forth in a subsequent suit. (*Das*, J.) HARDEO SINGH *v.* BHAWANI SAHI. **60 I.C. 496=(1921) Pat. 125.**

Instalment Bond.

———**O. 2, R. 2**—*Instalment bond—Omission to sue for instalments which had accrued due bars subsequent suit therefor.*

On 28—6—1917 plff. brought a suit against defts. for recovery of the instalment of an annuity which had fallen due from 1—1—1914 up to 1—1—1917. On 31—7—1917 the suit was dismissed by the Court on the ground that the suit was premature because an appeal was pending with respect to a certain sale-deed. The parties, however, were absent on that date. The plff. applied to the court under O. 9, R. 4, C.P.C. to set aside the dismissal but the application was rejected. Against the order of rejection plff. filed an appeal but on 2—3—1918 that appeal was withdrawn and dismissed. Meantime the instalment of the annuity which fell due on 1—7—1917 had become payable and a suit was brought on 22—12—1917 for its recovery and decreed on 2—4—1918. In a subsequent suit plaintiff claimed arrears of annuity from 1—1—1914 up to 1—7—1919. *Held* that when the plaintiff brought the suit on 22—12—1917 in respect of the half-yearly instalment of the annuity which had become payable on 1--7--1917 he was bound to include in his claim a claim for all other instalments which had become due up to that date and with respect to which a claim would have been within limitation; and that the present suit was barred by O. 2, R. 2, by reason of the prior suit decreed on 2—4—1918. Plff. cannot be heard to say that he was in any way protected against the operation of O. 2, R. 2, C. P. C. by the fact that he had an appeal pending in the District Court at the time the second suit was filed. After the appeal was withdrawn any protection, which might have accrued to the plaintiff, by reason of the appeal having been filed was taken away and his proper course then was to apply to the court in which the suit was pending and to ask for amendment of the claim and permission to include in the claim a claim for the years 1914 to 1917. (*Lindsay and Kanhaiya Lal*, JJ.) ABDUL KARIM KHAN *v.* MAHOMED JAU. **44 A. 663=20 A.L.J. 890=L.R. 3 A. 480=68 I.C. 970=1922 All. 379.**

C. P. CODE (V of 1908), O. 2, R. 2—Mesne Profits.

———**O. 2, R. 2**—*Instalment bond—Whole amount payable on default of single instalment—Failure to pay—Suit for unpaid instalments only—Effect.*

Under a mortgage executed in 1902 the principal sum borrowed was Rs. 1,200 and the sum was payable in annual instalments of 100 rupees each. On default of payment of any one instalment the whole of the balance was to be paid at once. In the years 1903 and 1904 the mortgagors paid Rs. 44 only. In 1905 the plaintiffs filed a suit to recover the amount of the first two instalments and obtained a decree. In 1917 plaintiffs (mortgagees) filed a suit for recovery of the remaining instalments with interest. *Held* that the suit was barred by O. 2, R. 2, C. P. Code. 20 Bom. L.R. 773; 37 A. 400; 43 A. 671, foll.; 39 M. 981, diss. (*Macleod*, C. J. *and Crump*, J.) SHRINIVAS *v.* CHANBASAPA GOWDA. **25 Bom. L.R. 208=72 I.C. 290=1923 Bom. 201 (2).**

———**O. 2, R. 2**—*Instalment bond — Prior suit for some instalments—If bars subsequent time.*

An instalment bond gave the creditor option to enforce full payment on a single default being committed or to waive it. The creditor first sued for some instalments which had fallen due and subsequently for the balance. *Held*, he did not waive his right to the second suit by filing the prior suit. (*Hallifax*, A.J.C.) KESHEO RAO *v.* SUKLIA. **19 N.L.R. 170=76 I.C. 122=1924 Nag. 61.**

Limitation.

———**O. 2, R. 2 (3)**—*Limitation.*

There is no limitation for certifying payment under O. 2, R. 2 (3) of the C. P. Code. (*Macleod*, C.J. *and Heaton*, J.) PANDURANG *v.* JAGYA. **22 Bom. L.R. 1120=59 I.C. 399=45 Bom. 91.**

Mesne Profits.

———**O. 2, R. 2**—*Mesne profits—Prior suit for possession only.*

R. 2 does not bar a suit for mesne profits brought subsequently to a suit for possession, as a claim for mesne profits is based on a cause of action distinct from a claim for possession. (*Walsh and Sulaiman*, JJ.) MIYAN KHAN *v.* SARFARAZ KHAN. **60 I.C. 65.**

———**O. 2, R. 2**—*Mesne profits—Suit for possession—Subsequent suit for mesne profits.*

Where in a prior suit for possession and future mesne profits the Court did not purport to decide the question of future mesne profits,

C. P. CODE (V of 1908), O. 2, R. 2—Mesne Profits.

a subsequent suit for mesne profits *pendente lite* is not barred. (*Richards*, C.J. *and Banerjee*, J.) MOHAMMAD ISHAQKHAN *v.* RUSTUM ALI KHAN. **40 All. 292=44 I C 88=16 A.L.J. 182.**

———O. 2, R. 2—*Mesne profits—First suit for possession—Subsequent suit for mesne profits.*

A prior suit for possession does not bar a suit for mesne profits due for a period subsequent to the institution of the prior suit. The cause of action for such mesne profits is one which has accrued subsequent to the suit for possession. (*C. C. Ghose*, J.) EQUITABLE COAL COMPANY, LTD. *v.* BAGALA SUNDARI DEBI. **71 I.C. 972=1924 Cal. 442.**

———O. 2, R. 2—*Mesne profits—Suit for possession.*

A tenancy held by defts. terminated on the date of suit for partition and accounts wherein the question of the rent of the tenancy was involved. A subsequent suit for damages for occupation of tenancy during the period of the previous partition suit is not barred under O. 2, R. 2. (*Chatterjee and Newbould*, JJ.) KRISTO DAS ROY *v.* BEHARI LAL SIKDAR, **37 I.C. 900.**

———O. 2, R. 2—*Mesne profits—Mortgage—Payment of.*

Suit for profits accrued between date of deposit of mortgage money and delivery of possession is maintainable. (*Lindsay*, J. C.) RAM KARAN *v.* ACHAL SINGH. **3 O.L.J. 271=35 I.C. 799=19 O.C. 161.**

———O. 2, R. 2 and O. 20, R. 12—*Mesne profits—Subsequent suit.*

A party is not bound to include mesne profits after the institution of suit though he is required to do so for profits before suit. (*Fox*, C.J.) SHEW BON *v.* MI U THA NGO. **32 I.C. 696=9 Bur. L.T. 92.**

———O. 2, R. 2—*Mesne profits—Suit for possession—Prior suit for mesne profits—Bar.*

The institution of a suit for mesne profits only consequent on dispossession is a bar to a subsequent suit for possession under O. 2, R. 2, C. P. C. (*Pratt*, J. C. *and Fawcett*, A. J C.) HIROMAL *v.* FARID KHAN. **29 I.C. 939=9 S.L.R. 23.**

Minor.

———O. 2, R. 2—*Minor—Omission of claim by guardian does not bind minor.*

An omission in a suit by the next friend of a minor of a portion of the property to which the minor is entitled, will not bar a second suit by the minor for the partition omitted. (*Macleod*, C.J. *and Shah*, J.) VYANKAT AWACHI PATIL *v.* ONKAR NATHU. **45 Bom. 805=61 I C. 276=23 Bom. L.R. 250.**

———O. 2, R. 2—*Minor — Negligence of guardian.*

A minor may sue for properties for which his guardian omitted to sue in a prior suit. R. 2 does not bar such a suit. (*D. Chatterjee and N. R. Chatterjee*, JJ.) ABDUL GAFFUR *v.* SONA BIBI. **14 I.C. 93.**

Mortgage.

———O. 2, R. 2—*Mortgage — Mortgagee, suing twice for sale.*

If the mortage provided, as mortgages always do in England, for an independent obligation to pay the principal and the interest, then a suit brought to obtain a personal judgment in respect of the interest alone, would not prevent a subsequent claim for payment of the principal. In such a case the cause of action would be distinct. The matter is, however, different if the non-payment of the interest causes the principal money to become due, as in that case the cause of action, the non-payment of the interest gives rise, to two forms of relief which the Code provides shall not be split. The fact that the decree obtained by the mortgagee was not a decree for sale but in the nature of a personal judgment, does not alter the effect of his claiming a decree for money recoverable from the mortgaged property. (*Lord Buckmaster.*) KHISHAN NARAIN *v.* BALA MAL, **25 Bom. L.R. 220=44 M.L.J. 128=32 M.L.T. 41=4 L.W.=50 I.A. 115=L.R.4 P.C. 46=72 I.C. 187=27 C.W.N. 802=50 C. 1252=28 C L.J 125=16 L.W. 341=26 P.W.R. 1923=9 O & A L.R 488=1922 P.C. 412 (P.C.).**

———O. 2, R. 2 and O. 34, R. 14—*Mortgage—Suit for money—Decree only—Second suit on the same mortgage or sale of property whether maintainable.*

A mortgagee having brought a suit on the basis of his mortgage for a simple money decree only and obtained a decree, which, however, was not satisfied, a second suit by him on the same basis for sale of the mortgaged property is maintainable under O. 34, R. 14 in spite of O. 2, R. 2. (*Richards*, C.J., *and Banerjee*, J.) INDAR PAL SINGH v. MEWAH LAL, **36 All. 264=29 I.C. 429=12 A.L. J. 274.**

C. P. CODE (V of 1908), O. 2, R. 2—Mortgage.

———O. 2, R. 2—*Mortgage—Redemption—Second suit.*

Where a decree for possession is passed in favour of a person, subject to payment of the mortgage money within a specified time, but the suit is not framed properly as a redemption suit, and the person instead af paying within time the mortgage money as ordered in the decree, brings a suit for redemption the second suit is not barred by the former, inasmuch as the cause of action in a suit for redemption is the mortgagor's title *plus* valid tender or deposit of the mortgage debt., so as long as there is no decree which makes it impossible for the mortgagor to make a valid tender or deposit, his right to do so continues. 24 A. 448, ref. (*Piggott*, J.) GANAPAT SINGH *v.* TOHFA. 15 I.C. 15=10 A.L.J. 36.

———O. 2, R. 2, and O. 34, R. 6—*Mortgage—Fresh suit for sale.*

No fresh suit will lie for sale of another property for recovery of the balance due after selling one property against which the decree was obtained unless the first suit included both the properties against which the mortgage decree could be obtained. (*Richards*, C.J., *and Tudball*, J.) MAHAMAD HUSSAIN *v.* DHANESHWER RAI. 10 I.C. 386=8 A.L.J. 899.

———O. 2, R. 2—*Mortgage—Two mortgages—Each can be sued on separately.*

Where two successive mortgages are created on the same property by the same debtor, in favour of the same creditor, the creditor may either sue on the first including the claim as to the second or sue separately on each claim and he is not debarred from adopting the latter procedure either by S. 11, expl. IV or O. 2, R. 2. (*Mookerjee*, A.C.J. *and Fletcher*, J.) NILU ROY *v.* ASIBABAD MANDAL. 33 C.L.J. 282=60 I.C. 809=25 C.W.N. 129.

———O. 2, R. 2—*Mortgage—Suit by mortgagee for possession on default of payment of interest—Subsequent suit under S. 12 of Punjab Act II of 1913—Maintainability.*

In 1902 a mortgagee in enforcement of the terms of his mortgage sued for possession of the mortgaged property on default of payment of interest for the previous years. The mortgagee obtained a decree in 1904 but the Court refused to go into the question of what arrears of interest were due. The mortgagor subsequently applied to the Collector under Punjab Act II of 1913 and obtained a decision that the mortgage could be redeemed on payment of Rs. 570. Thereupon the mortgagee sued for a declaration that there was a further charge on the land for Rs. 5,015 and that there could be no redemption without payment of that amount. *Held*, that the mortgagee's suit was not barred under O. 2, R. 2, C.P. Code. by reason of the prior suit for possession. 66 P.R. 1912, foll.; 1 Lah. 457 F.B., Ref. (*Martineau and Campbell*, JJ.) KHOTA RAM *v.* NAWAZ.
3 Lah. L.J. 238=4 Lah. 76=72 I.C. 765=1925 Lah. 21.

C. P. CODE (V of 1908), O. 2, R. 2—Mortgage.

———O. 2, R. 2—*Mortgage—Suit on—Dismissal of prior suit for possession—Subsequent suit for money.*

A subsequent suit for recovery of the principal and interest due on the mortgage is barred by the dismissal of a prior suit by a mortgagee for possession of the mortgaged land. 25 B. 161, foll. (*Scott-Smith and Leslie-Jones*, JJ.) HARNAM SINGH *v.* BHOLA SINGH.
4 Lah. L.J. 302.

———O. 2, R. 2—*Mortgage and lease forming one transaction.*

Where a mortgage and the lease form one transaction and the lease is only a mode for realizing the interest due on the mortgage, a suit on the mortgage cannot be brought subsequent to a suit for rent on the lease. (*Leslie-Jones and Broadway*, JJ.) RALA RAM *v.* DIWAN CHAND. 63 I.C. 928=3 Lah. L.J. 390.

———O. 2, R. 2—*Mortgage suit—Causes of action—Suit for possession.*

O. 2, R. 2 aims at preventing two evils, *viz*, the splitting of claims and the splitting of remedies. A man omitting from his suit a portion of his claim shall not afterwards be allowed to sue in respect of it. If he omits one of his remedies, he cannot afterwards pursue it. 25 B. 161, foll. Plffs. sued defts. for mortgage money with interest alleging that the land of deft. No. 1 was originally mortgaged with possession to deft. No. 2, by three deeds which were transferred to their father by deft. No. 2. They also alleged that deft. No. 1 orally mortgaged his land to the father of plffs. for Rs. 1,000 and that mutation of this mortgage was effected but was set aside on appeal. It was found that plff.'s father had sued deft. No. 1 for possession of the land alleged to have been orally mortgaged to him, but his suit was dismissed as the mortgage was not proved. *Held*, that the plffs. ought to have sued for both the remedies, the possession of the land or the return of the mortgage money in the alternative in one suit, and they were precluded from suing for the mortgage money now, by O. 2, R. 2, C. P.C. (*Scott-Smith and Leslie-Jones*, JJ.) HARNAM SINGH *v.* BHOLA SINGH. 56 I.C. 966=2 U.P.L.R. (Lah.) 108.

———O. 2, R. 2—*Mortgage—Redemption.*

A mortgagor brought a suit to recover Rs. 100 paid in excess to the mortgagee. It was dismissed as the mortgage was not satisfied. The mortgagor brought a suit for redemption. This was held barred by O. 2, R. 2 of C.P.C. (*Chevis and Broadway*, JJ.) BARKHURDAR *v.* CHHATTA MAL.
48 I.C. 798=119 P.R. 1918.

———O. 2, R. 2—*Mortgage—Suits—Default in payment of rent—Suit for arrears—Subsequent suit for arrears and principal.*

A mortgage deed provided that the mortgagors should remain in possession of the mortgaged land under a separate lease and should

C. P. CODE (V of 1908), O. 2, R. 2—Mortgage.

pay rent. The mortgagee on failure to pay rent could recover the principal and rent or recover the rent and eject the mortgagors. The mortgagee sued twice for rent and obtained decrees. Lastly the mortgagee sued the mortgagors for the principal and the arrears of rent then due. *Held* the causes of action in this and the previous suits were not the same and the previous suits in the absence of evidence to the contrary must be taken to have been based on the lease alone. 18 P.R. 1907, Dist. 36 I.C. 209. Foll. (*Le Rossignol*, J.) BUDHA SHAH *v.* SULEMAN

41 I.C. 576=71 P.W.R. 1917.

———O. 2, R. 2—*Mortgage—Suit for profits—Subsequent suit for possession whether barred.*

A subsequent suit for possession of the mortgaged property is maintainable, after a previous suit for profits only, if the mortgagee was then precluded from suing for possession under the mortgage the mortgagor not then being in possession. 28 P.R. 1907; 17 I.C. 581. Dist. (*Shan Din*, J.) NATHUMAL *v.* TILOKA.

32 I.C. 719=42 P.W.R. 1916.

——O. 2, R. 2—*Mortgage—Default in payment of interest.*

A share of the produce was agreed to be paid in lieu of interest in a mortgage without possession; in default of payment the mortgagee could assume possession of the land. Plff. first sued for recovery of produce which was decreed; subsequently he brought a suit for possession also. The suit was held barred by O. 2, R 2, C. P. C. (*Shah Din and Agnew*, JJ.) CHAHABILDAS *v.* MASU.

243 P.L.R. 1913=145 P.W.R. 1913=207 P.W.R. 1913=19 I.C. 981=4 P.R. 1914.

———O. 2, R. 2—*Mortgage—First suit for arrears of interest—Subsequent suit to recover both principal and interest or possession.*

If a mortgagee, who has, under the mortgage-deed, a clear option on the happening of a default in regular payment of interest by the mortgagor, of either taking possession at once or of realising interest or of accumulating interest with the principal until possession is taken, sues and obtains a decree only for arrears of interest, his subsequent suit for principal and interest or for possession against the vendee of the equity of redemption of the mortgaged property is barred. The fact that the mortgagee had obtained an intermediate decree against the vendee, declaring his lien against the mortgaged property both for principal and interest does not revive his rights extinguished on the first occasion under the force of the said rule by reason of his suing only for arrears of interest. (*Kensington*, J.) BRIJ LAL *v.* RAM RATTAN. **17 I.C. 581=268 P.W.R, 1912.**

———O. 2, R. 2—*Mortgage—Suit for redemption—Prior suit for accounts.*

A suit for redemption is barred when the plff. had first sued for recovery of excess balance realised by the mortgagee. (*Spencer and Krishnan*, JJ.) NADHA MUNI IYYAN *v.* APPU ODAYAN. **48 I.C. 789.**

C. P. CODE (V of 1908), O. 2, R. 2—Mortgage.

——O. 2, R. 2 — *Mortgage — Successive suits.*

Where a suit on a mortgage is brought against some of the co-owners of the mortgaged property and a decree obtained, a subsequent suit on the mortgage against the other co-owners is barred under O. 2, R. 2 of the C.P. Code. (*Bakewell and Phillips*, JJ.) KIZHAKE MANJAMBARATH *v.* KANNA KURUP.

47 I.C. 595=8 L.W. 152.

———O. 2, R. 2—*Mortgage suit—Separate mortgages—Different causes of action.*

A person holding two mortgages on a property may sue for sale on the second mortgage reserving his rights under the first. A mortgagee having separate mortgages has separate causes of action and is not bound to sue on them all. (*Wallis*, C.J., *Ayling and Sadasiva Aiyar*, JJ.) SUBRAMANIA AIYAR *v.* BALASUBRAMANIA AIYAR. **38 Mad. 927=30 I.C. 317=29 M.L.J. 195 (F.B.).**

——O. 2, R. 2—*Mortgage—Redemption—Fresh suit for profits.*

In a redemption suit, all claims between the mortgagor and the mortgagee should be settled. 30 A. 36; 30 A. 225; 13 M. 15 Foll. So no separate suit will lie for recovering the value of the crops on the mortgaged land, in a Small Cause Court. (*Sadasiva Aiyar*, J.) NARASINGA PATRO *v.* BHAGAVAN SABUTO.

24 I.C. 688=(1914) M.W.N. 499.

——O. 2, R. 2—*Mortgage suit—Paying part consideration and recovering amount by suit—Second suit after paying previous mortgage decree*—Res judicata.

Where A, a mortgagee, undertook to pay off various debts of his mortgagor including a previous mortgage decree and paid off all the debts except the last, and sued for the recovery of those debts, and subsequently paid off the mortgage decree and sued for the recovery of the amount due thereon, *held* that the second suit was not barred by S. 11 or O. 2, Rr. 1 & 2, C.P.C., that A could not be supposed to have waived his right to enforce the mortgage paid off by him, and that he was not estopped from enforcing it. (*Benson and Sundara Aiyar*, JJ.) SUNDARA REDDIAR *v.* SUBBIAH KOUNDAN.

24 M.L.J. 28=13 M.L.T. 266=18 I.C. 610=(1913) M.W.N. 369.

——O. 2, R. 2—*Mortgage suit—Subsequent mortgage not pleaded—Effect of.*

Where a person having two mortgages on the same property sues on the first mortgage and omits to set up the second mortgage and obtains a decree, he cannot afterwards sue to enforce the second mortgage against the property. 25 Mad. 108; 30 Mad. 353, 30 Bom. 156; 39 Bom. 138. Foll. (*Lyle*, A.J.C.) GUR PRASAD *v.* CHHUTKU LAL. **53 I.C. 753=6 O.L.J. 482.**

C. P. CODE (V of 1908), O. 2, R. 2—Mortgage.

——O. 2, R. 2—*Mortgage—Two mortgages—Suit on latter one does not bar subsequent suit on former one.*

Where a person holds two mortgages over the same property a suit on the latter one will not bar a suit subsequently brought on the former. (*Maung Kin*, C. J.) MA MYIT *v.* SHARMA.
69 I C. 897=10 L.B.R. 360.

Object of.

——O. 2, R. 2—*Object of.*

O. 2, R. 2 is framed to protect the deft. being twice vexed for one and the same cause. (*Jenkins*, C.J. *and Woodroffe*, J.) MANDAL AND CO. v. FAZUL ELLAHIE. 26 I.C. 209=41 Cal. 825.

Omission of Claim.

——O. 2, R. 2—*Omission of claim—Misapprehension—Subsequent suit—No bar.*

O. 2, R. 2 of the C.P. Code, does not debar a plff. from including in his claim certain additional profits omitted in a previous suit under a misapprehension that the profits were paid annually and not, as was subsequently ascertained to be the fact, half yearly. (*Mears*, C.J. *and Banerji*, J.) BABU NIHAL SINGH *v.* MST. NAJUBAN. 4 U P.L R. (A.) 16=65 I.C. 585=1923 All. 230.

——O. 2, R. 2 (2)—*Omission of claim—Intentional.*

"Omits to sue" in O. 2, R. 2 (2) means "intentionally omits." (*Piggott and Walsh*, JJ.) RAM HARAKH *v.* RAM LAL. 38 All. 217=33 I.C. 124=14 A.L J. 237.

——O. 2, R. 2—*Omission of claim—Relinquishment of claim—Subsequent suit—Revival of right by court.*

Where a plff. relinquishes a portion of his claim, he cannot subsequently maintain a suit in respect of that portion. No subsequent order of the court can revive the right. (*Richards*, C.J. *and Lyle*, J.) HORI LAL *v.* DWARAKA PRASAD. 20 I.C. 173.

——O. 2, Rr. 2 and 1—*Omission of claim—Effect—Second suit.*

A plff. omitting to ask for a relief which he could have demanded in a former suit is barred from seeking it in a subsequent suit. (*Tudball*, J.) SHEO PHER SINGH *v.* BHOLA SINGH. 11 I.C. 87.

——O. 2, R. 2—*Omission of claim—Prior suit for redemption of portion of mortgaged property—Subsequent suit for possession of remainder.*

Where in a suit for redemption of a portion of the mortgaged property the plaintiff succeeds and obtains a decree he is debarred from bringing a fresh suit for recovery of possession of the remaining portion of the mortgaged property. (*Shah*, A.J.C. *and Crump*, J.) BHAU DAJI KHADE *v.* PATLU MALU SABLE.
73 I.C. 862=24 Bom. L.R. 1157=1923 Bom. 63.

C.P. CODE (V of 1908), O. 2, R. 2—Omission of Claim.

——O. 2, R. 2—*Omission of claim—Subsequent suit—Bar.*

In a suit in 1908 against deft. for damages for Rs. 1,900 for having dismantled a building situate on certain land and belonging to the plff. in certain undivided shares the plff. alleged that the deft. company had not only dispossessed the plff. from his share of the property by denying the plff.'s title thereto but had wrongfully appropriated the materials of the same on such demolition as aforesaid to the prejudice of the plff.'s right. The plff. did not ask for recovery of possession but got a decree for damages. In a suit brought by the plffs. in 1914 against the same defts. for the recovery of the separate possession of the property after partition, *held*, that the cause of action in the present suit was the same as that of the former suit and plff. was by O. 2, R. 2 of the C. P. C., precluded from suing for the relief now claimed. (*Chitty and Panton*, JJ.) KHARDAH COMPANY, LTD. *v.* DURGA CHARAN CHANDRA. 38 I C. 636=46 Cal. 640.

——O. 2, R. 2—*Omission of claim—Suit not terminated in decree—No bar.*

O. 2, R. 2 of the C. P. Code refers to a case where there has been a suit in which there has been an omission to sue in respect of a portion of a claim and a decree has been made in that suit. It does not apply to the amendment of plaint by the addition of the claim which had been omitted. (*Sanderson*, C.J., *and Woodroffe*, J.) UPENDRA NARAIN ROY *v.* RAJ JANOKI NATH ROY.
45 Cal. 305=47 I.C. 129=22 C.W.N. 611.

——O. 2, R. 2—*Omission of claim—Suit for arrears of royalty—Court decreeing payments to be adjusted to arrears claimed in suit—Subsequent suit for previous arrears—Accidental omission.*

The plff. sued for royalties due on a mining lease during a specified period, excluding from his claim certain previous arrears due on the ground that the amount paid by the defts. during the period in suit were recovered in discharge of their previous arrears, but the Courts held that the payments should have been appropriated in discharge of a portion of the arrears not included in the claim in the previous suit. *Held* a suit for such arrears was barred by O. 2, R. 2. Even an involuntary or accidental omission by a plff. of a portion of his claim is covered by the rule. 11 M. I. A. 551, Foll.; 12 W. R. 79, Ref. (*Fletcher and Teunon*, JJ.) JANARDHAN KISHORE LAL SINGH *v.* SIR PROSAD RAM. 43 Cal. 95=36 I.C. 179=20 C.W.N. 473.

——O. 2, R. 2—*Omission of claim—Bar.*

Purchaser of a holding in execution of a rent decree could not maintain his suit for its possession after his suit for possession for a part of it has been dismissed. For, having omitted to sue for that portion in the former

C. P. CODE (V of 1908), O. 2, R. 2—Omission of Claim.

suit he could not sue for it again. (*Holmwood and Chapman, JJ.*) KALI KUMAR *v.* ASLAM.
33 I C. 139=20 C.W.N. 163.

——— **O. 2, R. 2**—*Omission of claim—Whole of it should be joined.*

Joinder of all the causes of action is not necessary. Whole claim arising out of the cause of action, sued upon is necessary. For different causes of action different suits are allowed. (*Mookerjee and Chapman, JJ.*) SUMEKA DASI *v.* BAIKUNTHA CHANDRA DAS
30 I.C. 607.

——— **O. 2, R. 2**—*Omission of claim.*

O. 2, R. 2 only prevents the splitting of claims and does not bar a subsequent suit on the whole claim against a different person. (*Beachcroft and Newbould, JJ.*) MAHARAJA SIR RAMESHWAR SINGH *v.* SRIMATI JANESHWARI BABOOSHIR AND EKRADESHWAR SINGH.
18 C.W.N. 129=21 I.C. 397=19 C.L J. 19.

——— **O. 2, R. 2**—*Omission of claim—Knowledge of right.*

Where plff. sued for declaration of title of certain share in immoveable property including a mortgage decree, and had previously sued for partition but was not aware at that time of the existence of the property now in dispute, *held* that there was no intentional omission to sue and hence the claim was not barred. (*Mookerjee and Carnduff, JJ.*) GORA CHAND *v.* BASANTA KUMAR. **12 I.C. 684=15 C.L.J. 258.**

——— **O. 2, R. 2**—*Omission of claim.*

Where the plaintiffs alleged that the land of defendant No. 1 was mortgaged with possession to B by three deeds but that these mortgages were transferred to their father C by B by endorsing the assignment on the deeds and also by an oral mortgage for an amount equal to the sum total of the three deeds and further that the mutation of these mortgages was effected but was set aside on appeal and now had recourse to a suit for mortgage money with interest; *held* that the plaintiffs ought to have sued for both the remedies in the alternative *viz.*, possession of land or return of money. Order 2, r. 2 of the Civil Procedure Code is directed against two evils, the splitting of claims and the splitting of remedies. If a man omits from his suit a portion of his claim, he shall not afterwards sue in respect of it: if he omits one of his remedies he cannot afterwards pursue it. (*Scott-Smith and Leslie Jones, JJ*). HARAMAN SINGH, *v.* BHOLA SINGH.
55 I.C. 966 (2)=2 U.P.L.R. (L.) 108.

——— **O. 2, R. 2**—*Omission to claim—Knowledge.*

The possession of a right, without knowledge of it, cannot be said to be a 'portion of his claim, which can be intentionally relinquished' within O. 2, R. 2. 15 C. 800 P.C. ref. (*Rattigan, J.*) AISHAN *v.* MUHAMMAD DIN.
37 I.C. 119=94 P.R. 1916.

C. P. CODE (V of 1908), O. 2, R. 2—Omission of Claim.

——— **O. 2, R. 2**—*Omission of claim.*

O. 2, R. 2 requires a plff. to include in a suit the whole of the claim he is entitled to make in respect of a particular cause of action forming the basis, but does not compel him to include all claims arising out of different causes of action. (*Chevis and Shadi Lal, JJ.*) GULAB SHAH *v.* HAVELI SHAH. **87 P.R. 1915=31 I.C. 463=181 P.W.R. 1915.**

——— **O. 2, R. 2**—*Omission of claim.*

Where a suit is based on certain title to certain property, the plff. is not debarred under O. 2, R. 2, to recover some other property on some other ground in a subsequent suit. 26 A. 238; 23 W.R. 314; 29 M. 48; 12 C.L.J. 336; 13 B. 34; foll. 23 W.R. 150; 39 C. 704; 29 M. 560; 12 M. 134; 17 C. 933, dist.; 1 A. 688, (P.C.) 19 W.R. 133 (P.C.), ref. to. (*Oldfield and Seshagiri Aiyar, JJ.*) GANDALA PEDDA NAGANNA *v.* SIVANAPPA. **38 Mad. 1162=16 M.L.T. 310=26 I.C. 232=27 M.L.J. 320.**

——— **O. 2, R. 2.**—*Omission of claim—Bars subsequent suit.*

Where a person alleging to be the heir of another sues for the recovery of a portion of the estate from another alleged to be in wrongful possession of the same, the omission to sue for the remainder operates as a bar to a subsequent suit for the recovery of the same. (*Kotwal, A. J. C.*) BHUDMAL SHEOLAL *v.* ZUNKARI. **18 N.L.R. 136=66 I. C 388=1922 Nag. 246.**

——— **O. 2, R. 2**—*Omission of claim—Knowledge of right essential—Abandonment—Bar.*

To make O. 2, R. 2 of the C.P. Code applicable so as to bar a subsequent suit, it is necessary to show that the plaintiff had at the date of the institution of the previous suit actual and not merely constructive knowledge of the right which he is seeking to enforce in the subsequent suit. 15 Cal. 800, Foll. (*Mitra, A.J.C.*) BINYA BAI *v.* GANPAT. **47 I.C. 881.**

——— **O. 2, R. 2**—*Omission of claim—Knowledge of right litigated in later suit — Absence of.*

A person is not affected by O. 2, R. 2 of the C.P. Code, if at the time he brought his former suit, he was not in a position to know all his rights. (*Staurt, A.J.C.*) RAM KHOLAWAN *v.* JASKARAN. **21 O.C. 307=49 I.C. 84=1 U P.L.R. 19.**

——— **O. 2, R. 2**—*Omission of claim—Leave of court.*

The competence of a court of giving leave to plaintiff to omit to sue for relief is not affected by the pecuniary value of the relief sought to be omitted. (*Maung Kin, J.*) MAUNG ON GAING *v.* MA ON SIN. **38 I.C. 188=9 Bur. L.T. 93.**

C. P. CODE (V of 1908), O. 2, R. 2—Omission of Claim.

———O. 2, R. 2—*Omission of claim*—Bona-fide *purchaser.*

When it is open for the plff. a *bona fide* purchaser for value, to ask that a mortgage decree should be executed only in respect of the land and that the house built by him thereon be exempted, his omission to do so is a bar to another suit in respect of the same cause of action. (*Twomey*, J.) MAUNG KAUK SIT *v.* MATHURAPPA CHETTY. 9 I.C. 460 = 4 Bur. L.T. 16.

Option to sue.

———O. 2, R. 2—*Option to sue—Mortgagee authorized to sue for interest or for possession in default by mortgagor—Suit for interest—Subsequent suit for possession.*

Where by a stipulation the mortgagor authorized the mortgagee to sue him for interest or for possession in the event of the former's failure to pay interest at the stipulated time, and the mortgagee on the mortgagor's default sued only for interest, and afterwards for a subsequent default sued for possession *held*, that the suit was not barred under O. 2, R. 2, C. P. C. (*Shadi Lal*, C. J., *Chevis, Scott-Smith, Broadway and Wilberforce*, JJ.) PARMESHRI DAS *v.* FAKERIA. 2 Lah. 13 = 69 I.C. 71 = 56 P.W.R. 1920 (F.B.)

Partition.

———O. 2, R. 2—*Partition—Property situated in several districts.*

A subsequent suit for partition of property in one district is not barred by O. 2, R. 2, merely because the plaintiff had sued for partition and possession of some property in another district, as the causes of action in the two are different. 16 I. C. 383; 7 Bom. 182; 3 Mad. H.C.R. 376. (*Pigpott and Walsh*, JJ.) RAM HARAKH *v.* RAM LAL. 38 All. 217 = 33 I.C. 124 = 14 A.L.J. 257.

———O. 2, R. 2—*Partition—Profits.*

The fact that a suit for partition is pending does not bar a second suit against the *lambardar* for profits. (*Richardson and Banerjee*, JJ.) MUHAMMAD ABDUL AZIZ *v.* RAFI-UN-NISSA BIBI. 17 I.C. 833 = 10 A L J. 469.

———O. 2, R. 2—*Partition—Decree—Subsequent suit for accounts for a period prior to partition—If lies.*

In a suit for partition a plaintiff is bound to include all the claims that he might have at the time the suit is filed, in respect of the property. He is not to file first a partition suit and then after the decree to file another for accounts for a period prior to the partition. (*Macleod*, C.J., *and Coyajee*, J.) VISHNU *v.* GANGADHAR. 46 B. 823 = 69 I.C. 399 = 24 Bom. L R. 302 = 1922 Bom. 9 (1).

C. P. CODE (V of 1908), O. 2, R. 2—Partition.

———O. 2, R. 2; (1882, S. 43)—*Partition—Successive suits.*

The defts. in a partition suit must insist upon the plffs. to join all the properties held jointly. Their failure to do so implies their consent for the joint use of the properties omitted but liable to be partitioned afterwards when any or all of the owners choose. The perpetual recurrence of the cause of action for partition is one of the incidents of joint property. There is a distinction between the rights of tenant in common to claim division of each field between co-tenants and the partition of all the fields held in common. (*Mookerjee and Beachcroft*, JJ.) MANSARAM CHAKRAVARTI *v.* GANESH CHAKRAVARTI. 16 I.C. 383 = 17 C.W.N. 521.

———O. 2, R. 2—*Partition — Causes of action—Right to sue—Prior suit for dissolution of partnership.*

The essential condition for O. 2, R. 2, is that the cause of action in both cases should be identical, and the plff. must have been bound to sue in the earlier case for the relief for which he prays in the subsequent suit. The right of an owner in joint property to sue for partition so long as the property shall remain undivided is a continuing right and once the immoveable property in suit has been declared to be the common property, the plff. has a right to ask for partition at any time. Where a prior suit for dissolution of partnership and accounts between the same parties was referred to arbitration and an award was passed subsequently and one of them sued for partition of the immoveables according to the shares fixed by the award. *Held*, that though in the first case the plff. ought to have sued for partition of the immoveable property, he was not bound to sue for its partition by metes and bounds. The award and the decree passed in accordance therewith dealt with the right of the parties in the immoveable property by declaring it as their common property in equal shares. The present suit was not one between partners for dissolution of partnership and for rendition of partnership accounts, but was one between tenants-in-common for mesne profits and partition of the common property. The first suit was no bar to the present suit because the causes of action in the two were quite different. (*Chevis*, Ag. C.J. *and Martineau*, J.) ZIA-UL-HAQ *v.* MUHAMMAD IBRAHIM. 56 I C. 701 = 2 Lah. L.J. 528.

———O. 2, R. 2—*Partition—Dismissal of prior suit.*

A suit for partial partition though dismissed does not bar a suit for partition of all joint properties under O. 2, R. 2 as the causes of action in the two suits are different and as the previous one was dismissed for formal defect. (*Chevis and Shadi Lal*, JJ). GULAB SHAH *v.* HAVELI SHAH. 87 P.R. 1915 = 31 I.C. 463 = 181 P.W.R. 1915.

C. P. CODE of 1908), O. 2, R. 2—Partition.

———O. 2, R, 2—*Partition—Property situate in different jurisdiction—Separate suits if maintainable,*

Sections 16 and 17 of C.P. Code do not override the principles of the provisions of S. 11 and O. 11, R. 2 of the Code. They simply provide for the machinery to enable litigants with property in more than one jurisdiction to adhere to these principles. (*Oldfield*, J.) BANAKARA BASAVANA *v.* BANAKARA DODDALINGAPPA.
(1923) M.W.N. 295=44 M L.J. 652=
17 L.W. 740=72 I C. 430=
1923 Mad. 584.

———O. 2, R. 2—*Partition—Pro-notes executed—Partition suit—Suit upon pro-notes—Cause of action if different.*

Where in pursuance of an agreement one of the brothers constituting a Hindu family had a promissory note executed in his favour and subsequently filed a suit for partition and got a decree and upon his death his widow sued the executant's minor son upon the pro-note, *held*, that the cause of action upon the pro-note arose independently of the partition arrangement and that the suit was maintainable. 24 M. 96; 7 B. 134; 20 A. 322; 13 B. 45, foll.; 27 M. 116 Dist. 29 A. 256, diss. (*Sundara Aiyar and Spencer*, JJ.) ANANTANARAYANA AIYAR *v.* SAVITRI AMMAL. 36 Mad. 151=
(1912) M.W.N. 59=11. M.L.T. 63=
13 I.C. 458=22 M.L.J 231.

———O. 2, R. 2—*Partition—Suit for.*

Two suits by a member of a Hindu joint family one in respect of the property covered by an award dividing the main portion of the family property, and the other in respect of the property that was still joint, are separately maintainable. (*Kendal*, A.J.C.) SAN LAL *v.* RAMESHWAR DAYAL. 42 I.C. 413=
4 O.L.J. 820.

———O. 2, R. 2—*Partition.*

In a partition suit, despite the general rule of including all the properties held jointly by a family, property held jointly with strangers, need not be included as the stranger has no interest in the whole of the property. Where a property is inherited from the collaterals of the parties to a previous suit for partition, there is no bar under O. 2, R. 2 to a fresh suit for partitioning the property held by them jointly with other collaterals. (*Lindsay and Rafique*, JJ.) DEBI SAHAI *v.* GOURI SHANKER SAHAI.
15 I.C. 214=15 O.C 81,

———O. 2, R. 2—*Partition suit—Certain properties omitted—Effect.*

Where in a suit for partition the plff. intentionally omitted certain property from the suit he cannot bring fresh suit for the partition of that property. (*Chamier*, C.J.) SHEOMBAR SINGH *v.* KALKA BAKSH SINGH. 9 I.C. 424.

———O. 2, R. 2—*Partition—Dismissal of prior suit for possession—Subsequent suit for partition.*

C. P. CODE (V of 1908), O. 2, R 2—Principal and Interest.

Where a purchaser of the share of a co-owner in a specific plot of land brings a suit for possession of that specific land and the suit is dismissed on the ground that the partition alleged by the plaintiff as between his vendor and the defendant was not proved a subsequent suit for partition of the entire plot is not barred by O. 2, R. 2, C.P. Code as the causes of action in the two suits were different. In the first case the cause of action was exclusion from joint possession by a co-sharer. In the second the cause of action was the right of every co-sharer to bring an action against his other co-sharers for partition. (*Twomey*, C.J., *and Robinson*, J.) MAUNG LU THA *v.* MAUNG PO. U. 64 I.C. 174=11 L.B.R. 1.

Partnership.

———O. 2, R. 2—*Partnership suit for dissolution of partnership and rendition of accounts—Subsequent suit by partner for recovery of property held as co-owners—Previous suit if a bar.*

A partner suing for dissolution of partnership and rendition of accounts of his share of the partnership property need not claim from his partners' property which he and they hold as co-owners and independently of the partnership and the suit is no bar to a subsequent suit for the recovery of such property. (*Rattigan and Scott-Smith*, JJ.) HAR DYAL *v.* AYA RAM. 83 P.L.R. 1914=22 I C 664=
43 P.W.R. 1914.

———O. 2, R. 2—*Partnership—Dissolution.*

The buyer could not bring the present suit under O. 2, R. 2, claiming relief as partner as the cause of action in both the present and the previous suits was based on the contract of partnership and he had brought the previous one for establishing his right. (*Abdur Rahim and Spencer*, JJ.) AMALUS VENKAYYA NAIDU *v.* VISA LAXMINARAN SAYA. 58 I.C. 989.

Plea of.

———O. 2, R. 2—*Plea of—Proof.*

A plea of bar under O. 2, R. 2, C.P.C., must be specifically pleaded and established to the Court's satisfaction. (*Shadi Lal and Wilberforce*, JJ.) FARZAND ALI *v.* ZAFAR ALI.
46 I.C. 119=132 P.W.R. 1918.

Principal and Interest.

———O. 2, R. 2—*Principal and interest—Mortgagee's suit for interest—Subsequent suit for principal and further interest—Bar.*

A mortgage for a term of two years executed in 1904 provided for realisation of interest alone by the mortgagee by suit. The interest was in arrears after 1905. The mortgagee instituted a suit in 1908 for the interest then due reserving the right to sue for the principal and future interest. The suit was decreed. In 1914 he instituted a suit for the principal and interest

C.P. CODE (V of 1908), O. 2, R. 2—Principal and Interest.

still due. *Held*, that the suit was barred under O. 2, R. 2, C. P. Code 49 I. A. 9, foll. (*Lord Buckmaster.*) KISHAN NARAIN *v.* PALA MAL.
44 M.L.J. 123=32 M.L.T. (P.C.) 41=
25 Bom. L.R. 220=50 C. 126=
L.R. 4 P.C. 46=4 Lah. 32=
27 C.W.N. 802=38 C.L.J. 126=
18 L.W. 341=9 O. & A.L.R. 488=
6 P.W.R. 1923=50 I.A. 115=
72 I.C. 187=1922 P.C. 412 (P.C.)

——O. 2, R. 2—*Principal and interest—Mortgage—Option to sue for interest alone—Suit for interest after expiry of term—Second suit for principal and interest.*

If a mortgagee to whom a cause of action to realise the whole mortgage security, has accrued exercises the option given to him by the document and sues for interest alone, he must be deemed to have relinquished his claim for further relief, under Order 2, Rule 2 of the Code of Civil Procedure and a second suit for principal and interest is not maintainable. 15 I. A. 156 ; 12 I. A. 116 ; 21 Bom. 267, Ref. (*Lord Buckmaster*) MUHAMMAD HAFIZ *v.* MIRZA MUHAMMAD ZAKARIYA.
44 All. 121=20 A.L.J. 17=26 C.W.N. 297=
(1922) M.W N. 89=38 C.L.J. 126=
42 M.L.J. 248=24 Bom. L.R. 341=
15 L.W. 377=L.R. 8 P.C. 73=
30 M.L.T. 224=3 Pat. L.T 279=
1 P.W.R. 1922=66 I.C. 79=
49 I.A. 9=1922 P.C. 28 (P C.)

——O. 2, R. 2—*Principal and interest—Suit for interest—Second suit for principal of a mortgage bond.*

First suit for sale of mortgaged property for interest only, bars a second suit for recovering principal and balance of interest. (*Piggott and Walsh*, JJ.) MUHAMMAD ZAKARIYA *v.* MUHAMMAD HAFIZ.
39 All. 506=41 I.C. 233=
15 A.L.J. 557.

——O. 2, R. 2—*Principal and interest—Suit for interest after the principal became due—Subsequent suit for principal and interest.*

O. 2, R. 2, of the C. P. Code bars a suit for principal and interest due on a mortgage where the plff. mortgagee has previously sued and obtained a decree for interest only, when he could have sued for the principal as well. (*Chevis and Broadway*, JJ.) KISHEN NARAIN *v.* PALA MAL.
102 P.L.R. 1918=88 P R. 1918=
47 I.C. 987=167 P.W R. 1918.

——O. 2, R. 2—*Principal and interest—Mortgage—Interest payable monthly—Default—Suit for interest—Subsequent suit for principal not barred.*

Where the time stipulated for payment of the principal is one year after the date of the mortgage but interest is made payable monthly, a default in the payment of interest gives rise to a cause of action and a suit for interest alone

C. P. CODE (V of 1908), O. 2, R. 2—Rent Suit.

does not bar a subsequent suit for principal. (*Brown*, A.J.C.) MAUNG KYIN PEIN *v.* MA PWA ME.
4 U B.R (1921) 62=
64 I.C. 953=1922 U.B. 1.

Promissory Note.

——O. 2, Rr. 2 and 3—*Promissory note—Consideration—Suit on.*

A party suing on a negotiable instrument can ask for a decree on the original consideration for the note. (*Lord Buckmaster.*) FIRM OF SADSUKH JANKIDAS *v.* KRISHNEN PERSHAD.
46 Cal. 663=29 C L.J. 340=
17 A.L.J. 405=25 M.L T. 258=36 M.L.J. 429=
21 Bom. L R. 605=50 I C. 216=
1 U.P.L.R. (P.C.) 37=(1919) M W.N. 310=
28 C.W.N. 937=10 L.W. 143 (P.C.)

——O. 2, R. 2—*Promissory note—Dismissal of suit—Second suit on accounts.*

A suit for recovery of money due under a promissory note was dismissed for default. Another suit was then filed to recover the same money based on entries in the account books. *Held*, that the cause of action was the same and the suit was not maintainable. (*Lindsay and Ryves*, JJ.) MUNDAR BIBI *v.* BAIJ NATH PRASAD.
54 I.C. 424=18 A.L.J. 81.

——O. 2, R. 2—*Promissory note—Accounts—Suits on.*

Where on a settlement of accounts a sum was found due to the plff. by the deft. and the plff. drew a hundi upon the deft. which was afterwards paid by the plff. and the plff. brought a suit on the hundi which was dismissed and the plff. brought another suit upon accounts, it was held, that the latter suit was not barred by the previous suit upon the hundi as in both the suits the cause of action was different. (*Richards*, C.J. *and Tudball*, J.) BENIRAM *v.* RAMACHANDRA.
36 All. 360=26 I.C. 302=12 A.L.J. 989.

Rent Suit.

——O. 2, R. 2—*Rent suit—Prior claim for possession.*

The non-inclusion of a claim for rent in the previous suit for possession is not a bar under O. 2, R. 2, to a subsequent suit for rent. (*Richards*. C.J., *Banerji and Tudball*, JJ) NANDAN SINGH *v.* GANGA PRASAD. 35 All. 512=
20 I.C. 892=11 A L J. 786.

——O. 2, R. 2—*Rent suit—Rent suspended but due at time of institution of prior suit for rent for other years—If second suit barred.*

Where at the time of institution of a previous suit for rent for other yeare, rent was due for a certain year but could not be sued for owing to its having been suspended, *held*, a subsequent suit for it, is not barred under O. 2, R. 2, C.P.C. (*Richards*, C. J. *and Banerji*, J.) GANGA PRASHAD *v.* DIG BIJAI SINGH. 18 I.C. 288.

C. P. CODE (V of 1908), O. 2, R. 2—Rent Suit.

———O. 2, R. 2—*Rent suit.*

A prior suit for account of rents bars a subsequent suit for rent due prior to the date of the first suit. (*Macleod*, C.J. *and Shah*, J.) MAHOMEDBHAI *v.* ADAMJI.
23 Bom. L.R. 1086=64 I.C. 919=46 Bom. 229=1922 Bom. 152.

———O. 2, Rr. 2 and 4 (c)—*Rent suit—Suit for possession and for rent.*

'Cause of action' does not depend upon the character of the relief prayed for but refers to the *media* upon which a court is asked to come to a conclusion. O. 2, R. 4 (c), C.P.C., does not imply that in all cases a suit for possession must be based upon a different cause of action to one for arrears of rent of the same land. (*Scott*, C.J., *and Batchelor*, J.) KASHINATH *v.* NATHO KESHAV. **38 Bom. 444=25 I.C. 73=16 Bom. L R. 454.**

——O. 2, R. 2—*Rent suit—Reservation of right—Prior suit for accounts.*

A statement made in a previous suit by a party that he reserved the right of bringing another suit for damages cannot avoid the operation of the rule of limitation or of O. 2, R. 2 of C.P.C. When under a mortgage of a leasehold for a fixed term there was to be a mutual adjustment of accounts at the end of the term, but the leasehold is sold in execution of a rent decree by the superior landlord, and the rent had been covenanted to be paid by the deft. on behalf of the plff. tenant, a suit by the plff. for compensation for breach of contract to pay the rent, is barred under O. 2, R. 2, C.P.C., after he had sued the deft. for adjustment of accounts. (*Chatterjee and Richardson*, JJ.) TARAN KRISHNA *v.* SAMIRUDDIN.
34 I.C. 51.

——O. 2. R. 2—*Rent suit—Possession—Cause of action.*

Plffs. who have obtained a sale of certain property and afterwards by a separate assignment purchased the right of the vendor to the arrears of rent, first sued for the arrears and subsequently for the rent due to him under his title between the date of his purchase of the property and the first suit. *Held*, that the causes of action for the two suits were different and the second suit was not barred. The cause of action for a suit is constituted of a right and the infringement of the right taken together. (*Seshagiri Aiyar and Phillips*, JJ.) CHIDAMBARAM PILLAI *v.* DURAISWAMI CHETTY. **26 M.L T. 114=52 I.C. 325=10 L.W. 31.**

Restitution.

———O. 2, R. 2—*Restitution.*

A proceeding in which relief by way of restitution is claimed is neither a suit nor an execution proceeding, but a miscellaneous proceeding to which the rules applicable to execution proceedings in substance apply. The provisions of

C. P. CODE (V of 1908), O. 2, R. 2—Specific Performance.

O. 2, R. 2 do not apply to such a proceeding. 40 M. 780, Ref. (*Mullick and Atkinson*, JJ.) KRUPASINDHU ROY *v.* BALBHADRA DAS.
47 I.C. 47=3 P.L.J. 367.

———O. 2, R. 2—*Restitution—Proceedings under S. 144, C.P. Code.*

The provisions of O. 2, R. 2 of the C.P. Code have no application to proceedings under S. 144 of the C.P. Code. (*Pratt*, J. C. *and Fawcett*, A. J. C.) GHULAM MAHOMED *v.* GALCHAND. **53 I.C. 552=13 S.L.R. 153.**

Revenue Court.

———O. 2, R. 2—*Revenue Court.*

O 2, R. 2 does not apply to proceedings in the Revenue Court. (*Richards*, C. J. *and Tudball*, J.) KALKA PRASAD *v.* MANMOHAN LAL.
38 All. 302=33 I.C. 86=14 A.L.J. 373.

———O. 2, R. 2—*Revenue Court—Applicability to proceedings in.*

O. 2, R. 2, C.P. Code which requires that every suit shall include the whole of the claim which plaintiff is entitled to in respect of the cause of action is applicable to proceedings in Revenue Courts for recovery of arrears of rent. It applies not only to cases of deliberate relinquishments but also of accidental or involuntary omission. (*Mookerjee and Cuming*, JJ.) PRATAB CHANDRA JANA *v.* SECRETARY OF STATE.
36 C.L.J. 304=67 I.C. 375=1922 Cal. 101.

Same Parties.

———O. 2, R. 2—*Same parties—Different defts.—Special suit against one debtor if a bar to a suit against another.*

O. 2, R. 2 of the C.P. Code applies only where the deft. in the subsequent suit was the deft. in the previous suit. The rule does not apply where the subsequent suit is brought against a different deft. (*Mittra*, A.J.C.) KASHI BAI *v.* SHEO RAM KUPCHAND. **47 I.C. 896.**

Specific Performance.

———O. 2, R. 2—*Specific performance—Suit for—Subsequent suit for earnest money is not barred.*

Plff.'s suit for specific performance of a contract of sale of immoveable property in his favour was dismissed and he subsequently brought a suit for recovery of earnest money from the defendant. *Held*, that the claim for the recovery of the earnest money was based on a different cause of action from the claim for specific performance and that O. 2, R. 2, C. P. Code was no bar to the subsequent suit. 27 M. 380 referred to. (*Lindsay*, J.) MUNNI BABU *v.* KOER KAMTA SINGH. **45 A. 378=21 A.L J. 263=9 O. & A.L.R. 429=72 I.C. 86=L.R. 4 A. 176=1923 All. 321.**

C. P. CODE (V of 1908), O. 2, R. 2—Specific Performance.

———O. 2, R. 2—*Specific performance—Suit for—Failure to ask for possession—Effect.*

Per *Krishnan*, J.—*Quaere* : Whether a plaintiff suing for a conveyance is not entitled to ask for possession as of right and the failure to ask for it in the first case is a bar under O. 2, R. 2. Per *Venkatasubba Rao*, J.—The true principle in such a case is that if the claim to possession in the second case is based on the contract, O. 2, R. 2 bars the suit ; but if it is based on the conveyance obtained in the first suit it can lie. (*Krishnan and Venkatasubba Rao*, JJ.) SUNDARA RAMANUJAM NAIDU *v.* SIVALINGAM PILLAI. 45 M.L.J. 431=18 L.W. 338= 77 I.C. 542=(1923) M.W.N. 726= 47 Mad. 150=1924 Mad. 360.

———O. 2, R. 2 — *Specific performance—Contract of sale—Subsequent suit for possession.*

A suit for possession of immoveable property on the basis of a registered conveyance obtained in execution of a decree for specific performance of a contract of sale, is not barred under O. 2, R. 2, C.P. Code. (*Sankaran Nair and Tyabji*, JJ.) KRISHNAMMAL *v.* MANANDIAR SUNDARARAJA AIYER. 1 L.W. 147= (1914) M.W.N. 200=22 I.C. 912= 38 Mad. 698=16 M.L.T. 103.

———O. 2, R. 2 — *Specific performance—Subsequent suit for possession.*

A decree in a suit for the specific performance of an agreement to lease does not bar a fresh suit for possession of the properties. (*Drake-Brockman*, J. C.) PANDU *v.* SITAL PRASAD. 48 I.C. 188=14 N.L.R. 176.

——O. 2, R. 2—*Specific performance—Possession—Single suit.*

In a suit for specific performance of a contract for the sale of land, it is open to the plff. to join a claim for delivery of possession unless the contract expressly disentitled him to such relief. The cause of action for delivery of possession may arise both upon the contract and the completed conveyance. If the plff. in such a suit omitted to ask for delivery of possession a subsequent suit to obtain delivery of possession might be barred under O. 2, R. 2, C. P. C. (*Mullick and Sultan Ahmed*, JJ.) DEONANDAN PRASAD SINGH v. JANKI SINGH. 3 P. L.J. 314= 1 P. L.T. 325=2 U.P.L.R. (Pat) 108= 56 I.C. 322=(1920) Pat. 266.

Suit for Possession.

——O. 2, R. 2—*Suit for possession—First suit for injunction dismissed because plff. was not in possession.*

Where a plff.'s suit for a permanent injunction was dismissed because plff. was not in possession, a second suit for possession is not barred by O. 2, R. 2, (*Richards*, C. J. *and Banerjee*, J.) BANDEY ALI v. GOKUL MISIR. 35 All. 172=13 I.C. 154= 9 A.L.J. 111.

C. P. CODE (V of 1908), O. 2, R. 2—Withdrawal of Suit.

———O. 2, R. 2—*Suit for possession—All persons in possession should be joined.*

Where the son-in-law was in possession under a sale-deed by which half the property was sold to him by the mother-in-law and the daughter along with her husband was in joint possession under a will by which the remaining half was bequeathed to her and the previous suit, after the death of the widow was brought for possession of the portion that had been alienated against the husband only *held* the present suit against the daughter is barred. Plaintiff should join all the persons in possession of the property which he claims. (*Martineau and Harrison*, JJ.) MAULA BAKSH *v.* MT. JIVI. 1923 Lah. 556.

———O. 2, R. 2—*Suit for possession—Subsequent suit for redemption—No bar.*

If a purchaser in execution of a mortgage decree fails in his suit for possession he is not debarred from bringing a suit separately for redemption or any other relief. (*Sadasiva Aiyar and Tyabji*, JJ.) ELKUR RAMCHANDRIAH *v.* CHAVVA PAPANNA. 21 I.C. 42=(1913) M.W.N. 646.

———O. 2, R. 2—*Suit for possession—Prior suit for cancellation.*

Where in a suit for cancellation of a deed, possession is not prayed for and no leave is taken to file a separate suit therefor, a subsequent suit for possession is barred by O. 2, R. 2, sub-rule 3 of the C. P. C. (*Maung Kin*, J.) MAUNG ON GAING *v.* MAON SIN. 33 I.C. 135=9 Bur. L.T. 93.

Tort.

———O. 2, R. 2—*Tort—Causes of action—Same set of facts.*

The same set of facts cannot give ground for two actions (*i. e.*) for a tort and a conspiracy to cause damage. The one excludes the other. (*Woodroffe, Coxe and Chatterjee*, JJ.) D. WESTON *v.* PEARY MOHUN DAS. 40 Cal. 898=23 I.C. 25=18 C.W.N. 185.

Waiver.

———O. 2, R. 2—*Waiver—Effect of.*

A court is not bound to take up *proprio motu* the question of a bar to a suit under O. 2, R. 2, C. P. C. The rule is a provision in favour of the defendant, which he may waive. (*Chevis and Shadi Lal*, JJ.) GOPAL DAS *v.* GHULAM MOHY-UD-DIN. 23 P.L.R. 1915= 27 I.C. 579=237 P.W.R. 1915.

Withdrawal of Suit.

———O. 2, R. 2, and O. 23, R. 1—*Withdrawal of suit—Fresh suit operates as bar.*

Where plffs. first sued for their shares in the moveable property of a deceased collateral and then separately sued for their shares in his immoveable property and the Court allowed them to withdraw their suits for moveable

C. P. CODE (V of 1908), O. 2, R. 2—Withdrawal of Suit.

property with permission to bring fresh suits under O. 23, R. 1, *held*, that the suits for immoveable property were not barred by R. 2 of O. 2, as the effect of the permission under O. 23 was that such suits were conceived to have been not instituted. (*Scott-Smith and Broadway*, JJ.) GHULAM MUHAMMAD KHAN *v.* NUR KHAN. **65 P.R. 1917=41 I.C. 897=105 P.W.R. 1917.**

———**O. 2, R. 2**—*Withdrawal of suit—Santhal Paraganas Settlement Regulation, III of 1872—Jurisdiction of Civil Court.*

One S had two wives B and N. By B he had one son and one daughter both of whom predeceased their father. By N he had a son H. N predeceased S but B survived him. S died in 1900 when H was 5 or 6 years old. After the death of S, the Settlement Officer entered the name of B and H in the Record of Rights. In 1909 a guardian for H was appointed when B averred that the half share entered in her name was her own. In 1911 H sued B for declaration of his right to the whole property alleging fraud on the part of B in having got the property entered as their joint property. B defended on the ground of Record of Rights and impugned the legitimacy of H. In April 1911, the suit was dismissed on the ground that S. 11 of Regn. III of 1872 barred the jurisdiction of the Civil Court in the case. In June an appeal to the Dist. Judge was dismissed on the same ground. H then preferred a Second Appeal. In the meantime H sued for temporary partition on 15th Aug. 1911. B resisted on the ground that the suit lands belonged to her father from whom she inherited them after her brother. In Nov. 1911 H's suit was decreed and the property was partitioned in 1912. About the 24th Aug. 1913 B died and two sons of her daughter were impleaded in the Second Appeal. On the 26th Aug. 1914 H withdrew and in 1918 sued the grandsons for declaration and possession of half the property. The defts. contended that the suit was barred by O. 2 R. 2 and also S. 11 of Regn. III of 1872. *Held*, by (F.B.) (*Mullick* J. *diss.*), that the suit was not barred. (*Miller*, C. J., *Mullick and Bucknill*, JJ.) HARE KRISHNA SEN *v.* UMESH CHANDRA DUTT. **2 Pat. L.T. 528=3 U.P.L.R. (Pat.) 57=62 I.C. 962=6 Pat. L.J. 373=(1921) Pat. 209 (F.B.).**

———**O. 2, R. 3**—*Joinder of causes of action—Suit by landlord against different tenants in possession of separate holdings—Irregularity—Waiver—C. P. Code, S. 99.*

Where a landlord sued to eject several tenants in possession of different parcels of land, making them all defts. in one and the same suit, and the litigation was conducted as though the defts. were a community with common interests, the procedure though highly irregular, nevertheless prevents the landlord from objecting to the use of evidence given in the case of some tenants as evidence in favour of all the

C. P. CODE (V of 1908), O, 2, R. 3.

defts. (*Sir Lawrence Jenkins.*) SETURATNAM AIYAR *v.* VENKATACHALA GOUNDAN. **43 Mad, 567=47 I.A. 76=(1920) M.W.N. 61=27 M L.T. 102=56 I.C. 117=11 L.W. 399=38 M.L.J. 476=18 A.L.J. 707=22 Bom. L.R. 578=25 C.W.N. 485=(P.C.).**

[On appeal from 24 M.L J. 571=20 I.C. 374=13 M.L.T. 450=(1918) M.W.N. 434.]

———**O. 2, R. 3**—*Joinder of causes of action.*

Two reliefs *i.e.* for setting aside an order of the execution Court and for a declaration that property could be attached in execution of the decree, can be joined in the same suit, the parties being the same. (*Stuart*, J.) SHAMBU DIYAL SINGH *v.* ISWAR SARAN. **75 I.C. 597=1923 A. 306.**

———**O. 2, Rr. 3 and 4**—*Joinder of causes of action—Declaration of title and mesne profits.*

Where a person sues for a decree declaratory of his right to a half share in a cultivatory holding, he is also entitled to ask for mesne profits. The court may in granting a declaratory decree, also decree mesne profits as defined in C.P.C. (*Banerjee and Wallach*, JJ.) GANGA SAHAI *v.* BANSI. **42 All. 64=52 I C. 649=17 A.L.J. 993=1 U.P.L.R. (H.C.) 129.**

———**O. 2, R. 3**—*Suit to set aside alienations—Joinder of defts.*

Where an alienor alienates property to various alienees on different occasions a suit to set aside these alienations can be brought against any such alienee or all the alienees may be made co-defts. (*Batchelor and Hayward*, JJ.) SONU KHUSHAL KHADAKE *v.* BAHINIBAI KRISHNA.

40 Bom. 351=33 I.C. 950=16 Bom. L.R. 45.

———**O. 2, R. 3**—*Joinder of causes of action—Claims under several contracts.*

A cause of action might include claims upon several contracts provided they form part of a continuous course of dealing. (*Jenkins*, C.J. *and Woodroffe*, J.) MANDAL AND CO *v.* FAZUL ELLAJIE. **26 I.C. 209=41 Cal. 825.**

———**O. 2, Rr. 3 and 4**—*Joinder of causes of action—Ejectment suit—"Deft.'s" possession of—Different plots under different rights—Title of plaintiff.*

The cause of action of a plaintiff suing in ejectment cannot be affected by the title under which the deft. professes to hold possession. The plaintiff is entitled to claim recovery of possession of the land as a whole, and not in fragments, and all persons who oppose him, whatever be their rights, are proper parties to the suit. (*Stephen and Holmwood*, JJ.) LAKSHI CHARAN SHAHA *v.* CHUNI MIAH.

18 I.C. 852.

———**O. 2, R. 3**—*Joinder of causes of action—Maintenance—Claim.*

A single suit for maintenance brought by three persons, a patricide, his wife, and son is

C. P. CODE (V of 1908), O. 2, R. 3.

not bad for misjoinder of parties and causes of action. (*Imam*, J.) NILAMADHAL MITRA *v.* JOTINDRANATH MITRA. 18 I.C. 764= 17 C.W.N. 341.

——O. 2, R. 3—*Misjoinder — Purchaser from co-sharer—Other co-sharers.*

In a suit for recovery of possession of strips of land on the ground that the defts. wrongfully encroached upon the disputed land, if a purchaser from a co-sharer joins the others as plaintiffs, the suit is not open to the objection of misjoinder of parties or of causes of action. 18 A. 131; 2 C. L. J. 602, dist. (*Mookerjee and Beachcroft*, JJ.) BHAGWAN CHANDRA DEY *v.* DAYAL HARI DAS. 16 I.C. 623.

——O. 2, R. 3—*Multifariousness - Plaintiffs deriving title from different sources—One suit for possession.*

Several plaintiffs whose titles are derived from different sources, some by purchase and some by inheritance, having between them, the entire sixteen annas share in the property of which they were dispossessed by defts. and against whom they are jointly interested may bring one suit against defts. for possession of property. The suit is not multifarious though they allege in the plaint that their cause of action was a certain order in certain Criminal proceedings, which applied to some plaintiffs only as the real cause of action is clearly common to all the plaintiffs from other allegations in the plaint. It is reasonably clear what the real cause of action is, and that it is common to all the plffs. 22 C. 833 ; 16 B. 119, rel. upon. (*Maclean*, C. J. *and Geidt*, J.) GIRAJA NATH RAY *v.* SURENDUA NATH RAY. 16 I.C. 94=16 C.L J. 1.

——O. 2, R. 3—*Pre-emption — Joinder of several causes of action against vendee—If allowed.*

A suit for pre-emption is against the vendee, the vendors being only *pro forma* defendants. A plaintiff pre-emptor can bring a single suit for pre-emption against the same vendee with respect to four different sales. (*Abdul Raoof*. J.) PAIRA RAM *v.* KESHO NATH. 73 I.C. 892= 1924 Lah. 156.

——O. 2, R. 3—*Same transaction—Agreements to refer to arbitration.*

Where each of three distinct agreements between the same parties and relating to all intents and purposes, to one transaction contained a provision to refer to arbitration, the plff. may ask the Court in one application to take action with respect to all the agreements. (*Rattigan*, J.) DREYFUS AND CO. *v.* GURDITTA MAL. 70 P.W.R. 1911= 85 P.L.R. 1911=9 I C. 655= 36 P.R. 1911.

——O. 2, R. 3—*Specific performance—Suit for—Claim for possession—Vendor's mortgagee—Dismissal for misjoinder, bad.*

A claim for possession can be joined to a claim for specific performance of a contract

C. P. CODE (V of 1908), O. 2, R. 3.

for sale of immoveable property against the vendor but not a claim for possession against the usufructuary mortgagee of the vendor. The suit ought not to be dismissed for such misjoinder, but so much of the suit as asks for specific performance must be allowed to be proceeded with. (*Wallis*, C.J. *and Seshagiri Aiyar*, J.) APPALA NAIDU *v.* CHANGALAVAL JOGIRAJU. 32 I.C. 237= (1916) 1 M.W.N. 77.

——O. 2, R. 3—*Joinder of causes of action.*

A suit by a Malabar *stanom* whose right to the office of *stani* arose in 1903, for a declaration that previous *stani* was not validly appointed in 1895, and for possession of the property is not bad for misjoinder of causes of action as the former relief is only ancillary to the latter main relief. (*Ayling and Seshagiri Aiyar*. JJ.) PATINHAR KURNI *v.* RAMAN VARMA. 24 I.C. 819=28 M.L J. 669.

——O. 2, R. 3—*Joinder of plaintiffs—Same defendant — Different reliefs claimed against him.*

A plaint presented by two or more plffs. claiming different reliefs against the deft. is not improperly framed nor is it bad for misjoinder of causes of action. (*Sadasiva Aiyar*, J.) KANAGAMMAL *v.* PANCHAPAKESA ODAYAR. 26 M.L.J. 343=23 I.C. 82= (1914) M.W.N. 827.

——O. 2, R. 3—*Joinder of causes of action—Original contract—Novation.*

A claim on an original contract can be joined with a claim on a substituted contract in the alternative. (*Stanyan*, A.J.C.) NATHUSA *v.* PHULCHANDSA. 14 I.C. 399= 8 N.L.R. 7.

——O. 2, R. 3—*Joinder of claims—Claim for share of profits and arrears of revenue.*

A plff. is entitled to join a claim for a share of profits as co-sharer with a claim for arrears of revenue, etc., as lambardar in one suit. S. 108 of the Oudh Rent Act does not make this improper or unlawful and under O. 2, R. 3, read with S. 136 of the Oudh Rent Act, two causes of action can be joined in one suit. (*Ashworth*, A.J.C.) BHIM SHANKAR DATT *v.* KEDAR NATH. 22 O.C. 183= 53 I.C. 486=1 U P.L.R. (J.C.) 85.

——O. 2, R. 3—*Joinder of causes of action—Alternative relief.*

A party may join two or more alternative claims for relief based on inconsistent allegations but is not bound to do so unless such joinder is possible without confusion or embarrassment, and without impleading others as parties. (*Stuart*, J. C. *and Kanhaiya Lal*, A.J.C.) SURAJ BIKRAM SINGH *v.* CHANDRABHAN SINGH. 17 I.C. 334.

——O. 2, Rr. 3, 6—*Suit for rescission of contract and return of earnest money—Specific performance can be claimed in the alternative.*

C. P. CODE (V of 1908), O. 2, R. 3.

Rr. 3 to 6 of O. 2 allow a plaintiff to unite in the same suit several causes of action against the same defendant and to order separate trials if necessary. The Court can in a suit for rescission of contract and return of earnest money also try an alternative claim for specific performance arising out of the same facts. The scope and effect of the Judicature Act pointed out. (*Das and Macpherson*, JJ.) CHANDRIKA PRASAD *v.* HIRA LAL.
(1923) Pat. 357=75 I.C. 433=3 Pat. L T. 49=2 Pat. L.R. 82=1924 P. 280.

——O. 2, R. 3—*Multifariousness—Test of.*

The question of multifariousness can only be decided on an allegation made in the plaint. The test is to see whether there is a common question to be tried between the parties on the facts disclosed in the plaint. 45 Cal. 111, ref. A suit for the recovery of a sum of money on the basis of two *rokkas* with an allegation that all the defts. were benefited by the loan, although one of the *rokkas* was executed by two and the other by one only of the several defts., is not bad for multifariousness. (*Das and Adami*, JJ.) ISWAR DAS MARWARI *v.* RAGHUNANDAN MAHTON. **51 I.C. 609**

——O. 2, R. 3—*Joinder of causes of action—Suit by several plaintiffs against one defendant.*

In a suit for declaration by several tenants against one landlord, that their holdings were fixed rate and that the decrees obtained by the landlord against them for rent were inoperative, there are as many causes of action as there are holdings and decrees. (*Roe*, J.) CHETHRU MAHTON *v.* MUHAMMAD KARIM NAWAB. **50 I.C. 328=4 Pat. L.J. 297.**

——O. 2, R. 3—*Misjoinder of defendants—Effect.*

A good test to see whether two suits filed separately ought to have been filed together is to see if they could have been filed as one without a misjoinder of defendants. (*Duckworth and Po Han*, JJ.) STANDARD ELECTRIC AND MOTOR WORKS *v.* PICTURE PALACE
2 Bur. L.J. 218=76 I C. 791=1 Rang. 682=1924 Rang. 161.

——O. 2, R. 3—*Suit for inheritance—Different persons in possession of different portions of the estate.*

In a suit by an heir for a share in an estate all the persons in possessions of different portions of the estate cannot be joined as defts. unless they are in possession by virtue of the same transaction or the same series of transactions. Under O. 2, R. 3, a plff. cannot join in the same suit several causes of action against several defts. unless they are all jointly interested in each separate cause of action. (*Young*, J.) W. DHAR *v.* HITOON MAY.
52 I.C. 927=12 Bur.L.T. 106.

——O. 2, Rr. 3 and 5—*Representative capacity — Same person — Claims different—Joinder of.*

C. P. CODE (V of 1908), O. 2, R. 4.

A person sued in different capacities is not the same defendant but a separate person in respect of each capacity. Claims against different estates cannot be joined in one suit merely because all such estates are represented by the same person, unless they are based on the same instrument affecting plaintiff's rights against all the estates. (*Young*, J.) ARIFF *v.* RAHMAT BEE. 50 I.C 528=11 Bur. L.T. 222.

——O. 2, Rr. 3 and 7—*Joinder of causes of action—Suit for accounts and recovery of properties from some of the partners and strangers.*

A suit for declaration that the sale of a partnership is fraudulent, and null and void as against the plaintiff and for recovery of the assets from the purchasers and for an account of the partnership from the other partners is bad for misjoinder. (*Hayward*, J. C. *and Crouch*, A. J. C.) GULRAJMAL *v.* PAMANMAL.
27 I.C. 344=8 S L.R. 69.

——O. 2, R 3 (1)—*Joinder of causes of action—Same defts.—Joined in one suit.*

Though the plffs. satisfied two different claims against themselves and the deft. separately, on two different occasions, the causes of action, which were different could be joined in one suit for contribution. (*N. R. Chatterjee and Duval*, JJ.) MAHARAJA BIRENDRA KISHORE MANIKYA BAHADUR *v.* PADMA LOCHAN MANIKYA. **51 I.C. 826.**

——O. 2, R. 3 (1) and (2)—*Joinder of causes of action—Jurisdiction.*

The plff. sued in one suit on three pro-notes, the claim in respect of each of which was less than Rs. 500. *Held*, that under O 2, R 3 a plff. can combine in one suit against a deft. several causes of action and according to the aggregate value of the causes of action comprised in this suit, it was not cognisable by a Court of Small Causes but by a Subordinate Judge. (*Shah Din and Le Rossignol*, JJ.) CHIRAGH DIN *v.* BHAGWANDAS. **100 P R 1915—32 I.C. 40=189 P W.R. 1915.**

——O. 2, R. 4—*Misjoinder of causes of action.*

A person who basis his claim on his father's title denying his mother's right to gift away the property, cannot join in the same action, his claim as the heir of his daughter on the allegation that she got a good title from her grandmother. (*Scott*, C.J. *and Batchelor*, J.) ABDUL ALI *v.* MIAKHAN. **35 Bom. 297=10 I C. 890=13 Bom. L.R. 268.**

——O. 2, Rr. 4 and 5—*Immoveable property—Mortgage.*

Where one of the properties claimed in the suit is a mortgage-decree, the suit is not one to recover immoveable property or to obtain a declaration in respect of immoveable property within Rr. 4 and 5. (*Mookerjee and Carnduff*, JJ.) GORA CHAND *v.* BASANTA KUMAR.
12 I.C. 685=15 C.L.J. 255.

C. P. CODE (V of 1908), O. 2, R. 4.

——O. 2, R. 4 (c)—*Scope of.*

The new clause (c) has been inserted in order to avoid the possibility of mistake and to make it clear that there is nothing irregular in seeking to recover in one suit immoveable and moveable property if the cause of action is the same in both. (*Shah Din and Agnew*, JJ.) CHAHABIL DAS *v.* MASU. 249 P.L.R. 1913 = 146 P.W.R. 1913 = 207 P.W.R. 1913 = 19 I.C. 981 = 4 P.R. 1914.

——O. 2, R. 5.—*Misjoinder—Suit for Stridhanam and maintenance by Hindu widow.*

A suit by a Hindu widow against the surviving co-parceners of her deceased husband to recover *Stridhanam* illegally detained by them and to enforce her right to maintenance is not bad for misjoinder. (*Devar*, J.) JANKI BAI *v.* SHRINIVAS GANESH VALSANKAR. 38 Bom. 120 = 20 I.C. 533 = 16 Bom. L.R. 685.

——O. 2, R. 5—"*Estate*" *Meaning of.*

The word "estate" means not only the "estate" rightly and properly held by executors but also the "estate" in its physical sense, so that a claim against an executor as such can be joined with a claim against him personally when both the claims arise in reference to the same estate. (*Chatterjee and Smither*, JJ.) NRIPENDRA NATH ROY, *v.* BIRENDRA NATH ROY. 41 I.C. 615 = 21 C.W.N. 939.

——O. 2, R. 5—'*Arises with reference to*' *—Construction—Partnership between plaintiff's father and defendant—Subsequent partnership between plaintiff and defendant with old assets—Plaintiff obtaining letters of administration to his father's estate—Suit by plaintiff to recover father's share in the first partnership and his own share in the second—Not bad for misjoinder.*

Plaintiff's father who was divided from the plaintiff was carrying on a business in partnership with the first defendant which lasted till the plaintiff's father's death. Subsequent to the plaintiff's father's death the plaintiff and the first defendant carried on business with the old partnership assets the plaintiff subsequently obtained letters of administration to his father's estate. He as administrator brought the present suit for the accounts of the partnership between his father and the first defendant. He also claimed in the same suit his share in the partnership between himself and the first defendant. Such a suit does not offend the provisions of O. 2, R. 5, C.P. Code, and it comes within the exception specified in the rule as the plaintiffs personal claim in respect of the partnership with himself "arises with reference to the estate in respect of which he is suing as administrator". The words "arises with reference to" in the exception to O. 2, R. 5 are very general and cover a case where the plaintiff's personal claim can only be determined after calculating the amount due to him as administrator. The expression "arises with reference to" should not be read as being equivalent only to "arises against or on behalf of." *Tredegar* v. *Roberts*, (1914) 1 K. B. 283 dist. (*Oldfield and Venkatasubba Rao*, JJ.) ARUNACHELLAM CHETTIAR *v.* ARUNACHELLAM CHETTIAR. 43 M.L.J. 218 = 16 L.W. 178 = (1922) M.W.N. 453 = 69 I C. 966 = 1922 Mad. 436.

C. P. CODE (V of 1908), O. 2, R. 6.

——O. 2, R. 5—*Executor—Money—Attachment.*

It is contrary to the principle of O. 2, R. 5 to attach money in the hands of an executor, administrator, or heir as such, in execution of a decree against them personally, though the executor is a legatee and the money in his hands is due to him personally as legatee. The right course is to attach the right, title and interest of the legatee, and the executor may be restrained from receiving in his personal capacity, any portion of the money in his hands as executor and from dealing with it otherwise than in his representative capacity. (*Young*, J.) K. HILL *v.* M. M. GREENBERG. 38 I.C. 563 = 9 Bur. L T. 226.

——O. 2, R. 6—*Separate trials—Causes of action not conveniently triable together—Suit against executors of inherited properties and trustees of charity—Advocate-General's sanction—Finding premature.*

The case contemplated by O. 2, R. 5 is one where the causes of action joined in the same suit are essentially different. If facts alleged in the plaint arise out of facts that are common to both the causes of action joined in the suit, the Court should not exclude one of them on the ground that it would not be convenient to try those two causes of action together. In a suit against two classes of defendants firstly, against the executors of late husband's will to account for moneys come to their hands has executors and secondly, against the trustees of certain charity established by her husband, under a scheme settled by the District Judge on a compromise entered into between the executors and the then guardian of the minor plaintiff, for a declaration that the scheme relating to the charity settled by the District Judge was obtained by fraud and was not binding upon her, the Court excluded the first cause of action from the suit and about the second, *held* that that cause of action could not be tried without the consent of the Advocate General which had not been obtained. *Held*, that the order of the Court exoluding one of the causes of action should be set aside and the order of sanction was premature. (*Fletcher and Teunon*, JJ.) NANDARANI DASI *v.* HARICHARAN GANGOPADYA. 35 I.C. 29.

——O. 2, R. 6—*Trial Court refusing to act under—Appellate Court should not interfere.*

In a case of a joinder of causes of action, where the Trial court does not think fit to act under O. 2, R. 6, it is not proper for the appellate court to interfere with the discretion. (*Abdul Raoof*, J.) PAIRA RAM *v.* KESHO NATH. 72 I.C. 892 = 1924 Lah. 156.

C. P. CODE (V of 1908), O. 3.

———O. 3.

See also LEGAL PRACTITIONER.

———O. 3, Rr. 1 and 2—*Pleader appointed by recognised agent of party is a 'duly appointed pleader' and an execution petition signed by him only is valid.*

Where a party to a suit authorizes an agent by special power of attorney to appoint a pleader to sign execution petitions, a pleader so empowered by the agent, is a "pleader appointed to act on his (the party's) behalf," within S. 36 of the C.P. Code of 1882 and the petition signed by the pleader but not signed by the party is a duly presented petition even if neither the agent nor the pleader is a "recognised agent" within S. 37 of the Code of 1882. (*Lord Atkinson,*) THIRUVENGADASWAMI AIYANGAR v. PAVADAI PILLAI.

44 Mad 736=48 I.A. 334=
(1921) M.W.N. 352=41 M.L.J. 645=
14 L.W. 244=30 M.L.T. 109=
26 C.W.N. 376=24 Bom. L.R. 606=
1922 P.C. 225 (P.C.).

———O. 3, R. 1—*Recognised agent—Rights of.*

A recognised agent as such has no right of audience. (*Jenkins*, C.J. *and Chatterjee*, J.) HARCHAND RAY GOBARDHAN DAS *v.* BENGAL-NAGPUR RAILWAY CO.

28 I.C. 838=19 C.W.N. 64.

———O. 3 R. 1—*Power of attorney—Validity—Objection as to, cannot be raised for the first time in appeal.*

Where the defendant in the court below failed to take the objection that a power of attorney constituting a recognised agent was not valid, he must be deemed to have waived the same. The objection cannot be allowed to be raised for the first time in appeal. (*Scott-Smith*, J.) GOPAL SINGH v. BHAGA. 69 I.C. 366.

———O. 3, Rr. 1, 4 and O. 20, R. 2—*Presence of pleaders—Presence of pleaders at the time of delivering the judgment is presence of parties.*

A judge cannot pronounce a judgment for the second time in presence of parties and if he does so he acts without jurisdiction. (*Broadway*, J.) BHALLA *v.* FAZAL MOHAMMAD.

97 P.L.R. 1920=58 I.C. 143=
52 P.W.R. 1920.

———O. 3, Rr. 1 and 2 and O. 41, R. 1—*Formalities of—Power signed by party or his agent—Subsequent signing—Agent.*

An appeal was presented by a pleader whose power of attorney was not signed by the appellant or his agent till after limitation had expired. *Held*, the omission to sign the power of attorney was an oversight and the subsequent signing cured the defect. The appeal was held to be properly presented. 22 A. 55; 40 A. 147; 36 A. 46, Ref. (*Chevis*, O.C.J.) KHAIRA *v.* MATHU.

58 I.C. 990=2 U.P.L.R. 88.

C. P. CODE (V of 1908), O. 3, R. 2.

———O. 3, R. 1 and O. 16—*Party desiring to examine his opponent as a witness—Procedure.*

Where one party desires the presence of the opposite party in court for the purpose of examining him as a witness the proper procedure to adopt is the one under O. 16 and not the one under the proviso to O.3, R. 1, C.P. Code. (*Krishnan*, J.) AYYA NADAN *v.* THANAMMAL. 27 M.L.T. 171=
(1920) M.W.N. 241=55 I.C. 945=
11 L.W. 289.

———O. 3, R. 1 and O. 9, R. 12—*Power of court*—Ex-parte *decree — Failure of party to appear.*

A court has power to direct a party in person under O. 3, R. 1 and on his failure to appear he may be declared *ex-parte* under O. 3, R. 12 though his vakil may be present in Court. 23 B. 318, diss. (*Sadasiva Aiyar and Bakewell*, JJ.) VAIKUNTHAMMAL *v.* VILIAMMAL.

41 Mad. 236=6 L.W. 337=41 I.C. 719=
(1917) M.W.N. 743.

———O. 3, R. 1 and O. 41, R. 1—*Appeal—Presentation by pleader without vakalat.*

A petition of appeal presented without a 'Vakalatnama' has not been legally presented at all. (*Roe and Coutts*, JJ.) SHAIK PALAT *v.* SARWAN SAHU. 55 I.C. 271.

———O. 3, R. 1 and O. 9, R. 9—*Appearance by pleader.*

A decree dismissing a suit in the presence of the pleaders of a party is not within O. 9, R. 9 as there is no default of appearance. The personal appearance of the party is not necessary. (*Mullick and Thornhill*, JJ.) MOWAR RAGHUBAR SINGH *v.* GOURI CHARAN SINGH.

46 I.C. 492.

———O. 3, R. 1—*Recognised agent.*

An agent authorised to enter appearances in suits can sign the amended plaint where the suit is filed by the principal. (*Ormond and Parlett*, JJ.) P. R. N. PALANIAPPA CHETTY *v.* P. M. R. M. FIRM. 25 I.C. 136=7 Bur. L.T. 199.

———O. 3, R. 1—*Pleader—Power of—Arbitration—Reference.*

Under the new C. P. C. a pleader duly appointed to act for a party can make any application including an application for a reference to arbitration. 14 Bom. 455, diss. (*Pratt*, J.C. *and Body*, A.J.C.) SRIKISHEN *v.* RELUMAL PARIOMAL.

34 I.C. 845=9 S.L.R. 183.

———O. 3, R. 2—*Power of attorney—Special power—Suit filed by Mukhtear—Irregularity Immaterial defect—C. P. Code, S. 99.*

Plff. instituted a suit for recovery of possession of land from defendants and the plaint was filed by a Mukhtear holding a special power of attorney from plff. and not a general power of attorney as required by O. 3, R. 2 (*a*) as amended by the Rules made by the High Court of Bombay. The defendants objected that the suit was not properly instituted but the courts

C. P. CODE (V of 1908), O. 3, R. 2.

below overruled the plea and decreed the suit. *Held* on second appeal, that the irregularity, if any, was cured by S. 99, C. P. Code, and that the decree of the court below should be affirmed. (1886) P. J. 63, foll. (*Shah*, A.C.J. *and Crump*, J.) GANAPATHY NANA POWAR *v.* JIVANABAI. **24 Bom. L.R. 1302 = 76 I C. 34 = 47 B. 227 = 1923 Bom. 44 (1).**

——**O. 3, R. 2**—*Power of attorney--General and special—Rule of the Bombay High Court.*

A power of attorney provided as follows: "I have constituted and appointed the above-named person my true and lawful attorney in this matter, to recover all moneys due to me in respect of the principal and interest of the aforesaid mortgage bond by suing on my behalf in a Civil Court or by coming to an amicable settlement and to do all such acts in this one matter as I, if present, would have done or could have done or would have been permitted to do or would have been called upon to do." *Held*, that it was a special power of attorney, as the agent's authority did not extend to any class of business or employment, but was limited to the doing of all necessary acts to achieve one partioular purpose, the realisation of the debt. (*Batchelor*, A.C.J. *and Shah*, J.) VARADAJI *v.* CHANDRAPPA. **41 Bom. 40 = 36 I.C. 805 = 18 Bom. L.R. 821.**

——**O. 3, R. 2**—*General power of attorney —Execution—Application in accordance with law—Continuation of document.*

A power of attorney authorising an agent to do all acts relating to the execution of the decree in favour of the principal is a general power of attorney, and an application by the agent for an execution is an application in accordance with law, for purposes of limitation. The legal nature of the document must be ascertained from the contents and not from the stamp affixed to it. (*Benson and Sundara Aiyar*, JJ.) VENKATRAMA AIYAR *v.* NARSING RAO. **38 Mad. 134 = (1913) M.W.N. 72 = 18 M.L.T. 114 = 18 I.C. 135 = 24 M.L.J. 180.**

——**O. 3, R. 2**—*Power of attorney—Execution, actual proof—When necessary to call for.*

An agent who holds a power of attorney should be allowed to appear and act under O. 3, R. 2, C.P.C., and it is not necessary to call for proof of execution of the power unless its genuineness is suspected, under S. 85 of the Evidence Act. (*Kanhaiya Lal*, A.J.C.) HABIB UN-NISSA *v.* MUSHARAF ALI. **33 I.C. 661 = 18 O. C. 372.**

——**O. 3, R. 2 (a)**—*Bombay High Court Rules—Scope of—Person holding general power of attorney can act.*

O. 3, R. 2, Cl. (*a*) as altered by the rule made by Bombay High Court enables a person holding a general power of attorney from a party not resident within the local limits of the jurisdiction of the court within which limits the

C. P. CODE (V of 1908), O. 3, R. 4.

appearance is made, authorizing him to appear and act on behalf of the party, to so appear and act. (*Shah and Crump*, JJ.) ACHUT SITARAM *v.* TARACHAND. **72 I.C. 1003 = 1923 Bom. 41 (1).**

——**O. 3, R. 4**—Vakalatnamah—*Pleader's name—Omission of.*

Where in a *vakalatnamah* the pleader's name has been omitted by oversight there is no due appointment of the pleader and the appeal is not on that account, properly presented. This objection can be taken at any stage of the case. (*Richards*, C.J. *and Banerjee*, J.) MUHAMMAD ALI KHAN *v.* JASRAM. **36 All. 46 = 23 I.C. 464 = 11 A.L.J. 1015.**

——**O. 3, R. 4**—*Duties of pleader—When terminate.*

Per *Sanderson, C. J.*—Unless and until the conditions specified in O. 3, R. 4, C.P. Code, are complied with, the duties and obligations of the pleader will remain. Per *Mookerjee, J.*: A pleader must be duly appointed before he can appear, act and plead in a case. (*Sanderson*, C.J., *Woodroffe and Mookerjee*, JJ.) EMPEROR *v.* RAJANI KANTA BOSE. **49 Cal. 732 = 35 C.L J. 356 = 26 C.W.N. 589 = 71 I.C. 81 = 24 Cr. L.J. 33 = 1922 Cal. 515.**

——**O. 3, R. 4**—*Execution filed by pleader, whose name is not contained in the* vakalatnamah, *validity of.*

Inadvertent omission from the body of *vakalatnamah* of a pleader's name is a mere error which might be rectified by permitting the party to put the name. (*Chitty and Beachcroft*, JJ.) MAKFOZUL HUQ *v.* MAZHORUL HUQ. **41 I.C. 685.**

——**O. 3, R. 4**—Vakalatnamah—*Acceptance.*

A mere verbal acceptance of a *vakalatnamah* is not sufficient. (*Carnduff and Richardson*, JJ.) *In the matter of* JOEGSH CHANDRA GUPTA. **33 I.C. 831 = 17 Cr L J. 1916 = 20 C.W.N. 283.**

——**O. 3, R. 4**—Vakalatnamah—*Acceptance of.*

Acceptance of *Vakalatnamah* need not be in writing, (*Chatterjee and Beachcroft*, JJ.) MOHESH CHANDRA ADDY *v.* PANCHU MUDALI. **48 Cal. 884 = 32 I.C. 395 = 23 C.L.J. 297 = 20 C.W.N. 287. [But See Contra 33 I C. 881 = 20 C.W.N. 283.]**

——**O. 3, R. 4**—*Power of attorney—Acceptance must be in writing.*

(*Scott-Smith and Zafar Ali*, JJ.) THE FIRM MATHRA DAS *v.* THE FIRM RAMA LAL. **1923 Lah. 402.**

——**O. 3, R. 4**—*Pleader*—Vakalat—*Acceptance—Omission of pleader's name in vakalat —Effect of—Presentation of plaint, if proper.*

Where a *vakalatnama* executed without the pleader's name appearing upon it is accepted by the particular pleader who was engaged by the

C. P. CODE (V of 1908), O. 3, R. 4.

party and a plaint was presented by that pleader. *Held* that the provisions of O. 3, R. 5 of C.P.C. were sufficiently complied with and that the presentation of the plaint was proper. Once the party has delivered the *vakalatnama* to a pleader without putting a name on it he must be deemed to have impliedly authorised the pleader to fill up the necessary details and to appear for him. Even where a court returns a plaint for presentation to a proper court the original *vakalatnama* will continue to be in force even after the return of the plaint. O. 3, R 4 provides that the authorisation must be in writing not that it must be in any particular form, nor that it must show the pleader's name in the main body of the document. As long as it is a writing which states that the party authorises the pleader to act for him and is signed by the party and the pleader, there is no relaxation of the provisions of the rule in accepting it. Even if there is any defect in the *vakalatnama* by reason of the omission to mention the name of the particular pleader authorised to appear, such defects can be cured by amendment. (*Hallifax*, A.J.C.) MAHARASHTRAYA JNAN KOSH MANDAL *v.* BIJJULAL.
6 N.L.J 100=71 I.C. 436=19 N.L R 36=
1923 Nag. 182.

———O. 3, R. 4—*Pleader—Authority to represent client—Return of plaint does not terminate.*

So far as the client is concerned, the appointment of a pleader is not determined until all proceedings in the suit are ended. The return of a plaint for presentation to the proper court does not put an end to the authority of the pleader and if the plaint is presented to the proper court on the same day the pleader can act in the case. (*Hallifax*, A.J.C.) DEBI LAL *v.* KRISHNAJI. 67 I.C. 293=5 N.L J. 268=
1922 Nag. 125.

———O. 3, R. 4—Vakalatnamah—*Pleader's name—Omission of.*

A party delivered a *vakalatnama*, to a pleader duly signed by him but omitted the name of the pleader in the body of the *vakalatnamah*: *Held*, the pleader had implied authority to fill in the details. If the pleader simultaneously accepted the *vakalatnamah* and signed his name in token of acceptance, this was sufficient compliance with law. If in such a case the pleader presented an appeal, the omission of his name in the body of the *vakalatnamah* would not invalidate the presentation of the appeal. (*Mittra*, A. J. C.) MUSSAMMAT MASUMBI *v.* DONGAR SINGH.
55 I.C. 315.

———O. 3, R. 4—*Pleader not duly appointed.*

A pleader whose name does not appear though by oversight in the *vakalatnamah*, is not duly appointed, and an appeal presented by such a pleader, is not properly presented in spite of there being no objection on this ground till a late stage of the case. (*Stanyon*, A. J. C.) DANOO LAL *v.* BAJI. 37 I.C. 103=
12 N.L.R. 189.

C. P. CODE (V of 1908), O 3, R. 4.

———O. 3, R. 4—Vakalatnama—*One person signing for another.*

The rules as regards appointing pleaders are salutary and strict rules made with a view to prevent fraud. But in a case where no fraud has been committed and one person signs for another with the full knowledge and acquiescence of the latter, the irregularity is a formal one not affecting the merits of the case and is cured by S. 99, C. P. Code. (*Miller*, C J. *and Kulwant Sahay*, J.) BANWARI RAI *v.* CHETHRU LAL RAI. 2 Pat. L.R. 174=
74 I C. 1033=1924 P. 114.

——— ———O. 3, R. 4—*Appointment of pleaders and advocates—Evasion of law.*

An unqualified person cannot practise as an advocate under cover of special powers of attorney from the parties. (*Shaw*, J.C.) NGA NYUN *v.* NGA PO. GO. 25 I.C 163=
7 Bur. L T. 206.

———O. 3, R. 4 (1)—*Pleader—Appointment—Vakalat can be accepted even after filing in Court*

Where a pleader's name appears in a vakalat he is competent to sign and accept the vakalat even though it has already been accepted and filed in Court by another pleader also retained by the party. The Court has no power to refuse permission to the pleader whose name appears on the vakalat to sign it and appear for the party. R. 46 (*f*) of Ch. XI of the General Rules and Circular Orders provides for a *vakalanamah* already filed in Court being subsequently accepted by a pleader or vakil whose name appears in the *vakalatnamah* at the time when it was filed. All that is necessary is that there should be an endorsement of acceptance in proof of acceptance 5 C.W.N. 816; 20 C.W.N. 263; 20 C.W.N, 287, Ref. (*Jwala Prasad*, J.) KUNJ BEHARI SINGH *v.* SHEODAHIN PANDEY. 3 Pat. L.T. 447=68 I C. 659=
1922 Pat. 504.

———O. 3, R. 4 (2)—*Appointment of pleader by guardian* ad litem—*Scope of.*

A guardian *ad litem* can appoint a *vakil* for the minor party and such appointment continues till the minor dies or till it is rescinded in writing with the Court's permission. The word 'client' in the rule means the minor and not the guardian. The client's attaining the majority does not determine the authority of the *vakil*. (*Ayling and Sadasiva Aiyar*, JJ.) ENUGA SUNDAR RAMA *v.* BEZWADA PATTABHI RAMA REDDI.
(1917) M.W.N. 495=42 I.C. 421=
6 L.W. 272.

——— ———O. 3, R. 4 (2)—*Pleader's authority—Determination of.*

After a pleader has once been appointed by a party, his employment cannot be determined except (1) by a writing signed by the client or the pleader and filed in court with the leave of the court or (2) by the termination of the proceedings in the suit. In miscellaneous proceedings arising out of a suit, a pleader is

C. P. CODE (V of 1908), O. 3, R. 5.

entitled to act on the authority of a *Vakalatnamah* obtained by him in the principal suit. A pleader not endorsing his acceptance on the *Vakalatnamah* should not be allowed by the Judge to be heard or to act in any manner on behalf of the party. (*Chamier*, C.J., *and Sharfuddin and Chapman*, JJ.) *In the matter of* TWO PLEADERS.
1 Pat. L.W. 483 = 2 Pat. L.J. 289 = 41 I.C. 328 = 18 Or. L.J. 808 = 1917 Pat. 217.

——O. 3, R. 5—*Pleader, position and duty of—Power of pleader, how determined.*

When a pleader accepts a case it is his duty to attend to his client's interest throughout the proceedings in the case unless his appointment be determined with the leave of the Court by a writing signed by him or his client filed in Court. (*Lyle*, A. J. C.) SHEO SAIK SINGH *v.* AUSAN. 25 O.C. 40 = 9 O.L.J. 170 = 67 I.C. 554 = 1922 Oudh 73.

——O. 4, R. 1—*Plaint — Vakil patra—Signed by plaintiff's servant—Plaintiff should be given opportunity to sign.*

A suit cannot be dismissed without notice to the plaintiff and an opportunity to him to sign it personally where the plaint when filed was signed by the plaintiff's servant who also empowered the pleader though the servant was not the recognized plaintiff's agent. (*Macleod*, C.J. *and Shah*, J). UTTARAM *v.* THAKOR DAS. 68 I.C. 217 (1) = 23 Bom. L.R. 911.

——O. 4, R. 1—*Presentation of plaint—When proper.*

Presentation of plaint to the Head Ministerial Officer of the Court is legal and proper, where such officers are authorised to receive plaints. (*Oldfield and Phillips*, JJ.) RADHAKRISHNA AIYAR *v.* SWAMINATHA AIYAR. 40 I.C. 587 = 6 L.W. 16.
[On appeal see 40 M.L.J. 229 = (1921) M.W.N. 119 = 13 L.W. 321 = 19 A.L.J. 161 (P.C.)]

——O. 4, R. 1—*Presentation of plaint.*

Presentation of plaint at residence of Judge after the usual Court hours is valid. (*Dhobbey*, A. J. C.) MADHORAO *v.* MANOHARLAL. 68 I.C. 674 = 1922 Nag. 167.

——O. 4, R. 1—*Presentation to clerk—Invalid—Suit.*

The presentation of a petition to the clerk of the Deputy Commissioner's Court (Oudh), is not a valid presentation. (*Lindsay and Rafique*, A. J. (Js.) HABIB SHAH *v.* DEBI BAX SINGH. 14 I.C. 221.

——O. 4, R. 1 (1)—*Presentation out of officehours—Whether proper.*

A presentation out of office hours of a plaint is not a proper presentation unless certified by court that very day. (*Sadasiva Aiyar and Spencer*, JJ.) APPAYU PILLAI *v.* AMEER SAHIB. 23 I.C. 360.

C. P. CODE (V of 1908), O. 5, R. 10.

——O. 5, R. 1—*Appearance by pleader.*

Appearance by pleader instructed only to apply for an adjournment is not appearance by the party in person or by pleader. (*Sankaran Nair and Abdur Rahim*, JJ.) VENKATARAM AIYAR *v.* NATARAJA AIYAR, 13 M.L.T. 140 = 24 M.L.J. 238 = 18 I.C. 360 = (1913) M.W.N. 165.

——O. 5, R. 3 and S. 115—*Dismissal for default on adjourned date—Revision.*

Where a Court fixed the hearing of a suit for a particular date and on that date adjourned the case to another date without making any order as to the personal appearance of the plaintiff and dismissed the suit for default on the adjourned date for non-appearance of the plaintiff, *held*, in revision that the order dismissing the suit for default of prosecution was made without jurisdiction. The habit of Court in making parties and witnesses to hang about, is most reprehensible. (*Knox*, J.) SUNDAR NATH *v* MALLU. 39 All. 476 = 39 I.C. 634 = 15 A.L.J. 522.

——O. 5, R. 5—*Summons issued for final disposal—Defendant, appearance by—Plaintiff not ready with witnesses—Procedure.*

Where in a suit, summons were issued for final disposal and the deft. appeared and denied execution and the plff. was not ready with his witnesses, *held*, the court should not have dismissed the suit but should have issued summons only for settlement of issues and given an opportunity to produce evidence on the issues raised. (*Heaton and Shah*, JJ.) PULJARAM HARICHAND GUJAR *v.* SITARAM NARAYAN KASAR. 38 Bom. 377 = 24 I.C. 665 = 16 Bom. L.R. 39.

——O. 5, R. 9—"*Residence.*"

"Residence" is not synonymous with ownership for purposes of the service of summons. (*Mookerjee and Teunon*, JJ.) KUMUD NATH *v.* JATINDRA NATH. 38 Cal. 394 = 13 C.L.J. 221 = 9 I.C. 189 = 15 C.W.N. 399.

——O. 5, R. 10—*Service of summons when complete.*

Service of summons is complete when it is tendered to the witness, and his refusal to sign the original makes no difference. (*Kumaraswami Sastri*, J.) *In re* S. KUPPUSWAMI AIYAR. 39 Mad. 561 = 28 M.L.J. 508 = 2 L.W. 463 = 29 I.C. 109 = 17 M.L.T. 398 = 16 Cr. L.J. 477 = (1916) M.W.N. 365.

——O. 5, Rr. 10 and 17—*Service of summons—Compliance with formalities.*

A service of summons by delivery or tender of a copy of the summons to the deft. is complete and no subsequent irregularity of the process-server can undo it. The maxim *quod fieri non debet factum valet* will apply. But where the service is not personal, the rules of procedure laid down in the C.P.C. should be strictly complied with. 26 C. 101, appr.; 16 B. 117, diss. (*Stanyon*, A.J.C.) GOPALDAS GIRDHARILAL *v.* ISLU. 46 I.C. 277.

C. P. CODE (V of 1908), O. 5. R. 10.

———O. 5, Rr. 10, 16 and 17—*Acceptance of summons.*

A deft. without accepting a copy of the summons tendered by the process-server shut himself up in the house. The copy was affixed to the door of the house. Deft.'s conduct amounted to a refusal to accept and also to a refusal to acknowledge that the tender was made and consequently summons was duly served by affixture. (*Drake-Brockman*, J.C.) IMDAD HUSSAIN *v.* PARESHWAR.
38 I.C. 345=13 N.L.R. 46.

———O. 5, Rr. 12 and 17—*Service—Knowledge of defendant—Summons pasted on outer door.*

Even if the deft. knows of issue of the writ it is not sufficient service, if the summons is pasted upon the premises, by the bailiff after his having gone over on three separate days to the deft.'s place of business and on each occasion somebody having told the bailiff that the deft. was not at that time in the place. (*Sanderson*, C.J., *Woodroffe and Mookerjee*, JJ.) KASSIM EBRAHIM SALEJI *v.* JOHURMUL KHEMKA. 43 Cal. 447=34 I.C. 799=23 C.L.J. 183=20 C.W.N, 173.

———O. 5, Rr. 12 and 25—*Collector's refusal to serve summons—Defendant residing in Amindivi Island—Method of service—Procedure.*

The mere fact that the Collector refused to serve the summons is not a sufficient reason for dismissing a suit. If the deft. at first residing in British India is at the time of the suit residing in the Amindivi Island, the service should be effected by affixing the summons to his last known place of residence in British India and by registered post. (*Kumaraswami Sastri*, J.) ABDUL KADYA BEHARI *v.* SHABYODE KUNHI AHMED. 32 I.C. 820.

———O. 5, R. 12—*Service—Defendant going about from place to place—Place of residence or business.*

If a deft. is going about from place to place, it is not the duty of the plff. to be following him to all the places to serve the summons. But if he has any other place of residence or business, the plff. should take out summons to that place. (*Seshagiri Aiyar*, J.) MADURATHACHI *v.* CHOKALINGA PILLAI. 23 I.C. 324=(1914) M.W.N. 314.

———O. 5, Rr. 12 and 20—Pardanashin *lady.*

Service on a *pardanashin* lady not being practicable, affixing a copy of summons at her residence is sufficient service. (*Kanhaiya Lal*, A.J.C.) HAIDARI KHANAM *v.* HUSNARU BEGAM. 57 I.C. 595.

———O. 5, R. 12—*Service on* Chela.

Service of summons on the *Chela* of a person is not a valid service. (*Lindsay*, J. C.) SHEO CHARAN DAS BABA *v.* BAIJNATH SINGH.
57 I.C. 568=23 O. C. 104.

C. P. CODE (V of 1908), O. 5, R. 15.

———O. 5, Rr. 12, 14 and 17—Pardanashin *lady—Service of summons on husband is not proper service.*

A *pardanashin* lady executed a power of attorney in favour of her husband but there was no power given to accept service of summons on her behalf. The summons was served on the husband. *Held*, that there was no proper service under O. 5, R. 12 as the husband was not an agent duly authorised to accept service of summons. As a *pardanashin* lady is not able to accept service personally, she comes under the expression "cannot be found" under O. 5, Rr. 14 and 17, and service of summons can be effected by serving it on any adult male member of the family, or affixing it on the outer door of the house in which the lady ordinarily resides. (*Jwala Prasad and Ross*, JJ.) MT. NAJMUNNISSA *v.* JAGMOHAN LALL.
4 Pat. L.T. 89=72 I.C. 910=1923 P. 483.

———O. 5, R. 13—*Service on cousin—No attempt to serve personally—Service not proper.*

If it is not shown that sufficient attempt was made to personally serve the summons, and if it is not shown that the person who has been described as a cousin of the appellant was a person who was sufficiently authorised to receive the summons, the appeal to set aside an *ex parte* decree must succeed on the ground of non-service of summons. (*Woodroffe and Ghose*, JJ.) ROMESH CHANDRA *v.* DURGA CHARAN.
70 I.C. 292=1922 Cal. 128.

———O. 5, R. 14 and O. 9, R. 13—*Service on brother—No attempt at personal service.*

Where the defendant lived away from his brother and the summons was served on his brother without any attempt to serve on the defendant personally, the service is bad. (*Abdur Rahim and Ayling*, JJ.) SANKARA BHATTA *v.* SUBRAYA RHATTA.
(1911) 1 M.W.N. 186=9 I C. 763=9 M.L.T. 358.

———O. 5. R. 15—*Service of summons on paternal uncle of defendant.*

A service of summons on the paternal uncle of a deft. living with him is not sufficient unless it is proved to the Court's satisfaction that the deft. could not be found, unless evidence shows without difficulty since service must as far as possible be personal. (*Richards*, C.J., *and Piggott*, J.) MAKHAN DAS *v.* MANNU LAL. 35 All. 556=21 I.C. 615=11 A.L.J. 875.

———O. 5, R. 15—*Mode of service—Service on son when sufficient to bind father—Conditions necessary.*

Service on son is not sufficient to bind father when it is not proved that the father can not be found and the son is not proved to be adult. (*Mookerjee*, A.C.J. *and Fletcher*, J.) BHARAMCHAND GUIN *v.* KANEK SARKAR.
26 C.W.N 359=68 I.C. 991=35 C.L.J. 203.

C. P. CODE (V of 1908), O. 5, R. 5.

———**O. 5, Rr. 15, 16, 27 and 28**—*Service of notice—Marine service—Sufficiency of.*

An officer employed in the Indian Marine Service is subject to the same rules regarding service of summons as any other person under O. 5, Rr. 27 and 28, and a notice served under the provisions of Rr. 15 and 16 is a sufficient service. (*Holmwood and Chapman*, JJ.) INTU MIAH *v.* DHARBUKSH BHUIYAN.
25 I.C. 380=42 Cal. 67.

———**O. 5, R. 15 and O. 30, R. 3**—*Service of summons on* Munim.

In a suit for recovery of money, the Court directed that notice should be issued to the parties and their pleaders and that they should attend on a certain date. Instead of serving the notice on the pleader, it was served on the plff.'s *munim*, an agent. In consequence of this, the plff. and his pleader both were absent and the suit was dismissed. *Held*, that the order of the court, not having been properly complied with in the matter of giving notice, notice given to the *munim* was held not to be a notice to the plff. or his pleader and the order of dismissal was set aside. (*Scott-Smith*, J.) FIRM OF RAM GOPAL KANHIA LAL *v.* NARAINDAS. 45 I.C. 932=105 P.W.R. 1918.

——**O. 5, R. 15**—*Service on father.*

In defendant's absence his father took the summons and made the endorsement that he had gone to another place. *Held*, that summons was not only served, no attempt being made to make personal service nor it being shown that the defendant was avoiding service. (*Rattigan*, J.) HARDYAL *v.* PIG SANT DAS.
186 P.L.R. 1911=10 I.C. 242=
227 P.W.R. 1911.

———**O. 5, R. 17**—*Service of summons by post—R. 22 of the Allahabad Rule Committee.*

Service by post or fixing to the door, in case, a person cannot be personally served, is *prima facie* sufficient; but under R. 22 added by the Allahabad Rule Committee, to O. 7, C.P.C., the Court is bound to direct additional service by registered post. (*Piggott and Walsh*, JJ.) MATHURA PRASAD *v.* BHOOP NARAYAN. 43 All. 411=61 I.C. 135=
19 A.L.J. 155.

———**O. 5, Rr. 17 and 19**—*Affixture—Declaration of service by Court essential.*

Where a summons is fixed to the outer door of a deft. under O. 5, R. 17, he cannot be said to be "duly served" until an order under R. 19 is made by the Court, declaring that the summons had been duly served. Such order ought to be obtained as soon as possible after the return is made by the serving officer. (*Richards*, C.J. *and Banerji*, J.) CHAMPAT SINGH *v.* MAHABIR PRASAD. 43 I.C. 632.

——**O. 5, R. 17**—*Service of summons—Mode of.*

The provisions as to service of process in the Code, must be strictly observed and wherever it is reasonably possible, personal service should be made. Therefore, where a serving officer found that the respondent was away from his house but was expected back in a couple of days, but affixed the summons to the door of his house, *held*, that it was not a sufficient service. (*Richards*, C.J. *and Banerjee*, J.) NATHU *v.* SARUP SINGH.
39 I.C. 544.

C. P. CODE (V of 1908), O. 5, R. 17.

——**O. 5, R. 17**—*Temporary absence.*

Fixation of summons on door when a person is temporarily away and is traceable, is no service on him. 24 A. 302, foll. (*Banerji and Piggott*, JJ.) KUNJ BEHARI LAL *v.* SARJU PRASAD. 32 I.C. 826.

——**O. 5, R. 17**—*Duty of serving officer—Affidavit.*

The service of a summons or of a notice upon a person is a very important step and the Law requires that the action of the person charged with the service should be set out in full and be supported by an affidavit. Until this is done, the summons cannot be taken to have been sufficiently served. (*Knox and Rafique*, JJ.) RAM KETI *v.* CHAJJU.
20 I.C. 318=11 A.L.J. 340.

——**O. 5, Rr. 17, 19 and 23**—*Service of summons—Copy of summons affixed on outer door of wrong house—Declaration of service under R. 19.*

A declaration of order of service of summons under O. 5, R. 19 can be made also by a Court to which it has been sent for service, though in exceptional cases the Court originally issuing the summons can reopen the question of service. (*Knox and Piggott*, JJ.) DWARKA PRASAD *v.* BRIJ MOHAN LAL. 8 A.L.J. 715=
11 I.C. 39=33 All. 649.

———**O. 5, R. 17**—*Service of summons—Mode of.*

If a deft. refuses to accept summons attempted to be served upon him at a place where he does not ordinarily reside, the summons must be served in the house in which he ordinarily resides. (*Mookerjee and Greaves*, JJ.) BRAJA NATH PAL *v.* SURENDRA KRISHNA ROY.
41 I.C. 181.

———**O. 5, R. 17**—*Service of summons—Enquiries.*

For serving summons upon the deft. proper enquiries, and real and substantial effort and not perfunctory efforts should be made as to when and where the deft. is likely to be found. 19 C. 201, appr. (*Sanderson*, C.J., *Woodroffe and Mookerjee*, JJ.) KASIM EBRAHIM SALEJI *v.* JOHURMUL KHEMKA. 23 C.L.J. 183=
43 Cal. 447=34 I.C. 799=20 C.W.N. 178.

———**O. 5, R. 17**—*Notice—Service of.*

A service of notice by affixing a copy on the entrance door of the judgment-debtor without any diligent search, is not service according to law. (*Sharfuddin and Teunon*, JJ.) ANANDRAM *v.* NITYANDA BAKHAM.
32 I.C. 744.

C. P. CODE (V of 1908), O. 5, R. 17.

——— **O. 5, R. 17**—Pardanashin *lady—Service on.*

In the case of *Pardanashin* lady, who had no agent so empowered or any adult male member, or in the case of one who is incapable of personally accepting service, affixing or a copy of the summons on the outer door or some other conspicuous part of the house, is valid service. (*Mookerjee and Newbould*, JJ.) KHIRODA SUNDARI DASI *v.* NABIN CHANDRA SAHA.
21 C.L J. 653=30 I.C. 64=19 C.W.N. 1231.

———**O. 5, R. 17**—*Substituted service—When proper.*

Where a peon who went to serve a deft. with summons was informed that the deft. had gone to another Presidency and affixed the summons to the outer door, it was held that this was sufficient compliance with the provisions of O. 5, R. 17 because a mere temporary absence from a house will not make the house, one in which the deft. did not ordinarily reside. 24 A. 302; 30 B. 623; 21 M. 419; 29 M. 324; 21 B. 223, dist; 21 M. 324, rel. on. (*Mookerjee and Carnduff*, JJ.) SITARAM *v.* KALANDI PATRA. **13 I.C. 127=17 C.W.N. 999.**

———**O. 5, Rr. 17 and 20**—*Substituted service—Conditions.*

Substituted service can be effected under the new code if the Court is satisfied that proper efforts had been made to find out the deft. and in spite of them the deft. could not be found. (*Mookerjee and Teunon*, JJ.) KUMUD NATH *v.* JATINDRA NATH. **13 C.L.J. 221=9 I.C. 189=15 C.W.N. 399=38 Cal. 394.**

———**O. 5, R. 17**—*Service by affixture—Temporary absence of defendant—Duty of Court.*

Mere temporary absence of the deft. does not justify the serving officer in affixing a copy of the summons on the door of his house. Before that can be done all due and reasonable diligence to find him must be used, and where it cannot be said that this was done, service by affixture is improper. (*Scott-Smith*, J.) NIHALA *v.* KHAZAN SINGH. **73 I.C. 34 (1)=1924 Lah 239.**

[But see 42 M.L.J. 422].

———**O. 5, Rr. 17 and 20**—*Substituted service—When effectual—Order of Court.*

In the absence of an order passed by the Court under O. 5, R. 20 for effecting substituted service, there is no legal service as contemplated by the C. P. Code. (*Shadi Lal and Wilberforce*, JJ.) BARKAT ULLAH *v.* FAZAL MAULA. **55 I.C. 824.**

———**O. 5, R. 17**—*Service of summons—Modes of.*

There are three modes of serving a summons on a deft.; (1) by delivery of a copy of the summons to deft. personally or to an agent and obtaining his signature in acknowledgment of service; (2) by affixing a copy of the summons on the door of deft.'s residence or place of business; (3) and by effecting substituted service as laid down in O. 5, R. 20, C.P.C. Mere

C. P. CODE (V of 1908), O. 5, R. 17.

delivery of summons to a person who refused to accept it is not by itself sufficient. (*Broadway*, J.) DIWAN CHAND *v.* MUSAMMAT PARBATI. **99 P.R. 1918=48 I.C. 28=184 P.W.R. 1918.**

———**O. 5, R. 17 and O. 9, R. 13**—*Ex-parte decree—Application to set aside—Return of process server—Denial of—Refusal to accept service.*

From the affidavit of the serving officer it appeared that the deft. refused to accept service of the summons which was, therefore, affixed to the outer door of his dwelling. The Court granted an *ex parte* preliminary decree to the plff. for dissolution of partnership and accounts and directed the deft. to file a true and full account of the partnership. The deft. applied for setting aside the *ex parte* decree. *Held*, that inasmuch as the deft. refused to accept service of the notice although it was read out to him and he was repeatedly asked to receive it and as he did not categorically deny the facts stated by the process server in his affidavit, the Court was justified in proceeding *ex parte* against the deft. (*Rattigan*, C.J. *and Shah Din*, J.) RADHA KISSEN *v.* TIRATH RAM.
41 P.L.R. 1918=43 I.C. 718=31 P.W.R. 1918.

———**O. 5, Rr. 17 and 20**—*Minor—Officer of Court—Guardian* ad litem—*Summons.*

The Court officer appointed as guardian *ad litem* is not a deft. in the literal sense and the proper course in such cases is not to dismiss the suit for non-payment of process fees but to serve a notice on the deft. irrespective of age and sex, if a guardian is necessary, and in case of a minor to satisfy itself, that the infant was served with notice and had an opportunity of being heard. (*Rattigan*, J.) GOBIND RAM *v.* MUHAMMAD ALI. **115 P.W.R. 1911=211 P.L.R. 1911=11 I.C. 317=35 P.R. 1912.**

———**O. 5, R. 17**—*Affixture to outer door—Propriety of.*

The petitioner at the hearing of an application to set aside an *ex parte* decree alleged that the summons had not been affixed on the outer door of his house as stated in the return but the court refused to enquire into the matter and dismissed the petition. *Held*, that the disposal of the petition was irregular and the court must enquire and come to a conclusion on the evidence. (*Kumaraswami Sastri*, J.) KARUTHAN AMBALAM *v.* DORAISWAMI AIYANGAR. **16 L.W. 444=1923 Mad. 27.**

———**O. 5, R. 17**—*Service by affixture—Temporary absence,*

Service by affixture during the temporary absence of the party to be served with a notice, on the outer door of his house where his wife was living is sufficient service within the meaning of O. 5, R. 17. (*Oldfield and Ramesam*, JJ.) KASIVISVANATHAM CHETTY *v.* SOMASUNDARAM CHETTY. **42 M.L.J. 422=(1922) M.W.N. 178=70 I.C. 611=45 M. 875=1922 Mad. 93.**
[But see 73 I.C. 34 (1)].

C. P. CODE (V of 1908), O. 5, R. 17.

———**O. 5, R. 17**—*Foreign resident—Non-service on defendant.*

The mere fact that the Collector refused to serve the summons is not a reason for dismissing a suit. Service of summons should be effected by affixing the summons to the last known place of residence of the deft. in British India and by registered post. (*Kumaraswami Sastri*, J.) ABDUL KADYA BEARI *v.* SHABYODE KUNHI AHMED. **32 I C. 820.**

———**O. 5, Rr. 17 and 19**—*Affixture—Summons 'if duly served.'*

The summons returned by the serving officer cannot be said to have been 'duly served'. (*Sadasiva Aiyar and Tyabji*, JJ.) VELLAYAPYA CHETTY *v.* VEERAPPA CHETTY.
(1914) M.W.N. 79=22 I.C. 498=1 L.W. 1.

——**O. 5, R. 17**—*Affixture—Absence of defendant.*

The affixing of a copy of the summons on the outer door is sufficient service if the deft. is absent and it is not known when he would return. (*Abdur Rahim and Spencer*, JJ.) KASIVISVANATHAN *v.* ARUNACHELAM CHETTY.
21 M L.J 978=10 M.L T. 566=12 I.C. 420=(1911) 2 M.W.N. 357.

——**O. 5, R. 17**—*Service of summons—Personal service—Necessity for—Diligence.*

Where there is an agent empowered to accept service on behalf of the deft. or any other person on whom service can be made, it is not incumbent on the serving officer to make such diligent efforts to effect personal service as in a case where there is nobody else on whom service can be made. (*Hallifax*, A J.C.) MADAN SINGH *v.* KESHEO PRASAD. **8 N.L J. 41=66 I.C. 44=1922 Nag. 105.**

———**O 5, R. 17**—*Service by affixture—Temporary absence—Only one attempt—Effect.*

Service by affixture should not be made the very first time notice is sought to be served. If it is done and a decree is passed *ex parte*, it is sufficient cause within the meaning of O. 9, R. 13 to set aside the decree Temporary absence at the time of the process-server's call does not mean he cannot be found within the meaning of O. 5, R. 17. (*Dalal*, A. J. C.) MATHURA SINGH *v.* SHEO MOHAN PRASAD.
9 O. & A.L.R. 437=10 O L J. 337=74 I.C. 792=1924 Oudh 287.

———**O. 5, R. 17**—*Service of notice—Ladies—Notice tendered to adult member is sufficient.*

Where a notice was ordered to two ladies and it was tendered to an adult male resident of their house who was closely related to them and he refused to take the notice whereupon it was affixed to their door. *Held*, that the service was sufficient. (*Daniels*, A.J C.) MT. BASHIRAN *v.* BISHAMBHAR NATH.
9 O.L.J 439=69 I C. 667=1923 Oudh 268.

———**O. 5, R. 17**—*Substituted service—Validity.*

C. P. CODE (V of 1908), O. 5, R. 19.

In the temporary absence of the person to be served with notice, the server must take every step to effect personal service. If without doing so the process server affixes the summons to the outer door of the house, a Court is not justified in treating this as due service. The C. P. Code does not take into account the female members of the family on the presumption that they would not necessarily inform the male of what took place in his absence. (*Kanhaiya Lal*, A J.C.) RAM HARAK *v.* SARAJU PRASAD. **16 I.C. 600=16 O.C. 83.**

——**O. 5, R. 17**—Ex parte *decree—Setting aside.*

A judgment-debtor cannot bring a separate suit, to set aside an *ex parte* decree against him on the ground that provisions of O. 5, R. 27 were not complied with. An *ex parte* decree is final unless it is shown that a deception was practised upon the Court, preventing it from arriving at a true appreciation of the merits of the case. (*Roe and Jwala Prasad*, JJ.) MEGHA KOER *v.* DEO NARAIN RAI.
38 I C. 207=1 Pat. L.W. 246.

———**O. 5, R. 17**—*Substituted service—When proper.*

The serving officer must make enquiries to follow the person, and should go to his house where he is likely to be found at home before effecting substituted service. (*Saunders*, J.C.) MAUNG MAUNG THAN *v.* SOMASUNDARAM CHETTY. **50 I.C. 566=(1918) 3 U.B.R. 128.**

——**O. 5, Rr. 18, 19**—*Identification of person sought to be served—Identifier need not be supplied by party.*

It is not incumbent on a party to provide an identifier for the purposes of O. 5, R. 18, C. P. Code. The identifier may be a person in the village knowing the defendant. (*Jwala Prasad and Ross*, JJ.) NAGENDRA NATH GHOSH *v.* SAMBU NATH PANDE. **8 Pat. L.T. 498=66 I.C. 49=1923 P. 114.**

——**O. 5, Rr. 19 and 20**—*Substituted service.*

Where it is a question of substituted service and the defendant has not been served personally, it is most essential that the requirements of the rules of the C.P.C. should be strictly observed in all respects. (*Sanderson*, C.J., *Woodroffe and Mookerjee*, JJ.) KASIM EBRAHIM SALEJI *v* JOHURMAL KHEMKA.
43 Cal. 447=34 I.C. 799=23 C L.J. 183=20 C.W N. 173.

——**O. 5, R. 19 and O. 9, R. 13**—Ex-parte *decree—Finding that service was sufficient not recorded.*

Where a Small Cause Court without recording any order under O. 5, R. 19, Civil Procedure Code, and without finding that the service was sufficient decreed the suit *ex parte*, *Held*, that the *ex parte* decree must be set aside. (*Ramesam*, J.) PERINGADI ABDU RAHIMANHAJI *v.* KARUVANTAKATH MOIDIN. **15 L.W. 17=1922 Mad. 417 (1).**

C. P. CODE (V of 1908), O. 5, R. 19.

———O. 5, R. 19—*Return of summons—Order of court.*

If summonses are returned unserved, the subsequent orders of the Court should be very clear stating the cause of non-service, etc. A vague order to the effect "no vigilant steps are taken to secure attendance of witnesses" is not sufficient. (*Benson and Sundara Aiyar*, JJ.) PONNA KRISHNAVASUNDRUDU *v.* KOVVIRIRI BASURI REDDI. **15 I.C. 188 = (1912) M.W.N. 174.**

———O. 5, R. 20 — *Substituted service—When to be ordered.*

Under O. 5, R. 20 substituted service should be ordered only when the court is satisfied that there is reason to believe that the defendant is evading service or that summons cannot be served in the ordinary way. Where the plaintiff knew all along that defendant had left a certain place two or three years before suit, it cannot be said he was evading service at that place. (*Chevis*, J.) RAM KISHAN *v.* MULA. **69 I.C. 467.**

———O. 5, R. 20—*Service by affixture—Affixing of summons on outer door, if sufficient.*

Affixing of summons to a defendant on the outer door of his house in his absence without any attempt to effect service on the defendant at the place to which he had gone, is not sufficient service. The mere fact that a third person unconnected with the suit enquired of the defendant as to what had been done with the suit, is not sufficient to declare that the defendant had notice of suit. (*Spencer and Seshagiri Aiyar*, JJ.) KATTAMPUDI SUBBIAH CHETTY *v.* WALJI LALJI SAIT. **29 I.C. 26.**

———O. 5, R. 20—*Copy attached to tree near house is sufficient.*

Provided the tree to which the copy of summons is attached was reasonably near the hut, that would probably be sufficient. (*Batten*, J.C. *and Hallifax*, A.J.C.) PANJAB RAO *v.* BAJIRAM. **69 I.C. 549 = 1923 Nag. 13.**

———O. 5, R. 22—*Service by post—Bombay High Court Civil Circulars*, 1912, *Chap.* 1, *R.* 20.

The service of summons by post is allowed to litigants as a matter of convenience. Retrial should be ordered if, after the decree has been passed against him on evidence that the summons was sent by registered post and returned refused, when he appears and denied that the packet has ever been delivered to him by the postal authorities. (*Macleod*, C.J. *and Shah*, J.) SUNDER *v.* MAKAN **23 Bom. L.R. 908 = 46 Bom. 130 = 64 I.C. 386 = 1922 Bom. 377.**

———O. 5, R. 25—*Defendant residing in foreign country—Summons sent by registered post—Return of cover—With endorsement "refused"—Service, if proper.*

It is a proper service of summons where the same is sent by registered post to the defendant's address and the cover is returned to the Court with the endorsement 'refused'. (*Robertson*, J.) BALURAM RAMKISSEN *v.* BAI PANNABAI. **35 Bom. 213 = 11 I.C. 351 = 13 Bom. L.R. 328.**

C. P. CODE (V of 1908), O. 6, R. 2.

———O. 5, R. 28—*Service on soldiers—Sepoy—Notice received without objection without the intervention of Commanding Officer.*

Where a notice was served upon a sepoy directly and accepted by the sepoy he cannot afterwards raise, in an application to set aside an *ex-parte* decree, the objection that the notice was not served through the Commanding Officer. (*Johnstone*, J.) SANTU *v.* ARJAN DAS. **13 I.C. 318 = 131 P.W.R. 1912.**

———O. 6, 47, R. 1 (1) (c)—*Other sufficient reason—Prior case reversed in appeal.*

When a decree in a small cause suit was based on a finding in an original suit, and set aside in appeal, the proper procedure was to apply to the Court which passed the decree to revise its decision. (*Benson*, J.) MUTHUSWAMY *v.* BHUMMUGARUNDARAM. **19 I.C. 214 = 13 M.L.T. 226.**

———O. 6, R. 2—*Plaint in collision cases—Frame of.*

The decision of a case, should be founded upon a case to be found in the pleadings or involved in or consistent with the case thereby made. In collision cases, especially, the plaint should be so framed that it sets out the circumstances of the collision, with clearness and accuracy, to enable his adversary to know the case he has to meet, and to state the particular acts of negligence that, according to him caused the collision. (*Mookerjee and Buckland*, JJ.) REES *v.* YOUNG. **25 C.W.N. 819 = 66 I.C. 745 = 34 C.L.J. 178.**

———O. 6, R. 2—"*Essentials of plaint*".

A plaint should state, with substantial accuracy, the nature of the relief sought and the facts and the nature of deeds entitling him to the relief prayed for to put the defendant on his guard so as not to embarrass him at the trial but it need not disclose the evidence. (*Mookerjee and Roe*, JJ.) MATI LAL PODDAR *v.* JUDHISTIR DAS. **22 C.L.J. 354 = 31 I.C. 181 = 20 C.W.N. 310.**

———O. 6, R. 2—*Plea of transfer without landlord's consent.*

In a suit between the transferee of a holding and his original tenant, settled on the land by the landlord, the plea of the validity of the transfer can be raised; but as between two purchasers it cannot be raised. (*Coxe*, J.) BAHAR MAHMUD BEPARI *v.* SADER MUHAMMAD MONDAL. **9 I.C. 837.**

———O. 6, R. 2—*Denial of marriage includes denial of validity of marriage.*

The denial of a marriage ceremony in answer to a claim for restitution of conjugal rights covers the plea that, if the marriage, if performed, was otherwise invalid. (*Wilberforce and Abdul Qadir*, JJ.) RAMJAWAI *v.* GOPAL CHAND. **64 I.C. 150.**

C. P. CODE (V of 1908), O. 6, R. 2.

———**O. 6, R. 2**—*Pleadings—Object of.*

The object of pleadings is to bring the parties to an issue and they must be looked at, only for the purpose of being informed of the allegations and contentions of the parties. They do not prove that those allegations and contentions are true, (*Sadasiva Aiyar and Tyabji, JJ.*) APPAVU CHETTIAR *v.* NANJAPPA GOUNDAN. **14 M.L.T. 117 = 20 I.C. 792 = 25 M.L.J. 329.**

———**O. 6, R. 4**—*Fraud — Collusion — Nature of—Proof necessary.*

Charges of fraud and collusion must be proved by those who make them by established facts or inferences legitimately drawn from those facts taken together as a whole. Suspicions and surmises and conjectures are not permissible substitutes for those facts or those inferences, but that by no means requires that every puzzling artifice or contrivance resorted to by one accused of fraud must necessarily be completely be unravelled and cleared up and made plain before a verdict can be properly found against him. (*Lord Atkinson.*) SATISH CHANDRA CHATTERJEE *v.* KUMAR SATISH KANTA ROY. **43 M.L.J. 363 = 33 M.L.T. 326 = 28 C.W.N. 827 = 73 I.C. 391 = 39 C.L.J. 165. (P.C.) = 1923 P.C. 73.**

———**O. 6, R. 4**—*Fraud—Undue influence — Coercion — Separate categories — Specific allegations necessary.*

Under the contract law of India as well as by ordinary principles, coercion, undue influence, fraud, and misrepresentation (though they may overlap or may be combined) are all separate categories in law. General allegations, however strong, are insufficient even to an averment of fraud of which any court ought to take notice. 15 I. A. 119, Ref. (*Lord Shaw.*) BAL GANGADHAR TILAK *v.* SHRI SHRINIWAS PANDIT. **39 Bom. 441 = 13 A.L.J. 570 = 19 C.W.N. 729 = 17 Bom. L.R. 527 = 22 C.L.J. 1 = 29 M.L.J. 34 = 18 M.L.T. 1 = (1915) M.W.N. 484 = 2 L.W. 611 = 29 I.C. 639 = 42 I.A. 135 (P.C.).**

———**O. 6, R. 4**—*Fraud—Particulars—Duty to disclose—Procedure.*

Where the defendant pleads fraud in his defence in a vague position it is the duty of the pleader for the plaintiff to apply to the Court to order the defendant to deliver further and better particulars of the charge of fraud. When settling issues it is the duty of the Judge himself to require the defendant to specify with particularity the nature of the fraud alleged. Subordinate Judges should be watchful to see that in all cases the parties have pleaded their cases so plainly, fully and clearly that each side knows the nature of the case which has to be met, and this rule is one of general application. Frequently the result of ordinary particulars of nebulous claims and defences will be to make it manifest that the claim or defence has no substance. A Subordinate Judge should, when ordering particulars to be given, order the party in default to pay a specified sum of costs to the other side for the costs occasioned by the application; such payment to be made on or before the delivery of the particulars. If the order is disobeyed and if the plaintiff is in default he should have his action staged; and if the defendant is in default, his defence should be struck out. Particulars having been furnished the Judge should be careful at the trial to exclude all evidence which is not fairly covered by the original paragraph and particularly should give that as his reason. (*Mears, C.J. and Piggott, J.*) GAURI SHANKER *v.* MANKI KUNWAR. **21 A.L.J. 871 = L.R. 4 A. 464 = 43 A. 624 = 74 I.C. 466 = 1924 All. 17.**

C. P. CODE (V of 1908), O. 6, R. 4.

———**O. 6, R. 4**—*Fraud—Not specifically alleged—No objection taken at first hearing.*

Though the general rule is that where fraud is alleged and relied on, it must, before it can be proved, be clearly stated as is required by O. 6, R. 4, the rule does not apply where the party aggrieved raises no objection and fights out the case at the first hearing as though the pleadings were in proper form. (*Walsh, J.*) BENI MADHO *v.* BASANTO KUNBI. **35 I.C. 252.**

———**O. 6, R. 4**—"*Undue influence.*"

Specific allegation of undue influence is unnecessary if there is already an allegation of fraud in the plaint. (*Scott, C.J. and Shah, J.*) NARAYANBHAT BHIMBHAT JOSHI *v.* AKKUBAI MANOHARBHAT JOSHI. **33 I.C. 576 = 18 Bom. L.R. 27.**

———**O. 6, R. 4**—*Coercion—Fraud—Particulars to be stated.*

Where fraud or coercion is alleged, it must, by law, be supported by particulars and it is only after due proof and establishment of those particulars, can the Court find as a matter of fact that the alleged fraud or coercion is proved. A Court cannot give the go by to every material particular alleged, and yet reach the conclusion which ought only to be reached by those steps. A mere suspicion or probability is not sufficient to prove coercion. (*Beaman and Hayward, JJ.*) PURUSHOTTUM DAJEE MANDLIK *v.* PANDURANG CHINTAMAN. **39 Bom. 149 = 28 I.C. 921 = 17 Bom. L.R. 187.**

———**O. 6, R. 4**—*Fraud of one kind alleged—Relief on another ground cannot be given.*

In a case based on a fraud of a particular kind no relief can be given on any other ground. But the obtaining of a benefit by undue influence is a fraud of the gravest kind and when such fraud is alleged and proved the allegation that they were parts of a scheme very early conceived is, whether made out or not, of no material consequence. (*Mookerjee and Buckland, JJ.*) SATIS *v.* KALIDASI. **34 C.L.J. 529 = 68 I.C. 577 = 26 C.W.N. 177 = 1922 Cal. 202.**

C. P. CODE (V of 1908), O. 6, R. 4.

———O. 6, R. 4—*Allegation of custom to be specific.*

A custom should be specifically pleaded and all the essential requisites to its validity and binding effect must be proved. (*Mookerjee and Panton*, JJ.) GOPALKRISHNA *v.* ABDUL.
66 I.C. 640=34 C.L.J. 319.

——O. 6, R. 4—*Fraud—Pleading and proof—Variance between.*

A charge of fraud must be substantially proved as laid, so that when one kind of fraud is charged, another kind of fraud cannot, upon failure of proof, be substituted for it. 11 Bom. 620, rel. Every variance between pleading and proof is not fatal; the Court must carefully consider whether the objection is one of form or of substance. (*Mookerjee and Panton*, JJ.) KUMAR SATISH KANTHA ROY *v.* SATISH CHANDRA CHATTERJEE. 24 C.W.N. 662=55 I.C. 689=30 C.L.J. 475.

———O. 6, R. 4—*Fraud—Particulars to be given.*

Allegations of fraud have to be particularised in the plaint and unless this is done the question of fraud will not be enquired into. (*Chaudhuri and Cuming*, JJ.) ANNADA CHARAN MONDAL *v.* ATUL CHANDRA MALIK.
23 C.W.N. 1045=54 I.C. 197=31 C.L.J. 3.

———O. 6, R. 4—*Undue influence—Denial of execution.*

The Court should not go into the question of undue influence where the defendant denies the execution of the mortgage and does not give particulars of the alleged undue influence as required by O. 6, R. 4 of the C. P. Code. (*Fletcher and Smither*, JJ.) KAHHI RANNASSA CHOWDHURANI *v.* HEM CHARAN KASYA. 47 I.C. 11 (Cal.)

———O. 6, R. 4—*Fraud—Plea of defendant involved in fraud—Proof.*

A defendant who wants to defeat the claim of a plaintiff on the ground of fraud alleging that he was a party to the fraud, must produce strong evidence to establish the fraud to extricate himself. (*Chatterjee and Newbould*, JJ.) AKIL CHANDRA SAHA *v.* GIRISH CHANDRA SAHA.
41 I.C. 302=21 C.W.N. 864.

———O. 6, R. 4—*Fraud—Pleading and proof—Variance.*

General allegations of fraud, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any court ought to take notice and a plaintiff seeking relief on the ground of fraud is bound under O. 6, R. 4 to specify in his plaint the facts constituting the fraud, and when one kind of fraud is charged, another kind of fraud cannot, upon failure of proof, be substituted for it. (*Mookerjee and Beachcroft*, JJ.) NAGENDRA NATH BASU *v.* PARBADI CHARAN KOYAL. 33 I.C. 339=20 C.W.N. 819.

C. P. CODE (V of 1908), O. 6, R. 4.

———O. 6, R. 4—*Fraud—Pleadings and proof—Variance.*

A plaintiff impeaching a transaction on the ground of fraud should distinctly, accurately and specifically set forth in the plaint, the facts constituting the alleged fraud; the proof of fraud must be consistent with a case set out in the pleadings and when one kind of fraud is charged another kind of fraud, cannot, on failure of proof, be substituted for it. (*Mookerjee and Beachcroft*, JJ.) BANSIRAM *v.* SECRETARY OF STATE. 35 I.C. 284=20 C.W.N. 638.

———O. 6, R. 4—*Fraud—Particulars to be specified.*

A rent-decree cannot be set aside on the ground of fraud if the fraud is not clearly and precisely alleged in the plaint at all. (*Sharfuddin and Coxe*, JJ.) BIBI SALIMAN *v.* UDHORAN SAHI. 27 I.C. 890.

———O. 6, R. 4—*Special plea—Must be distinctly raised.*

A plea of a special nature must be distinctly pleaded and made the subject of a distinct issue. (*Jenkins*, C.J., *and Roy*, J.) BISHNU CHARAN ROY *v.* BIPIN CHANDRA ROY.
25 I.C. 729=18 C.W.N. 622.

———O. 6, R. 4—*Fraud—Misconduct—Particulars—Proof of.*

In a suit based on fraud, plaintiff should state precisely what the fraud is, which he alleged, and against whom he charges it. Such charges must be proved clearly and beyond reasonable doubt. (*Woodroffe, Coxe and Chatterjee*, JJ.) D. WESTON *v.* PEARY MOHUN DAS.
40 Cal. 898=23 I.C. 25=18 C.W.N. 185.

———O. 6, R. 4—*Fraud—Allegation to be clear.*

A plea of fraud must be raised in clear and specific terms and at the earliest opportunity. (*Coxe and Roy*, JJ.) KHIRODE CHANDRA GHOSE *v.* JANKI DAS. 20 I.C. 758.

———O. 6, R. 4—*Fraud—Want of consideration.*

The plea of want of consideration is distinguishable from a plea of fraud. If there is no consideration there is no valid contract. If there is a consideration there is a contract, though it may be voidable on the ground of fraud. (*Chevis*, J.) NEKI RAM *v.* KHUSHI RAM. 39 P.L.R. 1919=51 I.C. 879=14 P.W.R. 1919.

———O. 6, R. 4—*Fraud—Specific allegations.*

No man ought to be found guilty of fraud and collusion (which is a particularly gross kind of fraud) unless it is clearly and unambiguously alleged and put in issue against him. It is not enough that there are allegations in the written statement of the deft. from which a plea of

C. P. CODE (V of 1908), O. 6, R. 4.

this kind against the plff. can be spun out. *Spencer and Coutts-Trotter*, JJ.) SANKUNNI MENON *v.* NALLAPPAH RAMUNNI MENON.
29 I.C. 482.

——O. 6, R. 4—*Fraud—Plea of—Court's duty.*

A Court is bound to consider a plea of fraud distinctly raised, though the allegations on which it is based are not set out in detail. (*Stanyon*, A. J. C.) AMRITABAI *v.* JABBANBI.
46 I C. 676.

——O. 6, R. 4—*Fraud—Omission in pleadings—Plea can be raised when party becomes aware of it.*

A party who is not aware of fraud and does not set up the plea in pleadings, can do so as soon as he becomes aware of the fraud. (*Stuart*, J. C.) RADA KISHEN *v.* WAJIB ALI KHAN.
3 O.L.J. 801=36 I.C. 746=19 O C. 334.

——O. 6, R. 4—*Fraud—General averment not sufficient.*

A general averment in the plaint that a survey entry has been obtained by fraud is not sufficient. It must be stated who committed the fraud and if full particulars are not given as required by R. 4, the plaint should be rejected. (*Miller*, C. J., *Mullick and Bucknill*, JJ.) HARE KRISHNA SEN *v.* UMESH CHANDRA DUTT.
2 Pat. L.T. 528=
3 U P.L.R. (Pat) 57=
62 I.C. 962=1921 Pat. 209=
6 P.L.J. 373 (F.B.).

——O. 6, R. 4—*Fraud—Particulars to be given.*

Under the rule, the party relying on fraud must clearly state its particulars in pleadings. It does not admit of general objections. (*Jwala Prasad*, J.) JANKI KUER *v.* MAHABIR SINGH.
58 I.C. 317=2 U P.L.R. (P.) 242.

——O. 6, R. 4—*Fraud — Specific allegations.*

The allegations of fraud, in a suit based on it must be specific. (*Saunders*, J.C.) MANIKCHAND *v.* GIRIDHARI LAL. 46 I.C. 342=
(1918) 3 U.B.R. 69.

——O 6, R. 4—*Fraud—Plea to be specific.*

A plea of fraud will not be heard unless expressly and specifically advanced in the pleadings. (*Twomey*, J.) LAL MAHOMED *v.* MRA THA AUNG.
8 Bur. L.T. 269=30 I.C. 20=8 L.B.R. 185.

——O. 6, R. 5—*Particulars—Plaint.*

If averments in a plaint are not precise, the defendant can apply for particulars. Failure to do so, operates as estoppel in second appeal. (*Das and Coutts*, JJ.) PREM SUKH DAS *v.* RAM BUJHAVAN MAHTO. 1 Pat L.T. 34=
52 I.C. 964=1919 Pat. 451.

——O. 6, R. 6—*Condition precedent—Allegation and denial—Pleadings.*

It is for the defendant, if he contends that there was a condition precedent and that it has

C. P. CODE (V of 1908), O. 6, R. 14.

not been duly performed to state specifically what the condition was and to plead its non-performance otherwise its due performance will be presumed. (1914) 1 Ch. 920, Rel. (*Ross*, J.) MURLI MANOHAR *v.* RAJA NAND SINGH.
72 I.C. 1=1924 P. 205.

——O. 6, R. 7—*Alternative claim—New case.*

A plaintiff must ordinarily be limited to the case which he puts forward in his plaint, though he may put forward an alternative case in the plaint so that the defendant may know if he has more than one case to meet and may not be taken by surprise. A court cannot make out a new case for the plaintiff which the defendant has had opportunity to meet. (*Shadi Lal and Wilberforce*, JJ.) MAHOMED SHAH *v.* FATTA. 4 P.W.R 1920=
54 I.C. 43=2 U.P.L.R. (L) 17=
15 P.L.R. 1920.

——O. 6, R. 7—*Pleadings—New grounds of claim—Whether the court can ignore them—Whether remand justified.*

Under the rule the court can ignore subsequent pleadings. Omission to record an order rejecting them does not justify a remand. (*Macnair*, A.J.C.) GOVIND SINGH *v.* MUNGAGI.
57 I C. 684.

——O. 6, R. 8—*Denial of execution—Want of consideration.*

Plea of want of consideration can be raised even when execution of the document is denied. (5 C. 684 : 13 M. 549 ; 18 A. 125, Ref.) (*Fox*, C.J., *and Twomey*, J.) VENKATACHELLAM CHETTY *v.* MAUNG KYANK LON.
4 Bur. L.T. 24=9 I.C. 469=5 L.B.R. 261.

——O. 6, R. 10—*Fraud—Pleadings.*

Allegation of fraud must be taken in the pleadings and must not be allowed to be made at a later stage of the suit. (*Coutts Trotter and Seshagiri Aiyar*, JJ.) GOVINDASAWMY NAIDU *v.* ETHIRAJAMMAL. 34 I.C. 1=
(1916) 1 M.W.N. 180.

——O. 6, R. 10—*Fraud — Particulars necessary.*

A person alleging fraud must state in detail the facts constituting fraud. A vague allegation of fraud cannot be accepted. A judgment-debtor applying to set aside an execution sale on the ground of fraud must clearly state in his petition as to how he was kept from the knowledge of the execution proceedings and the sale, and how this fraud was practised and how he came to know of the sale. Mere want of diligence is not fraud. (*Jwala Prasad and Adami*, JJ.) BABU DAS NARAYAN SINGH *v.* MUHAMMAD YUSUF *alias* BHEKHO.
3 U.P.L.R. (Pat.) 33 =61 I.C. 823=
2 Pat. L.T. 401=1921 Pat. 181.

——O. 6, Rr. 14 and 15—*Pleadings—Admissions in, by pardanashin woman, value of.*

Strict proof of the pleadings, having been read out and explained to pardanashin ladies should be had, before they are accepted as

satisfactory proof of the contents. (*Lord Atkinson*). SADIK HUSAIN KHAN *v.* HAJINI ALI KHAN. 38 All. 627=31 M.L.J. 607= 14 A.L.J. 1248=19 O.C. 192= 18 Bom L R. 1037=21 C.W.N. 130= (1916) 2 M.W.N. 577=21 M.L.T. 40= 1 P. L. W. 187=4 O. L. J. 22= 25 C.L.J. 363=6 L.W. 378= 10 Bur. L.T. 140=36. I.C 104= 43 I.A. 212 (P. C.).

[Reversing 13 I. C. 882=14 O. C. 386.]

——O. 6, R. 14—*Signature of plaint—Prisoner in jail.*

The breach of Jail Regulations by the prisoner, his pleader or friends cannot destroy a cause of action or invalidate a plaint. A person in jail, who is unable to sign a plaint, may authorise some other person under O. 6, R. 14 to sign it for him and the plaint so signed will be a valid plaint. 22 All. 55, Ref. The object of courts is to decide the right of parties and not to punish them for mistakes which they may make in the conduct of their case. (*Walsh*, J.) BISHESHAR NATH *v.* EMPEROR. 16 A. L. J. 64=44 I C. 28= 19 Cr. L.J. 865=40 A. 147.

——O. 6, R. 14—*Signature of* mukhtear.

A written statement as also a plaint may be presented or tendered by a *mukhtear*, but neither can be signed by him. (*Mookerjee and Beachcroft*, JJ.) LEAKAT HOSSEIN *v.* BISESSUR SANYAL. 16 I.C. 255= 16 C.L J. 578.

——O. 6, Rr. 14 and 15—*Plaint—Omission to sign—Effect.*

An omission by the plaintiff to sign the plaint is no ground for rejecting it; the plaint ought to be returned for amendment. (*Johnstone*, J.) NAND LAL *v.* SHANKRU. 165 P.W.R. 1911=11 I.C. 842= 254 P.L R. 1911.

——O. 6, R. 14—*Signature of plaint.*

A plaint is properly signed under O. 6, R. 14 when it is signed by a person specially authorised to do so by a company, which is incorporated in a foreign country. (*Rattigan*, J.) SINGER MANUFACTURING COMPANY, DELHI *v.* IJAR MAHOMED KHAN. 8 P R. 1912= 160 P.L.R. 1911=10 I.C. 141= 251 P.W.R. 1911.

——O. 6, R. 14—*Pleadings—Signature.*

If the plaintiff resides, within the jurisdiction of the Court in which he brings a suit, he must sign the plaint. (*Drake-Brockman*, J.C.) DURGAGIR *v.* KOLLU. 10 I.C. 731= 7 N.L.R. 33.

——O. 6, Rr. 14, 15—*Signing and verification—Technical defects can be amended.*

Where the manager of a Bank gives a power of attorney to one of the Directors, who happens to be a Pleader to institute a suit and the plaint is filed as signed by him and verified by the Accountant of the Bank, there is nothing

irregular. Defects of this category are merely technical and can be allowed to be amended. (*Pipon*, J. C.) NATHU RAM *v.* THE LYALLPUR BANK. 69 I.C. 422.

——O. 6, R. 15—*Verified plaint—Value of.*

A verified plaint is not legal evidence of the facts contained in it, though a false verification may be the basis of a prosecution under S. 193 of the I.P.C. and comes within the definition of the false evidence. (*Sanderson*, C.J., *Woodroffee and Mookerji*, JJ.) J. B. ROSS *v.* C. R. SCRIVEN. 20 C W.N. 1192= 34 I.C. 285=43 Cal. 1001.

——O. 6, R. 15—*Verification—Importance of.*

A verification is a matter of great importance as possessing the security of being made under the sanction of a solemn declaration for which the person making it would be liable to the penalties attaching to the crime of giving false evidence, if the declarations were false to his knowledge. (*Jenkins*, C.J., *Stephen and Chaudhuri*, JJ.) *In re* AN ATTORNEY. 19 I.C. 993=14 Cr. L.J. 305=41 Cal. 113.

——O. 6, R. 15—*Pleadings—Allegations—Duty of plaintiff.*

A plaintiff when he brings a suit, must place before the Court all the facts relating to the claim, which are within his knowledge and must vouch for the truth of his allegations in the plaint. (*Lindsay*, J.C.) SARUP NARAIN *v.* SHEO SHANKAR LAL. 42 I.C. 416= 4 O.L.J. 522.

——O. 6, R. 15—*Pleadings—Falsification If punishable.*

A wilful falsification of pleadings is punishable by the Criminal law. (*Parlett*, J.) BRITISH INDIA STEAM NAVIGATION CO., LTD. *v.* FAKIR MOHOMED. 25 I.C. 805= 7 L.B.R. 257.

——O. 6, R. 16—*Alternative case—Right to set up.*

Either party to a litigation may in a proper case include in his pleadings two or more inconsistent sets of material facts and claim relief thereunder in the alternative; but whenever such alternative cases are alleged, the facts belonging to them respectively should not be mixed up but should be stated separately so as to show on what facts such alternative relief is claimed. (*Mookerjee and Panton*, JJ.) OFFICIAL ASSIGNEE OF CALCUTTA *v.* BIDYA SUNDARI DASI. 24 C.W.N. 145= 54 I.C. 700=30 C.L.J. 428.

——O. 6, R. 16—*Inconsistent rights.*

Parties should confine to the pleadings as regards the facts to be proved at the trial; inconsistent rights claimed alternatively may be permitted except when they are destructive of each other. (*Mookerjee and Roe*, JJ.) MATI LAL PODDAR *v.* JUDHISTRI DAS. 22 C.L.J. 254=31 I.C. 181= 20 C.W.N. 310.

C. P. CODE (V of 1908), O. 6, R. 16.

———O. 6, R. 16—*Inconsistent positions.*

Parties litigants cannot assume inconsistent positions in Court to the detriment of their opponents ; where they elect to adopt a certain course of action they will be confined to the course they have deliberately adopted. (*Mookerjee and Beachcroft*, JJ.) GOKHAI PADHAN *v.* GONES LAL PANDIT.

17 C W.N. 566=17 I.C. 936=16 C.L.J. 404.

———O. 6, R. 16—*Alternative pleas.*

In a suit by a member of a joint Hindu family, that an alienation by father does not affect his share, the purchaser may plead not only according to the recital of the sale-deed, that the property was the self-acquisition of the vendor but also in the alternative, that the sale was for purposes binding on the family. (*Seshagiri Aiyar and Phillipps*, JJ.) AUDIMULA MUDALI *v.* ALAMELAMMAL.

(1916) 2 M.W.N. 115=36 I.C. 365=
4 L.W. 126.

———O. 6, R. 16—*Expunging remarks.*

A Sub-judge while allowing amendment of a Devasthanam scheme petition remarked 'He did not care a brass farthing for Devasthanam. It is not a case for the High Court to exercise the power of expunging the remarks. (*Sadasiva Iyer and Moore*, JJ.) RAMA BADRA NAIDU *v.* ARUNACHELAM CHETTIAR.

33 I.C. 608=3 L.W. 283.

———O. 6, R. 16—*Alternative claims.*

A Court can at any stage of the proceedings direct that any matter in any pleading which may tend to prejudice, embarass or delay the fair trial of a suit be amended or struck out. But the Court is not to dictate to the parties how they should frame their cases. The object of permitting alternative relief to be claimed in one litigation is to obviate the necessity of another litigation, to dispose of the same controversy or the subject matter of the same relief though the ground upon which the relief is claimed, may be different. (*Kanhaiya Lal*, A.J.C.) MUHAMMAD ABDUL HUSSAN KHAN *v.* MUHAMMAD ALI MUHAMMAD KHAN.

20 O.C. 192=41 I.C. 903=4 O.L.J. 499.

———O. 6, R. 16—*Inconsistent pleadings.*

Where in a suit for possession, plff. denied the genuineness of the *wakf* set up in defence, and pleaded in the alternative, that the deed had been obtained from her by fraud and undue influence. *Held*, that there was nothing in the allegations to embarass, delay or prejudice the fair trial so as to justify the Court in taking action under O. 6, R. 16, C.P.C. (*Kanhaiya Lal and Kendall*, A.J.Cs.) FARIDUN-NISSA *v.* MUKTHAR AHMED.

40 I.C. 488=4 O.L.J. 280.

———O. 6, Rr. 16, 17—*Alternative case—Suit for rescission of contract—Amendment asking for specific performance in the alternative can be allowed.*

In an action for rescission of a contract and for return of earnest money, the plaintiff can be allowed an amendment claiming specific performance as an alternative relief, arising out of the same facts. The court has always the power to strike out matters which tend to prejudice, embarass or delay the trial, if the occasion arises during the trial. Scope and effect of the Judicature Act pointed out. (*Das and Macpherson*, JJ.) CHANDRA PRASAD *v.* HIRA LAL.

2 Pat. L.R. 82=
5 Pat. L.T. 49=78 I.C. 483=
(1923) Pat. 357=1924 P. 280.

C. P. CODE (V of 1908), O. 6, R. 17—Abandonment of claim.

———O. 6, R. 16—*Dismissal of suit—Allegations in plaint.*

A suit may be dismissed on the plaint, only when disrespect of the court or obvious embarassment to deft. will be caused by inconsistent allegations made in the course of the suit and not when they occur in the plaint only. (*Chapman and Jwala Prasad*, JJ.) PARAMESWAR SINGH *v.* RAMNAND PRASAD NARAYAN SINGH.

42 I.C. 620=2 Pat. L.W. 226.

———O. 6, R. 17.

ABANDONMENT OF CLAIM.
ADDITION OF PARTY.
ADDITION OF RELIEF.
ALTERNATIVE CASE.
APPELLATE COURT.
CAUSE OF ACTION.
CUSTOM.
DAMAGES.
DEAD MAN.
DECLARATORY SUIT.
DESCRIPTION.
DIFFERENT CAUSES OF ACTION.
DISCRETION.
EJECTMENT.
INCONSISTENT CLAIMS AND PLEAS.
LATE STAGE.
LIMITATION.
MISTAKE.
MORTGAGE.
NATURE OF SUIT.
NEW PLEA OR CASE.
PARTITION.
POWER OF COURT.
PREJUDICE TO DEFENDANT.
PROCEDURE.
REDEMPTION.
REFUSAL TO AMEND.
REVISION.
SHORTENING LITIGATION.
SUBSEQUENT CAUSE OF ACTION.
TECHNICAL DEFECT.

Abandonment of claim.

———O. 6, R. 17—*Abandonment of claim—Effect of.*

The effect of an application to amend a plaint by striking out certain claims is in substance as if the suit had never been commenced in respect of such claims. (*Twomey*, C.J., *and Ormond*, J.) P. MOOLCHAND *v.* PO THEIN.

12 Bur. L.T. 155=31 I.C. 376=
9 L.B.R. 275.

C. P. CODE (V of 1908), O. 6, R. 17—Addition of Party.

Addition of Party.

———O. 6, R. 17—*Addition of party—Limitation.*

Amendment should not be refused on the ground that a fresh party shall have to be joined and that as against him the suit will be time-barred. (*Skinner*, J.C.) BANSIDHER *v.* RAGHAHIR. **10 I.C. 787=7 N.L R. 43.**

Addition of Relief.

———O. 6, R. 17—*Addition of relief.*

Where a suit seeking to disturb a possession which the defts, had been enjoying for a period of 40 years is found to be not maintainable on the basis of the relief asked for, the plff should not be allowed to amend the plaint by asking for the proper relief. (*Richards*, C J. *and Banerji*, J) JUGAL KISHORE *v* SHAFIUDDIN. **14 I.C. 537.**

———O. 6, R. 17—*Addition of relief—Suit for possession of lands—Effect of.*

The addition of a claim for new lands to those claimed first in the plaint is a new relief. (*Woodroffe and Cuming*, JJ.) MANINDRA CHANDRA NANDI *v.* RANGALAL. **41 I.C. 728.**

———O. 6, R. 17—*Addition of relief—Suit for specific performance—Possession.*

In a plaint in a suit for possession a prayer for specific performance of the contract by the execution of a conveyance can be added. Even a Court of Appeal can allow the amendment provided the evidence on which a decree can be passed on the plaint as amended is before the court or can be easily obtained and it is possible to compensate the deft. by costs for any prejudice he is likely to have sustained or sustain. (*Abdur Rahim and Oldfield*, JJ.) SUBRAMANIA IYER *v.* KALYANASUNDARAM IYER. **53 I.C. 283.**

———O. 6, R. 17—*Addition of relief.*

When there has been a part performance of the contract alleged, and when time is not the essence of the contract the plaint should be allowed to be amended under O. 6, R. 17, if necessary. (*Sadasiva Iyer and Napier*, JJ.) SHUNMUGAM CHETTY *v.* SUBBA REDDI. **31 I.C. 1.**

———O. 6, R. 17—*Addition of relief—Limitation.*

Where the amendment does not seek to introduce a new cause of action or one which may be barred at the date of suit but only, prayed for an additional relief in the facts alleged in the plaint, it ought to be allowed. If it changes the cause of action and the suit if brought on that date would be barred, the amendment should be refused. 36 M. 378 Foll.; 27 M. L. J. 25. Dist. (*Ayling and Tyabji*, JJ) NARAYANAN CHETTIAR *v.* RATNASABAPATHI AIYAR. **28 I.C. 828=29 M.L.J. 464.**

C. P. CODE (V of 1908), O. 6, R. 17—Addition of Relief.

———O. 6, R. 17—*Addition of relief—Redemption.*

Where in a suit to declare a mortgage of the *Tarwad* properties by the *Karnawathi* invalid and not binding upon the junior members, of the tarward, a part of the consideration for the mortgage is found to be binding on the family, the plaint should be allowed to be amended by adding a relief for redemption of the mortgage on payment of the binding portion of the debt. 15 M. 15, 13 B. 548. Followed (*Sadasiva Iyer and Hannay*, JJ.) MANI *v.* MOMALAN KANNAN. **26 I C. 443**

———O. 6, R. 17—*Addition of relief—Specific performance—Contract by father of joint family—Suit on behalf of family against father and son*

Where in a suit for specific performance of contract to sell by a father in favour of one member of the joint family the prayer was that the sale-deed should be executed by the father and his undivided son in favour of the other member, the plaint could be amended by a prayer for specific performance against the father alone. (*Ayling and Tyabji*, JJ.) KONDAPANNENI KOTAYYA *v.* GANGARU SESHAYYA. **(1913) M.W.N. 935=21 I.C. 778=14 M.L.T. 496.**

———O. 6, R. 17—*Addition of relief—Suit for recovery of account books from servant—Amendment of plaint to recover monies if can be allowed.*

Where a suit is for recovery of account books from the plaintiff's servant, an application for amendment of the plaint claiming by way of further relief the money due from them, should be allowed even though the latter relief might have become barred in the interval. (*Benson and Spencer*, JJ.) SEVUGAN CHETTY *v.* KRISHNA AIYANGAR, **10 M.L.T. 557=22 M.L.J. 139=13 I.C. 268=36 M. 378.**

———O. 6, R. 17—*Addition of relief.*

A suit ought not to be dismissed merely because the plff. has misconceived the appropriate relief to which he was entitled. He should be allowed to amend his plaint by inserting the proper prayer. (*Abdur Rahim and Ayling*, JJ.) ABDUL KADIR *v.* BANGARU SWAMI NAICKEN, **(1911) 1 M.W.N. 270=10 I.C. 260=9 M.L.T. 429.**

———O. 6, R. 17—*Addition of relief—Amendment of plaint—Principles.*

If the claim sought to be introduced is an entirely different cause of action and is one that was not heard of before limitation expired the amendment ought not to be allowed but if it is nothing more than the original claim in another form and is one that the other party had already to meet no injustice is caused and the amendment ought to be allowed. (*Robinson*, J.) MA E GWE *v.* MA LE WA. **64 I.C. 29=13 Bur. L.T. 201.**

C. P. CODE (V of 1908), O. 6, R. 17—Addition of Relief.

———**O. 6, R. 17**—*Addition of relief—Specific performance—Redemption.*

Where in a suit for redemption on a document, which in fact was a sale-deed with an option to re-purchase, the plff. sought specific performance of the agreement to re-sell, he was allowed to amend plaint as the facts and the relief sought were in effect the same. (*Ormond and Twomey*, JJ.) MA SHWE *v.* MAUNG PO LU. **37 I.C. 91=9 Bur. L T. 177.**

Alternative Case.

——**O. 6, R. 17**—*Alternative case—Pre-emption based on custom or contract.*

A plaintiff basing his suit on a custom of pre-emption, without even mentioning any contract of pre-emption, should not be allowed to amend the plaint at appellate stage. (*Piggott and Walsh*, JJ.) RAM GARIB TIWARI *v.* SHANKER TIWARI. **20 A L J. 15=63 I.C. 242=L R. 3 A. 636=1922 All. 5.**

———**O. 6. R 17**—*Alternative case—Suit based on Muhammadan Law—Application for amendment of plaint to base claim also on wajib-ul-arz.*

If in a suit for pre-emption plff. seeks to put his case in the alternative, court should allow plff. to amend the plaint. But if court finds that the custom of pre-emption exists apart from Muhammadan Law on which the claim was based the claim should be decreed without amendment. (*Richards*, C.J. *and Tudball*, J.) ABDUL HAMID v. MASEETULLAH.

36 All. 673=26 I C. 70=12 A.L.J. 966.

———**O. 6, R. 17**—*Alternative case—Suit on promissory note insufficiently stamped—Original consideration.*

Where the plaintiff, whose suit based on an insufficiently stamped hundi was dismissed, applied for leave to amend his plaint as he wished to sue on the original consideration and the court refused leave, *held* in revision the amendment should have been allowed. (*Martineau*, J.) SUNDAR DAS *v.* PURAN SINGH. **10 P.W.R. 1922=1922 Lah. 394 (1).**

———**O, 6, R. 17**—*Alternative case.*

It is altering the nature of the case to allow a suit by plff. as full owner to be amended into a suit for ejectment by plff. as the manager of wakf property. (*Rattigan and Chevis*, JJ.) RAM DAS *v.* DAULAT RAM.

225 P.L.R 1913=18 I.C. 807=114 P.W.R 1913.

——**O. 6, R. 17** — *Alternative case—Grounds for.*

In a suit for specific performance or in the alternative for damages, plaintiff can be allowed to amend his plaint by giving up his claim for specific performance in view of the fact that the property had depreciated in value. It is a well recognised rule of law that under O. 6, R. 17, C.P.C. the powers of amendment vested in the Court are very wide. (*Raymond*, A.J.C.) EANCHOSE NABSE *v.* ABDUL HUSSAIN.

1922 Sindh 46.

C. P. CODE (V of 1908), O. 6, R. 17—Appellate Court.

Appellate Court

——**O. 6, R. 17**—*Appellate Court—Amendment in second appeal.*

A suit for ejectment cannot be allowed to be so amended in second appeal as to convert it into a suit for redemption. (*Richards and Tudball*, JJ.) MUNNA LAL *v.* MAIKU LAL.

24 I.C. 728.

———**O. 6, R 17**—*Appellate Court—Amendment of plaint.*

A direction by an Appellate Court for amendment of a plaint can be carried out in the Appellate Court. (*Chatterjea and Panton*, JJ.) NRIPENDRANATH *v.* HEMANTA KUMAR.

63 I.C. 701.

——**O. 6, R. 17**—*Appellate Court—Second appeal.*

Order of the Appellate Court allowing an amendment of the plaint is not open to second appeal. (*Fletcher and Smither*, JJ.) KUSUM KUMARI *v.* SURENDRA KRISHNA GHOSE.

42 I C. 455.

——**O. 6, R. 17**—*Appellate Court—Power of.*

If a plaintiff argued in the lower courts that his suit was properly framed and presented, he should not in second appeal be allowed to amend the plaint on admitting that the suit was brought in a wrong form. (*Fletcher and Newbould*, JJ.) CHHATRAPAT SINHA *v.* MAHARAJA BAHADUR SINHA. **39 I.C. 861.**

——**O. 6, R. 17**—*Appellate Court—Powers of—Amendment of grounds of appeal.*

The court has full discretion under the C.P. Code to allow the amendment of pleadings at any stage and if the grounds of appeal are not sufficiently clear, there is no reason why an appellate Court should not direct a report on all the points raised in the applications filed by the parties in the District Judge's Court. (*Scott-Smith and Abdul Raoof*, JJ.) MT. RAM PIARI *v.* SULTAN BAKSH. **3 Lah. 382=77 I.C. 207=1923 Lah. 115.**

———**O. 6, R. 17**—*Appellate Court—Amendment can be allowed in.*

Where plaintiffs alleged but failed to prove exclusive title to certain fraction of the joint estate and where the defendants asserted their exclusive title but it was found that they have no such exclusive title a decree for joint possession of joint property can be given. 29 P.R. 1918, distinguished. The question whether a co-sharer occupying a portion of the joint land without denying the joint-character thereof should be allowed to retain it until partition in the case of *abadi* land when that land has been reduced to a minimum area barely sufficient for the common purposes of the village was raised but was not decided. The highest court of appeal may allow an amendment of the plaint. (*Shadi Lal*, C.J. *and Leslie Jones*, J.) MAUJI ASHAQ ALI *v.* GHULAM MAHOMED. **3 Lah. L.J. 75.**

C. P. CODE (V of 1908), O. 6, R. 17—Appellate Court.

———O. 6, R. 17 — *Appellate Court, Amendment by.*

A pre-emption suit in respect of land transferred on a Adhlapi Tenure, was dismissed on the ground of the plff's failure to state in the plaint, his willingness to perform all the conditions attaching to such a tenure. Also an application for the required amendment was rejected for late presentation; but the appellate court allowed the amendment. *Held*, that the appellate court can allow an amendment which does not offend the provisions of any law; and as such the present case was a fit one of which nature was not altered, by the amendment. (*Abdul Raoof*, J.) SADDA KHAN *v.* SULTAN KHAN. **58 I.C. 965.**

———O. 6, R. 17—*Appellate Court—Second appeal.*

A Court of second appeal cannot order amendment of a plaint espscially, when the plff. has not asked for it in both the lower Courts and which amendment if allowed would mean the trial of the case *denovo*. (*Shadi Lal*, J.) MAHTAB ALI SHAH *v.* IMDAD ASI SHAH. **59 P.L.R. 1916=30 I.C. 387=91 P.W.R. 1915.**

———O. 6, R. 17—*Appellate Court—Amendment of plaint—in appeal—when not allowed.*

A plff. cannot be allowed to amend his plaint in appeal so as to change the whole character of his suit. (*Shah Din and Agnew*, JJ.) MUKAND *v.* ABDUL MAJID. **180 P.W.R. 1913=20 I.C. 501=292 P.L.R. 1913.**

———O. 6, R. 17—*Appellate Court—Second appeal—Amendment of plaint.*

Where the plff. uses due diligence in framing his plaint he would be allowed to amend the plaint if necessary but not where he is careless. The proposition that a plff. will not be allowed to add fresh causes of action by way of amendment when if a fresh suit on these causes were instituted it would be barred by limitation, is subject to the exception, *e.g.*, where the cause of action is the same but the plff. has made a mistake as to the appropriate remedy he would be entited to in law. The amendment may be allowed even in second appeal if the error is *bona fide* for instance due to conflict of opinion in judgments of High Courts. (*Benson and Sundara Aiyar*, JJ.) MULLVEETIL *v.* ACHUTAN NAIR. **21 M.L.J. 478=10 I.C. 218=9 M.L.T. 499.**

———O. 6, R. 17—*Appellate Court—Second appeal—Amendment in.*

Where parties go to trial on a particular cause of action, and the issues and the evidence are limited to those which are relevant to that cause of action, the court will not on second appeal permit an amendment of the pleadings with a view to a remand for retrial as that would practically be starting a new trial on a cause of action deliberately abandoned. (*Daniels*, A.J.C.) BAJRANG LAL *v.* BRAHMA DAT. **52 I.C. 849=6 O.L.J. 322.**

C. P. CODE (V of 1908), O. 6, R. 17—Custom.

———O. 6, R. 17—and O. 41, R. 33—*Appellate Court—Amendment of plaint.*

Amendment of plaint may be allowed in appeal under exceptional circumstances. (*Kanhaiya Lal and Daniels*, A.J.Cs.) MAHADEV KUNWAR *v.* BAHU RANI. **50 I.C. 180=6 O.L.J. 55.**

———O. 6, R. 17—*Appellate Court—Powers of*—Bona fide *mistake—Effect.*

An amendment is not generally allowed by an appellate Court if the plaintiff has elected to go to trial on an issue whether the frame of the suit is correct notwithstanding the objection of the defendant that it offends S. 42, Specific Relief Act. But where it is framed *bona fide* believing consequential relief is not open to him, the appellate court can allow an amendment of the plaint. The rule is subject to change and that no amendment can be allowed if the plaintiff had notice in the trial court of the objection to the frame of the suit. (*Mullick and Bucknill*, JJ.) SHEIPUJAN RAI *v.* MAHARAJA BAHADUR KESHO PRASAD SINGH. **2 P. 919=76 I.C. 347=3 Pat. L.T. 315=1924 P. 310.**

———O. 6, R. 17—*Appellate Court—Second appeal.*

Plaint should not be allowed to be amended in second appeal when it involves fresh issues and fresh evidence. (*Mc Coll*, A.J.C.) NGA TUN BOM *v.* NGA KAN. **12 I.C. 200=4 Bur. L.T. 244.**

———O. 6, R. 17—*Appellate Court—Amendment on second appeal.*

Amendments involving an entire change in the form and character of a suit cannot be allowed in second appeal. (*Twomey*, J.) PALANEAPPA CHETTY *v.* MA SHIV ME. **9 I.C. 774=4 Bur. L.T. 47.**

Cause of Action.

———O. 6, R. 17—*Different cause of action—Redemption—Suit on one mortgage—Relief on another mortgage.*

The general rule, that where a plff. fails to establish the specific mortgage sued on, he should not be given a decree on a mortgage to be spelled out from documents or pleading, is subject to exceptions, *e.g.*, where the plaintiff is under an error induced by the defendants. 18 M. 462, 13 M.L.J. 274; (1915) M.W.N. 105; (1916) 17 M.W.N. 171; 30 M. 388, Ref. In no case can a plaintiff who has fabricated a document be allowed to obtain a decree on the admission of defendant. (*Seshagiri Aiyar and Napier*, JJ.) MADHAVAN VYDIAR *v.* LAKSHMANA PATTAR. (1918) **M W.N. 139=44 I.C 447=7 L.W. 284.**

Custom.

———O. 6, R. 17—*Custom — Late stage of proceedings.*

A custom set up at a late stage of the proceedings, when not pleaded in the pleadings will not be entertained. (*Lindsay*, J.C.) SUBAJ BALI *v.* TILOK CHAND. **36 I.C. 66=3 O.L.J. 327.**

C. P. CODE (V of 1908), O. 6, R. 17—Damages.

Damages.

———O. 6, R. 17—*Damages—Suit for damages—Amendment—Increase of claim.*

In an action for damages the Court has power to order an amendment of the plaint at any stage of the suit so as to enhance the claim for damages, if the application is made at the beginning of the trial. (*Wallis*, C.J. *and Sadasiva Aiyar*, JJ.) VINAYAKA MUDALI *v.* PARTHASARATHY AIYANGAR.
7 L.W. 415=45 I.C. 556=23 M.L.T. 312.

Deadman.

———O. 6, R. 17—*Dead person—Amendment of suit against—Nullity.*

A suit filed against a dead person is no suit at all and no question of amendment of the plaint arises. 31 M. 86, foll. (*Srinivasa Aiyangar*, J.) RANGA GOUNDAN *v.* PICHAMUTU PILLAI. **42 I.C. 539.**

———O. 6, R. 17—*Deadman—Amending suit into one against legal representative.*

A Court cannot allow the amendment of the plaint directed against a deadman into one against his legal representative and decide the suit as brought against the latter instead of the deadman. 31 M. 86, foll. (*Sadasiva Aiyar and Napier*, JJ.) *In re* ARUNACHALLAM CHETTIAR. **30 I.C. 679=2 L.W. 828.**

Declaratory Suit.

———O. 6, R. 17—*Declaratory suit—Amendment of plaint—Specific Relief Act, S. 42, Proviso.*

The plff. appealed: *Held*, (*a*) that declaration suit that a certain decree being based on fraud shall not affect the plff.'s rights and for any other relief which the Court might deem fit to grant, was one for declaration only. 20 Bom. 736 and 30 Cal. 788, Ref.; (*b*) that a suit for a mere declaration was not competent in this case unless followed up by a prayer for consequential relief by injunction or otherwise, 38 Mad. 922 and 29 I.C. 132, Ref; (*c*) that the Court ought to have allowed the plff. an opportunity to amend his plaint so as to include the necessary prayer for consequential relief by injunction or otherwise; and (*d*) that the mere prayer for general relief is not necessarily a prayer for consequential relief so as to make the suit out of the class of suits for a declaration only. (*Shadilal* C.J. *and Dundas*, J.) BUA DITTA *v.* LADHA MAL. **65 P.W.R. 1921.**

———O. 6, R. 17—*Declaratory suit—Possession—Grounds of amendment.*

Where a plff. lost possession of the land in suit owing to a decree in a Revenue Court during the pendency of a suit for declaration of title he must be allowed to amend his plaint and ask for possession as futher relief. (*Chevis and Wilberforce*, JJ.) KARAM DAD *v.* HUSSAIN BAKHSH. **66 I.C. 468.**

———O. 6, R. 17—*Declaratory suit—Consequential relief.*

C. P. CODE (V of 1908), O. 6, R. 17—Description.

Plaintiff can be allowed in appeal to amend the nature of the suit, *i.e.*, so as to make it one for possession instead of for ejectment. (*Chevis and Broadway*, JJ.) SHIV RAM DASS *v.* BHAG DEVI. **48 I.C. 838=118 P.R. 1918.**

———O. 6, R. 17—*Declaratory suit—Amendment of plaint suit for possession by reversioner against widow and daughter—Declaration of right of succession after death of widow.*

A suit by nephew of a deceased against daughter and widow for possession of property of the deceased stating that he would be at least entitled to declaration of his right of succession after death of widow, in case the widow is proved to be lawfully married to the deceased was dismissed as premature. holding that the widow was legally married. *Held* the court should have allowed the amendment of the plaint in terms of the second prayer and should have decided the suit on this right. (*Shah Din and Agnew*, JJ.) GURDIT SINGH *v.* MUSAMMAT PERMESHRI.
238 P.L.R. 1913=19 I.C. 928=142 P.W.R. 1913.

———O. 6, R. 17—*Declaratory suit—Converted into one for possession.*

A plaint may be returned for amendment only if the party applies for it. The Court cannot of its own accord return a plaint for amendment or convert a suit for declaration into one for possession. (*Sankara Nair*, J.) VENKATACHALA CHETTI *v.* NARAYANA AIYAR. **24 M.L.J. 455=19 I.C. 672=(1913) M.W.N. 399.**

———O. 6, R. 17—*Declaratory suit—Possession.*

A declaratory suit ought not to be permitted to be changed into one for a recovery of possession and injunction, at the time of appeal, if substantial injustice will not be done by asking him to bring a fresh suit or if the change sought to be made is of an unprecedented description. (*Mullick and Atkinson*, JJ.) SATYA NARAYAN CHAKKRAVARTI *v.* DWARKA NATH SADHU. **2 Pat. L.J. 379=40 I.C. 174=1 Pat. L.W. 738.**

Description.

———O. 6, R. 17—*Description of party—Suit brought in wrong name—Limitation for.*

Where a plff. intending to sue one person, by mistake enters another name the amendment may be made even after limitation but if by mistake the plff. intended to sue a wrong person, the amendment after limitation will not bring the suit within time. (*Wallis and Ayling*, JJ.) NARAYANA SASTRIGAL *v.* MANGALATHAMMAL. **28 I.C. 764=1 L.W. 336.**

See also (*Sharfuddin and Doss*, JJ.) DHANPAT SINGH *v.* JOHURMAL.
7 I.C. 161=13 C.L.J. 383.

C. P. CODE (V of 1908), O. 6, R. 17—Description.

———**O. 6, R. 17**—*Description of property—Inclusion of wrong property owing to mistaken identity—Amendment.*

Where the plff. was honestly misled as to the identity of the lands which he claimed there is no reason why he should not be allowed to correct the mistake. (*Rattigan*, C.J., *and Dundas*, J.) SHANKAR LAL. *v.* ARJMAND KHAN. **51 I.C. 757=56 P.W.R. 1919.**

Discretion.

———**O. 6, R. 17**—*Discretion—Suit* in forma pauperis—*Costs of application—Order for payment of.*

An order directing a plaintiff to pay in cash the costs of an amendment of the plaint, after he has been found to be a pauper is improper. (*Shah* A.C.J. *and Crump*, J.) AMBAJI BALWANT RAO *v.* HAMMANG RAO DESHMUKH. **24 Bom. L.R. 924=69 I C. 207=47 B. 104=1922 Bom. 385.**

———**O. 6, R. 17**—*Discretion—Appeal.*

An appellate court will not ordinarily interfere with the discretion deliberately exercised by the lower court in refusing to allow a plaintiff to amend his plaint during the progress of the suit unless it is satisfied that the lower court came to a wrong conclusion. (*Fletcher and Teunon*, JJ.) HARI KRISHNA DAS *v.* DINOR KINLA. **29 I.C. 335.**

———**O. 6, R. 17**—*Discretion—Amendment of plaint.*

To allow or not to allow an amendment is in the Court's discretion. (*Jenkins*, C. J., *and Mookerjee*, J.) SATYES CHANDRA SARKAR *v.* MANMOHINI DASI. **25 I.C. 567=19 C.L.J. 518.**

———**O. 6, R. 17**—*Discretion—Principles.*

A party can be allowed to amend a pleading if no injustice is done to the opposite party for the purpose of raising the real questions at issue. (*Mookerjee and Carnduff*, JJ.) SRI RANG BEHARI LAL *v.* RANCHAYYA LAL. **13 I.C. 128=15 C.L.J. 489.**

———**O. 6, R. 17**—*Discretion of Court.*

It is in the discretion of Court to allow an amendment of the pleadings, but the discretion is judicial and not merely arbitrary and an erroneous exercise of it is capable of correction by a Court of appeal. (*Mookerjee and Caspersz*, JJ.) RAMJI RAM *v.* SALIG RAM. **11 I C. 481=14 C.L J. 188.**

———**O. 6, R. 17**—*Discretion—Principles—Minor.*

An amendment should always be allowed when it does not change the nature of the suit and any inconvenience caused to the deft. can be compensated by costs. Permission to amend was all the more justified in the case in question as the minor would not have been bound by the act of his next friend. (*Le Rossignol*, J.) FATEH KHAN *v.* MUHAMMAD ISA. **84 P.R. 1919=52 I.C. 464=6 P.L.R. 1919.**

C. P. CODE (V of 1908), O. 6, R. 17—Discretion.

———**O. 6, R. 17**—*Discretion of court—Interference in appeal.*

O. 6, R. 17 of the C. P. Code confers a very wide discretion upon the court with respect to the amendment of pleadings. An order allowing amendment will not be set aside on appeal when the amendment has not caused prejudice to the deft. (*Shadi Lal and Wilberforce*, JJ.) F. A. GREGORY *v.* ALBERT PUSACH. **49 I.C. 441=21 P.W.R. 1919.**

———**O. 6, R. 17**—*Discretion — Appellate Court.*

Where the first Court accepted a suit on a balance of account as amended into a suit on previous accounts, the Appellate Court must not dismiss the suit. Such a narrow interpretation of Court's power amounts to material irregularity liable to revision. 68 P. R. 1904, 119 P. R. 1908, Expl. (*Kensington*, J.) AMIR CHAND *v.* SUNDERMAL. **7 P L.R. 1912=12 I.C. 617=207 P.W.R. 1911.**

———**O. 6, R. 17 and O. 14, R. 5**—*Discretion—Revision.*

The power of allowing amendment is discretionary and unless its exercise is shown to be absurd or perverse, no revision lies from it. (*Reid*, C. J.) INDAR NARAIN *v* NANAK CHAND. **51 P.L.R. 1911=9 I C. 267=193 P.L.R. 1911.**

———**O. 6, R. 17**—*Discretion of Court—General principles.*

It is within the discretion of a court to grant permission to amend the pleadings. Provided the opposite party is not taken by surprise or precluded from giving evidence, the court should grant leave to amend the plaint. It should be refused where the party is agitating only a technical claim or where it would alter the character of the suit, or where there has been inordinate delay in applying for amendment. The main object of allowing an amendment is to avoid multiplicity of suits. After the disposal of the appeal the plff. was allowed to amend his plaint by adding a new claim for mense profits which was omitted in the first suit. (*Seshagiri Aiyar and Napier*, JJ.) RAMASWAMI REDDI *v.* GANGA RADDI. **48 I.C. 619.**

———**O. 6, R. 17**—*Discretion of Court—Principles guiding.*

It is left to the discretion of the Court to grant leave for amending a plaint and such leave should not, under particular circumstances, be refused merely because the amended plaint would become time-barred, if there is no material alteration in the plaint by the amendments and the claim is not barred on the date of the filing of the plaint. In these matters exercise of discretion one way or another depends upon the particular facts of each case, and the court should take into consideration the question of delay in applying for leave and the consequent question of limitation. When an application for leave to amend, is based on

C. P. CODE (V of 1908), O. 6, R. 17—Discretion.

a mistake in regard to a recent decision necessitating the amendment, long delay in making the application and the fact of the decision making no change in the law would be grounds for refusing the leave applied for. (*Oldfield and Krishnan, JJ.*) GATIGANTI SUBBARAYUDU *v.* ARUMILLI SURAYYA.
37 I.C. 914.

——O. 6, R. 17—*Discretion—Exercise of.*

Discretion in allowing amendment should be freely exercised but not where the suit by amendment would relate to a different subject-matter. (*Sadasiva Aiyar and Napier, JJ.*) PAYKAL MANAKKAL *v.* THEYYANKARAN.
32 I.C. 624=(1916) 1 M.W.N. 171.

——O. 6, R. 17—*Discretion—Laches.*

The language of O. 6, R. 17, C.P.C., is very wide but indulgence under it is not to be shown when the plaintiff failed to avail himself of the other remedies open to him. (*Spencer and Coutts Trotter, JJ.*) RAMANADHAN *v.* ANNAMALAI. 29 I.C. 132.

——O. 6, R. 17—*Discretion—Character of suit changed.*

An amendment altering the character of the suit entirely, was under section 53 of the Old Code, expressly forbidden. But section 135, and rule 17 of order 6 of the present Code make no express restriction on the discretion of the Court, provided it is judicially exercised. (*Hallifax, A.J.C.*) SHEONARAIN *v.* RAM PRASAD.
74 I.C. 317=1923 Nag. 241.

——O. 6, R. 17—*Discretion of Court—General rule—Change of plea.*

O. 6, R. 17 of the Code is in more general terms than the corresponding S. 53 of the Code of 1882. Questions of amendment of pleadings are entirely in the discretion of the court, which must be exercised in accordance with settled judicial principles. Amendment must be either raised in the pleadings or be consistent with the case originally laid; the state of facts and the equities and grounds of relief originally alleged and pleaded by the plff. should not be departed from. 6 Cal. 871 and 11 M.I.A. 7, Foll. A suit to enforce a mortgagor's right of redemption cannot be amended so as to convert it into a suit to enforce a right as owner. (*Fox, C. J. and Teunon, J.*) NAUK TO *v.* MA HININ. 9 Bur. L.T. 180=36 I.C. 5=8 L.B.R. 418.

——O. 6, R. 17—*Discretion— Principles—Amendment of plaint.*

The power of granting amendments of plaint is discretionary with the Court, and in so exercising that discretion regard should be had to the fact that no amendment should be allowed which alters the nature of the case. But an amendment should not be refused merely because it introduces a new case but not a new cause of action. (*Bell, J.*) STEEL BROTHERS AND COMPANY *v.* CASSIMJI AHMED MADHA.
11 I.C. 827=4 Bur. L.T. 177.

C. P. CODE (V of 1908), O. 6, R. 17—Different causes of action.

——O. 6, R. 17—*Discretion—Appellate court.*

If in an amended plaint there is no irreconcilable contradiction between the allegations in the original and in the amended plaints, the Appellate Court should not take the objection that the amended plaint put forward a new case of its own motion, nor should it decide without giving the plff. an opportunity to explain. (*Shaw, J.C.*) NGA PO TUN *v.* MI THET PON.
10 I.C. 991=(1910) 1 U.B.R. 66.

——O. 6, R. 17—*Discretion of Court—Principles regulating.*

A Court is not bound by any absolute rule of law in granting amendments. They will be granted according to the circumstances of the case and with due regard to the interests of the other side and to the fact that multiplicity of suits should if possible be avoided. (*Pratt, J.C., and Fawcett, A.J.C.*) NUR KHANTUN *v.* SUMAR SAWAYO. 31 I.C. 7=9 S.L.R. 61.

Different Causes of Action.

——O. 6, R. 17—*Different cause of action—Account stated found to be forgery—Account stated in previous year.*

An account stated in a particular year upon which a suit was brought having been found to be forgery, the suit cannot be altered to one on the account stated in the previous year. (*Coxe and Imam, JJ.*) BHAIRO PRASHAD *v.* GAJADHAR PRASHAD. 23 I.C. 387=19 C.W.N. 170.

——O. 6, R. 17—*Different cause of action—Original suit based on negligence—Amendment based on nuisance.*

Where a plaint in a suit against the Secretary of State was based on negligence, but the proposed amendment was based upon nuisance; *held*, that amendment could not be granted, the cause of action being different from that in the plaint but leave was given to withdraw with liberty to bring a fresh suit. (*Jenkins, C.J. and Woodroffe, J.*) MCINERNY *v.* SECRETARY OF STATE. 13 I.C. 370=38 Cal. 797.

——O. 6, R. 17—*Different cause of action—Suit on pro-note—Decree on original consideration—Amendment—Oral application.*

Where a suit is based on a promissory note which is invalid under the Stamp Act the Court should allow the plaintiff to amend his plaint and fall back on his original cause of action. A written application is not necessary to move the Court for an order allowing an amendment of the pleadings. An oral application is sufficient. (*Phillips, J.*) KAMAKSHI AMMAL *v.* SUBBARAYA CHETTY.
32 I.C. 768.

——O. 6, R. 17—*Different cause of action—Suit on one mortgage—Decree on another.*

Per *Sadasiva Aiyar, J.* (*Tyabji, J. contra*)—When the plaintiff rests his claim to redeem

C. P. CODE (V of 1908), O. 6, R. 17—Different cause of action.

upon one mortgage and fails to prove it, a decree cannot be given to him on the footing of another and earlier mortgage proved by the admissions of the defendants without a formal amendment of the plaint. *Quære:*—If such an amendment should at all be permitted. (*Spencer, Tyabji and Sadasiva Aiyar, JJ.*) KALLIANIAMMA *v.* NARAYANA NAMBIAR.
28 M.L.J. 266=17 M.L.T. 170=28 I C. 69=(1915) M.W N. 105.

———O. 6, R. 17—*Different cause of action—Not to be introduced.*

A plaintiff would not be allowed to amend his plaint so as to substitute a fresh cause of action or a separate cause of action from the one disclosed in the plaint as originally framed. (*Pratt*, J.C.) MA NYUN *v.* MAUNG SHWE KAUNG. **52 I.C. 961=(1919) 3 U.B.R. 171.**

——— O. 6, R. 17—*Different cause of action—Suit for rent—Damages for use and occupation.*

A suit for rent may be amended into one for damages for use and occupation. (*Fox*, O.J.) MAUNG PO SHIN *v.* MOHAMED THAMBI.
8 L.B.R. 270=30 I.C. 783=8 Bur. L.T. 284.

Ejectment.

——— O. 6, R. 17—*Ejectment—Redemption—Late stage—Claim for.*

A suit for possession of immoveable property on the ground that the deft. is a trespasser cannot be transformed into one for redemption especially at the last stage of the suit. *Obiter Dictum*:—A suit for possession from trespasser and one for redemption cannot be lawfully included in plaint in the alternative. (*Johnstone* J.) KALA *v.* LACHHMMI. **167 P.W.R. 1911=12 I.C. 576=1 P.L.R. 1912.**

——— O. 6, R. 17—*Ejectment—Joint possession.*

When plff. sues for exclusive possession of property and the plff. is found to be entitled only to joint possession, the court may give plff. a decree for joint possession. But plff. cannot claim it as a matter of right. (*Sundara Aiyar*, J.) *In re* PURUVALA PERUMAL CHETTY **12 M.L.T. 159=15 I.C. 665=(1912) M W.N. 1116.**

——— O. 6, R. 17—*Ejectment—Partition.*

A suit in ejectment cannot be converted into one for partition. (*White*, C.J. *and Benson*, J.) VAITHILINGA MUDALI *v.* MUNIGAN.
37 Mad. 529=23 M.L.J. 189=15 I.C. 299=(1912) M.W.N. 1127.

Inconsistent Claims and Pleas.

——— O. 6, R. 17—*Inconsistent case.*

The power conferred by O. 6, R. 17 of the Code on a court to allow amendments should be liberally exercised if it be not prejudicial to the opposite party and does not introduce a new and inconsistent case. (*Chatterjee and Duval*, JJ.) RABATI RAMA BASAK *v.* HARIS CHANDRA BASAK. **56 I.C. 665=24 C.W.N. 749.**

C. P. CODE (V of 1908). O. 6, R. 17—Inconsistent claims and pleas.

———O. 6, R. 17—*Inconsistent case.*

A plff. cannot be permitted to turn round at the final stage and set up a case inconsistent with that set forth in the plaint and which was found to be untrue. (*Mookerjee and Beachcroft*, JJ.) KOLI MOHAN TRIPURA *v.* BIRENDRA KISHORE. **31 I.C. 391=22 C.L.J. 309.**

———O. 6, R. 17—*Inconsistent pleas.*

Where the plaint contained a wrong statement of facts but the plff.'s pleader in the course of the appeal, put in a long application giving a correct narrative of the facts. *Held*, that it could not be treated as amounting to an amendment of the plaint, nor would amendment be allowed at such a late stage. (*Shah Din*, J.) NANU v. MOTI.
46 I.C. 471=119 P.W.R. 1918.

——— O. 6, R. 17—*Inconsistent claims—Legal representative of deceased plaintiff cannot plead what the latter could not have pleaded.*

In a suit for redemption of a mortgage, the mortgagor being the owner of an impartible estate the plaintiff died and his legal representative sought to amend the plaint, by including a cause of action for a declaration that the mortgage was not binding on him, the successor to the estate. *Held*, that the amendment could not be allowed. It is not open to the legal representative of a deceased plaintiff, to seek to include in the plaint by way of an amendment, a claim or relief, which the original plaintiff himself could not have asked for. The proper course for the legal representative is to file a separate suit for such a relief. The wide powers of amendment given under the Code of 1908 are always subject to the rule that by means of an amendment the subject-matter of the suit cannot be changed, or one distinct and inconsistent cause of action cannot be substituted for another. (1921) M.W.N. 396, Ref. (*Kumaraswami Sastri*, J.) INAGANTI VENKATARAMA ROW *v.* VENKATALINGAMA NAYANIM BAHADUR VARU. **42 M.L.J. 43=(1922) M.W.N. 42=15 L.W. 72=30 M.L T. 204 (H.C.)=68 I.C. 703=1922 Mad. 49.**

———O. 6, R. 17—*Inconsistent case.*

If the amendment prayed for is inconsistent with the plaint it should not be allowed. (*Wallis*, C.J., *Ayling and Kumaraswamy Sastry*, JJ.) MUKKOOSA NAIR VEETIL *v.* SECRETARY OF STATE. **34 I.C. 541.**

——— O. 6, R. 17—*Inconsistent case—Late stage.*

The power of a court to allow amendments of pleadings is wide but where a new case is set up by deft. after plff. has closed his case the permission for amendment of the written statement should be refused unless the plff. also is given an opportunity to call further evidence to rebut the new case set up. (1884) 26 Ch. D. 700 at pp. 710, 711, Ref. (*Tyabji and Spencer*, JJ.) TADIPARTI HANUMANULU *v.* MADDUKURI GOLAYYA. **24 I.C. 822.**

C. P. CODE (V of 1908), O. 6, R. 17—Inconsistent claims and pleas.

———O. 6, R. 17—*Inconsistent claims—Suit for rent—Damages for breach of agreement to take on lease—Inconsistent claims.*

A plaint cannot be allowed to be amended so as to convert a claim for rent into one for damages for breach of an agreement to take on lease. (*Twomey*, J.) KARAM CHAND *v.* HURDIAL. 11 I.C. 849=4 Bur. L.T. 181.

Late Stage.

———O. 6, R. 17—*Late stage—New plea.*

A party to a suit should not be allowed to raise a fresh plea after remand which was not advanced either in the first Court or in the appellate court. (*Stanley*, C.J. *and Banerji*, J.) SOHAN BIBI *v.* HIRAN BIBI. 10 I.C. 280.

———O. 6, R. 17—*Late stage—Second appeal—Suit for possession if can be altered into a suit on mortgage.*

A plff. cannot, in second appeal be allowed to alter his suit so as to convert it from a suit for possession into one to enforce a mortgage. (*Fletcher*, J.) MOHENDRA LAL *v.* JAGAT CHANDRA DEY. 59 I.C. 63.

———O. 6, R. 17—*Late stage--Power of Court.*

A Subordinate Judge can allow amendment of plaint even after eleven and half months after institution of suit. (*Teunon and Greaves*, JJ.) RAMSARAN RAY *v.* RAMPRASANNA. 50 I.C. 49=29 C.L.J. 206.

———O. 6, R. 17—*Late stage—Technical plea.*

The principle is well settled that under O. 6, R. 17, C.P.C., amendments of pleadings should be allowed when this is necessary for the purposes of determining the real question in controversy but leave to amend ought to be refused where the amendment is merely technical or immaterial. The objection that the suit was barred by S. 244, C.P.C. 1882, S. 47, C.P.C. 1908, is highly technical, and should not be allowed at a later stage. (*Mookerjee and Casperss*, JJ.) NAGENDRA BALA CHAUDIRINI *v.* SECRETARY OF STATE. 10 I.C. 532=14 C.L.J. 88.

———O 6, R. 17—*Late stage.*

Where defendants based their defence on a definite plea that they were holding under a completed sale, and it was that plea that was put in issue and had been decided against them. They cannot be allowed to plead at such a late state as second appeal an agreement to sell. It has been repeatedly pointed out that pleadings must be strictly construed, and parties must be restricted to what they allege in their plaint or in their written statements as the case may be. (*Broadway*, J.) PALU *v.* RASILU. 75 I.C. 740=1923 Lah. 675.

———O. 6, R. 17—*Late stage.*

When there is an amendment at a very late stage it should not be allowed. (*Broadway and Wilberforce, JJ.*) SANKARI *v.* JODHA. 3 Lah. L.J. 487.

C. P. CODE (V of 1908), O. 6, R. 17—Late stage.

———O. 6, R. 17—*Late stage—Change of case—Improper grant of leave to amend—Interference on appeal.*

When a suit for redemption of a mortgage was ready for judgment the plaintiff presented an application stating that he had filed the plaint in ignorance of real facts and asked the Court to allow him to amend his plaint. This prayer was granted by the Court at this late stage. In the amended plaint the plaintiff alleged that the mortgage deed was unlawful and was executed without consideration and necessity, and that he was entitled to get possession of the mortgaged property without paying anything to the mortgagee. *Held*, that by the amendment the nature of the suit was altogether altered and such amendment ought not to have been allowed at such a late stage. (*Broadway and Abdul Raoof*, JJ.) TOHLU MAL *v.* BUTA. 67 I.C. 132=3 Lah. L.J. 184.

———O. 6, R. 17—*Late stage—Amendment of plaint.*

An amendment should be allowed at however a late stage, provided it can be made without injustice to the other side and if the other side can be compensated by costs, there is no injustice. (*Shadi Lal*, C.J. *and Wilberforce*, J.) DEVI DAYAL *v.* WAZIR CHAND. 61 I C 328=3 U P.L.R. (Lah.) 44.

———O. 6, R. 17—*Late stage—Amendment ordered after conclusion of trial is not necessary.*

In a suit for a declaration that a decree obtained against a minor was not binding on him on account of the gross negligence of the guardian *ad litem* in the conduct of the prior suit, the plaint did not allege and the deft. did not ask for, particular of the alleged negligence. The parties, however, went to trial and it was found on the evidence that negligence had been established. Subsequently the court ordered an amendment of the plaint. *Held* that the case having been tried out and a finding of negligence arrived at, no amendment was necessary. (*Krishnan and Venkatasubba Rao*, JJ.) VEERAPPAN *v.* MENNAPPAN. 70 I.C. 335=31 M.L.T. 449=1923 Mad. 245.

———O. 6, R. 17—*Late stage—Amendment.*

An application for amendment of the pleadings will not be granted at a late stage of the case. (*Mitra*, A.J.C.) BALARAM *v.* GANPAT. 47 I C 906.

———O. 6, R. 17—*Late stage—Case closed.*

A suit was filed for possession of a site. The case was closed for judgment to be delivered on a particular day. Six days before the date fixed for judgment, plaintiff applied for amendment and prayed for a right of way of six cubits. The lower court allowed the amendment and granted a decree. *Held*, the amendment should not have been allowed after the case was closed for judgment. (*Prideaux*, A. J. C.) CHAINU *v.* MANBODH. 45 I.C. 895.

C. P. CODE (V of 1908), O. 6, R. 17—Late stage.

——O. 6, R. 17—*Late stage—New issue involving evidence—Custom.*

In a suit contesting an adoption, plff. applied after a considerable body of evidence had been taken, to amend the plaint for the purpose of alleging that the parties did not recognise the custom of adoption. *Held*, the plff. could not be allowed to amend the plaint at that stage. Evidence, however was admissible to show the origin of the community to which the plff.'s ancestors belonged as there was nothing in the plaint as originally filed which was irreconcilable with such evidence and such evidence was relevant to an issue which had been framed to determine whether the estate was governed by a custom which barred inheritance by adopted sons. (*Chapman and Atkinson*, JJ.) SHAH DEO NARAIN DEO *v.* KUSUM KUMARI.

46 I.C. 929=5 Pat. L.J. 165.

——O. 6, R. 17—*Late stage.*

An amendment of the plaint cannot be allowed at a late stage where it would be altering the nature of the suit. (*Ormond and Parlett*, JJ.) MAHOMED EBRAHIM SAIB KHATEEH *v.* MOUNG BA GYAW.

24 I.C. 482=7 Bur. L.T. 69.

——O. 6, R. 17—*Late stage—Opportunity already given—Prejudice to defendant.*

Where in the written statement the defts. raised a plea that the suit was badly framed inasmuch as possession had not been asked for and an issue was raised on this contention of the defts. but yet the plff. never thought of applying for the necessary amendment of the plaint; and the trial Judge allowed the plff. an opportunity of amending plaint and yet the plff. refused to amend, and it was only after the whole case was concluded and the plff. probably had suspicions as to the bent of the Judge's mind for amendment. *Held* the Court below acted quite rightly in refusing the amendment. 9 S.L.R. 174; 26 C. 845, Foll. Where an order for amendment would operate prejudicially to the defts. so far as their evidence of possession is concerned, the Court will refuse to allow amendment of plaint. (*Kincaid*, J.C. *and Raymond*, A.J.C.) MANOHERDAS *v.* RAMDAS.

78 I.C. 549=1923 Sindh 17.

——O. 6, R. 17 and O. 23, R. 1—*Late stage— Technical pleas— Refusal—Leave to withdraw suit with liberty.*

An application is not one made in good faith, if it is made at a late stage of the suit, merely to get an advantage over the other side in the course of arguments on a preliminary issue and raising a plea which clearly is an afterthought. Where a Court has refused an application to amend a plaint, it ought not to allow the plff. to withdraw the suit with liberty to institute a fresh suit. (*Fawcett*, A.J.C.) FIRM OF LUDOMAL PUTTOMAL *v.* SECRETARY OF STATE. **51 I.C. 870=18 S.L.R. 1.**

C. P. CODE (V of 1908), O. 6, R. 17—Limitation.

Limitation.

——O. 6, R. 17—*Limitation—Power of Court to allow amendment so as to defeat plea of limitation.*

Amendment should not as a rule be allowed where it is likely to take away from a defendant a legal right which has accrued to him by lapse of time but there may be special cases where such considerations are outweighed by the special circumstances of the case. (*Lord Buckmaster.*) CHARAN DAS *v.* AMIR KHAN.

39 M.L.J. 195=28 M.L.T. 149=18 A.L.J. 1095=22 Bom. L.R. 1370=25 C.W.N. 289=47 I.A. 255=8 P.W.R. 1921=48 Cal. 110=2 U.P.L.R. (P.C.) 124=57 I.C. 606=13 L.W. 49 (P.C.)

——O. 6, R. 17—*Limitation—Cause of action barred.*

A plaintiff cannot be allowed to amend his plaint so as to include a cause of action which has become barred by limitation since the institution of the suit. (*Tudball and Chamier*, JJ.) BISHESHAR PRASAD *v.* GOBINDRAM.

26 I.C. 42=12 A L J. 833.

——O. 6, R. 17—*Limitation—Addition of relief.*

Where a plff. though entitled to various alternative reliefs, sued only for one of the reliefs, within the period of limitation, *held*, he should not be allowed to amend his plaint in such a way as to enforce his other reliefs which had become time-barred at the date of the amendment. (*Rafique and Piggott*, JJ.) BAL KARAN UPADHYA *v.* GAYA DIN KALWAR.

36 All. 370=24 I.C. 255=12 A.L.J. 635.

——O. 6, R. 17—*Limitation—Effect of amendment of plaint—Date of institution of suit.*

Where the allegations introduced in a plaint by amendment are mere developments of the plff.'s position and original cause of action, the date of institution is the date of the original suit. (*Scott*, C.J. *and Russell*, J.) LALJI NENSEY *v.* KESHOWJI. **37 Bom. 340=17 I.C. 193=15 Bom. L.R. 840.**

——O. 6, R. 17—*Limitation—Amendment of plaint.*

A court can allow a plaint to be amended, even though at the time of the amendment a new suit on the same cause of action would not be allowed. (*Mookerjee and Rankin*, JJ.) SATOHIDANANDA DUTT *v.* NRITYA NATH MITTER. **27 C.W.N. 1007=50 Cal. 878=79 I.C. 287=1924 Cal. 517.**

——O. 6, R. 17—*Limitation—Cause of action different—Amendment not to be allowed.*

It is well settled that were a plaintiff bases his claim on a specific legal relation alleged to exist between him and the deft., he should not be allowed to amend the plaint so as to base it on a different relation. This rule is only one aspect of a broader principle that leave to

C. P. CODE (V of 1908), O. 6, R. 17 – Limitation.

amend a plaint should be refused where the amendment would introduce a totally different, new and inconsistent case. The amendment was also refused on the ground that if the plaintiff were to institute a fresh suit on the date the amendment was asked the new suit would be barred by limitation. (*Sanderson*, C.J. *and Mookerjee*, J.) KALIDAS CHAUDHURI *v.* SRI DANPADI SUNDARI DASI.
22 C.W.N. 104=43 I.C. 893=27 C.L.J. 403.

———O. 6, R. 17—*Limitation—Amendment —Appeal.*

No order for amendment of a plaint should be passed when it would deprive a party of a substantial right or privilege or otherwise prejudice a party. (*Sharfuddin and Mullick*, JJ.) SURENDRA NARAIN SINHA *v.* HAFFIJUR RAHAMAN. 30 I.C. 379.

———O. 6, R. 17—*Limitation — Execution application.*

Though the High Court has power under very exceptional circumstances, to allow amendments in appeal, but it will not ordinarily allow an amendment which would defeat the bar of limitation as by substituting in a later execution application in the column of the relief the property comprised in a previous application. (*Abdur Rahim and Kumaraswami Sastri*, JJ.) THIAGARAYAN *v.* KANNUSWAMI PILLAI. 43 I.C. 122.

———O. 6, R. 17—*Limitation—New cause of action sought to be added.*

If a cause of action is sought to be added by way of amendment and a fresh suit on that cause of action would be barred if instituted at the time of the amendment, then ordinarily, Courts would not allow the amendment so as to give the plaintiff the benefit of the time between the date of institution of suit and the time of amendment. But if no new cause of action is sought to be added only an amendment for the purpose of showing that the original cause of action as laid was not barred is intruded, it may be allowed. (*Ayling and Srinivasa Aiyangar*, JJ.) MUTHIAH CHETTIAR *v.* CHITAMBARAM CHETTY.
31 M.L.J. 688=4 L.W. 456=38 I.C. 720=(1916) 2 M.W.N. 362.

———O. 6, R. 17—*Limitation—Amendment after—Rules governing.*

Under very peculiar circumstances the Court might perhaps have power to allow such an amendment but certainly as a general rule it will not do so. (*Abdur Rahim and Ayling*, JJ.) PATTAH VEERAN KUTTI *v.* VEETHIL APPU. (1911) 1 M.W.N. 181=9 I.C. 760=9 M.L.T. 347.

———O. 6, R. 17—*Limitation—Correction of description of parties.*

Where no substitution or addition of a new plaintiff was made by an amendment but only he description of the plaintiff was corrected,

C. P. CODE (V of 1908), O. 6, R. 17—Mistake.

there is no question of limitation that arises. (*Katwal*, A. J. C.) BAKARAM *v.* RAMACHANDRA MAHARAJ. 71 I.C. 39=1923 Nag. 96.

———O. 6, R. 17 — *Limitation — Adding another relief which is barred—General rule—Appeal.*

An amendment operates retrospectively from date of institution of the suit. The general rule that amendment resulting in a claim for fresh relief which is barred since institution of the suit, will not be allowed, does not apply when it is ordered in the interest of and at the instance of the defendant. Where the plaintiff asked for an amendment within the period of limitation and the same was disallowed, an Appellate Court can give effect to it, even though the period of limitation had then elapsed. (*Mitra*, O. A. J. C.) NEMASA *v.* RAMAKRISHNA. 23 I.C. 165=10 N.L.R. 82.

———O. 6, R. 17—*Limitation — Date of amendment.*

For purposes of limitation the date of amendment of a plaint is immaterial, unless the time expressly allowed by the Court for amendment has been exceeded. (*Drake-Brockman*, J.C.) DURGAGIR *v.* KOLLU.
10 I.C. 731=7 N.L.R. 38.

———O. 6, R. 17—*Limitation—Amendment not to deprive opponent of.*

Where an amendment is likely to debar a party from pleading limitation it will not be allowed. (*Mc Coll*, A.J.C.) MI EIN ZI *v.* MI NI. 21 I.C. 806=(1913) 1 U.B.R. 178.

———O. 6, R. 17—*Limitation — Different cause of action—Right to object.*

An amendment of a plaint should not be allowed if the amendment includes a claim which could not under the law of limitation be made the subject of a first suit or if it introduces a completely new cause of action. Though no appeal lies against an order allowing an amendment the aggrieved party may object to the amendment in appeal against the decree. (*Hayward*, J.C. *and Crouch*, A.J.C.) GULRAJMAL *v.* PAMAN MAL. 27 I.C. 344=8 S.L.R. 69.

Mistake.

———O. 6, R. 17—*Mistake*—Bona fide *non-inclusion of previous mortgage through* bona fide *mistake—Postponement of amendment—Application disposed of at the trial.*

Where a plff. in a mortgage suit applied for amendment of the plaint by including a previous mortgage omitted to be stated in the plaint through a *bona fide* mistake and the trial Judge without deciding anything allowed the amendment subject to any contentions which the deft. might raise in answer to the claim as amended, *held*, that the plffs. should be given liberty to amend their plaint. It would have been better and more regular had the question of right to amendment been determined before

C P. CODE (V of 1908), O. 6, R. 17—Mistake.

the order was made. If this would have involved a lengthy enquiry covering the same ground as the evidence in the suit, the hearing of the application to amend should have been adjourned to the hearing of the suit and determined on the evidence then taken. The Court being desirous of getting at the true facts will allow an amendment subject to the three chief general conditions: *Bona fides* on the part of the applicant, possibly of amendment without such prejudice to the other party as cannot be compensated by costs (such as prejudice to rights accrued) and subject to this that the amendment is not such as to turn a suit of one character into a suit of another character. 18 Cal. 871; 18 Bom. 144; 16 W.R. 123; 9 B.H.C.R. 1; 5 Bom. L.R. 329; 9 Cal. 695, Rel. (*Sanderson*, C.J. *and Woodroffe*, J.) UPENDRA NARAIN RAY *v.* ROY JANAKI NATH RAYAR.
45 Cal. 305=47 I.C. 129=22 C.W.N. 611.

——**O. 6, R. 17**—*Mistake*—Bona fides.

A plaint may be allowed to be amended when a claim has been left out by mistake or inadvertence and not deliberately. (*Jenkins*, C.J. *and Chatterjee*, J.) BHUKHI KOERI *v.* RAM KHELWAN PRASAD. **17 I C. 646=17 C.W.N. 311.**

——**O. 6, R. 17**—*Mistake—Amendment—Date of institution of suit.*

A plaint can be amended by mentioning in the plaint in a pre-emption suit the property claimed which had been omitted by inadvertance and when so amended, the date of institution of the claim is the date of the original plaint and not the date of the amendment. (*Johnstone and Shadi Lal*, JJ.) JALAL DIN *v* QAIM DIN. **62 P.L R. 1914=25 I C. 439=255 P.L.R. 1914=161 P.W.R. 1914.**

Mortgage.

——**O. 6, R. 17**—*Mortgage—Money decree.*

Where the plaintiff sues to realise his debts on foot of a mortgage a simple money decree may be given by the Court, as a matter of grace. It should amend the plaint by adding a claim for a simple money decree in such cases. (*Richards*, C.J. *and Rafique*, J.) MOHAN LAL *v.* LEKHRAJ SINGH. **33 I C. 111.**

Nature of Suit.

——**O. 6, R. 17**—*Nature of suit changed—Redemption—Possession.*

A suit for redemption cannot be amended so as to make it a suit for avoidance of a sale on payment of a portion of the consideration money. (*Karamat Husain and Tudball*, JJ.) RAM BILAS *v.* BRIJ NARAIN. **14 I.C. 743=11 M.L.T. 424.**

——**O. 6, R. 17 and O. 21, R. 103**—*Nature of suit changed—Suit for possession—Redemption suit—Conversion into.*

The plaintiff, decree-holder, while seeking to recover possession in execution of the decree was obstructed by the defendant who claimed

C. P. CODE (V of 1908), O. 6, R. 17—Nature of suit.

to be a mortgagee in possession. Thereupon, the plaintiff filed a suit under O. 21, R. 103 of the C.P.C. to establish his right to the present possession of the property, alleging that the defendant's mortgage was a pretence. At the trial of the suit, however, it was found that the mortgage in favour of the defendant was valid whereupon the plaintiff applied to convert his suit into one for redemption. *Held*, that the plaintiff could not be allowed to amend his plaint as desired by him; for the suit was really one to get rid of the mortgage and having failed to do so he wanted to alter the nature of the suit to make it based on the validity of the mortgage. (*Macleod*, C.J. *and Heaton*, J.) LAXIMISHANKAR *v.* HANJAHBHAI. **22 Bom. L.R. 735=57 I.C. 426=44 Bom. 516.**

——**O. 6, R. 17**—*Nature of suit.*

Amendment of plaint is not allowed if it alters the nature of the suit. (*Chatterjee, and Newbould*, JJ.) GYANENDRANATH *v.* PORESH NATH. **35 C L.J. 25=65 I.C. 39=26 C.W.N. 73=1922 Cal. 255.**

——**O. 6, R. 17**—*Nature of suit changed.*

Leave to amend the plaint will not be given when its effect would be to change the nature of the suit (*i. e.*,) from a Small Cause to a regular suit. (*Beachcroft*, J.) NARAIN PRASAD *v.* RAMESHWAR ADYA. **51 I.C. 435.**

——**O. 6, R. 17**—*Nature of suit changed.*

A plaintiff cannot be allowed to amend his plaint and change its nature. (*Chatterjee and Newbould*, JJ.) SHYAMA SUNDAR GHOSE *v.* ASWINI KUMAR CHAKRAVARTHI. **35 I.C. 91.**

——**O. 6, R. 17**—*Nature of suit changed—Partnership—Accounts.*

A and B were really partners. A sued B, after business was stopped for prize of certain goods supplied during the partnership by A to B. *Held*, that a suit for accounts ought to have been filed and that suit being wholly a different nature the plaintiff should not be allowed to amend it. (*Kensington and Johnstone*, JJ.) BERAGI RAM *v.* BAJA RAM. **168 P.L R. 1911=10 I.C. 250=214 P.W.R. 1911.**

——**O. 6, R. 17**—*Nature of suit changed—Suit of one nature—Amendment.*

A suit based on fraud and instigation of false claims cannot be converted into one of an implied contract of indemnity though large powers of amendment are granted by the C.P.C., 1908. (*Sadasiva Aiyar and Spencer*, JJ.) PALAKUNATH KAMNAMBOTH IRMULUGHI NAIR *v.* MANMATHNATH KOLAVACHATIL. **21 I.C. 935=(1913) M.W.N. 980.**

——**O. 6, R. 17**—*Nature of suit changed—No amendment.*

However wide the power of amendment may be a suit based on adoption cannot be treated

C. P. CODE (V of 1908), O. 6, R. 17—Nature of suit.

as a suit for partition of undivided family property. (*White*, C.J. *and Tyabji*, J.) VENKATA SAMBA SADASIVA DEVARA *v.* PAPAYYA DEVARA. 21 I.C. 737=(1913) M.W.N. 828.

——O. 6, R. 17—*Nature of suit changed—Amendment—Not to be allowed.*

No amendment of the plaint can be allowed so as to raise an entirely new case inconsistent with that originally put forward. Where a plaintiff sues to recover rent from the defendant on an agreement to pay a rent but the agreement is not proved, the plaintiff cannot be allowed to change his case into one for occupation rent. (*Lindsay*, J.C.) BINDESHWARI PRASAD SINGH *v.* BISHESWAR SINGH.
30 I.C. 499=2 O L.J. 383.

——O. 6, R. 17—*Nature of suit changed—Adoption—Different forms.*

A claim based on *Kittima* adoption, cannot be amended in appeal by basing it on *apathitha* as the effect of the amendment would be to change the suit into one of a substantially different character. (*Maung Kin*, J.) MAUNG THA SO *v.* MAUNG LU PE.
41 I.C. 749=11 Bur. L T. 246.

——O. 6, R. 17—*Nature of suit changed—Suit for rent—Plaint, if can be amended as one for damages for use and occupation.*

A plaint cannot be amended as to convert a claim for rent into one for damages for use and occupation. Where a claim is only for rent, no decree can be passed for such damages. (*Twomey*, J.) LEARY *v.* MAUNG ON GAING.
11 I.C. 863=4 Bur. L.T. 197.

——O. 6, R. 17—*Nature of suit changed.*

An amendment which has the effect of altering a claim laid on the footing that the defendant, was carrier, into one based on his liability as bailee, is not allowable. (*Hayward*, A.J.C.) LOUIS DREYFUS AND CO. *v.* SECRETARY OF STATE FOR INDIA. 45 I.C. 173=
11 S.L R. 103.

New plea or case.

——O. 6, R. 17—*New case—Change of cause of action and subject-matter.*

A Court, though it has full power of amendment of pleadings, cannot allow one distinct cause of action to be substituted for another, nor to change the subject-matter of the suit nor to permit a new case to be made. (*Lord Buckmaster*) MA SHWE MYA *v.* MAUNG MO HNAUNG. (1921) M.W.N. 396=
48 I.A. 214=4 U.B.R. (1921) 30=
30 M.L T. 28=48 Cal. 832=
24 Bom. L.R. 682=63 I.C. 914
1922 P.C. 249 (P.C.).

——O. 6, R. 17 and O. 23, R. 1—*New case—Nature of suit and plaintiffs' title changed during suit amendment or withdrawal not necessary.*

Plaintiffs sued the defendants on the basis of a certain transfer which was challenged by the

C. P. CODE (V of 1908), O. 6, R. 17—New plea or case.

defendants as void in law. The suit was dismissed but during the pendency of appeal, plaintiff's transferor died and plaintiffs being his heirs put forth a new plea that they claimed not as transferees but as heirs: *held* that in view of justice, plaintiffs should succeed even though they have not asked for amendment or withdrawal under O 23, and though the nature of suit has undergone a change thereby. (*Daniels*, J.) INDER DEO RAI *v.* RAM CHARITTER RAI. 74 I.C. 971=
L R 5 A. 28=1923 All. 360 (Rev.)

——O. 6, R. 17—*New case—Amendment of plaint—Conditions for allowing.*

When allowing an amendment of pleadings, the court should take into consideration the *bona fides* of the applicant, the possibility of the amendment without such a prejudice to the other party, as cannot be compensated by costs and if the court should satisfy itself that the amendment is not such as to turn a suit of one character into one of another character. (*Chatterjea and Newbould*, JJ.) GYANENDRA NATH *v.* PURESHNATH PAL.
26 C.W N. 78=36 C.L.J. 25=
65 I.C. 39=1922 Cal. 255.

——O. 6, R 17—*New case—Second appeal.*

The High Court in second appeal refused an application for amendment on the ground that if granted plaintiff, would be able to start afresh on allegations wholly inconsistent with those made in the original plaint. (*Mookerjee and Beachcroft*, JJ.) PADMA LOCHAN PATAR *v.* GIRIS CHANDRA KIL. 46 Cal. 168=
45 I.C. 241=27 C.L.J. 392.

——O. 6, R. 17—*New case—Plaint—Amendment in second appeal.*

Where the plaintiffs had full opportunity to amend their plaint in the courts below, but never did so and there was nothing to prevent the plaintiffs from suing in the alternative in the first instance and basing their suit upon two alternative grounds and no explanation was put forward as to why the plaint was not framed in this manner, an opportunity to amend the plaint in second appeal by introducing an entirely new cause of action was refused. (*Motisagar*, J.) KIRPA *v.* MT. CHINTI.
77 I.C. 518=1923 Lah. 530.

——O. 6, R. 17—*New case—When not to be allowed.*

An amendment ought not to be allowed where the cause of action is materially changed and a party is prevented from setting up a plea of limitation. (*Napier and Odgers*, JJ.) SREEDHARAM VALIA RAJAH *v.* NARAYANA.
41 M.L.J. 525=71 I C. 270=
(1921) M.W.N. 639.

——O. 6, R. 17—*New plea or case—Subrogation.*

A claim of subrogation will not be allowed in appeal to a usufructuary mortgagee failing to prove the genuineness of the deed, especially

C. P. CODE (V of 1908), O. 6, R. 17—New plea or case.

when the mortgagor holds the property as lessee of the prior mortgagee. (*Spencer and Krishnan*, JJ.) PALLI KANDI LATHAPURATH MAMMAD *v.* MATANCHERI MAMMAD. (1917) **M.W.N. 769=43 I.C. 28=38 M.L.J. 315.**

——— O. 6, R. 17—*New case.*

The plaint cannot be so amended as to set up a totally different title in cause of action. (*Bakewell and Spencer*, JJ.) GADIGERE MULLA SUNKI REDDY *v.* VENGAL REDDY. **30 I.C. 391.**

——— O. 6, R. 17—*New case—Departure from original plea.*

O. 6, R. 17, C.P.C. is subject to the limitation that the case tried must be consistent with the case as originally laid and that the state of facts and equities and grounds of relief originally alleged and pleaded should not be departed from. 11 M.I.A. 7, (P.C.), Foll. Where in a suit for rent, the plaint clearly asserts title and the written statement denies it and an issue as to title is raised, held that the plff. could recover on title. (*Pratt*, J.C. *and Crouch*, A.J.C.) KHIARAM PARIOMAL *v.* CHHATOMAL TIRITH MAL. **20 I.C. 570=7 S.L.R. 23.**

Partition.

——— O 6, R. 17—*Partition—Joint possession—Amendment—Conditions.*

A person who has failed to prove that he had possession, actual or constructive of any share of the disputed property is not entitled to maintain a suit for partition. He may be permitted to amend his plaint by adding a prayer for joint possession on terms as to payment of costs. (*Mookerjee and Beachcroft*, JJ.) LOKENATH SINGH *v.* DHWAKESHWAR PROSAD NARAIN SINGH. **21 C.L.J. 263=27 I.C. 465=20 C.W.N. 51.**

——— O. 6, R. 17 and O. 8, R. 9—*Partition suit.*

Where in a suit for partition by one member against his co-parceners and several others who had come into possession of certain properties as alienees, the plaint contained no specification of titles by which they acquired the properties and when this defect in the plaint was pointed out to the Court and an application for amendment was put in, it was rejected and the plaint was also rejected for want of a cause of action; *held* that the petition for amendment ought not to have been dismissed, and the plaint ought not to have been rejected until opportunity had been given to amend. (*Oldfield and Tyabji*, JJ.) NARAYANASWAMI AIYAR *v.* KRISHNAMURTHI AIYAR. (1918) **M.W.N 122=26 I.C. 927=17 M.L.T. 48.**

Power of Court.

——— O. 6, R. 17—*Power of Court—Court's power to amend plaint.*

A Court can allow amendment of a plaint to do that substantial justice for which alone it

C. P. CODE (V of 1908), O. 6, R. 17—Power of Court.

exists. (*Mookerjee and Buckland*, JJ.) SATIS *v.* KALIDASI. **34 C.L.J. 529=26 C.W.N. 177=68 I.C. 577=1922 Cal. 202.**

——— O. 6, R. 17—*Power of Court—Amendment of plaint, when permissible.*

Courts will not allow amendment of pleadings except (1) where there is *bona fides* on the part of the applicant; (2) where the amendment does not cause such prejudice to the other party as cannot be compensated by costs; (3) where it does not convert a suit of one character to a suit of another character. (*Chatterjea and Newbould*, JJ.) GYANSUDRA *v.* PARESH NATH. **26 C.W.N. 73=35 C.L.J. 25=65 I.C. 39=1922 Cal. 255.**

——— O. 6, R. 17—*Power of Court.*

O. 6, R. 17, C.P.C., gives ample power to the Court to give leave to the parties to amend the pleadings but such leave should not be given where the amendment would prejudice the opposite party. (*Chatterjea and Duval*, JJ.) REPATI RAMAN BASAK *v.* HARISH CHANDRA BASAK, **58 I.C. 665=24 C.W.N. 749.**

——— O. 6, R. 17—*Power of Court—Duty of Court to allow all amendments—Application before framing of issues.*

A Court should always grant leave to amend unless it is satisfied that the party applying was acting mala fide or that by his blunder he had done some injury to his opponent which could not be compensated for by costs or otherwise. However negligent or careless may have been the omisision, the amendment should be allowed if it could be made without injustice to the other side. (*Scott-Smith*, J.) JHARIA COAL COMPANY *v.* DIWAN CHAND & CO, **67 I.C. 335.**

——— O. 6, R. 17—*Power of Court—Admission by pleader in ignorance of the true facts.*

The Court can allow an amendment of the plaint, where in view of the testimony of plff's. witnesses, it finds that the plff's. pleader had in the beginning of the trial and as a result of wrong information, made a wrong statement. (*Scott-Smith and Shadi Lal*, JJ.) CHUHAR BAI *v.* RAMANAND. **48 I.C. 114=113 P.W.R. 1918.**

——— O. 6, R. 17—*Power of Court—Wide.*

The provisions of O. 6, R. 17 of the Code, regarding powers of Courts to amend plaints are very comprehensive. (*Abdur Rahim and Sundara Aiyar*, JJ.) DRONAM RAJU RAMAYA *v.* CHUNDARI PEDDAYYA. **10 M.L.T. 116=12 I.C. 119=(1911) 2 M.W.N. 174.**

——— O. 6, R. 17—*Power of Court.*

Under the Civil Procedure Code of 1908 Courts have very wide powers to order amendment of a plaint, a claim for partition may be allowed to be amended into one partly for partition and partly for recovery of certain property under a will. (*Sundara Aiyar*, J.) *In re* JOTHY MAHALINGA AIYAR. **12 I.C. 104=10 M.L.T. 188.**

C. P. CODE (V of 1908), O. 6, R. 17—Power of Court.

——— **O. 6, R. 17**—*Power of Court.*

Both the original court and the appellate court have full powers of amendment to try and decide all matters in dispute between the parties. (*Atkinson and Jwala Prasad, JJ.*) MUKUNDA LAL *v.* JOGESH CHANDRA.
20 C.W.N. 1276=35 I.C. 870=1 Pat. L.J. 393.

———— **O. 6, R. 17**—*Power of Court—Amendment when allowed.*

The powers of amendment under the new Code are much wider than under the old one. But it is an accepted principle that amendment will not be allowed if it converts the suit into one which is not only different from but is inconsistent with the plaint as originally framed. Where the amendment meets the ends of justice by allowing the whole question in dispute to be decided between the parties and avoid unnecessary litigation, then it ought to be allowed. (*Pipon, J.C.*) GHULAM HAIDAR KHAN *v.* SARDAR ALI KHAN. **73 I.C. 748.**

———— **O. 6, R. 17**—*Powers of Court—New Code.*

The new Code gives extended powers to courts to allow amendments of plaints in a late stage even if the amendment would alter the character of the suit; such amendments should usually be allowed and the defendants compensated for loss possibly occasioned to them thereby. (*Bell, J.*) KASTURCHAND DAGA *v.* MAUNG BATHAW. **11 I C. 856=4 Bur. L.T. 188.**

———— **O. 6, R. 17**—*Powers of Court—Amendment of plaint after preliminary decree—Partition suit.*

The rule regarding amendment of a plaint is not absolutely mandatory and a rigid rule of Law. It has been read as subject to the inherent power of the court to prevent abuse of its powers. An amendment necessary to the settlement of real dispute must be permitted if it does not cause injustice which cannot be compensated for in costs. (*Crouch, and Boyd, A.J.Cs.*) TURABALISHA *v.* BIBI NAJU.
26 I.C. 863=8 S.L.R. 28.

Prejudice to defendant.

——— **O. 6, R. 17**—*Prejudice to defendant—Costs.*

A plaint cannot be amended when it would expose the deft. to an injury which could not be compensated in costs. (*Batchelor and Hayward, JJ.*) HARKISON DAS *v.* CHAHAGAN LAL.
40 Bom, 158=33 I.C. 264=18 Bom. L.R. 1.

———— **O. 6, R. 17**—*Prejudice to defendant—Specification of boundaries—Order of amendment without notice—Effect of.*

Where the boundaries of properties described in the plaint are amended without notice to the defts. but the amendment has in no way prejudiced them, effect should be given to it. (*Shamsul Huda, J.*) SHEIKH AKUB ALI *v.* ASKAR ALI BEPARI. **64 I.C. 305.**

C. P. CODE (V of 1908), O. 6, R. 17—Procedure.

——— **O. 6, R. 17**—*Prejudice to defendant—Amendment of plaint—Extent of.*

An amendment will not be allowed which would prejudice the rights of the opposite party existing at the date of the proposed amendment, *e.g.*, a right acquired by virtue of the Statute of Limitation. (*Ross, J.*) SINEHI RAM BIHARI LALL *v.* AGENT, E. I. RY.
64 I.C. 125=2 Pat. L.T. 679.

Procedure.

———— **O. 6, R. 17**—*Procedure — Amendment—Objection—Waiver.*

When defendants do not take any objection in their statement to the amendment they waived their right to object. (*Chatterjee and Newbould, JJ.*) GANGA DAS SIL *v.* SECRETARY OF STATE. **32 I.C 752=20 C.W.N. 686.**

———— **O. 6, R. 17**—*Procedure—Opportunity to amend written statement.*

Where an application to amend a plaint is made, the only matter for consideration is, whether the amendment can be permitted without injustice to the defendant an injustice which cannot be remedied by an appropriate order for costs. 12 C.L.J. 556, ref. If plaintiff is allowed to amend his plaint by including certain property in his claim which had been omitted by mistake, defendant should be allowed an opportunity to amend his written statement and produce evidence to rebut the new claim of the plaintiff. Defendant should not be refused this opportunity because this case had been pending for a long time. *Held* that the amendment was properly allowed by the primary court. (*Mookerjee and Beachcroft, JJ.*) MANJI DUTT MISSER *v.* KALANAND SINGH. **16 I.C. 785.**

———— **O. 6, R. 17**—*Procedure—Party not availing of R. 17—Effect.*

If a party to whom permission under R. 17 is given, does not avail himself of it, he cannot according to R. 18 amend it afterwards unless the time allowed for amendment is extended by Court. Where therefore a plaintiff fails to amend his plaint when so directed, the Court cannot dismiss the suit merely on this account. (*Martineau, J.*) TOMLINSON *v.* GORAN.
60 I.C. 376.

———— **O. 6, R. 17**—*Procedure—Application to amend — No orders passed— Decree on grounds mentioned therein.*

Where after the institution of a suit for pre-emption an application was put in by the plaintiff to amend the plaint by adding a new ground of claim and without the plaint being amended the court gave the plaintiff a decree on the additional ground sought to be put in, *held*, that it was not justified for doing so as the vendee had no opportunity of pleading to the amended plaint. (*Shah Din, J.*) GORA SINGH *v.* JAGTA SINGH. **83 P.R. 1917=42 I.C. 263=142 P.W.R. 1917.**

C. P. CODE (V of 1908), O. 6, R. 17—Redemption.

Redemption.

——— **O. 6, R. 17**—*Redemption—Suit for possession.*

A plaintiff can be allowed to amend his plaint which prayed for redemption of the whole mortgage by praying for recovery in the alternative of his share and for partition and possession of such share on payment of the proportionate amount of the mortgage, even in second appeal. (*Oldfield and Phillips*, JJ.) PUTHUSSERI MANIANNOOR *v.* THOZUKKAT PULLANIYIL. **32 M.L.J. 489 = (1917) M.W.N. 222 = 39 I.C. 46 = 21 M.L.T. 299**

Refusal to Amend.

——— **O. 6, R. 17**—*Refusal to amend—Change in cause of action.*

The plaintiff sued for money on a promissory note, which he alleged had been executed by the defendant in consideration of certain sums due. The defendant denied having executed the promissory note, but he was suspected to have substituted a forged promissory note for the one which he had written. The Finger Print Bureau at Allahabad were of the opinion that the finger printed in the document did not agree with those of the defendant. The trial Court held that the plaintiff is entitled to sue on the oral settlement made before the promissory note was given, and on the basis of that settlement it had given the plaintiff a decree for the full amount claimed. On appeal by defendant, the plaintiff had nowhere stated that he wished to change the basis of his suit and fall back on the oral settlement, nor had he asked to be allowed to amend his plaint. The suit had been passed through solely on the promissory note, *held*, when it has been found that the promissory note sued upon is a forgery, the claim must necessarily fail. (*Martineau and Zafar Ali*, JJ.) RAJINDAR SINGH v. TEK CHAND. **1923 Lah. 628.**

——— **O. 6, R. 17 and S. 115**—*Refusal to amend—Revision.*

An order refusing to leave to amend the plaint under O. 6, R. 17 can be set aside in revision. (*Broadway*, J.) IMDAD ALI SHAH *v.* SAYED ALI. **40 I.C. 65 = 26 P. R. 1917.**

——— **O. 6, R. 17**—*Refusal to amend—Revision.*

Where a District Judge refused to amend the plaint as such amendment materially altered the nature of the suit and passed an order under O. 6, R. 17, C.P.C., the High Court cannot interfere in revision even though the Dt. Judge exercised his discretion wrongly unless he acted with such material irregularity as to justify interference in revision. (*Phillips*, J.) V. VENKATASUBBIAH *v.* SESHACHELLAM.
12 I.C. 173 = 22 M.L.J. 136 = 10 M.L.T. 549 = (1911) 2 M.W.N. 257.

C. P. CODE (V of 1908), O. 6, R 17—Shortening Litigation.

Revision.

——— **O. 6, R. 17**—*Revision.*

Though orders refusing amendment have been set aside by the High Courts on revision where the lower courts have acted with material irregularity, each case must be decided on its own merits, and no hard and fast rule can be laid down that an amendment must, as a general rule be allowed where a refusal to amend would be likely to result in hardship to a party. The test to be applied is whether the amendment would or would not occasion injury to the opposite party such as cannot be recouped by costs and leave to amend should generally be refused if it would. (*Moti Sagar*, J.) SHAMSUD-DIN *v.* DEVI DAS.
77 I.C. 471 = 1923 Lah. 505.

——— **O. 6, R. 17**—*Revision—Amendment.*

The plaintiff cannot be allowed to amend his plaint in revision, by showing another basis for damages on a breach of contract. (*Maung Kin*, J.) ISMAIL SODAGAR *v.* EBRAHIM ABDULLA TANOO. **42 I.C. 893 (L.B.).**

Shortening Litigation.

——— **O. 6, R. 17**—*Shortening litigation—Amendment—Duty of Court to allow.*

It is the manifest duty of a Judge to try to put an end, once for all, to all questions that can arise in relation to a particular transaction. Where an amendment is necessary for the purposes of settling all matters in controversy and works no injustice, nor takes by surprise the opposite party, the Judge should make such amendments. (*Mears*, C.J. *and Banerjee*, J.) NUR MAHOMED *v.* NATWAR LAL.
48 A. 220 = 71 I.C. 452 = 1923 All. 112.

——— **O. 6, R. 17**—*Shortening of litigation—Amendment.*

The amendment of a plaint may be allowed to avoid multiplicity of actions especially before actual trial. (*Banerji*, J.) MUMTAZ ALI *v.* KARIM ALI. **19 I.C. 250 = 11 A.L.J. 423.**

——— **O. 6, R. 17**—*Shortening of litigation.*

A Court is justified in refusing to allow amendment if this would tend to reduce a litigation. (*Broadway*, J.) TULSI RAM *v.* MUSSAMMAT JAI DEVI.
53 P.L.R. 1919.

——— **O. 6, R 17**—*Shortening of litigation. Amendment.*

O. 6, R. 17 allows a party to alter or amend his pleadings in such manner and upon such terms as may be just and allows the amendment to be made at any stage of the proceedings. An amendment should always be allowed if thereby the real and substantial question can be raised between the parties and multiplicity of legal proceedings is avoided. (*Shadi Lal and Broadway*, JJ.) DARBARI LAL *v.* WASU MALIK. **56 I.C. 115 (Lah).**

C. P. CODE (V of 1908), O. 6, R. 17—Shortening litigation.

———O. 6, R. 17—*Shortening litigation.*

The only object of allowing amendment of a plaint is to avoid multiplicity of suits. (*Hallifax*, A.J.C.) SHIOBAKSH SINGH *v.* JAGANNATH. **64 I.C. 99 (Nag.).**

Subsequent Cause of Action.

———O. 6, R. 17—*Subsequent cause of action—Amendment—Second appeal.*

The High Court in second appeal will not allow an amendment of the plaint so as to allow the plaintiff to sue on a cause of action which has arisen subsequent to the suit. (*Sanderson*, C. J. *and Chotzner*, J.) MOBARAK MOLLA *v.* HECHAMUDDI MULLA.

68 I.C. 214.

———O. 6, R. 17—*Subsequent cause of action—Power to take note of—Appellate Court.*

Courts have power in certain circumstances to grant a decree in a case where the cause of action arose subsequently to the filing of the plaint. An appellate Court can take cognizance of matters which may have happened after the institution of the suit for the purpose of moulding the relief that a party is entitled to, provided it is not based on the new title which accrued after the action. (*Broadway and Martineau*, JJ.) TARA CHAND *v.* ABDUL AHAD.

67 I.C. 891.

———O. 6, R. 17—*Subsequent cause of action—Change of position.*

An amendment should be allowed when it is necessary for the determination of the question at issue owing to the change of a position of parties since the suit. (*Le Rossignol and Wilberforce*, JJ.) MUMTAZ *v.* NAURANG.

3 Lah. L J. 227.

———O. 6, R. 17—*Subsequent events.*

A plff. can be given a decree even when cause of action arises after filing the suit, no amendment of plaint being necessary in such case. (*Martineau*, J.) GHULAM FATIMA *v.* RAHMAN. **50 I.C. 270=127 P.R. 1919.**

———O. 6, R. 17—*Subsequent cause of action—Subsequent to institution of suit—Relief on.*

Courts have power, in exceptional circumstances, to grant a decree even in cases where the cause of action, arose subsequent to the suit. Where in a suit it was found that the money became payable immediately after suit, but it was contended that the suit was premature because of the terms of an unregistered mortgage bond between the parties. *Held*, that a decree should be passed for the plff. without driving him to a fresh suit. (*Seshagiri Aiyar and Kumaraswamy Sastri*, JJ.) SUBBRAYYA CHETTY *v.* NACHIAR AMMAL.

(1918) M.W.N. 199=44 I.C 863=7 L.W. 403.

C. P. CODE (V of 1908), O. 6, R. 17—Subsequent cause of action.

———O 6, R. 17—*Subsequent events—Inclusion of.*

A person brought a suit for redemption of a mortgage executed by the widow of the last male owner on the footing of an adoption and when the adoption was questioned by the deft., obtained a conveyance of the equity of redemption from the next reversioner and was allowed to put in an additional written statement on which an issue as to the new title was raised. It was found that at the time when the additional written statement was put in by the plff. and for a long time thereafter, the right to redeem the mortgage would not be barred and there was no prejudice to defts. *Held*, in the circumstances of the case the Court should grant the plff. a decree for redemption on the title set out in the additional written statement without driving him to a fresh suit. (*Wallis*, C.J. *and Kumaraswami Sastri*, J.) DURASAMI *v.* CHINNA GOUNDEN.

22 M.L.T. 538=(1918) M.W.N. 89=34 M.L.J. 258=43 I.C. 360=7 L.W. 335.

———O. 6, R. 17—*Subsequent cause of action—Amendment—Appellate Court.*

There can be no doubt that Courts can allow an amendment of plaint with reference to events that transpire after the institution of the suit. If pending, a suit for declaration, the deft. takes possession, plff. may be allowed to amend his plaint by asking for possession, and need not separately sue for ejectment. Such amendment may be allowed by the Appellate Court. (*Sundara Iyer and Sadasiva Iyer*, JJ.) SUBBA NAIKEN *v.* SAMI NAIKEN.

16 I.C. 734.

———O. 6, R. 17—*Subsequent cause of action—Declaratory relief—Prayer for possession.*

An amendment in the pleadings should be made if thereby the real and substantial question can be raised between the parties and multiplicity of legal proceedings can be avoided. If a plaintiff sues for a mere declaration and in the altered condition of things it so happens that a declaration will be useless and a second suit for possession will be necessary it is open to the trial Court to order an amendment of the plaint by the addition of a prayer for possession. (*Simpson and Wazir Hasan*, A.J.C.) HAMID MIRZA BEG *v.* AHMAD MIRZA BEG. **9 O.L J. 359=68 I.C 986=4 U.P.L.R. (O.C.) 89=1922 Oudh 266.**

———O. 6, R. 17—*Subsequent events—Cause of action.*

A cause of action must be antecedent and cannot araise from the institution of the suit itself. (*Miller*, C.J. *and Roe*, J.) MAHANT GOBIND RAMANUJ DAS *v.* RANI DEBENDRA BALA DASI. **52 I.C. 231=4 Pat. L.J. 387.**

C. P. CODE (V of 1908), O. 6, R. 17—Subsequent cause of action.

———O. 6, R. 17 — *Subsequent events—Amendment—Discretion of Court.*

An amendment of the plaint is a matter of judicial discretion and there is nothing in the Civil Procedure Code prohibiting a Court from allowing an amendment based on an event happening subsequently to the filing of the suit. (*Pratt*, J.C. *and Fawcett*, A.J.C.) NUR KHATUN *v.* SUMAR SAWAYO.
31 I.C. 7=9 S.L.R. 61.

Technical Defect.

———O. 6, R. 17 and Small Cause Courts Act, (IX of 1887), S. 25—*Technical defects—Amendment of plaint—Dismissal—Revision.*

An order dismissing an application to amend a plaint which had certain technical defects is a material irregularity and ought to be set aside in revision. (*Knox*, J.) HEYDORN *v.* MUHAMMAD SHAFI. 34 All. 348=14 I.C. 507=9 A.L.J. 294.

———O. 6, R. 17—*Technical mistake—Description of property.*

An amendment which is but a correction of the description of the property, is an amendment which the court is entitled to make and it must be reckoned as from the date of the presentation of the plaint. (*Richards*, C.J. *and Tudball*, J.) MUHAMMAD SADIA *v.* ABDUL MAJID. 33 All. 616=10 I.C. 476=8 A.L.J. 636.

———O. 6, R. 17—*Technical defect—Description of the defendant—Limited Company.*

Where a suit for damages for loss of goods sent by the defendant Railway Company was entitled. "The Agent, Railway Company" as defendant and the Railway Company objected to this description *held* that the addition of the word "Agent" to the name of the Railway Company in the description of the defendant merely amounted to a misdescription and the plaintiff should be allowed to amend the plaint. If it can be said, in the interests of Justice, that there has been a misdescription of a party in the title of a plaint the necessary amendment ought to be allowed, if otherwise the rights of the parties would be prejudiced. 64 I.C. 125 Dissented from. (*Macleod*, C.J. *and Crump*, J.) THE SARASPUR MANUFACTURING CO. *v.* B. B. & C. I. RY. CO.
47 Bom. 785=25 Bom. L.R. 513=73 I.C. 1027=1923 Bom. 462.

———O. 6, R. 17—*Technical defect—Pleadings—Amendment.*

Technical errors in pleadings should not be allowed to affect rights of parties if otherwise they are entitled to it, *e.g.*, omission of prayer to modify the decree when the suits for rectification of a compromise in partition suits. (*Holmwood and Chapman*, JJ.) SRISH CHANDRA PAL *v.* TRIGUNA PROSAD PAL.
18 I.C. 444=40 Cal. 541.

C. P. CODE (V of 1908), O. 6, R. 18.

———O. 6, R. 17 — *Technical mistake—Minor.*

When the Court below dismissed a minor's suit on the ground that the plaint disclosed no cause of action but it appeared that the plaint was only technically not properly drawn up, *held*, that under the circumstances of the case, the plaint should be allowed to be amended. (*Shadi Lal and Le-Rossignol*, JJ.) SANJAT SINGH *v.* UTTAM SINGH.
65 P.W.R. 1915=29 I.C. 769=109 P.L.R. 1915.

———O. 6, R. 17—*Technical defect--Objection at a late stage—Amendment of.*

An objection by a vendee is a pre-emption suit after the evidence was recorded, as to the non-inclusion of certain property in the plaint cannot be entertained and even if it could be, the Court will allow amendment of the plaint. (*Kensington*, C.J. *and Shah Din*, J.) SHAN KAR LAL *v.* DALLI. 132 P.W.R. 1914=230 P.L.R. 1914=25 I.C. 68=18 P.R. 1915.

———O. 6, R. 17 and O. 7, R. 11—*Technical defect—Signature.*

The want of a proper signature does not under O. 7, R. 11 necessitate the rejection of a plaint and O. 6, R. 17 enables amendment of a plaint at any stage of the proceedings and the plaint is not void and inadmissible owing to the defective signature. (*Drake Brockman*, J.C.) DUGAGIR *v.* KOLLU. 10 I.C. 731=7 N.L.R. 33.

———O. 6, R. 17—*Technical defect—No prejudice to deft. costs.*

Where amendment of a plaint is allowed it is purely of a formal nature and does not in any way prejudice or increase deft's costs and he is entitled to no costs. (*Stuart and Kanhaiya Lal*, A.J.Cs.) NARENDRA BAHADUR *v.* OUDH COMMERCIAL BANK. 30 I.C. 323=2 O.L.J. 402.

———O. 6, R. 17—*Technical error—Promissory note—Suit upon decree on original claim.*

The fact that plaintiff sued upon a document as a promissory note is no bar to his suing upon the transaction referred to in the document as one of his causes of action and of using the document merely as evidence of the transaction upon which the suit rests. There can be no possible object in forcing the parties into fresh litigation merely by reason of a technical error in the plaint which can be corrected and the correction of which can allow the real dispute between the parties to be judicially settled. (*Pipon*, J.C.) SAYAD SIKANDAR SHAH *v.* BHAI RAM CHAND SANT RAM. 71 I.C. 968.

———O. 6, R. 18—*Period prescribed in, for amendment, not applicable, if amendment under general powers of High Court to enable parties to settle differences.*

A rent suit did not correctly mention the property as required by S. 47 of Chota-Nagpur Landlord and Tenant Procedure Act. The High Court in an appeal directed the description of the property to be amended and sent

C. P. CODE (V of 1908), O. 6, R. 18.

it to the first court through the lower Appellate Court. The latter court allowed the amendment of the plaint only leaving the decree-holder to take further steps. *Held*, the amendment order of the High Court was not under O. 6 of C.P.C. but under its general power. So the amendment made after 15 days is not out of time. (*Stephen and Mullick*, JJ.) MADAN MOHAN NATH *v.* MAHARAJA OF CHOTA NAGPUR. **22 I.C. 778 = 17 C.W.N. 200.**

——**O. 6, R. 18**—*Application for amendment—Part of the plaint.*

Plff. moved an amendment which was granted but plff. did not amend the plaint accordingly. On a contention being raised later on that ground, *held*, that the application for amendment can be read as part of the plaint and that the deft. not taking objection at first, waived the objection. (*Mookerjee and Caspersz*, JJ.) GAY KUMAR CHAND *v.* LACHMAN RAM. **10 I.C. 803 = 14 C.L.J. 627.**

——**O. 6, R. 18**—*Rejection of plaint.*

The Court cannot reject a plaint or dismiss the suit under O. 6, R. 18 but must proceed to try the suit on the original plaint. (*Robertson*, J.) MARLIDHAR KAUSHI RAM *v.* NARAYAN DAS. **169 P.L.R. 1913 = 19 I.C. 472 = 107 P.W.R. 1913.**

——**O. 7, Rr. 1 and 6** — *Limitation as regards suit—Plaintiff to prove he is in time.*

In limitation as regards suit, plaintiff is to prove that he is in time. (*Mookerjee and Rankin*, JJ.) PROHLAD CHANDRA CHOWDHURY *v.* RAMSARAN CHOWDHURY. **38 C.L.J. 218 = 1924 Cal. 420.**

——**O. 7, R. 1**—*Omission to designate party.*

Failure to mention in the title of the plaint the capacity of the deft. but full description of it in the plaint does not justify dismissal of the suit. (*Teunon and Sheepshanks*, JJ.) JAGATARINI DASI *v.* PRAFULLA CHANDRA GHOSE. **33 I.C. 792.**

——**O. 7, R. 1**—*Cause of action—Particulars.*

The plaint should contain in addition to other particulars, the facts constituting the cause of action and the time when it arose. (*Jenkins, C. J. and Stephen*, J.) MADRAS STEAM NAVIGATION CO., LTD. *v.* SHALIMAR WORKS, LTD. **28 I.C. 463 = 42 Cal. 85.**

——**O. 7, R. 1**—*Valuation of the suit.*

For purposes of O. 7, the aggregate of the claim put forward in the plaint is treated as one suit though there may be several causes of action. One plaint is only one suit. Jurisdiction depends on amount or value of the aggregate subject-matters at the date of institution. A Court cannot adjudicate upon a portion of the claim or one of the claims set up in the same plaint and return the other portion or other claims for adjudication in another Court. (*Abdur Rahim, Spencer and*

C. P. CODE (V of 1908), O. 7, R. 4.

Srinivasa Aiyangar, JJ.) PUTTAH KANNIAH CHETTY *v.* RUDRA BHALL VENKATANARSAYYA. **40 Mad. 1 = 39 I.C. 439 = 5 L.W. 680 = 32 M.L.J. 221 = (1917) M.W.N. 367.**

——**O. 7, R. 1**—*Contents of plaint.*

Under O. 7, R. 1 (*e*), C.P.C. the plaint is to state when the cause of action arose, and in an action of ejectment, it is for the plff. to prove a title subsisting at the date of his suit. 14 I.A. 168; 35 All. 273; 8 I.C. 1123, Ref. (*Drake Brockman*, J. C.) PARSOO *v.* MUNNA LAL. **39 I.C. 21 = 18 N.L.R. 16.**

——**O. 7, R. 1**—*Particulars—Partition.*

Where in the plaint in a Hindu family partition suit, some properties are omitted by in advertence or mistake or fraud, the suit should not be dismissed but the plaint must be allowed to be amended by supplying the omission. 28 Cal, 769, Foll. 14 Cal. 122 and 35 Cal 961, Ref. to (*Atkinson and Jwala Prasad*, JJ.) MUKUNDA LAL *v.* JOGESH CHANDRA. **20 C.W.N. 1276 = 35 I.C. 370 = 1 Pat. L.J. 393.**

——**O. 7, R. 2**— *Mesne profits accrued before suit—Valuation.*

Court-fee is not leviable on a claim for *mesne profits pendente lite*. 21 Mad. 171; 13 C.W.N. 815, Rel. on. But where the *mesne profits*, have accrued due before suit and the plaintiff is in a position to value it even approximately, he is bound to state the amount under O. 7, R. 2, C.P.C. (*Mookerjee and Beachcroft*, JJ.) BHUPENDRA KUMAR *v.* PURNA CHANDRA BOSE. **24 I.C. 232.**

——**O. 7, R. 2**—*Mesne profits from date of suit cannot be valued.*

Where mesne profits are claimed only from the date of institution of the suit it is obviously impossible to state even approximately the amount of mesne profits. (*Brown* A.J.C.) MAUNG LU GALE AND THREE OTHERS *v.* MAUNG LU PO AND TEN OTHERS. **1 Bur. L.J. 267 = 77 I.C. 53 = 4 L.B.R. 140 = 1923 Rang. 110.**

——**O. 7, R. 4**—*Representative capacity.*

In a suit by or against a person in a representative capacity, it is not necessary to state in cause-title of the plaint, the representative capacity itself. At any rate the defect is not one of joinder of parties but one curable by amendments. (*Fletcher and Cuming*, JJ.) BIDHU SEKAR *v.* KULODA PRASAD. **50 I.C. 523 = 46 Cal. 877.**

——**O. 7, R. 4**—*Suit in a representative capacity.*

The rule does not require that when the plaintiff sues in a representative capacity that fact should be stated in the cause-title of the plaint although that is a convenient place to state it. (*Fletcher and Teunon.*, JJ.) KAURWANI SINGH *v.* WASIF ALI MEERZA. **28 I.C. 818 = 19 C.W.N. 1193.**

C. P. CODE (V of 1908), O. 7, R. 6.

———O. 7, R. 6—*Mortgage suit — Limitation.*

Where a plff. sues to redeem a mortgage alleged to have been executed within 60 years, it is not necessary for him to plead acknowledgments to save limitation. (*Richards*, C. J. *and Banerji*, J.) KAMALA DEVI *v.* GURUDAYAL. **31 I C. 283 = 17 A.L J. 330.**

———O. 7, R. 6—*Grounds of exemption not stated.*

A suit was returned to be presented to the proper Court. When it was so presented to the later Court, it was beyond time. On the plaint no statement as required under R. 6, was made, *held* no statement was necessary as there was the endorsement of the Court returning the plaint giving the dates of original presentation and the date of return. (*Abdul Raoof and Fforde*, JJ.) SUKHBIR SINGH *v.* PIARE LAL. **1923 Lah. 591.**

———O. 7, R. 6 — *General relief—Grant of declaration—Suit for possession.*

Where a plaintiff prays for such general relief as the court might grant if his prayer for possession is refused, the Court can grant him a declaration of his title though he fails to obtain the specific relief prayed for. (*Le-Rossignol and Martineau*, JJ.) MOHAN LAL *v.* MAYA MAL. **4 Lah. L J. 393.**

———O. 7, R. 6—*Failure to set up acknowledgment as saving limitation is a bar.*

Where the plaintiff did not set up in his plaint, as required by O. 7, R. 6, an acknowledgment, within the meaning of S. 19 of the Limitation Act which would bring his suit within time, he cannot be allowed to raise it. (*Scott-Smith and Compbell*, JJ.) UTTAM CHAND *v.* MT. THAKUR DEVI. **4 Lah. L.J. 190 = 3 Lah. 233 = 1922 Lah. 39.**

———O. 7, R. 6—*Construction must be liberal--Ground of exemption from limitation omitted from plaint.*

R. 6 should be construed liberally and reasonably. Where the plaint does not state the ground of exemption from the Law of Limitation, the Court should allow the inclusion of that ground. Where that point is expressed in the plaint R. 6 is satisfied but in such a case plaintiff may try to get over the bar of limitation by putting forth another ground if he believes the latter to be true. (*Chevis and Scott-Smith*, JJ.) PARMESHRI DAS *v.* FAKIRAI. **60 I.C. 772 = 3 Lah. L.J. 22.**

———O. 7, R. 6—*Suit* prima facie *barred by limitation—Dismissal.*

O. 7, R. 6 of the C.P. Code is applicable to cases in which the suit as laid in the plaint is *prima facie* barred by limitation. (*Petman*, J.) KHANDU LAL *v.* FAZAL. **51 I C. 956 = 1 Lah. 21.**

C. P. CODE (V of 1908), O. 7, R. 6.

———O. 7, R. 6—*Amendment of plaint.*

O. 7, R. 6 should be construed liberally, and a plaintiff should generally be allowed to amend his plaint by stating the ground of exemption from limitation. (31 Cal. 195; 26 I.C. 441, dist.) (*Shah Din*, J.) RAM SUKH DAS *v.* GHULAM MUHMMAD. **116 P.W.R. 1918 = 46 I.C. 495 = 102 P.R. 1918 = 120 P.L.R. 1918.**

———O. 7, R. 6—*Suit beyond period of limitation—Plaint, silent on ground of exemption.*

The plaintiff, is bound to show in the plaint the ground upon which exemption from the law of limitation is claimed and in our opinion he cannot be allowed to rely upon a ground, on which the plaint is silent. (*Shah Din and Beadon*, JJ.) GOBINDA MAL *v.* SANTA. **83 P.R. 1914 = 26 I.C. 441 = 232 P.L.R. 1915.**

———O. 7, R. 6—*Plaint not on its face time-barred—Applicability*

O. 7, R. 6, C. P. C. has no application when the plaint is not on its face time-barred. (*Johnstone and Chevis*, JJ.) DEVARAJ *v.* SHIV RAM. **70 P.R. 1914 = 260 P.L.R. 1914 = 25 I.C. 463 = 165 P.W.R. 1914.**

———O. 7, R. 6—*Plea of exemption from limitation—Evidence of acknowledgment in course of trial.*

A plaintiff whose suit is on the face of it barred by limitation, must state in the plaint the ground on which the bar is saved. Where nothing is stated and no issue is framed, any document cannot be afterwards used in the course of the trial as being an acknowledgment saving limitation. (*Seshagiri Aiyar*, J.) MARUDAI MUTHIRIAN *v.* CHINNAKANNU MUTHIRIAN. **25 M.L.T. 298 = (1919) M.W.N. 429 = 52 I.C. 243 = 9 L.W. 82.**

———O. 7, R. 6—*Omission to set out in plaint the ground of exemption from limitation —Objection taken in revision.*

An objection that plaintiff did not set out the ground of exemption from limitation, will not be allowed to be taken in revision in the High Court. (*Krishnan*, J.) REGUNA NAGENDRAN CHETTY *v.* KUPPUSWAMI AIYAR. **36 I.C. 593 = 4 L.W. 148.**

———O. 7, R. 6—*Saving of limitation—Statement of facts.*

Where an application had been returned for presentation to the proper Court, the endorsement of the Court on the application as to dates of receipt and return is substantial compliance with the provisions of C. P. C., O. 7, R. 6. (S. 50 of the Old Code) though the application does not expressly mention how limitation was saved. (*Krishnaswami Aiyar and Ayling*, JJ.) YERENI ANJAYYA *v.* VAPPULATI BAPPAYA. **9 I.C. 157 = 9 M.L.T. 375.**

C. P. CODE (V of 1908), O. 7, R. 6.

——O. 7, R. 6—*Limitation—Exemption from—Plea of—Inconsistent averments may be allowed.*

A plaintiff fulfilling the requirements of O. 7, R. 6 of the C.P.C. by a statement of grounds showing how the plaint is within limitation, should be allowed to take another and even an inconsistent ground, for getting over the bar of limitation. (*Dhobley*, A.J.C.) ONKARLAL *v.* RAJ MAHOMED. **65 I.C 279= 17 N L R. 209.**

——O. 7, R. 6—*Holidays—Evidence Act*, S. 57 (9).

In spite of O. 7, R. 6, an omission to show ground of exemption in respect of a suit filed on the day the Court re-opened after its summer vacation (the period of limitation for bringing which, had expired during the vacation) would not entail the dismissal of the suit. S. 57 (9) of the Evidence Act empowers the Court to take judicial notice of any public holidays notified in the official Gazette and the plaintiff is entitled to presume that the Court would take such judicial notice; the Court should not in such a case dismiss the suit but require the plaint to be amended. (*Batten*, J.) TEKCHAND *v.* PATTO. **56 I.C. 926= 16 N.L.R. 198.**

——O. 7, R. 6—*Limitation—Saving of—Acknowledgment—Plea in defence not barred.*

It is open to the plff. to show in reply to the defence set up that his claim was within time by reason of the acknowledgments of the defendants. Such a plea in rebuttal is not inadmissible under O. 7, R. 6, C.P. Code. (*Kanhaiya Lal*, J.C.) RAM AUTAR *v.* BENI SINGH. **28 O.C. 89=68 I.C. 196=1922 Oudh 185.**

——O. 7, R. 6—*Suit after limitation period—Grounds of exemption.*

Grounds on which plaintiff relies for extending the period of limitation must be specifically alleged in the plaint. (*Hayward*, J.C. *and Crouch*, A.J.C.) GULRAJMAL *v.* PAMANMAL. **27 I.C. 344=8 S.L.R. 69.**

——O. 7, R. 7—*Alternative claims—Promissory note—Decree on consideration.*

In a suit on a negotiable instrument, relief on the strength of the original consideration could be granted if prayed for in the alternative. (*Lord Buckmaster.*) FIRM OF SADASUKH JANKIDAS *v.* KISHEN PERSHAD (P.C.) **46 Cal. 663=29 C.L.J. 340=50 I C. 216= 17 A.L.J. 405=25 M.L.T. 268= 36 M.L.J. 429=21 Bom. L.R. 605= 1 U.P.L.R. (P.C.) 37= (1919) M.W.N. 310=28 C.W.N. 937= 10 L.W. 143 (P.C.).**

——O. 7, R. 7—*Inconsistent relief—Change of case—Issues—Suit to set aside a deed of gift as fraudulent—Claim for accounts of share as from agent.*

On the eve of a contemplated pilgrimage to Mecca M transferred her property to her nephew E, by a deed of gift, and on the same

C. P. CODE (V of 1908), O. 7 . R. 7.

date, the latter executed a deed which provided that a fourth share of the properties thus conveyed should remain in her possession during her lifetime, and on her death should come into E's possession. In a suit to set aside the deed of gift on the ground of fraud and misrepresentation which failed, a general issue as to whether E was liable to render an account to M was raised with reference to the whole property. *Held*, that that issue would not justify the court in passing a decree directing E to account for the profits of 4 annas share, on the footing of his being M's agent in respect of that share. (*Lord Macnaghten*) SAYEDANI MAHMUDA KHATUN CHOWDRANI *v.* MAHOMED ELHABAD KHAN PANI. **23 I.C. 332=17 C.W.N. 427 (P.C.).**

——O. 7, R. 7—*Relief not claimed in the pleadings.*

The mere fact that plaintiffs did not admit themselves to be entitled to possession of the land in suit as service tenure that is, subject to certain conditions of service, should not disentitle them to a decree for recovery of possession of the land as service tenure holders provided that such right is established on the evidence. (*Piggott*, J.) JOKHAN CHOUBEY *v.* MAHESH SINGH. **27 I.C. 720=13 A.L.J. 160.**

——O. 7, R. 7—*Smaller relief.*

The Court granted a decree for a small portion of the property though the whole was sued for, with a view to avoid further litigation. (*Richards and Banerji*, JJ.) BHAGWAN DAYAL *v.* PARAMSUKH DASS. **37 All. 179= 27 I.C. 623=13 A.L.J. 179.**

——O. 7, Rr. 7 and 8—*Alternative claims.*

A plff. is entitled to put his case in the alternative and his suit should not be dismissed as being for inconsistent relief. 7 All. 184, Foll. (*Richards and Tudball*, JJ.) BHAGWATI SARAN *v.* PARAMESHAR DAS. **36 All. 476= 25 I.C. 283=12 A.L.J. 798.**

——O. 7, R. 7—*Variance between pleadings and proof—Effect.*

The fact, that the pleadings subsequent to the filing of the plaint, and the evidence in the case, disclosed facts at variance with the plaint, does not disentitle the plff. to relief if both parties perfectly well understood the point in dispute. 25 All. 256; 25 All. 498, Ref. (*Rafique*, J.) JUGAL KISHORE *v.* GOMTI KUAR. **25 I.C. 280.**

——O. 7, R. 7—*Specific allegation—Not proved—Decree on different allegation.*

Where a plff. comes to trial with a specific allegation, it is not open to the Court to arrive at a finding in his favour contrary to the allegation set up. (*Fletcher and Duval*, JJ.) BADARUDDIN *v.* HERAJTULLA. **34 I.C. 797.**

——O. 7, R. 7—*Original consideration—Suit on hundi—Decree on original consideration.*

C. P. CODE (V of 1908), O. 7, R. 7.

When it was admitted that the terms of the contract were reduced to writing but the written contract is inadmissible in evidence for want of stamp, oral evidence is admissible to prove the said terms and a suit should have been brought within three years of the date of the transaction if it could be maintained on the original consideration. 17 C.L.J. 399, Foll. (*N.R. Chatterjea and Newbould*, JJ.) GOBINDA KUMAR SUR *v.* RAMCHANDRA BHATTACHARJEE. **31 I.C. 945=29 C.L.J. 308.**

——O. 7, R. 7—*Accounts—Further relief.*

Accounts were directed to be taken, although there was no prayer in the plaint to that effect but only a general prayer. 3 Cal. 638. Foll. (*N.R. Chatterjea and Newbould*, JJ.) KRISHNA DHAN BANERJI *v.* SANYASI CHARAN.
28 C.W.N. 600=31 I.C. 597=29 C.L.J. 280.

——O. 7, R. 7—*Original claim—Decree on.*

If the plff.'s claim to goods sold and delivered is substantiated, the mere fact that the adjustment of account set out in his plaint is not proved, is not a proper ground for dismissing the suit when it is based upon goods sold. (*Fletcher and Richardson*, JJ.) KRISHNA KUMAR DE *v.* KALINATH GUHA RAY.
41 I.C. 421.

——O. 7, R. 7—*Subsequent events.*

Ordinarily the decree in a suit should conform with the rights of the parties as they stand at the date of its institution. (*Sanderson*, C.J. *and Mookerjee*, J.) NURI MIAH *v.* AMBIKA SINGH. **44 Cal 47=24 C.L.J. 140=34 I.C. 869=20 C.W.N. 1099.**

——O. 7, R. 7—*General relief—Specific relief can be granted.*

If a plaint contains charges putting facts in issue that are material, the plaintiff is entitled to relief which those facts will sustain under the general prayer; but he cannot desert the specific relief prayed and under the head of general relief, ask specific relief of another description, unless the facts and circumstances in the plaint will, consistently with the rules of the court, maintain the relief. The test is whether the deft. will be taken by surprise and there can be no surprise, if relief, not specifically claimed, is consistent with that specifically claimed, as well as with the case raised by the pleadings. (*Jenkins*, C.J., *Mookerjee and Holmwood*, JJ.) HEMENDRA NATH *v.* UPENDRA NARAIN. **48 Cal. 713=22 C.L.J. 419=32 I.C. 437=20 C.W.N. 446.**

——O. 7, R. 7—*Suit on promissory note—Full consideration not proved—Power of Court to pass decree for amount found due.*

Where in a suit for recovery of a certain sum, the Judge found that a sum shorter than one mentioned in the pro-note was really advanced but dismissed the suit for the reason that plaintiff had failed to prove the advance by him of the total amount claimed, *held*, that the Judge ought to have decreed in favour of the plaintiff

C. P. CODE (V of 1908), O. 7, R. 7.

the amount found to have been actually advanced by him. (*Fletcher and Teunon*, JJ.) BENODE BEHARI PATRA *v.* JANKI KALWAR.
29 I.C. 468.

——O. 7, R. 7—*Confirmation of possession—Decree for possession.*

A decree for possession may be passed in a suit for mere confirmation of possession where in substance the suit is one for recovery of possession and *ad valorem* court-fee is paid on the basis of a claim arising out of dispossession. (*N.R. Chatterjea*, J.) KALI KUMAR VIDYARATNA *v.* KASHI CHANDRA MITRA.
11 I.C. 882.

——O. 7, R. 7—*Exaggerated claim.*

An exaggerated claim is no ground for refusing a person the rights which he is found entitled to. (*Scott-Smith and Martineau*, JJ.) KHUDA BAX *v* FATTEH KHATUN.
140 P.W.R 1918=46 I.C. 679=18 P.R. 1919.

——O. 7, R. 7—*Suit on one sale—Decree on another.*

When a person's claim based on a sale is cancelled by the party's consent, a decree on a subsequent admitted sale of a part should be allowed to prevent further litigation between the parties. (*Shah Din*, J.) ALLAH DAD *v.* MEHRA. **13 P.W.R. 1915=27 I.C. 622=63 P.L.R. 1915.**

——O. 7, R. 7—*Alternative relief.*

A prayer for alternative relief only asks for something in default of anything better and therefore the right to the something better is not waived. (*Johnstone and Rattigan*, JJ.) ALLIANCE BANK *v.* KAHAN SINGH.
111 P.W.R. 1914=216 P.L.R. 1914=28 I.C. 856=4 P.R. 1915.

——O. 7, R. 7—*Prayer for "any other relief—What it covers.*

A prayer "for any other relief" may cover any other relief arising out of the same cause of action but not one arising under a different cause of action. (*Chevis*, J.) KARAM CHAND *v.* SULTAN. **72 P.W.R. 1912=13 I.C. 650=92 P.L.R 1912.**

——O. 7, R. 7—*Smaller relief—Grant of.*

Per *Kumaraswami Sastri*, J.—A party claiming a larger relief ought not to be denied relief which can properly be granted, unless the ground on which the lesser relief can be granted, is inconsistent with the case of the plaintiff as set out in the pleadings or would lead to the determination of the issues which would embarrass the defendants or necessitate the addition of parties or unless the claim of the plaintiff is unconscionable and the Court is unwilling to stretch a point in his favour. (*Sadasiva Aiyar and Kumaraswami Sastri*, JJ.) AMMALU AMMAL *v* NAMAGIRI AMMAL.
38 M.L.J. 631=22 M.L.T. 391=6 L.W. 722=43 I.C. 760=(1918) M.W.N. 110.

C. P CODE (V of 1908), O. 7, R. 7.

———O. 7, R. 7—*Ejectment—Decree for joint possession—Legality.*

Though a suit is one for ejectment, a decree, for joint possession may be passed. (*Sankaran Nair and Ayling*, JJ.) MUTHU RAMAKRISHNA v. MARIMUTHU GOUNDAN. 26 M L.J. 532= 24 I.C. 363=38 Mad. 1086.

———O. 7, R. 7—*Ejectment—Partition.*

In a suit for ejectment; a plaintiff can, if found entitled, be decreed a share of part of property even if no alternative case be set up. (*Miller and Abdur Rahim*, JJ.) VISWANATHASAWMI NAICKER v. KAMU AMMAL. 21 I.C. 724=24 M.L.J. 271.

———O 7, R. 7—*Plaintiff's case not proved—Defendant admitting a sum due—Decree.*

In a suit for dissolution of partnership and for ascertainment of plaintiff's share, the defendant pleads that the partnership was dissolved and that a certain sum was due to plaintiff; the Court could give a decree for the sum admitted to be due in spite of plaintiff's refusal to admit defendant's claim. (*Miller and Sadasiva Aiyar*, JJ.) KARU MUSI BRAHMANIA SASTRUDU v. JALDIA VENKATA SUBBA RAO. (1913) M.W.N. 432= 19 I.C. 848=24 M.L.J. 561.

———O. 7, R. 7—*Inconsistent pleas.*

There is no rule of law preventing a deft. from raising inconsistent pleas, at any rate, where the fact to which the pleas relate are not within his personal knowledge. (*Sundara Aiyer and Ayling*, JJ.) JANAGANTI CHINA VENKATA RAJAUM GARU v. KAPPO JEE LINGANNA. 15 I.C. 382= (1912) M.W.N. 413.

———O. 7, R. 7—*Ejectment—Redemption.*

It is open to the Court in a proper case to pass a decree for redemption of a mortgage, though the suit as framed was one in ejectment. 20 Bom. 196, 5 C. L. J. 527, 35 Bom. 507, Foll. (*Prideaux*, A.J.C.) KRISHNAJI HATKAR v. RAOJI. 44 I.C. 921.

———O. 7, R. 7—*Right to smaller relief.*

A plff. is always entitled to a lesser relief of the same kind as he asked for. (*Batten*, A.J.C.) GHOSTI v. SITKU. 44 I.C. 557.

———O. 7, R. 7—*Original consideration—Degree.*

Where a hundi is given in discharge of debt due, it does not extinguish the debt but is only a conditional payment, unless the debtor proves that it was accepted as a complete novation of the original liability. If the hundi cannot be sued on for some reason, *e.g*, want of proper stamp, a decree on the original consideration can be given. (*Stanyon*. A J.C.) NATHUSA v. PHULCHANDSA. 14 I C. 399=8 N.L.R. 7.

———O. 7, R. 7—*Damges—Suit for enforcement of transfer.*

In a suit to enforce the transfer the transferee cannot recover the consideration money as damages, in case the transfer is unenforceable under the law. (*Stuart, and Kanhaiya Lal*, A.J.Cs.) SHAHRUKH RUQAIYA BEGAM v. SHEO PRASAD. 41 I.C. 485= 4 O.L J. 428.

———O. 7, R. 7—*Ejectment—Redemption.*

A prayer for redemption, in case property is found encumbered, could not be allowed in a suit for ejectment. (*Lindsay*, J C.) JANG BAHADUR SINGH v. CHANDREJ SINGH. 41 I.C. 171=4 O.L J. 365.

———O. 7, R. 7—*Specific allegation—Failure to prove—Effect.*

It is a general principle of law that failure of a party to prove the particular allegations in the pleadings does not necessarily involve failure of the party's case. (*Piggott*, J.C.) GAYA KUNWAR v. DAL SINGH. 17 I.C. 296.

———O. 7, R. 7—*Prayer for general relief—Power of Court to grant reliefs not asked for in the plaint.*

Under O. 7, R. 7, C. P. Code, a prayer for general relief is unnecessary and a Court may always give general or other relief, as it may think just, to the same extent as if it had been asked for. All that is necessary is that the necessary foundation of facts must be laid in the plaint. (*Miller*, C. J. *and Foster*, J.) SATYATARAN CHAUDHURY v. JYOTI PRASAD SINHA DEO. 76 I C. 910=(1923) Pat. 188= 3 Pat. L.T. 330= 1923 P. 386.

———O. 7, R. 7—*Easement—Natural right—Claim specifically to be stated in plaint.*

Where plaintiff claims a right of easement and fails to establish it, it is not open to the Court to create a new case for him and to give him relief on the basis of a natural right which is not specifically claimed in the plaint. (*Das*, J.) MOHENDRA NATH GHOSE v. NABIB CHANDRA GHOSE. 37 I.C. 504.

———O. 7, R. 7—*Declaratory relief—Suit for possession—Relief.*

Where in a suit for *Khas* possession, plff. is found not entitled to possession till after expiry of a term, a decree for declaration of title and right to possession at the end of the term, can be granted. (*Chamier*, C. J. *and Sharfuddin*, J.) MAHADEO CHAUDHURY v. BHAGELU SAHU. 39 I C. 396= 1 Pat. L.W. 405.

———O. 7, R. 7—*Claim for inheritance—Administration decree.*

A suit for a share of inheritance must be treated as an administration suit, though not brought in that form and a decree should be passed on the lines of the model decrees in App. D forms 17 and 20, C. P. Code. (*Maung Kin*, J.) MA SHWE THET v. MA HLA SHIN. 41 I.C. 579.

C. P. CODE (V of 1908), O. 7, R. 7.

——— **O. 7, R 7**—*Damages—Use and occupation—Suit for rent.*

In a suit for rent, a decree for damages for use and occupation will not be given unless specifically asked in the plaint. (*Twomey*, J.) LEARY *v.* MAUNG ON GAING.
4 Bur. L.T. 197=11 I.C. 863.

———**O. 7, R. 7**—*Ejectment—Partition suit—Grant of relief of.*

Plff. suing for partition of certain property can be given a decree for ejectment if the plff. in effect asks for that relief and the defendant had not been taken by surprise. (*Fawcett*, J.C. *and Kincaid*, A.C.) NARAIN DAS *v.* BUTE.
83 I.C. 722=13 S.L.R. 159.

———**O. 7, R. 8**—*Allegations of fraud—Decree.*

If the allegations as to fraud can be eliminated so as still to leave a good cause of action the plaintiff should be given a decree. (*Lindsay*, O. A. J. C.) GHULAM HAZRAT KHAN *v.* RAHIMDAD KHAN. **9 I.C. 429.**

———**O. 7, R. 9**—*Institution of suit—Date of.*

A suit is instituted on the date when the plaint is filed and not on the date when it is ordered to be registered. (*Mookerjee and Panton*, JJ.) H. H. MAHARAJAH OF COOCH BEHAR *v.* RAJA MAHENDRA RANJAN.
66 I.C. 923=34 C.L.J. 465.

———**O. 7, R 10**—*Absence of jurisdiction—Return of plaint—Dismissal of suit improper.*

It is the duty of a court to return the plaint for presentation to a proper court and not to dismiss the suit if it holds that it has no jurisdiction to entertain it. (*Ryves and Stuart*, JJ.) RAM JAS SINGH *v.* BABU NENDAN SINGH. **44 All. 686=70 I.C. 98=1922 All. 424.**

———**O. 7, R. 10** — *Scope of — Plaint consisting of claims partly within and partly without jurisdiction—Ancestral home, if a test.*

O. 7, R. 10 does not specifically state what is to be done when a plaint consists of a claim within the court's jurisdiction and also a claim outside the jurisdiction but it obviously means that that portion of such a plaint which is outside the jurisdiction shall be treated as though it was a distinct plaint by itself. The mere fact that the ancestral home of persons, who are really residing outside the jurisdiction within the jurisdiction does not matter. (*Walsh and Wallach*, JJ.) KISHORI LAL *v.* RAM SUNDAR. **64 I.C. 688=19 A.L.J. 822.**

———**O. 7, R. 10, O. 33, R. 8 and O. 43, R. 1 (a)**—*Application for leave to sue in* forma pauperis—*Return for presentation to proper Court—Revision.*

An application for leave to sue as a pauper is not a plaint, and it only reaches the stage of a plaint when it is granted. Where, therefore, a Court, regarding such application as a plaint directs it to be returned for presentation to the proper Court it acts without jurisdiction and, although such an order is not appealable, the High Court will interfere and set aside the order in revision. (*Banerji and Piggott*, JJ.) NUR MAHOMMAD *v.* MALVI JAMIL AHMAD.
52 I.C. 688.

C. P. CODE (V of 1908), O. 7, R. 10.

———**O. 7, R. 10**—*Limitation—Representation—Continuance of suit.*

Where a plaint which had been presented within time was returned to be re-presented to the proper Court and was re-presented in accordance with the order of the Court but after the limitation for the original suit had expired, *held*, that the re-presentation was in continuance of the suit and the suit was not time barred. (*Banerjee and Rafique*, JJ.) GANGA PRASAD RAI *v.* RAM NAND GIR.
30 I.C. 544.

———**O. 7, R. 10**—*Applicability.*

O. 7, R. 10 applies only where the suit is instituted in a wrong Court and not where the necessary relief under S. 20 of the C. P. Code was not obtained. (*Macleod*, C.J. *and Shah*, J.) MAHOMEDBHAI *v.* ADAMJI.
23 Bom. L.R. 1086=64 I.C. 919=46 Bom. 229=1922 Bom. 152.

———**O. 7, R. 10**—*Small cause—Not cognizable—Dismissal, if permissible.*

A Small Cause Court, finding, that a suit is not cognizable by it, should not dismiss the suit but should return the plaint under Rule 10 at any stage, for presentation to the proper Court, (*Mookerjee and Beachcroft*, JJ.) PADU MAHOMED *v.* CHUTRA NATH.
41 I.C. 203=27 C.L.J. 590.

———**O. 7, R. 10** — *Limitation— Plaint returned for presentation to proper Court—Date of institution.*

Where a plaint is ordered to be presented to a Court of competent jurisdiction, the suit must be taken to have been instituted on the date of such presentation. (*Mookerjee and Carnduff*, JJ.) HEDLOT KHASIA *v.* KA RAN KHASIANI.
13 I.C. 377=15 C.L.J. 241.

———**O. 7, R. 10**—*Civil and Revenue Court—Plaint—Return of—To be presented to Revenue Court.*

Where it is found in enquiry that the suit is cognizable only by a Revenue Court and not by the Civil Court it is not a fit case for the return of the plaint to be presented to the Revenue Court. (*Johnstone*, J.) HARCHARAN DAS *v.* DIWAN CHAND. **96 P.W.R. 1914=25 I.C. 622=198 P.L.R. 1914.**

———**O. 7, R. 10**—*Want of jurisdiction—Order returning plaint.*

As the muneiff decided that he had no jurisdiction, he could not proceed to decide any point other than that of jurisdiction and no finding by him that a certain amount was due by one party to the other could be treated as a finding on the merits in the Court to which the

plaint had been ordered to be re-presented. 16 P.R. 1908, Rel. to. (*Reid*, C.J.) RADHA KISHEN *v.* KIDAR NATH. 96 P R. 1912= 15 I.C. 773=221 P.W.R. 1912.

——O. 7, R. 10—*Mandatory—Duty of Court to return plaint.*

The direction in O. 7, R. 10 is mandatory. Where in an ejectment suit by a landholder, the Court arrives at the conclusion that the deft.'s tenants have permanent rights of occupancy, it is bound to return the plaints for presentation to the Revenue Court even though the plff. himself may not have asked for such return. 10 Mad. 211, Foll. (*Oldfield and Phillips, JJ.*) AMBALAVANA PANDARA *v* PICHUKUTTI ODAYAN. (1920) M.W.N. 163= 53 I C. 308=10 L.W. 525.

——O. 7, R. 10—*Want of jurisdiction—Return of plaint.*

When the subject-matter of the suit is discovered to be beyond its jurisdiction a Court should under O. 7, R. 10 return the plaint for presentation to the proper Court. (*Oldfield and Sadasiva Iyer*, JJ.) KANNUSAWMI PILLAI *v.* JAGATHAMBAL. 41 Mad. 701= (1918) M.W.N. 497=24 M.L.T. 46= 8 L.W. 145=46 I.C. 265= 35 M.L J. 27.

——O. 7, R. 10—*Jurisdiction—Test of—Allegations in plaint—Defence.*

If the allegations in a plaint bring the case within Madras Estates Land Act, S. 77 the suit must be filed in the Revenue Court and the jurisdiction of the Court will not depend on any plea that defendant might raise. The fact that the Court will have to go into complicated questions will not affect the Revenue Court's jurisdiction. (*Spencer and Kumaraswami Sastri*, JJ.) VENKATA RAMAYYA APPA ROW *v.* CHAKALI VEERASWAMI GADU. 41 Mad 664=34 M.L J. 309= 23 M.L.T. 261=7 L.W. 508= 46 I.C. 471=(1918) M.W.N. 327.

——O. 7, R. 10 and O. 43, R. 1 (a)—*Appeal—Right of return of plaint—Presentation to Court directed—Appeal.*

A person, whose plaint is returned by a Court for presentation to the proper Court indicated therein, and who accordingly presents the plaint to the latter Court, does not lose his right of appeal against the order returning the plaint simply on the ground that he chose to file his suit in the sub-court. (*Oldfield and Sadasiva Aiyar*, JJ.) NARAIN NAIR *v.* CHERIA KATHIRI KUTTY. 41 Mad. 721= 45 I.C. 89=34 M.L J. 397.

——O. 7, R. 10—*Civil and Revenue Court—Plaint—Return.*

When a plaint filed in a Civil Court was returned to be presented to the Revenue Court the latter has no jurisdiction to return it to be presented to the Civil Court but is bound to entertain it. 38 Mad. 163, Dist. (*Srinivasa Aiyangar*, J.) GOPISETTI NARAYANASWAMI NAIDU GARU *v.* GHANTASALA KOTAYA. 42 I.C. 483=6 L.W. 239.

——O. 7, R 10—*Appeal—Appellate Courts power setting aside order.*

The Appellate Court cannot remand the case for restoration and disposal, setting aside the order of the lower court to present the plaint to proper court. It should leave the parties to take what steps they like, in the first Court. (*Seshagiri Aiyar*, J.) THOPPUKATTU RAMAYA GOUNDAN *v.* SATAGOPACHARIAR. 32 I.C. 789=(1916) M.W.N. 784.

——O. 7, R. 10—*Want of jurisdiction—Jurisdiction acquired after presentation.*

Where at the time of presentation of a plaint a court has no jurisdiction to hear the suit but is invested with jurisdiction when the plaint is represented, the suit should be considered to be instituted on the latter date. (*White*, C.J. *and Sankaran Nair*, J.) AJAPA NATESA PANDARA SANNADHI *v.* RAMA LINGAM PILLAI. 20 I.C. 767=24 M L.J. 658.

——O. 7, R. 10—*Court-fee — Return of plaint—Court Fees Act (VII of 1870), Ss. 28 and 30.*

Plaint was returned by the City Court for presentation to the Small Cause Court but after the stamps were cancelled, contention was raised that fresh stamp for the whole amount should be paid over again, the first stamp being cancelled: *Held*, that O. 7, R. 10 showed a contrary intention and that sections 28 and 30 of the Court Fees Act did not necessitate it. (*White*, C.J, *Munro and Sankaran Nair*, JJ.) VISWESWARA SARMAN *v.* NAIR. 35 Mad. 567= 10 I.C 201=21 M L.J, 583=10 M L.T. 29.

——O. 7, R. 10—*Abandonment of claim—Appellate Court—Return of plaint.*

O. 7, R. 10, C.P.C., applies when the suit as originally framed was wrongly instituted. The abandonment of a claim *pendente lite* cannot be given retrospective effect so as to vitiate the institution of the suit. (*Stanyon*, A.J.C.) SHEIKH NURKHAN *v.* SHAIKH RAHIM, 34 I.C. 655.

——O. 7, R. 10—*Return of plaint—Revision.*

Where on application of the plaintiff, the plaint was returned to be presented to the proper court and in revision the High Court by order refused to interfere but the lower appellate court in appeal set aside the order of the trial court returning the plaint, *held* it would be impossible to restore the plaintiff to his prior position and it is not desirable that any further inference should be made on revision with the progress of the hearing and the order of the trial court must be confirmed. (*Kanhaiya Lal*, J.C.) KHUNAI TEWARI *v.* MT. DILL KUNWAR. 1923 Oudh 38 (2).

C. P. CODE (V of 1908), O. 7, R. 10.

——— **O. 7, R. 10**—*Want of jurisdiction—Test of—Return of plaint to be presented as an application in execution—Power of Court to ignore reliefs.*

O. 7, R. 10, C.P. Code, empowers a Court to return a plaint for presentation like an application in the Court having jurisdiction to accept it. A Court can ignore a relief as being based on no cause of action and then proceed to find that the other reliefs are outside its jurisdiction. (*Lyle and Ashworth*, A J. Cs.) BALDEO DAS KEDAR NATH *v.* THE BOMBAY MERCANTILE BANK. **54 I.C. 364=6 O.L.J. 640.**

——— **O. 7, R. 10**—*Cause of action—Plff. must show.*

A plaintiff cannot rely upon the pleas in the written statement for making out a cause of action, but must show in his plaint, that a cause of action accrued to him prior to suit. (*Lindsay*, J. C.) AMBAI SINGH *v.* SARAB SUKH PANDE. **46 I.C. 650.**

——— **O. 7, R. 10**—*Civil and Revenue Court—Mortgage of occupancy holding—Declaratory landlord—Jurisdiction of Civil Court.*

When the landlord sues an occupancy tenant in a Civil Court for possession and declaration that the mortgage effected by him of his holding is invalid, the Court should not return the plaint for presentation to the proper court. It can grant the declaratory relief though it cannot grant the possessory relief. (*Kanhaiya Lal*, A. J. C.) BHAGWATI PRASAD SINGH *v.* GOVIND DAT. **41 I.C. 125=4 O.L.J. 374.**

——— **O. 7, R. 10**—*Valuation of suit—Objection to.*

Where a defendant had admitted the valuation of the suit (as put by the plaintiff) and the case had proceeded to trial, the Court has no jurisdiction to return the plaint on the ground that the real market value of the matter under claims (as assessed by a commissioner at that time) exceeds its pecuniary jurisdiction. (*Lindsay*, J. C.) ETIZAD NA AIN *v.* BENI BAHADUR.
33 I C. 619=18 O.C. 364.

——— **O. 7, R. 10**—*Munsiff returning plaint to be presented to Small Cause Courtscannot re-entertain it on the refusal by the latter court.*

A Munsiff's Court which has once returned the plaint on the ground that the suit was cognizable by a Court of Small Causes has no jurisdiction to entertain it again although the Small Cause Court has also returned the plaint for presentation to the Munsiff's Court, the previous order of the Munsiff being final between the parties unless set aside by a superior Court. (*Ross*, J.) MAULVI SYED RAZAUR RAHAMAN *v.* ATTAR HUSSAIN.
64 I C. 496=2 Pat. L.T. 739.

——— **O, 7, R. 10 and O. 43, R. 1 (a)**—*Application for mesne profits—Return of.*

An order returning an application for ascertainment of mesne profits, for presentation

C. P. CODE (V of 1908), O. 7, R. 11.

to the proper Court is not an order returning a plaint and is not appealable. (*Chapman and Jwala Prasad*, JJ.) MOHAMMAD ABDUL GHAFFOOR *v.* MAHTAB
41 I.C. 231=2 Pat. L J. 395.

——— **O. 7, R. 10**—*Refusal to entertain plaint as being dead—Second appeal.*

Where a plaint is rejected by the Court to which it is presented as being dead and that no proceedings could be had on it, the decision amounts to a preliminary decree and a second appeal would lie against the order of the lower Appellate Court, setting aside the preliminary decree. (*Chapman and Roe*, JJ.) CHANDI PRASAD MISRA *v.* GOBIND SAHAY.
39 I.C. 791=1 Pat. L.W. 499.

——— **O. 7, R. 10**—*Jurisdiction—Test of—Allegation in the plaint—Small Cause Court.*

It is the nature of the suit as brought and not the nature of the defence, that determines the jurisdiction of a Small Cause Court to try it. (*Parlett*, J.) DORABJEE *v.* HAVABEE.
6 Bur. L T. 85=20 I.C. 278=7 L.B.R. 20.

——— **O. 7, R. 11**—*Cause of action—Statements in plaint.*

All statements in plaint are to be taken as true, for argument on preliminary issue as to whether plaint discloses a cause of action. (*Lord Moulton.*) KANHAIYALAL *v.* NATIONAL BANK OF INDIA, LTD.
40 Cal. 598=I.A. 56=17 C.W.N. 541=18 I.C. 949=(1913) M.W.N. 406=13 M L T. 406=11 A.L J. 413=17 C L.J. 478=15 Bom. L R. 472=18½ P.L.R. 1913=26 M L.J. 104 (P.C.)
[On appeal from 9 I.C. 966=32 P.W.R. 1911.]

——— **O. 7, R. 11 and S. 149**—*Extension of time—Limitation.*

Under O. 7. R. 11 (*c*) read along with S. 149, C.P.C. a Court has power in its discretion to allow a plaintiff further time in which to make good a deficiency in court-fee and if such deficiency is made good within the time prescribed the fact that in the meantime limitation had expired would not affect the suit. (*Ryves*, J.) RAM DIAL *v.* SHER SINGH.
45 A 518=21 A.L.J. 387=L.R. 4 A. 251=74 I.C. 358=1923 All. 538 (1).

——— **O 7, R. 11**—*Court-fee—Failure to pay stamp duty—Effect.*

In a suit referred to arbitration, failure of the plaintiff to pay stamp duty as distinguished from Court-fee should not result in the dismissal of suit, after a decree has been ordered to be drawn up. (*Richards*, C.J. *and Banerji*, J.) SHEOMANGAL *v.* DIL RAJ.
17 A.L.J. 493=50 I.C. 886=1 U.P.L R. (H. C.) 9.

——— **O. 7, R. 11**—*Cause of action—Preliminary order dismissing suit without taking evidence on it—Validity.*

C. P. CODE (V of 1908), O. 7, R. 11.

Plff. sued a Magistrate on the allegation that the latter took him into custody and brought a false charge against him. The trial Court dismissed the suit as barred by the Judicial Officer's Protection Act. *Held*, that the allegation in the plaint disclosed the cause of action to which the Act referred to, did not apply. The defence under the Protection Act is as much a defence on the merits as any other defence such as limitation, etc., and the Judge must before dismissing the suit take such evidence in a case as is necessary to bring the case within the Act. (*Piggott and Walsh*, JJ.) IZZAT ALI *v.* MAHOMED SHARFATULLA KHAN. 39 All. 516=39 I.C. 553=15 A.L.J. 541.

——O 7, R. 11—*Cause of action—Mortgage.*

The mortgagee paid the Govt. Rev. for two mortgagors out of three in separate possession. He sued all the three for recovery of his money, *Held*, there was no cause of action against the third who had paid his revenue. (*Banerjee and Piggott*, JJ.) MUNSHI PRAG NARAIN *v.* CHAUBAY PRAG NARAIN. 36 I C. 198=11 A.L J. 605.

——O. 7, R. 11—*Provisions of mandatory—Deficient court-fee—Procedure — Objection when to be raised.*

The provisions of O. 7, R, 11, C.P.C. are mandatory and they require that where a plaint is written on paper insufficiently stamped, the Court is bound to give the plaintiff time to make good the deficiency. 38 B, 41, 2 Pat. L.J. 74, Ref. The fact that the objection is heard at a time subsequent to the registration of the suit is immaterial because the provisions of the rule can be brought into operation at any stage of the suit. 12 A. 553; 18 M. 338; 47 C. 376; 34 C. 20 Rel. (*Mookerjee and Cuming*, JJ.) RADHA KANTA SAHA *v* DEBENDRA NARAYAN SAHA, 49 Cal. 880=70 I C. 101=38 C. L. J. 74=27 C.W N. 566=1922 Cal. 806.

——O 7, R. 11—*Court-fee—Extension of period fixed for payment of deficit Court-fee.*

Under O. 7, R 11 (*c*) of the C. P. Code a Court has power to extend the period originally fixed by it for the payment of the Court-fees, even more than once. (*Chitty and Walmsley*, JJ.) NASIR MANDAL *v.* SATISH CHANDRA GOSH. 31 I.C. 154.

——O. 7, R. 11—*Mandatory.*

O. 7, R. 11 is mandatory and the Court must reject a plaint written on insufficiently stamped paper, when the plff., on being required to supply the requisite stamp within a time fixed by the Court, fails to do so. (*Sanderson*, C. J. *and Mookerjee*, J.) MIDNAPUR ZEMINDARY CO. *v.* THE SECRETARY OF STATE. 44 Cal. 352=40 I.C. 95=21 C.W.N. 834.

——O. 7, R 11—*Limitation—Bar.*

If from the allegations in the plaint, the suit appears to be barred by any law, the proper course is to reject the plaint under R. 11 (d) and not to dismiss the suit. (*Chatterjee and Richardson*, JJ.) PRAN KRISHNA SAHA *v.* KRIPA NATH. 21 C.W.N. 209=35 I.C. 76=29 C L J. 17.

——O. 7, R. 11—*Limitation—Applicability of.*

O. 7, R. 11 (d) does not apply when there is no statement in the plaint, suggesting the suit to be barred. (*Coxe and Beachcroft*, JJ.) RATANCHAND DHARAMCHAND *v.* SECRETARY OF STATE. 27 I.C. 232=18 C.W.N. 1340.

——O, 7, R. 11—*Cause of action arising after plaint filed—Suit should not be rejected.*

Where in a suit for money, the real cause of action arose only after the institution of the suit, the court should not reject the plaint and drive the plaintiff to filing a fresh suit but pass a decree there itself. (*Martineau and Zafar Ali*, JJ.) KANSHI RAM *v.* JAIMAL SINGH. 6 Lah. L.J. 31=75 I.C. 562=1923 Lah. 590.

——O. 7, R. 11 and O. 43, R. 1 (a)—*Appeal—Rejection of plaint—Order appealable—Revision.*

An order of rejection under O. 7, R. 11 (b) of a plaint, is appealable and a revision is therefore incompetent. (*Johnstone and Shadi Lal*, JJ.) SADA KUAR *v.* BUTA SINGH. 80 P.R. 1914=268 P.L.R. 1914=25 I.C. 565=167 P.W.R 1914.

——O. 7, R. 11—*Court-fee—Deficiency.*

When deficiency in Court fee is not made up within the time allowed, the plaint must be rejected. The suit ought not to be dismissed. (*Kensington and Beadon*, JJ.) NANAKCHAND *v.* JIWAN MAL. 35 P.R. 1914=25 I.C. 435=237 P.L.R. 1914.

——O. 7, R. 11—*Valuation—Improper—Valuation of suit—Procedure.*

A Court ought not to dismiss a suit for improper valuation but should allow time to pay up the deficiency, if any, and present it to the proper Court. (*Kensington and Chevis*, JJ.) WASAWA RAM *v.* BAHADUR CHAND. 25 I.C. 24=194 P.L R. 1914.

——O, 7, Rr. 11 and 12—*Misjoinder of parties and causes of action—Rejection of plaint.*

When there is confusion of non-joinder and misjoinder of parties, the mere fact that there is a misjoinder of parties and of causes of action or non-joinder of parties, does not justify a Court in rejecting the plaint. (*Shah Din and Chevis*, JJ.) SHAHAB-UD DIN *v.* ANJUMAN-I-NAUMANIA. 248 P.W.R. 1911=10 I.C. 212=132 P.L.R. 1911.

——O. 7, R. 11—*Valuation—Undervaluation—Dismissal.*

The proper course in a suit with an undervaluation is not to dismiss the suit but to return the plaint to be re-presented to the Court of competent jurisdiction when the proper

C. P. CODE (V of 1908), O. 7, R. 11.

valuation necessitates a change of forum. (*Sadasiva Iyer and Spencer*, JJ.) NARAYANI AMMAL *v.* SECRETARY OF STATE.
41 I.C. 167.

——O. 7, R. 11—*Court-fee—Pauper appeal.*

The memorandum of appeal accompanying an application to appeal, as a pauper which is dismissed, can be validated with effect from the date of presentation, by the supply of the requisite stamp within a time fixed by the court with reference to the rule. (*Oldfield and Sadasiva Aiyar*, JJ.) NELLAVADIVU AMMAL *v.* SUBRAMANIA PILLAI. 40 Mad. 687=38 I.C. 617=31 M.L.J. 269.

——O. 7, R 11—*Rejection of plaint—Once admitted.*

If once a Court has admitted and registered a plaint, it cannot subsequently be rejected and a Court may be deemed to have extended the time fixed for payment of deficient Court-fee when it accepts them on that date. (*Spencer and Seshagiri Iyer*, JJ) MARIA THANGATHAMMAL *v.* IRAVATHESWARA IYER. 28 I C. 504=(1915) M.W.N. 228.

——O. 7, R. 11—*Cause of action—Unjust decree how set aside.*

Where the plaint was based on allegations which contained no cause of action, it would be rejected and the plaintiff could set aside any decree that might have been passed against him on those allegations only by appeal or revision. (*Sadasiva Iyer and Spencer*. JJ.) PALAKUNATH KANNAMBOTH NULUCHI NAIR *v.* MANMATHANATH KOTA VACHALIL.
21 I.C. 935=(1913) M.W.N. 980.

——O. 7, R. 11—*Court-fee—Unstamped plaint, if entertainable.*

A Court has jurisdiction to entertain a plaint though it is unstamped. (*White*, C.J. *and Sankaran Nair*, J.) AJABA NATESA PANDARA SANNADI *v.* RAMA LINGAM PILLAI.
20 I.C. 767=24 M.L.J. 658.

——O. 7, R. 11—*Dismissal of suit—Amendment—Suit for dissolution of partnership—Allegations in plaint—Rejection of plaint—Amendment.*

In a suit for dissolution of partnership and for accounts plaintiff stated in the plaint that defendants were liable to submit account in respect of all profits realized by the firm up to that date and thereafter till the partnership, was dissolved, *Held*, that even though there was no distinct prayer to dissolve the partnership, yet it was implied and the Court instead of dismissing the suit should return the plaint for amendment. (*Sundara Iyer and Sadasiva Iyer*, JJ.) DRAKSHARAPA APPALASWAMI *v.* A.C. LA RIVE. 16 I.C. 986.

——O. 7, R. 11—*Valuation—Over-valuation*—Bona fide *belief.*

If a claim is advanced *bona fide* the fact that the claim would lie only with regard to some

C. P. CODE (V of 1908), O. 7, R. 11.

of the properties of a value below the jurisdiction of the court in which the suit is instituted, will not justify the Subordinate Judge in rejecting the plaint. (*Sankaran Nair*, J.) MANGALASHERI ILLATH KRISHNAN *v.* KESAVAN.
16 I.C. 612=(1912) M.W.N. 38.

——O. 7, R. 11—*Rejection of plaint—Powers of appellate Court.*

An appellate court has the same powers o rejecting a plaint under O. 7, R. 11 of the C.P.C. as the court of first instance. It is the duty of the plaintiff to show in his plaint the grounds on which he claims exemption from limitation in respect of a claim which is *prima facie* barred by limitation. If he fails to do so the appellate Court is not bound to give an opportunity to specify those grounds. (*Kotwal*, A.J.C.) VITHOBA YADEO *v.* SURYABHAN.
69 I C. 554 (1)=1924 Nag. 80.

——O. 7, Rr. 11 and 13—Res judicata—*Order of rejection of plaint.*

Where a plaint was rejected by the Appellate Court for want of cause of action after the suit was decreed on the finding that a certain *razinamah* entitled the plaintiff to contribution, a second suit for contribution is barred. (*Macnair*, A.J.C.) GOVIND SINGH *v.* MUNGHAJI.
57 I.C. 684.

——O. 7, R. 11 and O. 9, R. 9—*Rejection of plaint—Non-payment of Court-fee—Application for restoration does not lie.*

Where a plaint has been rejected by a Court for non-payment of Court-fees and the order has been signed by the Court, the order operates as a decree and the court has no power to restore the suit under O. 9, R. 9, C. P. Code or under its inherent powers under S. 151, C. P. Code. The proper remedy of the plaintiff is by a way of an application for review under O. 47, R. 11 of C. P. Code. (*Das and Kulwant Sahay*, JJ.) RAMESHWARDHARI SINGH *v.* SADHU SARAN SINGH. 2 Pat. 504=4 Pat. L.T. 261=72 I.C. 629=1923 P. 354.

——O. 7, r. 11—*Insufficient stamp—Time must be given to make good deficiency.*

In the case of a plaint insufficiently stamped, the Court is bound under O. 7, R. 11, to give the plaintiff time to make good the deficiency although it is found that the plaint had been deliberately filed on an insufficient Court-fee. (*Coutts and Macphersan* JJ.) DEONATH SAHAI *v.* RADHA KANT PRASAD. 3 P.L.T. 142=1922 P. 56 (1).

——O. 7, R. 11—*Court-fee—Deficiency in—Failure to make up—Dismissal of suit—Court Fees Act*, S. 10.

Where a Court finds deficit in Court-fee, plff. should be ordered to make it up and on his failure to do so, his suit should be dismissed. (*Mullick and Adami*, JJ.) BRIJ KRISHNA DAS *v.* MURLI RAI.
55 I.C. 316=4 Pat. L.J. 703.

C. P. CODE (V of 1908), O. 7, R. 11.

———**O. 7, R. 11 and O. 17, R. 3**—*Defect—Return for amendment—C. P. Code, S. 151.*

A Court cannot either dismiss a suit or reject a plaint merely because the plaint is defective in that, it does not comply with a provision of law. It should give plff. an opportunity to cure the defect and on his failure to do so, may proceed to decide the suit forthwith and dismiss it under O. 17, R. 3, or may reject the plaint under its ample powers. (*Das*, J.) MAHARAJA SIR RAMESWAR SINGH BAHADUR *v.* SADANANDA JHA. **1 Pat. L T. 188=55 I.C. 445= 2 U.P.L.R. (Pat.) 29.**

———**O. 7, R. 11 and O. 17, R. 3**—*Rejection of plaint—Suit under S. 148 (b) of the B.T. Act—Plaint defective—Dismissal of suit without giving lease to amend plaint—Interference—Revision.*

Where the lower court dismissed plff.'s suit as contravening S. 148 (*b*) (2) of the B.T. Act and refused opportunity to the plaintiff to amend the plaint, explaining the alterations in the area and *jama* as recorded in the Record of Rights, *held*, the court had no jurisdiction to dismiss the suit, without first asking plff. to amend the plaint within a time fixed by the court and on plaintiff's failure to comply with the order, the court would decide the suit forthwith or dismiss it under O. 17, R. 3. The High Court set aside the order in revision. (*Das*, J.) MAHARAJA SIR RAMESHWAR SINGH BAHADUR *v.* SADANAND JHA. **1 Pat. L.T. 188=55 I.C. 445= 2 U.P.L.R. (Pat.) 29.**

———**O. 7, R. 11**—*Defective—Pleadings—Dismissal of suit.*

When both the plaint and the written statement are defective, the Court may either return the plaint for presentation or it may call upon the parties and examine them; but should not dismiss the suit. (*Moore*, J.) MG. LUGAIR *v.* VENKATACHELLAM CHETTY. **10 I C. 922= 4 Bur. L T. 118.**

———**O. 7, R. 11 (c) and S. 149**—*Court fee—Plaint insufficiently stamped—Duty of Court.*

A Court should not reject a plaint under O 7, R. 11, C.P.C., unless and until it has given the plff. an opportunity to supply the deficient Court-fee within a time fixed for the purpose and the latter has failed to comply. The Court is bound to grant time for affixing the proper Court-fee. The rule laid down in O. 7, R. 11 which deals specifically with plaints is not controlled by S. 149, C.P.C., relating generally to all documents. 3 P.R. 1893, Foll. (*Scott Smith and Shadi Lal*, JJ.) JIWAN DASS *v.* KHUSHABI RAM. **27 P.L R. 1917= 89 I.C. 766=28 P.W.R. 1917.**

———**O. 7, R. 14**—*Documents not filed in list—Refreshing memory of witness.*

Where the question at issue was the date of birth of the plff., it is competent to a witness for the purpose of refreshing his memory to refer to horoscope made at the time although

C. P. CODE (V of 1908), O. 7, R. 14.

the document has not been included in the list of documents under O. 7, R. 14. (*Lord Phillimore.*) BANWARI LAL *v.* MAHESH. **41 All. 63=21 O.C. 328= 23 C.W.N. 577=6 O L J. 168= (1918) M.W.N. 490=49 I.C. 540= 46 I.A. 284 (P.C.).**

———**O. 7, R. 14**—*Document sued on—To be produced with plaint.*

A plaintiff cannot be allowed to put forward as creating rights a document on which he has not in terms sued and which he has not filed along with the plaint. If the document is filed subsequently, it can only be treated as evidence. (*Sir Lawrence Jenkins.*) SULAIMAN *v.* BIYATHUMMA. **32 M L.J. 137= (1917) M.W.N. 213=1 Pat. L W. 210= 21 M.L.T. 210=25 C L.J. 273= 21 C.W.N. 553=39 I C. 243= 19 Bom. L.R. 394 (P.C.).**

———**O. 7, Rr. 14 and 18**—*Late production—Court's discretion to refuse documents.*

Documents relied on by the plaintiff must be filed with the plaint, and the Court is justified in the exercise of its discretion to disallow a late production of such documents. (*Mcleod*, C.J. *and Heaton*, J.) GANGADHAR MAHADEO MIRASHI *v.* KRISHNAJI VISHRAM NADKARNI. **22 Bom. L.R. 819=57 I C. 598= 44 B. 625.**

———**O. 7, R. 14 and O. 13, Rr 1 and 2**—*Appellate Court—Discretion of Court—Interference.*

Documents relied on, but not produced at the first hearing of the suit, can be rejected by the Court, in its discretion, with the exercise of which, an Appellate Court will not interfere unless satisfied that it has been improperly or capriciously exercised. (*Chitty, and Richardson*, JJ.) MADHU SUDAN SINGHA *v.* KALI CHARAN SIHGHA. **46 I C. 246=27 C.L.J. 119.**

———**O. 7, Rr. 14 and 18**—*Document in existence at the date of suit but not produced within time—Rejection of.*

Where there is no doubt that the document was in existence at the date of the institution of the suit, rejection of it, because it was not filed with the plaint as required by O. 7, R. 14, C. P. C., is not a proper or judicial exercise of the discretion conferred by O. 7, R. 18. 13 C.W.N. 797 and 8 Bom. 377, Foll. (*Richardson and Beachcroft*, JJ.) JOGENDRA KUMAR GHOSE *v.* ANANDA CHANDRA MOZUMDAR. **44 I.C. 21.**

———**O. 7, Rr. 14, 17 and 18**—*Duty of plaintiff to produce accounts and other documents relied on.*

Under O. 7, Rr. 14, 17 and 18, C.P.C., it is incumbent on a plff. to produce in Court, the accounts or other documents on which he bases his claim when the plaint is filed. If he intends to rely upon any other documents as a piece of evidence in the case, he is bound to produce

C. P. CODE (V of 1908), O 7, R. 14.

them at the first hearing as is required by O. 14 Rr. 1 and 2, C.P.C. (*Rattigan*, C.J. *and Abdul Raoof*, J.) RAM SINGH *v.* RAM CHAND.
1 Lah. 6=6 P.W.R. 1920=57 I.C. 185=19 P.L.R. 1920.

——O. 7, R. 14—*Document in possession of third party—Whether it can be produced in course of trial.*

Though as a rule all documents that a plff. seeks to rely on, should be produced at the opening of the suit, plff. can produce in the course of the trial a document in the possession of a third party and called for in order to rebut a plea raised by the defendant. (*Rattigan*, J.) GAPPAMAL *v.* PIARI LAL. **32 I.C. 619=38 P.W R. 1916.**

——O. 7, R. 14—*Document filed by party—Evidence.*

A party filing a document either with the plaint or written statement, with the intention of relying upon it, cannot be permitted to resile from it unless it is proved that it was filed on account of some *bona fide* mistake and that he did not intend to use it. 29 All. 184 (P.C.), Ref. to. (*Kendal*, A.J.C.) SHEO DAT SINGH *v.* SIDHAN KUNWAR. **26 I.C. 503=17 O.C. 327.**

——O. 7, Rr. 14 and 18 (2)—*Documents produced by plaintiff in answer to case set up by defendants—No necessity for filing before first hearing.*

Where the plaintiff produces certain documents in rebuttal of a case set up by the defts. he neeed not enter them in the list prescribed by O. 7. R. 14, C. P. Code, nor need he file them before the first hearing under O. 7, R. 18 (2), C. P. C. Where the trial court refused to admit certain receipts tendered in evidence to prove the plaintiff's parentage which was denied by the defendant, on the ground they were not filed under O. 7, R. 18 (2), C. P. Code. *Held* the trial court was wrong in its procedure and it should have allowed the plaintiffs to prove the documents at the trial. (*Miller*, C.J. *and Mullick*, J.) MANBODH MISSIR *v.* BHAIRO MISSIR.
4 U P.L R. (Pat.) 97=4 Pat. L.T. 322=(1922) Pat. 300=1922 P. 569.

——O. 7, R. 14—*Document not filed in Court when may be allowed to be used.*

Where it is made clear to the Court, that though a document is not filed or entered in the list along with the plaint, the document cannot be said to be fabricated on the face of it there is no reason why the party should not be allowed to use it in Court. (*Jwala Prasad*, J.) SUKAN SHAHU *v.* JHORI MAHTO.
60 I.C. 372.

——O. 7, Rr. 14 (2) and 18 (1)—*Plaintiff need not list document which he does not know.*

A plaintiff need not list any document in his plaint unless he knows of the existence of the document when he files the plaint. (*Drake-Brockman*, J.C.) LAHANU *v.* MOTIRAM.
63 I.C. 968.

C. P. CODE (V of 1908), O. 7, R. 16.

——O. 7, R. 16—*Suit on lost hundi.*

Under O. 7, R. 16, C. P. Code, a plaintiff, founding his suit on a lost hundi must furnish security against possible claims. (*Shah Din and Chevis*, J.) DURGA DAS *v.* KANSHI RAM.
166 P.L.R. 1912=16 I.C. 769=273 P.W.R. 1912.

——O. 7, R. 16—*Suit on pro-note—Note not returned to defendant—Security.*

Where the promissory note sued on, is not returned to the defendant, the deft. may become liable to third persons who may become holders of the note in due course and Courts can obtain proper security from the plaintiff before awarding him the amount found due from the defendant. (*Sadasiva Aiyar and Spencer*, JJ.) DUGGEMPUDI NAGAMMA *v.* TIRUMALAREDDI PEDA VENKATAREDDI.
59 I.C. 363=12 L.W. 157.

——O. 7, R. 18—*Documents not produced with plaint—Admission in evidence at later stage—Effect—Appellate Court.*

Where in a suit on mortgage, the original mortgage deed was not produced with the plaint but was later on produced at the time of the written statement and the Court after showing the deed to the deft. admitted it in evidence; *held*, that the Court must be taken to have granted leave to the admission of the document within O. 7, R. 18, C. P. C. The Appellate Court should not reverse the order of the lower Court admitting it in evidence when the defendant was taken by surprise. (*Knox and Rafique*, JJ.) MUSAMMAT HAJI BEGAM *v.* JAWAHIR SINGH.
20 I.C. 331=11 A.L.J. 537.

——O. 7, R. 18—*Certified copies of public documents may be received, though not produced with plaint.*

The C.P. Code, no doubt, compels the parties to produce all the documentary evidence in their possession or power on which they intend to rely at the first hearing of the suit. The rule was enacted to prevent fraud by the late production of suspicious documents and no suspicion can attach to certified copies of public documents and such documents may be received in evidence though they have not been produced at the first hearing. (*Das and Adami*, JJ.) DWARKA PRASAD *v.* JAI BORHAM.
67 I.C. 686=1922 P. 322.

——O. 7, R. 18 (2)—*Documents filed by plaintiff—Cross-examination of his own witnesses.*

Documents containing deposition of witnesses in a suit relevant to the subject-matter of the subsequent suit, were tendered by the plaintiff after the filing of the plaint, but before any of the witnesses were examined; *held*, plaintiff was entitled to cross-examine witnesses which may have been cited on his behalf. "Defendant's witnesses" in O. 7, R. 18 (2), C. P. C., includes witnesses who have turned hostile to

C. P. CODE (V of 1908), O. 8, R. 1.

the plaintiff and may be treated as the adversary's witnesses. (*Mitra*, A.J.C.) SHANKAR *v.* GOVINDA. **54 I.C. 811.**

——O. 8, R. 1—*Written statement by accused.*

The practice of filing written statements on behalf of persons accused of criminal offences, is improper. (*Chitty and Richardson*, JJ.) DEPUTY LEGAL REMEMBRANCER *v.* MATUKDARI SINGH. **32 I.C. 137=17 Cr. L.J. 9=20 C.W.N. 126.**

——O. 8, Rr. 2 and 4—*Defence to be specific.*

It is the duty of defendants to particularise in their defence all points either of law or fact which they desire to take. Evasive denials are depreciated and the points of defence must be stated specifically and clearly. (*Ghose and Panton*, JJ.) SARIFUN MANDALIN *v.* FERADOUL KHATUN. **76 I.C. 603=1923 Cal 878.**

——O. 8, R. 2—*Limitation under special law cannot be allowed to be raised in appeal.*

A point of limitation under the provisions of Sch. III, Art. 2 of the Bengal Tenancy Act cannot be allowed to be raised for the first time in appeal as the determination of that question depends upon the fact as to when service of notice of deposit was made on the landlord. O. 8, R. 2 requires the defendant to raise a question of special limitation (*Ghose*, J.) SHEIKH HAJI SADAK ALI KHAN *v.* JANAKINATH SINGHA ROY. **69 I C 194.**

——O. 8, R. 2—*Limitation should be specifically pleaded.*

Limitation, where it is sought to be relied on, should be specifically pleaded, particularly where the bar is alleged to be under some special Law. Points of limitation should not be decided against the parties unless attention of the parties had been drawn thereto and opportunity given them to meet it on evidence. An issue ought to be framed if necessary (*Woodroffe and Cuming*, JJ.) SECY. OF STATE *v.* ANANDA MOHAN ROY.
66 I.C. 287=34 C.L.J. 205

——O. 8, R. 2—*Question of limitation cannot be raised in appeal*

A question of limitation cannot be raised for the first time in appeal. It must be raised by the defendant in his pleading according to O. 8, R. 2. (*Mookerji*, A.C.J. *and Fletcher*, J.) BHUSHAN CHANDRA PAL *v.* NARENDRA NATH KOER. **60 I.C. 280=32 C L.J. 286.**

——O. 8, R. 2—*Special limitation—Appellate Court—Duty of.*

The plea of bar by limitation under a special Act must be specially pleaded and if the facts in support thereof are not apparent on the face of the record, the appellate Court cannot make an enquiry whether on certain facts, he had

C. P. CODE (V of 1908), O. 8, R. 2.

found the suit is barred by limitation. 20 I.C. 350. Rel on. (*Fletcher and Huda*, JJ.) KEDAR NATH MONDAL *v.* MOESH CHANDRA KHAN. **46 I.C. 787=28 C.L J. 216.**

——O. 8, R. 2—Bona fide *purchase without notice—Defendant, when can avail himself of the plea.*

A defendant, to avail himself of the defence of want of notice, ought to plead in his written statement that he is a purchaser for value without notice. The onus of proving it lies on him. (*Mookerjee and Beachcroft*, JJ.) AKSHOY KUMAR BANERJEE *v.* CORPORATION OF CALCUTTA.
42 Cal. 626=19 C.W.N. 37=27 I.C. 261=21 C.L J. 177.

——O. 8, R. 2 and O. 41, R. 2—*New plea*—Res judicata.

A plea of *res judicata* not taken at the time of trial is not such a matter as could show that a plaintiff's suit was not maintainable under O 8, R. 2, C. P. C. and can be raised in appeal with the leave of the Court under O. 41, R. 2. (*Holmwood and Carnduff*, JJ.) KISHEN DAYAL GIR *v.* MAHOMED AMIRUL HUSSAIN.
26 I C, 673=19 C.W.N. 942.

——O. 8, Rr. 2 and 5—*Pleadings—Issues.*

Whether a matter is open upon the proceedings, sufficiently to give the Court the right to form a judgment, depends upon the allegations and form of the pleadings. The Courts must look not to the mere wordings of the plaint but to the issues settled and the manner of the treatment in the lower Courts. (*Oldfield and Tyabji*, JJ.) AZHIMANILA VEETTIL KANNU PILLAI *v* KAYINARI GOPALAN NAIR
26 I.C. 337=(1914) M.W N. 883.

——O. 8, R. 2—*Confession and avoidance—Plea of.*

A defence of confession and avoidance can be regarded to have been raised only when the defendant completely admits the basis of the plaintiff's claim but seeks to avoid the effect of that admission by pleading performance, fraud, release limitation, etc. (*Drake-Brockman*, J.C.) EKOJI KUNBI *v.* AKAJI KUNBI. **34 I C. 131.**

——O. 8, R. 2.—*Want of legal necessity—Plea cannot be raised for first time in appeal.*

Where a mortgage by the manager of a Hindu family is disputed on the ground that there was no necessity for a particular rate of interest, the plea cannot be raised for the first time in appeal. (*Miller* C J. *and Adami*, J.) AITHAN GOPE *v.* KHAKHAI GAHU.
3 Pat L.T. 367=67 I.C. 790=1 Pat. 612=1922 P. 366.

——O. 8, R. 2—*Pleadings—Broad issue—Death-bed gift—Undue influence.*

Where the broad issue raised by the Court in a suit for possession on the basis of a gift when the defence was that the gift was invalid as a death-bed gift, etc., there would be nothing inconsistent if the Appellate Court, while going in

C. P. CODE (V of 1908), O, 8 R 3.

to the question whether the gift was not a death-bed gift, went into the question if the gift was made under undue influence. (*Eales*, J. C.) UTHONDAYA *v.* NGANI.

18 I C. 568=(1912) 1 U.B.R. 141.

——O. 8, R. 3—*Suit on mortgage—Deft. putting plaintiff to proof—Effect.*

If a defendant puts plaintiff to a proof of mortgaged deed set up by him, defendant must be taken to put plaintiff, to proof of its execution, including its signing and attestation. (*Ashworth*, A.J C.) SHEIKH MUHAMMAD IBRAHIM *v.* ALI NABI. **54 I C. 107=6 O. L. J. 600.**

——O 8, R. 3—*Fraud, etc., not set up—Absence of issue—Court's powers.*

Where the defendants admitted execution of a document but did not plead fraud or undue influence and no issue was raised regarding the same, it is not open to courts to find that the defendants were not aware of the contents of the document. (*Mullick and Atkinson*, JJ,) SADANAND TEWARI *v.* DEB NATH MANJHI.

(1922) Pat 154=1922 P. 184.

——O. 8, R. 5—*Specific denial—Practice.*

In the absence of specific denial, a document relied on by a party must be accepted as admitted between the parties, and therefore need not be proved. (*Batchelor*, A.C.J *and Shah*, J.) LAKSMINARAYAN *v.* CHIMNIRAM.

41 Bom. 89=38 I C. 14=18 Bom. L.R. 946.

——O. 8, R. 5—*Pleadings—Admissions—Practice.*

Absence of a specific denial in the written statement about the plaintiff's title to the suit property would not justify a Court in inferring that the deft.'s silence in the written statement amounted to a constructive admission of the title, in view of the fact, that the standard of pleadings in India is not very high. (*Fletcher and Huda*, JJ.) NAGA MIA *v.* ABDUL KADAR. **45 I.C. 878.**

——O. 8, R. 5—*Pleading in mofussil—Construction.*

In spite of O. 8, R. 5 written statements in the mofussil are not given the strict construction that is placed upon pleadings in England or in the original side of the High Court. (*Fletcher and Smither*, JJ.) ABDUL GHAFUR MOLLA *v.* GHOLAM RAHAMAN NASKAR. **39 I.C 460.**

——O. 8, R. 5—*Dispensation with evidence.*

Neither the principle of admission by non-traverse under O. 8, R. 5, nor a verified plaint being itself legal evidence is a sufficient ground for a Court to dispense with evidence in any suit except in a suit on Negotiable Instrument under O. 37, R. 2, C.P.C. O 8, R. 5 is limited in its application to cases where there is in fact a pleading before the Court. (*Sanderson*, C.J., *Woodroffe and Mookerjee*, JJ.) J. B. ROSS *v.* C. R. SCRIVEN. **20 C.W.N. 1192=34 I.C. 235=43 C. 1001.**

C. P. CODE (V of 1908), O. 8, R. 5.

——O. 8, R. 5—*Cause of action—Admission of title.*

Non-denial by the defendant in written statement of plaintiff's title to land of which plaintiff had sued for recovery, does not show that the plaintiff had no cause of action, especially when there was no admission of plaintiff's title at any time prior to suit. (*N.R. Chatterjea and Newbould*, JJ.) GANGA DAS SIL *v.* SECRETARY OF STATE. **32 I.C. 752=20 C.W.N. 636.**

—— —— O. 8, R. 5—*No denial in written statement—Appellate Court, if can deal with point—Amendment of plaint.*

An Appellate Court may go into an issue framed by the lower Court, despite anything that may or may not appear in the written statement. (*Jenkins*, C.J., *and Mookerjee*, J.) SATYES CHANDRA SARKAR *v.* MANOMOHINI DASI. **25 I.C. 567=19 C.L.J. 518.**

——O. 8, R. 5—*Discretion when to be used—Admission made collusively or to evade a rule of public policy.*

The discretion under this rule, should be exercised by the lower Court where it suspects an admission, made collusively or to avoid a rule of public policy. An allegation of fact in a plaint not specifically denied, must be deemed to have been admitted and the Appellate Court would, in such case be using its discretion wrongly in requiring proof of the admission. (*Sadasiva Aiyar and Spencer*, JJ.) VENKATA REDDI *v.* MUTHU PAMBULU NAIK.

39 M.L.J. 463=60 I.C. 554=1920 M.W.N. 512=58 I C. 801=28 M.L.T. 213.

—— —— O. 8, R. 5—*Minor defendant—Allegation of proper execution of mortgage by plaint not denied—Issue not raised at the trial nor evidence adduced—Decree on mortgage— Omission to raise issues on question of fact.*

The scope of O. 8, R. 5 is only this, that the omission to deny an allegation of fact in the plaint is not to be taken as an admission in the case of minor defendants and the rule has nothing to do with the conduct of the suit afterwards. In a suit on a mortgage against minor defendants, the return statement did not deny the allegations in the plaint as to the proper execution of the mortgage. Defendants neither asked for an issue not let in evidence on the question but the whole trial proceeded only on the issues as the limitation and *res judicata* *Held*, there was the plea as to want of proper execution at the trial and that it was not incumbent on the Court to require proof of execution of the mortgage from the plaintiff. 26 Bom. 380, Dist, 7 M.L.T. 106, Ref. (*Abdur Rahim and Bakewell*, JJ.) NAGAPPA *v.* SIDALINGAPPA. **47 I.C. 589=38 M.L J. 372.**

——O. 8, R. 5—*Defendant ex parte—Proof of plaint allegations when necessary—Practice.*

Under O. 8, R. 5 where the defendant does not appear at all he must be taken to have admitted all the allegations in the plaint. Therefore ordinarily in an *ex parte* case no issue

C. P. CODE (V of 1908), O. 8, R. 5.

arises at all and there is nothing for the plaintiff to prove. But by the proviso to O. 8, R. 5 it is left to the discretion of the Court to select some of the facts which under the rule itself must be regarded as admitted and to say that the plaintiff must prove them in spite of the implied admission. The Courts do in practice almost invariably, though often tacitly, direct that the main points alleged in the plaint are to be proved otherwise than by the implied admission of the defendants and only the minor points are to be taken as proved by that admission. But when the Court accepts certain allegations in the plaint as proved by the implied admission of the defendant and selects others as requiring proof by the plaintiff it is bound to tell the plaintiff clearly what the points are that have been so selected and the only way to do this is to state them as issues. In the majority of *ex parte* cases it is so clear to everybody what the points selected as requiring proof otherwise than by the implied admission are that it is unnecessary to state them at all, and this would seem to be the state of things for which the last paragraph of rule 1 of O. 14 provides. But if there is any room for doubt about the matter, then the Court is bound to inform the plaintiff specifically which points he has to prove and which can be taken as proved. (*Batten*, J.C. *and Hallifax*, A.J.C.) MT. BHURIBA *v.* ISHAK HUSSAIN.
69 I.C. 619=1923 Nag. 83.

——**O. 8, R. 5**—*Allegations in plaint not denied in written statement.*

If an allegation in a plaint is not denied specifically or by necessary implication it must be deemed as admitted and the plaintiff may not prove it by evidence unless required by the Court to do so. (*Jwala Prasad*, J.) SAKALBATTI MISRAIN *v.* MUNSHI MANDAR.
49 I.C. 733.

——**O. 8, R. 5**—*Notice—Not denied in written statement.*

Where the original plaint contained no statement, that the requirements as to notice had been complied with, but this defect had been remedied by putting in an amended plaint before the written statement was filed. *Held*, the absence of a plea, denying notice amounted to admission. (*Twomey*, J.) COMMISSIONER FOR FORT OF RANGOON *v.* MOOLA DAWOOD SONS AND CO. **9 I.C. 470=4 Bur. L.T. 26.**

——**O. 8, R. 6**—*Counter-claim—Stranger to suit—No right to make—Costs.*

Even if the practice of making counter-claims is the same in India as in England, nobody who is not a party to the suit can counter-claim costs allowed against a person making a counter-claim without being a party to the suit. (*Sir John Edge*,) MAHNIT *v.* HASHIM IBRAHIM MITER. **38 M.L.J. 863=18 A.L.J. 335=(1920) M.W.N. 319=2 U.P.L.R. (P.C.) 68=22 Bom. L.R. 581=32 C.L.J. 214=55 I.C. 798=27 M.L.T. 190 (P.C.).**

C. P. CODE (V of 1908), O. 8, R. 6.

——**O. 8, R. 6**—*Damages—Servant leaving service without notice—Suit for salary.*

The plaintiff left his employment without notice on the 4th April, 1916, and sued for salary for March, 4 days of April and for May. The defendant, the employer claimed to set-off the pay for April "as damages in lieu of notice." *Held*, that the employer could not counter-claim to set off a month's salary as damages in the same suit. (*Banerji*, J.) THE VICTORIA MILLS CO., LTD. *v.* BRIJ MOHAN LAL. **39 All. 362=38 I.C. 206=15 A.L.J. 262.**

——**O. 8, R. 6**—*Barred debt, set off—Punjab Loans Limitation Act—Money can be set-off in suit in United Provinces.*

A defendant can set off against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff. Money recoverable under the Punjab Act can be set-off in a suit in the United Provinces, though the claim would be barred under the Limitation Act. (*Knox and Rafique*, JJ.) BACHCHAN LAL *v.* BANARSI DAS. **35 All. 238=18 I.C. 763=11 A.L.J. 144.**

——**O. 8, R. 6**—*Set-off—Counter-claim—Distinction—Claim for unliquidated damages—Omission to plead—Amendment.*

Under O. 8, R. 6, C.P.C., it is not open to a defendant to claim a set-off in respect of unliquidated damages for alleged breaches of contracts. But the C. P. Code does not exclude what is called an equitable set-off provided the defendant's cross-demand arises out of the same transaction as the plaintiff's claim. 2 M. H. C. R. 296, 303 foll. Under R. 118 of the Bom. High Court Rules a defendant may set up by way of set-off or counter-claim against the claims of the plaintiff's any right or claim whether such set-off or counter-claim sounds in damages or not. Nothing which was not a good set off before the passing of the said rule can be a good set-off under the said rule the set-off must still be for an ascertained sum or it must arise out of the same transaction, as the plaintiff's claim. A counter-claim, however, need not arise out of the same transaction. Set-off is a ground of defence and it should be pleaded in the written statement. Counter-claim does not afford any defence to the plff.'s claim: it is a weapon of offence which enables a defendant to enforce a claim against the plff. as effectually as in an independent action. The above distinction between a set-off and counter-claim has an important bearing on the question of limitation, for if the statute of limitations is pleaded to a defence of set-off, the plaintiff, in order to establish his plea, must prove that the set-off was barred when the plaintiff commenced his action; it is not enough to prove that it was barred at the time when it was pleaded. In the case of a counter-claim, it is enough for the plaintiff to prove that the counter-claim

C. P. CODE (V of 1908), O. 8, R. 6.

was barred when it was pleaded. *Wlaker* v. *Clemens*, (1850) 15 Q B. 104; *Mc Gowan* v. *Middleton*, (1888) 11 Q.B. 464; 7 A. 204, 42 M. 873 Rel. (*Mulla*, J.) NAJAN AHMED HAJI ALI *v* SALEMAHOMED PEERMAHOMED.
24 Bom. L.R. 993=1923 Bom. 113.

———O. 8, R. 6—*Set-off—Counter-claim—Equitable set off — Difference between — Suit dividend—Right to set off damages.*

A set-off and counter-olaim are governed by rules or procedure, and a person can only plead by way of set-off or counter-olaim that which is permitted by those rules. A set-off can be pleaded as a defence and can only be raised where the olaim to set-off one against the other whether by plff. or deft. exists in the same right. A set-off can also be the subject-matter of a separate action or a counter-claim. In a suit by a share-holder for recovery of dividends declared by the company it is not open to the directors to olaim by way of set-off damages due from plaintiff in respect of alleged breaches of contract. (*Macleod*, C.J. *and Coyajee*, J.) VITHALDAS GULABDAS SETH *v.* THE HYDERABAD SPINNING AND WEAVING CO., LTD. **47 Bom. 182=67 I.C. 326=24 Bom. L R. 328=1923 Bom 24.**

———O. 8, R. 6—*Different capacity—Claim on account—Defendant if entitled to set off wages due to him by plaintiff.*

Plff. sued deft. on a olaim on account. Deft. pleaded a set off to the extent of wages, due to him from plff. District Judge disallowed the right to set-off. On appeal, *held*, that in regard to both of the claims, the capacity of the parties is not varied, that the capacity in both the cases is nothing but the personal capacity, the claims being based on a money demand, and that under O. 8, R. 6, it is competent to the defendant to urge by way of set-off, the olaim which he seeks so to urge. (*Batchelor*, A.C.J. *and Shah*, J.) RAGHEVENDRA RAOJI v. YALGURAD RAMACHANDRA.
41 Bom. 163=89 I.C. 17=19 Bom. L.R. 67.

———O. 8, R. 6—*Different capacity—Suit by Inamdar for dues from different* khatedar—*Salary payable to* Pujaris.

In a suit by an inamdar for recovery of sums payable by a *khatedar* as inferior holder the deft. cannot olaim to set-off the stipend payable by plaintiffs to the *pujaris* of a temple including the deft. as, olaim for stipend was made in a different capacity from that of the *khatedar*. (*Scott*, C.J *and Davar*, J.) MADAVA RAO MORESWAR *v.* RAMAKALU GHADI.
39 Bom. 131=27 I.C. 350=16 Bom. L.R 746.

———O. 8, R. 6—*Scope of.*

O, 8, C. P. J. only provides for set off in suits for recovery of money but makes no provision for counter-olaim. (*Newbould and Cuming*, JJ.) GOUR CHANDRA GOSWAMI *v.* THE CHAIRMAN OF THE COMMISSIONER OF THE NABADWIP MUNICIPALITY, DISTRICT NADIA.
1922 Cal. 1 (1).

C. P. CODE of 1908), O 8, R. 6.

———O. 8, R. 6—*Barred debt—If can be pleaded as set-off.*

A olaim which has become barred by limitation at the time of filing of the written statement in a suit, is not a debt legally recoverable by the deft. from plff. and cannot therefore, be allowed to be set-off (*Chitty and Walmsley*, JJ.) KANAILAL KUNDU *v* NITY SARAN MUKERJEE. **47 I.C. 938.**

———O. 8, R. 6—*Barred debt—Equitable set-off—Right to.*

The right of set-off exists not only in cases of mutual debts and credits but also of cross-demands arising out of the same transaction. A time-barred debt may be olaimed by way of equitable set-off. (*Chatterjee and Walmsley*, JJ.) RAMDHARI SINGH *v.* PERMANUND
21 I C. 716=19 C.W.N. 1183.

———O. 8, R. 6—*Counter claim—Set off.*

A right to set-off exists not only in cases of mutual credits and debits but also where cross demands arise out of the same transaction or are so connected in their nature and circumstance as to make it inequitable that the plff. should recover and the deft. should be driven to a cross suit. In a suit by principal against his agent's surety for accounts, the surety will be allowed credit for arrears of salary due to the agent on a settlement of accounts. (*Mookerjee and Beachcroft*, JJ.) KALANAND SINGH *v.* SRI PRASAD DAS. **17 C W.N. 1060=19 I C. 901=19 C.L.J. 152.**

———O. 8, R. 6—*Rent suit—Sums paid by patnidar—Patni Regulation* (*VIII of* 1819.)

In a rent suit by a *patnidar* in respect of *dar-patni* the deft. cannot claim to set-off the amount of *patni* rent paid by him to avert a sale of the *patni* for arrears of rent, without rendering accounts in order that it may be determined whether they had, by means of their possession, already realised the amount advanced by them. (*Mookerjee and Holmwood*, JJ.) KALANAND SINGH *v.* JARAO KUMARI.
17 I.C. 238=17 C.L.J. 96.

———O. 8, R. 6—*Equitable set-off.*

O. 8, R. 6 applies only to a legal set-off and not to any other set-off that a party may equitably claim. (*Shadi Lal and Broadway*, JJ.) FIRM SHED PRASAD RADHA KISHEN *v.* INDORE MALWA UNITED MILLS.
65 P.W.R. 1917=39 I.C. 508=62 P.R. 1917.

———O. 8, R. 6—*Ascertained sum—Suit by liquidator for money—Defendants having money in fixed deposit.*

In a suit by a liquidator against the debtor of a company who is not a member of the company, the debtor can plead by way of set-off an ascertained sum of money due from the company and claim, that only the balance should be recovered from him. In order to find out where the amount due to the deft. was "ascertained" or not, the date to be taken into consideration is the date of the institution of

C. P. CODE (V of 1908), O. 8, R. 6.

suit and not the date of the winding up. (*Rattigan and Shadi Lal*, JJ.) MEHAR CHAND *v.* AMRISTAR BANK.
69 P.W.R 1915=89 P.L.R 1915=28 I.C. 975=63 P.R. 1915.

——O. 8, R. 6—*Right to set-off.*

A claim to set-off must be adjudicated according to common sense and equity. (*Johnstone and Shadi Lal*, JJ.) ABDUL ALI *v.* PURAN MAL. 82 P.R. 1914=25 I.C. 860=277 P.L.R. 1914.

——O. 8, R. 6—*Ascertained sum—Disputed transactions.*

A claim by the deft. to set-off a certain sum of money consisting of interest on certain items at a rate fixed by the deft. and not admitted by the plff., is not a claim relating to an "ascertained sum of money legally recoverable" by the deft. from plff. within O. 8, R. 6. (*Johnstone and Rattigan*, JJ.) BIDRA BAN *v.* GANPAT RAI. 38 P.W.R. 1912=14 I.C. 463=80 P.L.R. 1912.

——O. 8, R. 6—*Court-fee—Partnership suit.*

In a partnership case a deft. may get a decree for whatever is found due to him without being called upon to pay the Court-fee on what he alleges himself entitled to. (*Kensington and Johnstone*, JJ.) BERAGI RAM *v.* RAJA RAM. 163 P.L.R. 1911=10 I.C. 250=214 P.W.R. 1911.

——O. 8, R. 6—*Equitable set-off—Time-barred claim by a co-parcener against joint family cannot be set-off.*

When taking accounts in a partition suit, a time-barred claim by one co-parcener against the joint family, cannot be allowed as equitable set-off. (*Spencer and Ramesam*, JJ.) SUBRAYA BHANDARY *v.* JANARDANA BHANDARY. 41 M.L.J. 870=62 I.C. 852=14 L.W. 534.

——O. 8, R. 6—*Omission to plead set-off—Prior litigation—Effect of.*

In case of legal set-off, deft. is not bound to put forward his counter-claim and a separate suit by him will lie. Yet if he did put forward such a counter-claim by way of legal set off and if the whole of that counter-claim, was within the competence of the Court to decide, he cannot afterwards sue for any portion of that claim, if he did not get a decree for that portion in the fresh suit. An equitable set-off ought always to be the basis of a counter-claim in the first suit itself. (*Sadasiva Aiyar and Spencer*, JJ.) AMEENAMMAL *v.* MENAKSHI. 60 I.C. 226=12 L.W. 173

——O. 8, R. 6—*Set off — Duty of Court to try the claim.*

The Court is bound to try a claim to set off, which falls under O. 8, R. 6. When under a partition, it was agreed that any member paying the whole debt was entitled to contribution and such member did sue for contribution,

C. P. CODE (V of 1908), O. 8, R. 6

other members having some claim on the member paying the debt, can set it off, if it otherwise satisfies the conditions of O. 8, R. 6. (*Abdur Rahim*, J.) SUBRAMANIA AIYAR *v.* DHARAMUMBAL AMMAL. 37 I.C. 656=12 L.W. 85.

——O. 8, R. 6, and O. 20, R. 19 — *Barred claim—Equitable set off—Conditions.*

In a suit by an agent against his principal for accounts, the latter pleaded that if the accounts between the parties were looked into, a balance would be found to be due to him and prayed for a decree for the same. Defendant's claim against plaintiff was barred on the date on which he filed his written statement. *Held*, that though defendant's claim might be allowed to the extent of plaintiff's claim, and the latter's suit dismissed, defendant was not entitled to a decree against plaintiff for any additional amount claimed by him; "debt" in O 8, R. 6, C.P.C., means a present obligation to pay a liquidated sum of money and to constitute a debt, it is not sufficient that a sum of money be ultimately recoverable. Defendant's claim was not a set-off under O. 8, R. 6 and he was not entitled to a decree under O. 20, R. 19. An equitable set off which is barred by limitation cannot be allowed. 22 Mad. 139; 28 M. L.J. 294; 39 Mad. 939, Rel. (*Phillips and Bakewell*, JJ.) NARASIMHA RAO *v.* SRI RAJA SRINIVASA JAGANATH RAO BAHADUR.
42 Mad 873=37 M.L.J. 193=53 I.C. 234=10 L.W. 183=(1919) M.W.N. 328=26 M.L.T. 276.

——O. 8, R. 6—*Barred debt.*

A barred debt cannot be set off either under O. 8, R. 6 or as equitable set off. (*Sadasiva Aiyar and Phillips*, JJ.) VELLAYAPPA MOOTHAN *v.* KRISHNA MOOTHAN.
44 I.C. 428=34 M.L.J. 32.

——O. 6, R. 6—*Equitable set off—Meaning of.*

The doctrine that there is a right to equitable set-off is well-founded but has always been confined to unascertained sums arising out of the same transaction No set-off which is not covered by the provisions of O. 8, R. 6 can be pleaded in suits, but it is permissible to plead an equitable set-off where it is confined to unascertained sums and arises out of the same transaction. (*Ayling and Napier*, JJ.) SUBRAMANIA AIYAR *v.* SUBRAMANIA PATTAR.
40 Mad. 688=(1916) 1 M.W.N. 351=34 I.C. 859=30 M.L.J. 615.

——O. 8, R. 6—*Mesne profits—Restitution proceedings—Suit—Tenants.*

In a suit by tenants for mesne profits for the period during which landlord was in wrongful possession, he cannot set-off rents due from the tenants, prior to the landlord's wrongful possession. (*Sadasiva Aiyar and Moore*, JJ.) YADDANAPUDI LAKSHMI *v.* REPALLE SETHARAMASWAMY. 3 L.W. 405=35 I.C. 2=19 M.L.T. 336.

C. P. CODE (V of 1908), O. 8. R. 6.

———O. 8, R. 6—*Barred claim—Rent suit—Damages for obstruction in previous years—Set off.*

In a suit for rent by the lessor the lessee cannot plead by way of equitable set-off an unliquidated claim for damages for obstruction to quiet enjoyment in previous years which had become barred by limitation as apart from special cases like those of mortgagor and mortgagee, trustee and *cestui que* trust, a time-barred claim cannot be the subject of an equitable set-off. (*Wallis*, C.J., *and Seshagiri Aiyar*, J.) VYRAVAN CHETTY *v.* NATARAJA DESIKAR.
89 Mad. 939 = 30 M.L J. 59 = 32 I.C. 80 = 3 L.W. 24.

———O. 8, R. 6—*Written statement—Necessary.*

A plea of set-off cannot be raised withou filing a written statement. (*Sankaran Nair and Sadasiva Aiyar*, JJ.) MRS. C. SIMON *v.* AROGIA SWAMI PILLAI. 25 I C. 361 = 16 M.L.T. 122.

———O. 8, R. 6—*Chit fund—Suit by assignee—Set off.*

The assignee of benefited ticket-holder can claim set-off against the assignee of stake-holder of a Malabar Chit fund in a suit by a latter against former. The set-off cannot be claimed on the ground, that the debt claimed by the plaintiff arose out of the same transaction as the debt claimed by defendant. Such a set-off is allowed under S. 132 of the T.P. Act. (*Sadasiva Aiyar and Napier*, JJ.) SUBRAMANIAN PATTAR *v.* KIRADADASAN.
16 I.C. 686 = (1912) M.W.N. 1235.

———O. 8, R. 6—*Discharge—Set-off.*

A plea of set-off and a plea of payment are two distinct pleas. A plea of set-off cannot be entertained until the defendant pays the Court-fee with respect to it in the Court of first instance nor should it be entertained if the claim is not within the jurisdiction of the Court. (*Lindsay*, J.C.) MUHAMMAD RAZA *v.* KUBRA BIBI. 15 I.C. 526.

———O. 8, R. 6—*Right to set-off—Conditions of.*

The deft. in a suit for the recovery of money cannot set off against the plff.'s demand any sum which is not an ascertained sum legally recoverable and the claim with respect to which, does not arise out of the same transaction. (*Mullick and Atkinson*, JJ.) BISHUN CHAND *v.* AUDH BIHARI LAL.
1 Pat. L W. 615 = 2 Pat. L.J. 451 = 40 I.C. 350 = (1917) Pat. 279.

———O. 8, R. 6—*Costs—Order awarding costs to both sides—Set off—Right of.*

Several orders awarding costs made in the same suit and in the same proceeding, must be deemed to be incorporated with and to form part of the final decree, though the prior orders awarding costs are of an interlocutory character. Therefore a party can set off the costs awarded to him by one order in the same suit as against those awarded to another party by a subsequent order in that suit. (*Chamier*, C.J. *and Atkinson*, J.) RAMUSAHU *v.* THAKUR DAYAL RAI. 39 I.C. 888 = 2 Pat. L W. 62.

C. P. CODE (V of 1908), O. 8, R. 9.

———O. 8, R. 6—*Rent suit—Commission for collection.*

In a suit for rent by a landlord against the tenant the later can have a set off for the ascertained commission due for rent collected on behalf of landlord. (*Jwala Prasad*, J.) RAMESHWAR SINGH *v.* HALLIZHA.
38 I.C. 71.

———O. 8, R. 6—*Ascertained sum, meaning of.*

Ascertained sum means a conclusive and indisputable amount A contractual relation between parties would furnish a basis for a claim of set-off. Where there is no such contract there is an equitable set off, unless the set off is foreign to the original claim; but the right to equitable set-off is based on the condition of the set off arising out of the same transaction out of which the claim arises. (*Mullick and Atkinson*, JJ.) DITTOR KEOR *v.* HARKHOO SINGH. 37 I.C. 367.

———O. 8, R. 6—*Ascertained sum—Accounts.*

A sum to be ascertained on a settlement of accounts is not an ascertained sum within O. 8, R. 6. (*Fawcett*, A.J.C.) FIRM OF KEEVERBHAN SUKANAND *v.* FIRM OF MADANDAS SIROOMAL. 49 I.C. 193 = 12 S.L.R. 70.

———O. 8, R. 6—*Same transaction.*

The equity of set-off arises when there are cross-demands. It may arise even where transactions are distinct if the one party has given credit to the other on the faith of goods deposited by the other party with him. (*Pratt and Crouch*, A. J. Cs.) SHIVAN DAS *v.* MULAMAT. 19 I.C, 390 = 6 S.L.R. 138.

———O. 8, R. 9 and O. 14, R. 5—*Pleadings—New case—Relief—Amendment.*

Where in a suit on guarantee, no plea was taken that there was any misrepresentation in obtaining the guarantee and no issue was framed but such misrepresentation was sought to be proved by defendant in evidence which was accepted by the two lower Courts. *Held*, that the finding was unsustainable. The proper course is to have the written statement amended and to frame an issue and allow the defendant to adduce evidence. (*Wallis*, C.J. *and Ayling*, J.) SANKARARAMA AIYAR *v.* PONNUSWAMI PILLAI.
25 M.L.T. 257 = (1919) M.W.N 28 = 49 I.C. 273 = 9 L.W. 198.

———O. 8, R. 9—*Inconsistent case—Not to be allowed—Application to file new written statement.*

Where more than a year after the settling of issues in a suit, when the case was completely ready for hearing, defendant applied to file a fresh written statement raising a completely

C. P. CODE (V of 1908), O. 8, R. 10.

new point, the Court would exercise a proper discretion in refusing to allow it. (*Roe and Coutts*, JJ.) BABU BISHENDAYAL SINGH *v.* MT. JAISRI KUER. **48 I.C. 746 = (1918) Pat. 323.**

———**O. 8, R. 10**—*No written statement—No defence to actions.*

Where no written statement is put in, the Court may pronounce judgment presumably against the defendant. (*Beaman*, J.) JAINALAL RAMDAS *v.* NAGNATH SHAMBHUAPPA KATHLEY. **19 I.C. 98 = 15 Bom. L.R. 126.**

———**O. 8, R. 10**—*Delay in filing written statement—Vakil refusing to file is sufficient cause.*

Where a Vakil refused to file a written statement on behalf of the defendant and did not consent to any other Vakil being engaged, *held*, it was sufficient cause to excuse a delay in filing a written statement after the date fixed. (*Wallis and Krishnan*, JJ.) RAJA MUTHU KRISHNA *v.* NURSE. **14 L.W. 154 = 69 I.C. 698 = 41 M L J 213 = (1921) M.W.N. 862 = 44 Mad. 978.**

———**O. 8, R. 10**—*Scope of*—Ex-parte.

When the deft. who was ordered to file a written statement, asked for further time and the Court refused the request and declared the suit *ex parte*, *Held*, Per *Ayling*. J. (Contra per *Seshagiri Aiyar*, J.) that the order was not *ultra vires*; R. 10 of O. 8 relates back to R. 1 as well as to R. 9, and the rest are of the nature of an explanation to R. 1. 1 Bom. 217; 43 Cal. 1001, Not foll. (*Ayling and Seshagiri Aiyar*, JJ.) RANGASWAMY UDAYAN *v.* MANIKKAM PILLAI. **40 I.C. 223 = 1917 M.W.N. 241.**

———**O. 8, R. 10**—*Written statement not filed—Judgment—Material irregularity.*

A deft. did not file his written statement on the date on which he was ordered to file it. The Munsif thereupon decreed the claim of plff. under O. 8, R. 10 without going into the merits of the case or without stating the ground of his order. *Held*, that the Munsif's order was not a judgment, but merely an order decreeing the plff.'s claim, and that the Munsif acted with material irregularity. (*Evans*, J.C.) NANHE *v.* TASADDUQ HUSSAIN. **15 I C. 212 = 15 O.C. 78.**

———**O. 9, Rr. 2 and 3**—*Dismissal not set aside—Fresh suit not barred.*

The remedy of having the dismissal set aside and that of bringing a fresh suit are not mutually exclusive and therefore if the dismissal is not set aside, a fresh suit is not barred. (*Stuart*, J.) BHUDEO *v.* BAIKUNTHI. **63 I.C. 239.**

———**O. 9, Rr. 2 and 4**—*Dismissal of suit for default—No appeal.*

No appeal lies from an order dismissing a suit under O. 9, Rr. 2 and 4 for default, as it is

C. P. CODE (V of 1908), O. 9, R. 2.

not a decree, plff. could seek relief under R. 4. (*Piggott and Walsh*, JJ.) LACHMI NARAIN *v.* DARBARI LAL. **38 All. 357 = 33 I.C 737 = 14 A L.J. 347.**

———**O. 9, R. 2**—*Reasonable time for compliance.*

Two days' time for payment of process fees when the party is absent, is not a reasonable time for compliance with Court's order. (*Teunon and Beachcroft*, JJ.) RAMAPATI CHATTERJEE *v.* SACHIDANANDAM NANDI. **33 I.C. 660.**

———**O. 9, Rr. 2 and 4**—*Insolvency—Dismissal of petition—Dismissal of application for restoration.*

Dismissal of an application for restoration of application for adjudication in insolvency, dismissed under O. 9, R. 2 does not bar the presentation of a fresh application for insolvency. If an applicant avails himself of the second alternative mentioned in R. 4, the rule does not preclude him from making a fresh application. (*Woodroffe and Huda*, JJ.) ABDUL AZIZ *v.* HABID MISTRI. **49 I.C. 229.**

———**O. 9, Rr 2 and 4**—*Process fee paid in sufficient time—Summons not served—Suit cannot be dismissed.*

Where the plaintiff had paid the process fee on such a date when there was sufficient time for the service of summons being effected before the date of hearing, the suit cannot be dismissed under O. 9, R. 2, C. P. Code. The High Court can interfere in revision and set aside the dismissal even though the plaintiff can sue afresh. (*Abdul Raoof*, J.) RALLA RAM *v.* MT. RAJ. **4 Lah. L.J. 71 = 67 I.C. 945 = 1922 Lah. 63.**

———**O. 9, R. 2 and O. 48, R. 1 (2)**—*Court-fee—Failure to pay—Scope and meaning.*

The failure contemplated by O. 9, R. 2, C.P.C., includes not merely an entire omission to pay the requisite Court-fee, but also failure to pay the same within the time which the Court fixes for payment, under O. 48, R. 1 (2) (*Drake-Brockman*, J.C.) SADANAND *v.* NATHIA. **11 I.C. 906 = 7 N.L.R. 114.**

———**O. 9, R. 2**—*Failure to file affidavits of service of summons on guardians of minor defendants—Dismissal for default.*

Plff. failed to file affidavits of service of summons upon the guardians of the two minor defts. and the minors. The Court passed an order dismissing the suit refusing to grant further time. *Held*, that the Court could not dismiss the suit as against the major defts. What the Court should have done, was to direct the plff. to proceed with his suit as against the other defts. making a note in the order sheet that the decree would not be binding upon the minors. (*Roe and Coutts*, JJ.) SURENDRA MOHAN SINGH *v.* GENA SARDAR. **55 I.C. 826 = 1 Pat. L.T. 125.**

C. P. CODE (V of 1908), O. 9, R. 2.

——**O. 9, Rr. 2. and 8**—*Omission to pay process fee—Application by defendants for time to file written statement—Dismissal of suit.*

Where a plff. defaulted in paying the fee for service of summons on the defendant, but the defendant applied to the Court for time to file written statement, the filing of such application amounts to an appearance under O. 9, R. 8 of the C.P. Code, and the Court would not be justified in dismissing the suit under O. 9, R. 2. (*Jwala Prasad and Foster*, JJ.) MUSSAMMAT GOLAB KUER *v.* MUSSAMMAT BIBI SAIRA PAT. 53 I.C. 41.

——**O. 9, Rr. 3 and 6 and O. 17, Rr. 2 and 3**—*Dismissal of suit for non-prosecution—Effect.*

Where, on the date fixed for hearing, the deft. was *ex parte*, and the plff. failing to adduce evidence, the suit was dismissed for want of prosecution. *Held*, that the Court must be deemed to have acted under O. 17, R. 3 and dismissed the suit on the merits and that a second suit for the same relief was barred. 'Want of prosecution' could only mean that the plff. did nothing to support his claim and that there was no evidence on record supporting his claim. (*Banerjee and Abdul Raoof*, JJ.) HINGO SINGH *v.* JHURI SINGH.
40 All. 390=46 I.C. 390=16 A.L.J. 462.

——**O. 9, R. 3**—*Mortgage suit—Dismissal of application for final decree—Fresh application.*

A fresh application can be made where an application for a final decree in a mortgage suit is dismissed for default of appearance of both parties. (*Richards*, C.J. *and Banerjee*, J.) AHMED KHAN *v.* GAURA. 43 I C. 518=16 A.L.J. 143.

——**O. 9, Rr. 3 and 4**—*Refusal to restore—Grounds for.*

The mere fact that a case had been previously dismissed for default, is no reason for refusing to restore it after a second dismissal. (*Richards*, C.J. *and Banerjee*, J.) RAMJI DAS *v* BHAGWAN DAS. 43 I.C, 180.

——**O 9, Rr. 3 and 8 and O. 32, R. 3**—*Several defendants — Minor not represented—Suit dismissed for default — Fresh suit, if barred.*

If a suit is dismissed as against some defendants under O. 9, R. 3, a fresh suit is not barred, but if dismissed as against others under O. 9, R. 8, a fresh suit is barred. The provisions of O. 32, R. 3, are imperative and if a suit in which a minor is not represented is dismissed for default, major defts. being present, a fresh suit against the minor is not barred. (*Shah and Crump*, JJ.) DAMU DIGA *v.* VAKRYA NATHU. 44 Bom. 767=56 I.C 455=22 Bom. L R. 328.

——**O. 9, Rr. 3 and 4**—*Second application on order dismissing the first one.*

When an application is dismissed in default by a Court not of a competent jurisdiction, then a fresh application to a competent Court, is maintainable. (*Teunon and Beachcroft*, JJ.) KAMALA KANTA ROY *v.* MONARADDI. 58 I.C. 203.

C. P. CODE (V of 1908), O. 9, R. 3.

——**O. 9, R. 3**—"*Appears*"—*Meaning of.*

The mere physical presence of a pleader not instructed to proceed with the case, is not an appearance, 10 C.W.N. 40, Foll. (*Chatterjee*, J.) BEJOY CHAND *v.* SATISH CHANDRA. 9 I C. 842.

——**O. 9, Rr. 3 and 4**—*Dismissal for default—Application to set aside—Forum proper.*

An order of dismissal for default can under R. 4 of O. 9, be set aside only by the Court which passed the order. (*Martineau*, J.) LUCHMAN DAS *v.* DEVIDIAL. 100 P.L R 1920=2 Lah. L J. 48=56 I C. 884=19 P.W.R. 1920.

——**O. 9, Rr. 3 and 8**—*Dismissal for default in appearance—Case heard in camp—No notice to parties.*

If the parties have no notice that their case would be heard in camp, the case cannot be dismissed for default of appearance. (*Beadon*, J.) SOHNAMAL *v.* KHUDA BAKSH. 90 P.W.R. 1913=18 I.C. 280=165 P.L.R. 1913.

——**O. 9, R. 3**—*Does not apply to O. 10, R. 4.*

O. 9 does not apply to the special set of circumstances contemplated by O. 10, R. 4. (*Sadasiva Aiyar and Coutts Trotter*, JJ.) KANDOTH PUTHIYADATH CHENGARU CHANDU *v.* PUDIYADATH CHENGARA RAMAN NAIR. 1921 M.W.N. 390=63 I.C. 961=14 L.W. 15.

——**O. 9, R. 3 and O. 17, R. 3**—*Non-appearance of parties—Want of time.*

Dismissal of suit for non-appearance of parties on the date of rehearing, which was fixed because the Court has no time, is not under O. 17, R. 3 as no act was ordered to be done by plff. (*Srinivasa Aiyangar*, J.) VENKATAPPA NAYANAMVARU *v.* PADI RAMA KRISHNAPPA. 32 I.C. 715.

——**O. 9, R. 3**—*Striking of the case—Withdrawal.*

When the parties state that the case be struck off as settled, it amounts to withdrawal and no suit can lie again. (*Sadasiva Aiyar and Napier*, JJ.) PAYKAT MANAKKAL *v.* THEYYANKARAN. 32 I.C. 625=(1916) 1 M.W.N. 171.

——**O. 9, R. 3**—*Dismissal of suit under—Application for restoration—Notice to opposite side is not necessary.*

Notice of application for restoration of a suit dismissed under O. 9, R. 3 in the absence of both the parties, need not be sent to the other side. 10 A.L.J., 399, foll. (*Daniels*, J.C.) RAMJI LAL *v.* KESHO RAM. 24 O C. 347=9 O.L.J. 52=64 I.C. 767=1922 Oudh. 55.

C. P. CODE (V of 1908), O. 9, R.

———O. 9, R. 3—*Dismissal of suit — Rights of plaintiff.*

On dismissal of a suit under O. 17, R. 2 read with O. 9. R. 3, the plff. may apply for an order to set the dismissal aside and also to bring a fresh suit. R. 3 does not lay down that if plff. chooses to avail himself of one remedy, he is debarred from availing himself of the other. (*Stuart*, J.C.) DAYA SHANKAR v. RAJ KUMAR.
39 I C. 191=20 O. C. 66.

———O. 9, R. 3 — *Application for amendment of issues—Parties absent—Suit cannot be dismissed.*

Where, on a day fixed to consider an application for amendment of issues, in a suit, neither party is present, the Court can only dismiss the application for amendment and not dismiss the suit for default. (*Das and Adami*, JJ.) SUKHDEO v. JUDAGI. **6 Pat. L J. 331= 63 I C. 746=2 Pat. L.T. 760.**

———O. 9, R. 3 and O. 17, Rr. 2 and 3 — *Court's duty to mention provision of law—Failure—Effect—Adjournment to enable plaintiff to amend plaint—Omission—Dismissal of suit—Legality—Revision—C.P. Code, S. 115.*

When a suit is dismissed or decreed under O. 9, or O 17, C P Code, the Court should state, under what provision of the law it has acted. An adjournment was granted at the request of the plaintiff, to enable him to amend his plaint and on the date fixed, the plaintiff's pleader again applied for time and the Court recorded the following order: "No step taken for prosecution. The suit is dismissed thereon:" *Held*, the Court could not have acted under R. 3 of O. 9 because the plaintiff's pleader did in fact appear and ask for an adjournment and there was nothing in the order recorded to show that he was not willing to prosecute the suit upon the original plaint without amending it. The Court should have framed issues and continued the hearing of the suit. As the Court had dismissed the suit, without applying its mind to any provision of law at all, this amounted to a refusal to exercise jurisdiction, and, therefore S. 115 of the C.P. Code, was applicable, and also S. 107 of the Government of India Act, as there had been a denial of the right to a fair trial. (*Mullick and Jwala Prasad*, JJ.) NAURANG RAM SAHU v. BHAKHORI MANDAR.
51 I C. 189=4 Pat. L.J. 277.

———O. 9, Rr. 4 and 3—*Refusal to set aside dismissal—Not appealable.*

No appeal lies from an order under O. 9, R. 4 refusing to set aside the dismissal of a suit under O. 9, R. 3. (*Richards*, C.J. *and Banerji*, J.) RAMJI DAS v. BHAGWAN DAS.
43 I.C. 180.

———O. 9, Rr. 4 and 9—*Dismissal of application—Restoration.*

Under O. 9, R. 9, an application lies, when an application, for restoring a suit dismissed for default, is itself dismissed for default. (*Chatterji and Newbould*, JJ.) BEPIN BEHARI SAHA v. ABDUL BARIK.
44 Cal. 980=21 C.W.N. 80= 35 I.C. 618=24 C.L.J. 446.

C. P. CODE (V of 1908), O. 9, R. 4.

———O. 9, R. 4—*Mistake of pleader—Restoration of suit.*

Even when suits have been dismissed for the mistake or laches of the pleader, the Court might, if proper grounds are made out, restore the suit on payment of costs. (*Sanderson*, C.J., *Woodroffe and Mookerjee*, JJ.) MATHURA SUNDARA DASI v. HAR CHANDRA SHAH.
43 Cal. 857=20 C.W.N. 594= 34 I.C. 634=23 C L.J. 442.

———O 9, Rr. 4 and 3—*Dismissal for default—Power of another Judge to set aside.*

The Court which can, under R. 4 set aside an order dismissing a suit for default, is the Court which passed the order of dismissal and where the dismissal is set aside by a Judge having no jurisdiction, all subsequent proceedings in the suit were *ultra vires* and the decree must consequently be set aside. (*Martineau*, J.) LACHMAN DAS v. DEVI DIAL
2 Lah. L.J. 48=100 P.L R. 1920= 56 I C. 884=19 P.W.R. 1920.

———O. 9, R. 4—*Dismissal for default—Sufficient cause—Allegations not supported by affidavit.*

Where an execution application was dismissed for default and the appellant filed an appeal on the ground that he had gone to call his pleader and learnt on his return that the application was dismissed. No affidavit from the pleader was filed. *Held*, that in the absence of an affidavit from the pleader the appeal must be dismissed. It was the duty of the appellant to file an application in the lower Court, either soon after the *ex parte* order under appeal was passed against him, or on the following day to set aside the order. (*Shah Din*, J.) SHIKH PIARA v. NITYANAND
64 P.L R. 1918.

———O. 9, R. 4—*Dismissal of application to restore suit dismissed for default—Application for restoration.*

Where an application to set aside an order dismissing a suit for default is itself dismissed for default, an application for re-admission can be entertained under S. 141. (*Skinner*, A.J.C.) MANAKJI v. SURAJMAL. **10 I.C. 705= 7 N L.R. 82.**

———O. 9, R. 5—*Application—Notice of, to defendant is unnecessary.*

On an application under O. 9, R. 4 of the Code, notice to a deft. is unnecessary. 10 A.L.J. 399, foll. (*Daniels*, J.C.) RAMJI LAL v. KESHO RAM. **24 O.C. 347=9 O L J. 52= 64 I.C. 767=1923 Oudh. 55.**

———O. 9, R. 5—*Applicability—Application under O. 21, R. 100.*

An application under O. 21, R. 100 is not an application in execution, the proceedings being

C. P. CODE (V of 1908), O. 9, R. 4.

in the nature of a summary suit. Although the provision of O. 9, R. 4 does not apply to an application under O. 21, R. 90 it can well apply to proceedings under O. 21, R. 100. (*Das and Adami*, JJ.) SHEO NANDAN CHAUDHURY *v.* DEBI LAL CHAUDHURY.
4 Pat. L.T 93=(1923) Pat. 78=1 Pat. L R. 134=71 I.C. 484=2 Pat. 372=1923 P. 239.

——**O. 9. R. 4**—*Duly authorised agent present—Suit cannot be dismissed for default.*

Where there is a duly authorised agent with a registered power of attorney present in Court for the hearing of a suit, it is not competent to the court, to dismiss the suit for default of appearance of the party under O. 9, R. 4, C.P.C. (*Jwala Prasad*, J.) KUNJA BEHARI SINGH *v.* SHEODHIN PANDEY. **3 Pat. L T. 447=68 I C. 659=1922 P. 504.**

——**O. 9, R. 4**—*Default to pay process-fees for the attendance of one of several defendants—Suit cannot be dismissed against all.*

A suit should not be dismissed as against defts. who have been served and who have filed written statements, owing to the default of the plff. to pay process fees on the day fixed for payment in respect of some defts. The provisions of R. 4 apply to a date fixed for the hearing of the suit and not one fixed for the payment of process-fees. (*Das and Adami*, JJ.) RAMNAD SINGH *v.* CHANDRAMA SINGH. **60 I.C. 377=2 Pat. L.T. 256.**

——**O. 9, R. 4 and O. 21, Rr. 100 and 101**—*Execution proceedings.*

O. 9, R. 4, C.P.C. expressly applies to suits, and cases under O. 21, Rr. 100 and 101 are not suits within R. 4 of O 9, C.P.C. (*Das*, J.) JUGAL KISHORE *v.* BOCHINDER MOHAN.
52 I.C. 416.

——**O. 9, R. 4**—*Appeal.*

An order under O 9, R. 4, is not appealable. (*Sharfuddin and Roe*, JJ.) RAM NARAIN PRASAD *v.* RAMACHANDRA PRASAD.
42 I.C. 613=2 Pat. L.W 172.

——**O, 9, R. 4**—*Execution proceedings.*

O. 9, C. P. C. does not apply to execution proceedings. 17 All. 106, Foll. (*Roe*, J.) GUNJARA KOER *v.* LAKHAN KOER.
35 I.C. 387.

——**O. 9. R. 4**—*Application to sue as paupir—Dismissal for default—Fresh application.*

Fresh application can be made, although the applications to sue in *forma pauveries* is once dismissed. (*Po Han*, J.) MAUNG AUNG TUN *v.* MA E KIN. **2 Bur. L.J. 217=76 I C. 785=1924 Rang. 161.**

——**O. 9, R. 5**—*Scope of.*

O. 9, R. 5 does not give the appellant the right to apply for fresh summons at any time within a year from the date of return to the Court. (*Knox and Rafique*, JJ.) JAISARI SINGH *v.* JAISARI SINGH. **17 I.C. 294.**

C. P. CODE (V of 1908), O. 9, R. 6.

——**O 9, R. 8 and O. 23, R. 1**—*Striking of names of parties not served—Effect of order.*

In a suit against several defendants owing to some difficulty in serving one of them, his name was struck off with the consent of the plaintiffs, before the expiry of a year. *Held*, that the procedure was under O. 9, R. 5 and not under O 23, R. 1, C. P. C. (*Beamon and Heaton*, JJ.) NATHABHAI TRIKAMLAL *v.* RANCHODLAL RAMJI. **39 Bom. 52=27 I.C. 165=16 Bom L.R. 696.**

——**O. 9, R. 5**—*Decree passed contrary to law.*

A decree passed against a defendant, summons to whom has been returned unserved, is in no sense an "*ex parte*" decree and it is liable to be set aside. The effect of an order discharging a decree, for the reason that it was passed without service of summons on a defendant, is that the entire decree is discharged, and the suit is revived for retrial. (*Mookerjee and Chatterjee*, JJ.) CHATTERJEE BRAHMIN *v.* DURGADATT AGRAWALA.
23 C.L J. 486=34 I.C. 394=20 C.W.N. 913.

——**O. 9, R. 5**—*Summons returned unserved—Application for fresh summons.*

An application for a fresh summons to a defendant, the summons originally issued having been returned unserved, is not time barred under O. 9, R. 5 of the C. P. Code, if made within a year from the date on which the last summons was returned unserved. (*Scott-Smith*, J.) WIR SINGH *v.* RAHMAN.
2 Lah. L.J. 774=56 I.C. 191=1 Lah. 137.

——**O. 9, R, 5**—*Second suit.*

When the records of suit were placed in the record-room, on account of a non-service of summons to one of the defendants, a subsequent suit against the same defendants on the same cause of action could not be filed as the previous suit must be held to be still pending. (*Scott-Smith and Leslie Jones*, JJ.) NANAK CHAND *v.* NUR-UD-DIN. **40 I.C. 448.**

——**O. 9, R. 5 and O. 9, R. 14**—*Applicability to appeals.*

The provisions of O. 9, R. 5 giving one year's time for the issue of first summons, would apply to appeals. (*Sadasiva Aiyar and Tyabji*, JJ.) GOPISETTI NARAYANASAMI NAIDU GARU *v.* NAMBURI BHADRI RAZA.
21 I.C. 420=25 M.L.J. 451.

——**O. 9, Rr. 6 and 7**—*Order for ex parte proceeding—No necessity of setting aside the order.*

The mere fact that on a particular date on which a case had been taken up for hearing, the delt. was not present and an order was made that proceedings should be taken against him *ex parte* on that date, does not preclude him from appearing at a later stage in the suit and if decree is not passed *ex parte* against him, it is not necessary for him to have that

C. P. CODE (V of 1908), O. 9, R. 6.

order set aside. He can appear and defend the suit and can refer to arbitration and can authorise his pleader to do the same. (*Banerji*, J.) MAUNU v. TULSHI.
L.R. 3 A. 579=64 I.C. 958=
20 A L J. 89=1922 All. 33.

———O. 9, R. 6 and O. 17, R. 2 and S. 96—Ex parte *decree—Application for restoration—Remedy.*

In the absence of defendant on the adjourned date, the proper course is to hear sufficient evidence on the plff.'s side to justify the granting of the relief. The remedy of the deft. is either to apply to have the decree set aside or to appeal on the ground that there was no sufficient evidence. The Appellate Court cannot go into any question connected with the deft.'s non-appearance at the hearing. (*Richards*, C.J. *and Banerjee*, J.) HUMI v. AZI ZUDDIN.
39 All. 143=36 I C. 277=
14 A.L.J. 1226.

———O. 9, R. 6—*Suit on money claim*—Ex parte *defendant—Decree.*

Where in a suit on bonds, one of the defts. alone contested and the suit was decreed *ex parte*, as against the deft. No. 2, the suit was a non-contested one and judgment should have been entered in favour of the plff. for the amount claimed, and costs. (*Fletcher and Walmsley*, JJ.) LAL MOHAN SAHA v. TAZIMADDIN. 49 I.C. 756.

———O 9, R. 6—*Defendant* ex parte—*Decree without evidence.*

In a suit, not being one based on Negotiable Instruments governed by O 37, R. 2 no decree can be passed if the defendant is *ex parte* or chooses not to contest. The words "proceed *ex parte*" in O 9, R. 6 mean proceed to take and determine evidence, *i.e.*, in the defendant's absence by the taking of evidence. Great caution should be exercised when suits are heard *ex parte*. 15 W.R. 503, Rel. on. (*Sanderson*, C.J., *Woodroffe and Mookerji*, JJ.) J. B. ROSS v. C. R. SCRIVEN. 43 Cal. 1001=
34 I.C. 235=20 C W.N. 1192.

———O. 9, Rr. 6 and 13—*Decree* ex parte—*Defendant applying for adjournment—Refusal—Failure to adduce evidence.*

Deft. in a suit for rent, at first appeared and denied the relationship of landlord and tenant but asked for postponement which was refused. Deft's. pleader, however, did not withdraw from the case. The decree stated that the suit was decided in the presence of the deft's. pleader. *Held*, that the decree could not be called an *ex parte* decree merely because the deft. did not produce evidence or submit any argument at the trial. (*D. Chatterjee and Beachcroft*, JJ.) RAJ KUMAR ROY CHAUDHURY v. ALIMADDI.
16 I.C. 911=17 C.W.N. 627.

———O. 9, R. 6—*Striking off defence.*

The deft. examined as a witness by the plff. did not attend on the day of adjournment although he was bound to do so. His defence

C. P. CODE (V of 1908), O. 9, R. 6.

was ordered to be struck off. Such an order was not warranted by any provisions of the C. P. Code. (*Abdur Rahim*, J.) MANKOLAM VASUDEVAN v. MANKOLAM SANKARAN.
28 M.L.J. 60=12 I.C. 719=
(1912) 1 M.W.N. 346=10 M.L T. 451.

———O. 9, R. 6—Ex parte *procedure—Nature of, not specified.*

O. 9, R. 6, C. P. Code, lays down when the Court may proceed *ex parte* but there appears to be no explanation in the Code what *ex parte* procedure is. In respect of the issues, it is the accepted practice that none are framed, though the plaintiff is always called upon, expressly or impliedly but in quite general terms to prove his case. (*Batten*, J. C. *and Hallifax*, A.J.C.) MT. BHURIBA v. ISHAK HUSSAIN.
69 I.C. 619=1923 Nag. 83.

———O. 9, R. 6 and O. 17, R. 3—*Setting aside of a decree—Revision.*

A suit for rent was adjourned from time to time but on the day fixed for hearing when the defendant was absent, it was decided on evidence produced by plaintiff and the Court remarked in the judgment that it was to be an *ex parte* decree. On defendant's application the decree was set aside. *Held* in revision, the order being manifestly just there was no reason to interfere in revision. (*Simpson and Wazir Hasan*, A. J. C.) CHANHARJA BAKSH v. KALKA PANDE. 78 I.C. 394=9 O.L.J. 543=
1923 Oudh 18.

———O. 9, R. 6 and O. 17, R. 2—*Scope of—Procedure.*

Both under O. 9, R. 6 and O. 17, R. 2 the procedure is the same, where the defendant fails to appear at the first hearing, whether that hearing takes place on the day fixed in the summons as contemplated by O. 9, R. 6 or at a later date to which the hearing may be adjourned, which is contemplated by O. 17, R. 2. In either case, what is contemplated is the procedure on the first day on which the hearing of the suit, as distinguished from interlocutory proceedings, takes place (*Dawson Miller*, C. J. *and Coutts*, J.) MAHANT DAMODHAR DAS v. RAJ KUMAR DAS.
1 Pat. 188=69 I.C. 887=1922 P. 483.

———O 9, R. 6 (1) (a)—*Evidence in* ex parte *case.*

The mere fact of a case, being *ex parte*, does not render bad evidence otherwise reliable. (*Stuart*, J.C.) SARABJIT SINGH v. RAMPUR MATHRA ESTATE. 37 I.C. 27=
3 O L.J. 468.

———O. 9, R. 6 (1) (c)—Ex parte *procedure—Notice to defendant.*

A Court cannot pass an *ex parte* decree without giving proper notice of the date fixed for the disposal of the suit to deft. Where an application to set aside an *ex parte* decree is dismissed for default and the Court is satisfied that the default is caused by accident over which the applicant had no control, the Court should

C. P. CODE (V of 1908), O. 9, R. 7.

restore the application to the file. (*Walsh and Stuart, JJ.*) GOBIND SINGH *v.* KALYAN DASS. **38 I.C. 673=15 A.L.J. 24.**

——**O. 9, R. 7**—*Declaration ex parte—Subsequent appearance before decree—Not barred.*

Where on the date fixed for the first hearing of the suit the deft. did not appear and the Court declared him *ex parte*, it is open to him to appear on a subsequent hearing and to ask for leave to file a written statement and to examine witnesses. (*Banerji and Stuart, JJ.*) BHAGWAT PRASAD TEWARI *v* MAHOMED SHIBLI.
20 A.L.J. 270=L.R 3 A 225=66 I.C. 892=1922 All. 110.

——**O. 9, R. 7**—Ex parte *order—Setting aside.*

Until a suit is actually called on, a party is entitled to appear and defend. It may be that he is guilty of delay, and if that is the case he may be mulcted in costs. But if he does appear before the suit is heard, then he has a right to be heard. (*Macleod, C.J. and Coyajee, J.*) RADHABAI *v.* ANANT PANDURANG.
70 I.C. 762=1922 Bom. 345 (1).

——**O. 9, Rr. 7, 9, and 18**—Ex parte—*Minor defendant—Omission to appear—Guardian's negligence—Application to set aside.*

O. 9, R. 12 does not merely impose upon the person failing to appear, the disabilities contained in the proceeding provisions of that order but gives the right to the remedies given by other proceeding provisions also. An application to the Court under O. 9, R. 7, C. P. Code can be made through a Vakil notwithstanding that the Court had decided to proceed *ex parte* owing to the non-appearance of the deft, in person pursuant to an order of the Court. A guardian's laches is a sufficient cause for setting aside an *ex parte* decree or order in the case of minors. 27 M.L.J. 166 and 6 C. L. R. 69, Foll. A direction to a partyto appear, was an order made for the further progress of the suit and to help the Court in its proper disposal and decides no right between the parties. The Court could *suo motu* alter it whenever necessary or expedient. Though in setting aside an order to proceed with the suit *ex parte* under O. 9, R. 7, C. P. Code, the Court might in its discretion impose a condition as to the deft's appearance in Court in person, an omission to do so, is not an improper or irregular exercise of such discretion. (*Krishnan, J.*) AYYA NADAN *v.* THENAMMAL.
27 M.L.T. 171=(1920) M.W.N. 241=33 I.C. 945=11 L.W. 289.

——**O. 9, R. 7**—*Good cause not shown—Application need not be allowed.*

There is no authority for the proposition that whenever a defendant applied to be heard in a suit, the hearing of which had been adjourned *ex parte*, his application was bound to be allowed irrespective of whether he showed good cause of his previous non-appearance or not. 1922 A. 110, Expl. (*Ashworth, J.C.*) (SHEIKH) FARZAND ALI *v.* EKADASHI. **26 O.C. 10=73 I.C. 891=10 O.L.J. 36=1923 Oudh 177.**

C. P. CODE (V of 1908), O. 9, R. 8.

——**O. 9, R. 8**—*Claim partly rejected—Appeal lies.*

An appeal lies from an order dismissing a suit for default where part of the claim is rejected. (*Lord Dunedin*) KANHAIYA LAL *v.* NATIONAL BANK **38 M.L.J. 497=4 Lah. 284=33 M.L.T. 349 (P.C.)=25 Bom. L.R. 1248=50 I.A. 162=78 I.C. 7=1923 P.C. 114 (P.C.).**

——**O. 9, Rr. 8 and 9**—*Default of appearance—Death of sole plaintiff before trial.*

Where a sole plff. dies before trial, the dismissal of the suit for non-appearance is improper. The Court has inherent jurisdiction to set aside the dismiseal and to make the legal representative of the deceased plff. a party within six months under Art. 176 of the Lim. Act. (*Lord Shaw.*) DEBI BAKHSH SINGH *v.* HABIB SHAH. **33 All 331=16 O C. 194=40 I.A. 150=17 C W N 829=11 A.L J 625=18 C.L.J. 9=15 Bom. L R. 640=14 M.L.T. 33=(1913) M.W.N. 566=19 I C. 526=25 M.L.J. 148 (P.C.).**

[On appeal from, 14 I.C. 221. See also 14 I.C. 711.]

——**O. 9, R. 8 and O. 17, R. 2**—*Absence of plaintiff—Court cannot hear case on merits.*

Where the plaintiff and his pleader are both absent on the date of an adjourned hearing, the Court cannot hear the case on the merits under O. 17, R. 2. It can only dismiss the case under O. 9 R. 8 or postpone the hearing under O. 17, R. 2. (*Banerji, J.*) RUKAM *v.* TARA CHAND.
20 A.L.J. 123=L R. 3 A. 68=65 I.C. 775=1922 All. 68.

——**O. 9, R. 8 and O. 43, R. 1 (c)**—*Default—Restoration.*

A dismissal of a suit for default is made under O. 9, R. 8 and the dismissal of an application for restoration is appealable under O. 43, R. 1. (c). (*Piggott and Kanhaiya Lal, JJ.*) MAHARAJ SHIBI CHARAN DAS *v.* MUHAMMAD ZAHUR. **37 I.C. 246=2 U.P.L.R. (All.) 288.**

——**O. 9, R. 8**—*Plaintiff absent—Suit must be dismissed.*

The court has no option but to dismiss the case in default, when it finds that the plaintiff is absent on the day of hearing; it cannot record the statement of the defendant and decree the claim in part. (*Rafique, J.*) MATA BUX LAL *v.* BRIJ MOHAN. **33 I.C. 966.**

——**O. 9, R. 8 and O. 17, R. 2**—*Adjourned hearing—Non-appearance of plaintiff.*

If neither plaintiff nor his pleader appears on a day to which the hearing of a suit had been adjourned, the Court must make an order under O. 9, R. 8 and it cannot proceed to decide the suit on the merits. (*Richards, C.J. and Banerji, J.*) PHUL KOER *v.* HASHMAT ULLAH KHAN. **37 All. 460=29 I.C. 653=13 A.L.J. 679.**

C. P. CODE (V of 1908), O. 9, R. 8.

———**O. 9, R. 8 and O. 17, R. 2**—*Absence of plaintiff—Required to produce documents—Appeal.*

A suit was dismissed when the plaintiff absented himself on the day he was required to produce some account books. An application to restore the suit was also dismissed. *Held*, an appeal was maintainable against the second order, as the order dismissing the suit was passed under O. 9, R. 8 read with O. 17, R. 2 and not under O. 11, R. 21, C. P. C. (*Piggott and Chamier*, JJ.) JWALA PRASAD SAHU *v.* BIGAL RAM MANDWARI. **28 I.C. 905.**

———**O. 9, R. 8**—*Plaintiff absent—Dismissal—Remedy.*

Where the Court, on the day of hearing, when an application was made for adjournment as the plaintiff was ill, rejected the application and dismissed the suit. *Held*, the proper course was to apply for a review of the order or apply for an order to set aside the order of dismissal and not to apply in revision. (*Macleod*, C.J. *and Crump*, J.) PANDURANG VEDURAM *v* MOHAN CHHATRA BHUJ. **1923 Bom. 396.**

———**O 9, R. 8 and O. 17, Rr. 2 and 8**—*Scope of—Failure to appear—Procedure.*

O. 17, C.P. Code deals generally with adjournments. Under O 17, R. 2, where on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may dispose of the suit under O. 9, C. P. Code. In all the cases which come under O. 9, C. P. C. the party against whom a decree or order is passed in default of his appearance, can apply to the court to have the *ex parte* decree or order set aside on the ground that he can show sufficient cause for his non-appearance. Ordinarily if a case appears on the board on an adjourned date for hearing, and there is default of appearance on the part of both or either of the parties, the court must refer to O. 9, C. P. Code so as to ascertain the proper procedure to be followed and there is no necessity whatever to have any recourse to O. 17, R. 3. Where the hearing of a suit had not commenced and the plff. did not appear on the adjourned date, the suit should be dismissed under O. 9, R. 8, C. P. C., and not under O. 17, R. 3, C. P. C. In the case of a dismissal under O. 17, R. 3, C. P. C., the remedy is by way of appeal or review and in the case of a dismissal under O. 17, R. 2, the party can apply to set aside the dismissal under O. 9, R. 9 or R 13, C P. Code. Courts should exercise extreme caution, when, on an adjourned date the parties or any of them fail to appear. They should in the first place have recourse to O. 17, R. 2 rather than O. 17, R. 3 and even in cases where O. 17, R. 3 can be considered to apply, that is to say, where the case has been part heard and an adjournment granted, it would not be in accordance with justice to refuse a party who had failed to appear on the adjourned date at the time fixed, the chance of having the suit restored. 20 B. 736, 743, foll.

C .P. CODE (V of 1908), O. 9, R. 8.

(*Macleod*, C J. *and Shah*, J.) RATANBAI SHIVLAL LOHAR *v.* SHANKAR DEOCHAND LOHAR. **24 Bom. L R. 775=68 I.C. 514=1923 Bom. 27=46 Bom. 1026.**

———**O. 9, R. 8**—*Date fixed for appearance of guardian* ad litem—*Dismissal for default not proper.*

Where a suit is adjourned to a certain date for the appearance of the guardian *ad litem*, a dismissal for default on account of the absence of plaintiff is not justified. (*Macpherson*, J.) THAKUR PATHAK *v.* RAGHO PATHAK. **73 I.C. 559.**

———**O. 9, Rr. 8 and 10**—*Absence of one of two plffs.—Decree in favour of both is not illegal.*

A decree in a mortgage-suit by two plffs. in favour of both, is not illegal though one plff. was absent. The Court has discretion, under R. 10, in such cases, to permit the suit to proceed in the same way as if all the plffs. had appeared. (*Newbould and Panton*, JJ.) KUBENDRA KISHORE ROY *v.* RAI KISHORE SHAH. **62 I.C. 112=48 Cal. 57.**

———**O. 9, R. 8**—*Dismissal of suit—Commissioner's report—Revision.*

A Court is not competent to dismiss for default, a suit in which a Commissioner is appointed and has not made his report, as such a suit cannot be heard until the Commissioner has finished work. No appeal lies against such order of dismissal but the High Court can set it aside in revision. (*Chatterjee and Duval*, JJ.) SATINDRA NATH BANERJEE *v.* BANWARI MUKUNDA DAS. **34 I.C. 868.**

———**O. 9, R. 8**—*Default of prosecution—Deft. not entitled to let in evidence.*

Where the plff. offers no evidence, the Court is bound to dismiss the suit for want of prosecution and the deft. is not entitled to let in evidence. But if the plff. has given evidence, the deft. is entitled to let in evidence though the Court did not believe the plff.'s evidence. This, the deft. is entitled to, to avoid a remand. (*Fletcher*, J.) KESRI CHAND *v.* NATIONAL JUTE MILLS CO., LTD. **40 Cal. 119=17 I.C. 87=16 C.W.N. 968.**

———**O. 9, R. 8**—*Scope of.*

The 18th Feb. 1922, had been fixed for the hearing of the suits, but when the plff. arrived at Asni early that morning, he found that the presiding officer of the Court had left for Miltrankot. He at once went to Miltrankot, and learnt from the Muharrir of the court, whom he found there, that the suits had been dismissed for default and that the Munsif had left for Dera Ghazi Khan. He went to Dera Ghazi Khan and on the 20th Feb. put in applications for the restoration of the cases. He was told that the applications would be brought up when the Munsif returned to Asni, but was not

C. P. CODE (V of 1908), O. 9, R. 8.

given a date. The applications were laid before the Munsif after his return on the 27th March and he directed that the records should be sent for the 11th April and that the plaintiff should produce evidence. That order, however, was passed in the plff.'s absence and was not communicated to him. He afterwards learnt from the Muharrir that the 11th April was fixed for his appearance in Court, and he appeared on that date. The Munsif then summarily rejected the applications, remarking that the plff.'s plea was absurd and that he had produced no evidence. *Held* the Munsiff's procedure was illegal. (*Martineau*, J.) RAMAL DAS *v.* IMAM BAKSH. **1923 Lah. 431 (2).**

———**O. 9, R. 8**—*Admissions—Co-defendants—Admission by some when binding on others.*

Where there are several defts. jointly interested in a particular matter, an admission by some of them is relevant against all the defts. 44 C. 133; 45 C. 159, Ref. (*Le Rossignol and Martineau*, JJ.) BHIKA MAL *v.* PURAN MAL. **69 I.C. 35 = 1923 Lah. 123.**

———**O. 9, R. 8**—*Dismissal for default—Improper order.*

Where the order of dismissal ran as follows: "Claim be dismissed for want of prosecution. Plff. was present but subsequently went away; but the defendant is present. After waiting for some time the plff. was called again but he remained absent." *Held*, it was wrongful to dismiss the claim for default. (*Abdul Raoof*, J.) ATRA *v.* JAGTA. **3 Lah. L.J. 449.**

———**O. 9, R. 8**—*Absence of plaintiff—Qualified admission by defendant of plaintiff's claim—Suit should be dismissed for default.*

Where in a pre-emption suit, the plff. claimed to pre-empt with Rs. 1,500 but was absent at the hearing and the deft. admitted plff.'s claim but asserted the sum to be Rs. 12,000, and the Court passed a decree in plff.'s favour, that he should pre-empt on paying Rs. 12,000, *held*, the proper course was to dismiss the suit for default, as the deft.'s admission is not an admission of any part of plff.'s claim. (*Leslie Jones and Broadway*, JJ.) MEHR DAIM *v.* SHAHMAD. **60 I.C. 724.**

———**O. 9, Rr. 8 and 9**—*Arbitration—Dismissal of suit—Restoration.*

At the request of parties, a suit was referred to arbitration by the Court, but before the award was filed, the suit was dismissed for default. On its being restored to file, the arbitrator was directed to file the award though not re-appointed. The parties did not object to the award on the ground that the arbitrator's powers had ceased on dismissal of suit. Decree was passed in terms of the award. On appeal by deft., the Appellate Court remanded the suit for re-trial as the dismissal had destroyed the arbitration. *Held*, by the High Court

C. P. CODE (V of 1908), O. 9, R. 8.

that the deft., by his conduct must be presumed to have waived his objection to the authority of the arbitrator and that the award was legal. (*Johnstone*, O.J. *and Shadi Lal*, J.) HARI SINGH *v.* ALLAH BAKHSH. **38 I.C. 769 = 118 P.R. 1916.**

———**O. 9, R. 8**—*Dismissal for default in early part—Sufficient cause to be given.*

A suit or a petition should not be dismissed in the early part of the day owing to the temporary absence of the party or pleader and if the absence is explained, the suit or petition even if it had been dismissed, must be restored. (*Kensington*, J.) JESA RAM *v.* THAKAR DAS. **13 I.C. 468 = 197 P.W.R. 1911.**

———**O. 9, R. 8**—*Dismissal under—Appeal does not lie.*

After the framing of issues in a suit, the court disposed of it in these words: "The plaintiffs are absent. The suit is dismissed with costs." The plaintiff appealed against the decision and the appellate court remanded the case for fresh disposal after taking evidence. *Held*, that the disposal of the suit by the trial court was under O. 9, R. 8, C. P. C. and that its order could be displaced only under O. 9, R. 9 or an appeal from an order under that provision. (*Oldfield and Venkatasubba Rao*, JJ.) VELAYUTHA MUDALIAR *v.* SUNDARESAM PILLAI. **(1922) M.W.N. 483 = 1922 Mad. 416.**

———**O. 9, Rr. 8 and 9 and S. 2 (2)**—*Decree for portion of claim—Appeal—Dismissal for default—Restoration.*

In a suit, if a decree is passed for the part of the plff.'s claim acknowledged by the deft. and the rest is dismissed for deft's default of appearance under O. 9, R. 8, it is an appealable decree within the meaning of S. 2 (2) The acknowledgment by the deft. must be of the claim as stated in the plaint and for the amount as stated therein and not simply of the cause of action. S. 2 (2), C.P.C. applies to the total and not partial dismissal of a suit. A case was dismissed for the default of the plff. The deft. admitted the execution of the bond but pleaded the discharge of the part of the liability by work and labour done by him for the plff. The Court decreed the suit for the rest balance, *Held*, the part dismissed was an appealable decree. (*Doubtful*) :— The deft's plea was a cause within the meaning of O. 9, R. 8, and was neither a plea of set off or common action. The words in R. 8, 'admits the claim or part thereof' are applicable to the cases where the Court can consider on the examination of the plaint and deft.'s written statement, that the deft. is ready to pay the admitted claim there and then or submit to the relief claimed in the plaint. The word 'Claim' in O. 9, R. 8, being synonymous with the amount sued for, refers to the right claimed irrespective of the amount stated in the relief column. The plff. would get a decree under O. 9, R. 8, if the deft.

C. P. CODE (V of 1908), O. 9, R. 8.

admits the right, otherwise not. A plff. guilty of some technical error or mistake ought not to be shut out from the judgment seat as the costs against the plff. will afford the deft. a good protection. (*Coutts Trotter and Seshagiri Aiyar*, JJ.) MUNISAWMI GOUDU *v.* JUNJADU.
35 I.C. 68.

——O. 9. R. 8 and O. 17, R. 2—*Default of plaintiff to appear at adjourned hearing—Dismissal.*

O. 17, R. 2 only gives a judicial discretion to the Court to dismiss the suit under O. 9, on default of plff. to appear; hence a Court will not be justified in dismissing when plff. has *prima facie* proved his case. (*Phillips*, J.) SUBRAMANIA OTHUWAR *v.* MUNUSAMIYA PILLAI. 31 I.C. 869.

——O. 9, R. 8 and O. 17, R. 3—*Appearance—Plaintiff and witnesses absen—Pleader with instructions to ask for adjournment—Applicability.*

Where a plff. and his witnesses were absent and his pleader had instructions only for an adjournment, the Court can dismiss the suit only under O. 9, R. 8 and not under O. 17, R. 3 as a restoration of suit so dismissed is allowed only under the former provision. (*Seshagiri Aiyar*, J.) MITTADAR VANKOBA *v.* MITTADAR KHADIRAPPA.
23 I.C. 614=(1914) M.W.N. 344.

——O. 9, R. 8—*Application for restoration dismissed for default—Appeal.*

Appeal lies against an order of dismissal of an application for restoration of an application, dismissed in default, for restoration of the suit dismissed in default. (*Hallifax*, A.J.C.) KALICHARAN *v.* RATANSINGH.
19 N.L.R. 119=73 I.C. 589=1923 Nag. 293.

——O. 9, R. 8—*Dismissal for default—Plaintiff dead on the date of hearing—Order is a nullity.*

Where an order purported to be passed under O. IX, R. 8, Civil Procedure Code; but in fact the plff. was dead on that date though neither the Court nor any of the parties was aware of it, *held* that the order passed was a nullity. (*Daniels*, A.J.C.) TIRLOCHAN PRASAD SINGH *v.* BHAGWATI. 9 O. & A.L.R. 70=73 I.C. 230=1924 Oudh 114.

——O. 9, R. 8—*Dismissal for default—Death of plaintiff—Procedure.*

When the death of the plff. was not brought to the notice of the Court and nobody appeared on the date of hearing on behalf of the plff. the Court had jurisdiction to dismiss the suit under O. 9. R. 8. No application for substitution of legal representatives of a deceased plff. can be made when a suit has been dismissed for default, the sense of such an application being that the suit must be pending. The remedy of the legal representatives is to first apply within the limitation period for the restoration of the suit. (*Lindsay and Rafique*, A.J.Cs.) DEBI BAKHSH SINGH *v.* HABIB SHAH.
14 I.C. 711.

C. P. CODE (V of 1908), O. 9, R. 8.

——O. 9, R. 8—*Appearance — What amounts to.*

Where the party and his pleader appear, but the pleader asks for a pass over to consult his leader, and when the case is later called on, no one appears and is dismissed for default, it must be held the plaintiff had not appeared within the meaning of the rule. 3 P.L.J. 355 and 5 P.L.J. 17, foll. (*Coutts and Adami*, JJ.) BASDEO NARAIN SINGH *v.* HARAK NARAIN SINGH. 68 I C. 942=1928 P. 166.

——O. 9, R. 8—*Plaintiff entitled to decree on admission of defence—Cause of action.*

The question whether there is a cause of action or not does not depend upon the admission of the defendant. Where the plaint discloses a cause of action, the plaintiff is entitled to get a decree on the admission of the defence. (*Ross*, J.) BAUL DAS MISRA *v.* DIGAMBAR KURI. 65 I.C. 644=(1921) Pat. 297.

——O. 9, R. 8—*Dismissal for default—Minor plaintiff.*

In dismissing a suit for default, a Court has no jurisdiction to provide that the order shall not prejudice a minor plaintiff. (*Das and Ross*, JJ.) KIRIT NARAYAN *v.* CHANCHAL DAS. 63 I.C. 736=6 Pat. L.J. 317.

——O. 9, Rr. 8, and 10 (2)—*Co-plaintiffs—One plaintiff not appearing.*

A Court has jurisdiction to direct a plaintiff to appear in person and to dismiss his suit if he fails to appear. But it cannot dismiss the suit against the other plaintiffs. (*Roe and Coutts*, JJ.) SRI PRABHU *v.* DWARAKA PRASAD. 50 I.C. 323=4 Pat. L J. 152.

——O. 9, R. 8 and O. 14, R. 1 (5)—*Day fixed for hearing—Settlement of issus.*

The date fixed for the settlement of issues is a date fixed for the hearing of the suit within O. 9, R. 8. (*Roe and Jwala Prasad*, JJ.) FIRM OF HARCHAND RAI ANAND RAM *v.* RAM BAHDUR SINGH. 48 I C 192=(1919) Pat. 32.

——O. 9, Rr. 8 and 9—*Appearance of plaintiff—Pleader absent but plaintiff present in Court—Dismissal of suit—Restoration.*

Where the plaintiff appears in person and his pleader is absent, the mere presence of the plaintiff in Court without prosecuting his suit is not an appearance within the real meaning of the word and the dismissal of the suit in such a case was a dismissal for default within O. 9, R. 8. An application for restoration is therefore competent under O. 9, R. 9 of the Code. (*Roe and Jwala Prasad*, JJ.) LALJI SAHU *v.* LACHMI NARAIN SINGH.
47 I C. 27=3 Pat. L.J. 333.

——O. 9, Rr. 8 and 9—*Appearance of one of the plaintiffs.*

Where a Court dismisses a suit with costs after refusing to grant an application for adjournment by one of the plaintiffs who was

C. P. CODE (V of 1908), O. 9, R. 8.

present in Court, the order is a decree and is appealable as such. (*Chapman and Atkinson, JJ.*) JUGESHAR RAI *v.* RAILAL BAHADUR.
43 I.C. 189=4 Pat. L.W. 366.

———**O. 9, R. 8 and O. 47, R. 1**—*No evidence—Dismissal—Review.*

Dismissal of a suit owing to plff.'s inability to produce evidence in support of his case does not amount to a dismissal under O. 9, R. 8 and the plff. can either appeal against that order or apply for a review. (*Chamier and Jwala Prasad, JJ.*) MADHU SUDAN SINGH *v.* KRISHNA PRASAD SINGH.
1 Pat. L.W. 790=39 I C. 946=
3 Pat. L.W. 428.

———**O. 9, R. 8**—*Admission in part and counter-claim by defendant—Plaintiff absent—Procedure.*

Where a plaintiff's claim was admitted in part by the defendant subject to a counter-claim, but when the suit was called on the plaintiff being absent the suit was dismissed as a whole. *Held*, the suit ought to have been decreed to the extent the defendant admitted liability; the counter-claim can be considered only if the defendant comes forward to prove it. (*Kincaid, J.C. and Kennedy, A.J.C.*) KHEMCHAND DARYANOMAL *v.* MENGHOMAL CHUTAKNAL.
66 I.C. 789=15 S.L.R. 172.

———**O. 9, R. 9.**

APPLICATION.
CONDITIONAL ORDER.
DISMISSAL FOR DEFAULT.
EXECUTION PROCEEDINGS.
FORUM.
FRESH SUIT.
LIMITATION.
PROBATE APPLICATION.
RES JUDICATA.
RESTORATION.
REVISION.
SCOPE OF.
SUFFICIENT CAUSE.

Application.

———**O 9, R. 9; O. 21, R. (2) (2); O. 43, R. 1 (c)**—*Application for revival of petition under O. 21, R. 2 (2) which was dismissed for default—Appeal.*

O. 9, R 9. does not apply to an application under O. 21, R. 2 (2) and no appeal lies from an order dismissing an application for revival of a petition under O. 21, R. 2 (2) which was dismiesed for default. (*Sanderson, C J. and Richardson, J.*) HANSESWARI DASI *v.* RADHIKA PRASAD. **63 I.C. 855.**

———**O. 9, R. 9**—*Application—Procedure.*

Application under O. 9, R. 9 must be disposed of on evidence and not on the ground that it is *bona fide* or otherwise. (*Fletcher and Newbould, JJ.*) DURGA KENTA SARMA *v.* NTO KOCH. **42 I C. 649=22 C.W.N. 671.**

C. P. CODE (V of 1908), O. 9, R. 9—Dismissal for Default.

Conditional Order.

———**O, 9. R. 9**—*Conditional order—Order to restore on payment of costs—Proper order—Appeal.*

If a Court decides to restore a suit, the proper order to pass is to direct the plaintiff to deposit the amount of costs within a fixed period and to pass a final order after that period. But where the Court orders the deposit of costs within a fixed period and at the same time states that otherwise the suit will stand dismissed, it makes a final order and an appeal lies and the Appellate Court can consider the adequacy or otherwise of the costs. (*Chamier and Piggott JJ.*) NANDLAL *v.* KISHORI. **26 I.C. 895=**
2 A.L.J. 1270.

Dismissal for Default.

———**O. 9, R. 9**—*Dismissal of suit for default.*

The rules or orders dealing with the case of the new appearance of a suitor do not apply to the situation arising from the death of a suitor. (*Lord Shah.*) DEBI BAKSH SINGH *v* HABIB SHAH. **35 All. 331=17 C W N 829=**
11 A L.J. 625=18 C L J 9=
15 Bom. L R. 640=14 M.L T 33=
(1913) M.W.N. 366=23 M L.J. 148=
16 O.C. 194=19 I.C. 526=40 I.A. 150 (P.C.).

[On appeal from 14 I.C. 221.
See also 14 I.C. 711]

———**O. 9, R. 9**—*Dismissal for default—Application to set aside—Futile appeal—Effect of.*

An order dismissing an appeal for default, is not a decree and therefore the decree of the Court of first instance is not superseded by it nor does it merge into it. 39 All. 13; 36 All. 350 (P.C.), foll. Therefore if an appeal from an *ex parte* decree is dismissed for default, the first Court can allow the application to set aside that *ex parte* decree. (*Banerjee, J.*) RAFAQET HUSSAIN *v.* BIBI TAWAFF.
39 All. 393=39 I C. 819=
15 A.L J. 286.

———**O. 9, R. 9**—*Suit dismissed in default—Fresh suit.*

A suit was brought for a share of profits for the year 1313, 1314 and 1315 *faslis*; the suit was dismissed in default of the plaintiff. He brought a fresh suit for the years 1316, 1317, 1318 including the sums recovered for the previously mentioned years. The suit is not barred, cause of action being different. (*Chamier, J.*) RAJ BAHADUR *v.* SHIAM LAL. **30 I C. 868.**

———**O. 9, R. 9 and O. 43, R. 1 (c)**—*Dismissal for default—Application to set aside—Application dismissed for default—Subsequent application—Order on, not appealable.*

Where a suit is dismissed in default and an application to set aside the order is also dismissed in default, an order made on a subsequent application refusing to set aside the

C. P. CODE (V of 1908), O. 9, R. 9—Dismissal for Default.

dismissal of the previous application, is not an order refusing to set aside the dismissal of a suit in default within the meaning of the cl. (c) of R. 1 of O. XLIII of the Civil Procedure Code. Such an order is not appealable. (*Sanderson*, C.J. *and Richardson*, J.) HARA KUMAR MITTER *v.* MURARI MOHAN
36 C.L.J. 184=69 I.C. 1003=1922 Cal. 572.

——O. 9, R. 9—*Dismissal for default—Dismissal of an application against order dismissing an application under O. 9, R. 9 for default—Revision.*

An application lies to restore a former application which is dismissed for default. At the same time when that application is rejected, no appeal lies from the order of rejection. O. 43, R. 1 (c) shows that an appeal lies from an order under O. 9, R. 9, rejecting an application from an order to set aside the dismissal of a suit. This cannot be interpreted to mean that an appeal lies from an order under R. 9, O. 9, rejecting an application for an order to set aside the dismissal of an application, but a revision lies. (*Scott-Smith*, J.) LOK NATH *v.* MT. SATTAN BAI. **73 I.C. 821=1923 Lah. 302 (2).**

——O. 9, R. 9—*Dismissal for default—Fresh suit.*

Where, a claim preferred to an attachment having been disallowed, a regular suit instituted thereafter by the claimant was dismissed for default, the execution petition being in the meanwhile withdrawn, a fresh suit for the same declaratory right brought on the decree-holder's fresh application for execution is barred under O. 9, R. 9, as there was no fresh cause of action and under Art. 11 of the Limitation Act as the fresh suit was not brought within one year of the rejection of the objection. (27 I.C. 944, ref. to.) (*Rattigan and Le Rossignol*, JJ.) GOPAL SINGH *v.* GANAPATI RAI.
66 P.R. 1916=117 P.W.R. 1916=35 I C. 821=130 P.L.R. 1916.

——O. 9, R. 9 and Sch. III—*Dismissal of execution for default—No power to restore.*

An order of a Collector restoring an execution case to his file after it was dismissed by him in default of the decree-holder is illegal and without jurisdiction. Subsequent proceedings in respect of the case in the Collector's Court are, therefore, void, though the parties might submit to the Court. (*Findlay*, A.J.C.) DULCHAND *v.* NARAIN. **61 I.C. 237.**

——O. 9, R. 9—*Dismissal for default—Effect of—Rule of common law as to bar of action against joint contractors whether applies.*

A dismissal for default is not covered by the rule of common law, that a judgment recovered against one of several joint contractors is a bar against the rest. (*Mitra*. O. A. J. C.) BUKHARAM *v.* RAMJI. **28 I.C. 878=10 N.L.R. 39.**

C. P. CODE (V of 1908), O. 9, R. 9—Execution Proceedings.

——O. 9, R. 9—*Dismissal for default—Setting aside as regards some—Effect on others.*

An order under O. 9, R. 9 setting aside an order of dismissal for default made on the application of some of the plaintiffs may operate in favour of all of them, as the Court setting aside the order may direct. (*Stuart and Kanhaiya Lal*, A.J. Cs.) BISHAMBAR NATH *v.* GIRDHARI LAL. **7 O.L.J. 1=2 U.P.L.R.(J.C.) 46=58 I.C 481=23 O.C. 18.**

——O. 9, R. 9—*Dismissal for default.*

Where on the day of hearing, the plaintiff's pleader had instructions only to ask for adjournment which was not granted and the case dismissed, *held* the dismissal was under O. 17, R. 2 and an application for restoration under R 9 of O. 9 was maintainable. (*Mullick and Macpherson*, JJ.) SD SHAHA MUHAMMAD MAUDOOD *v.* MAHARAJA SIR RAMESHWAR SINGH. **1 Pat. L.R. 281=74 I C. 693=1923 P. 530.**

——O. 9, R. 9 and B. T. Act, S. 158—*Dismissal for default.*

Subsequent application for assessment of rent where the application failed for default, is not barred under S. 158 of the B. T. Act. (*Dawson Miller and Mullick*, JJ.) JANKI RAY *v.* RAJA KALANAND SINGH. **2 P. 192=4 Pat. L.T. 705=74 I.C. 464=1923 P. 381.**

——O. 9, R. 9—*Dismissal of application for default—Procedure.*

No application lies under O. 9, C.P.C. to set aside a dismissal for default of an application under O. 9, R. 9, C.P.C. 4 Pat. L. J. 135, foll. (*Roe and Jwala Prasad*, JJ.) RAMGHULAM SINGH *v.* SHEO DEONARAIN SINGH.
61 I.C. 182=4 Pat. L.J. 287.

Execution Proceedings.

——O. 9, R. 9—*Execution proceedings.*

O. 9, R. 9 does not apply to an application under O. 21, R. 2 (2) and no appeal lies from an order dismissing an application for revival of a petition under O. 21, R. 2 (2) dismissed for default. S. 141 does not make O. 9, R. 9 applicable to such a case. (*Sanderson*, C.J. *and Richardson*, J.) HANSESWARI *v.* RADHIKAPRASAD.
63 I.C. 855.

——O. 9, R. 9—*Execution proceedings—Dismissal for default—Whether the rule is applicable—Remedy.*

A fresh application for execution is competent when a previous application is dismissed for default, as R 9 does not apply. *Ex parte* orders or decrees and orders of dismissal for default made in the course of execution proceedings lie outside the scope of the remedies provided by O. 9. But when in relation to such a proceeding no special remedy is provided by the Code, the Courts have under the general law, aided perhaps by S. 158, an inherent power

C. P. CODE (V of 1908), O. 9, R. 9—Execution Proceedings.

to review *ex parte* order and an order for dismissal for default. Case-law discussed. (*Fletcher and Richardson*, JJ.) BHARAT CHANDRA NATH *v.* YASIN SARKAR. **41 I.C. 586 = 21 C.W.N. 769.**

——O. 9, R. 9—*Execution proceedings.*

There is no reason in principle why O. 9, R. 9. (O. 9 generally) should not be held applicable to applications for setting aside sales in execution, made under O. 21, R. 90, (*Teunon and Newbould*, JJ.) BHUBEN BEHARI NAG *v.* DHIRENDRA NATH. **33 I.C. 581 = 20 C.W.N. 1203.**

——O. 9, R. 9 and S. 141—*Execution proceedings—Applicability to an application under S. 47 and O. 21, R. 90.*

Where an application for setting aside an execution sale under O. 21, R. 90 is dismissed for default another application lies under O. 9, R. 9 to set aside that order. An application for setting aside a sale under S. 47 and O. 21, R. 90 is not an application for execution. It is a miscellaneous proceeding in the nature of an original proceeding in which the auction-purchaser is the principal interested party. S. 141 does not apply to applications for execution. (*D. Chatterjee and Chapman*, JJ.) DILJAN MIHHA BIBI *v.* HEMANTA KUMAR ROY. **29 I.C. 895 = 19 C.W.N. 758.**

——O. 9, R. 9—*Execution proceedings—Application for final decree is not.*

O. 9, R. 9 is applicable to an application for final decree for foreclosure dismissed for default, the application for final decree for foreclosure not being a proceeding in execution. (*Ashworth and Simpson*, A.J.Cs.) BABU RAM *v.* MT. RAM DULARI DEBI. **26 O C. 194 = 74 I.C. 701 = 1924 Oudh 30.**

——O. 9, R. 9 and S. 151—*Execution proceedings—Strong grounds necessary.*

O. 9, R. 9 has no application to execution proceedings the reason being that fresh applications can be filed. Strong grounds would be required to justify an application under S. 151 for the restoration of an execution application as would be required for an application for review. (*Ashworth*, J.C. *and Simson*, A.J C.) NAGESHWAR PRASAD *v.* JAI NARAYAN. **73 I C. 73 = 1922 Oudh 201 (2.).**

——O. 9, R. 9, O: 21, R. 90—*Execution proceedings—Restoration.*

O. 9, R. 9 applies to an order dismissing for default an application under O. 21, R. 90. (*Lindsay*, A.J.C.) GOWRI *v.* HINGA. **59 I.C. 675 = 23 O. C. 349.**

——O. 9, R. 9 and O. 21, R. 90—*Execution proceedings—Dismissed for default—Fresh suit.*

O. 9, R. 9 does not apply to an order dismissing for default an application to set aside a sale held in execution of a decree. Application for restoration is not a suit within R. 4 of O. 9. (*Das*, J.) JUGAL KISHORE *v.* BACHANDER MOHAN. **52 I.C. 416.**

C. P. CODE (V of 1908), O. 9, R. 9—Fresh Suit.

——O. 9, R. 9—*Execution proceedings—Proceeding under O. 21, R. 90—Dismissal of application.*

O. 9, R. 9 has no application to a proceeding in execution instituted under O. 21, R. 90 of the C. P. Code. 17 All. 106; 13 C. L. J. 532; 41 Cal. 1; 38 Mad. 199; 35 I. C. 337; 21 C. W. N. 769; 3 Pat. L. J. 367; 40 Mad. 780; foll; 3 C.L.J. 276; 12 C. L. J. 6; 19 C.W.N. 25; 37 Mad. 462 and 20 C. W. N. 1203, diss. (*Atkinson, Coutts and Manuk*, JJ.) BHUBANESWAR PRASAD SINGH *v.* TILAKDHARI LAL. **4 Pat. L. J. 135 = 49 I C. 617 = (1919) Pat. 75 (F.B.).**

——O. 9, R. 9—*Execution proceedings.*

O 9, C. P. Code, does not apply to execution proceedings. An application for execution dismissed for default cannot be restored either under O. 9, R. 9 or S. 151, C. P. C. 41 Cal. 1, foll. (*Mullick and Thornhill*, JJ.) BABU RITTU KOER *v.* BABU ALAKDEO NARAIN SINGH. **3 Pat L.W. 208 = 4 Pat. L.J. 330 = 47 I.C. 184 = (1918) Pat. 265.**

——O. 9, R. 9 and O. 21, R. 100—*Execution proceedings—Claim dismissed for default—Application for restoration.*

A person who was a stranger to a decree made a claim under O. 21, R. 100 and his claim was dismissed for non-appearance on the date fixed for hearing. He applied under O. 9, R. 9 for re-hearing of the case. *Held*, that the court had power to re-hear the application. An application under O. 21, R. 100 is in the nature of a summary suit and the provisions of the C. P. Code should apply. 41 Cal. 1, not foll. (*Roe and Jwala Prasad*, JJ.) SATYA NARAIN LAL *v.* GOBIND SAHAY. **3 Pat. L.J. 250 = 43 I.C. 951 = 4 Pat. L.W. 102.**

Forum.

——O. 9, R, 9—*Forum—Application under—Rejection—Appeal—Revision.*

While an application for restoration of a suit under O. 9, R. 9, C. P. C. was pending, the *forum* was transferred from British territory to a native state and the court returned the application for presentation to the proper court. *Held*, that the order of the court was, in substance and in effect, an order refusing to grant the application for restoration and was appealable. (*Tudball*, J.) SHEOTAHAL *v.* QASIM. **15 I.C. 34 = 10 A.L J. 41.**

Fresh Suit.

——O. 9, R. 9—*Fresh suit—When barred.*

O. 9, R. 9, C. P. Code, has a restricted application only to those cases only where a second suit is brought for the same object and on the same cause of action as the suit, which was dismissed. (*Kanhaiya Lal and Sulaiman*, JJ.) BALKISHAN *v.* RAGHUBAR DAYAL. **(L.R. 3 A. 486 = 74 I.C. 991 = 46 All. 81 = 1923 All. 409.**

C. P. CODE (V of 1908), O. 9, R. 9—Fresh Suit

——O. 9, R. 9—*Fresh suit—Cause of action—Suit for declaration—Dismissal for default.*

A suit for declaration that an alienation in favour of the defendant is invalid, was dismissed for default. The plaintiff subsequently sued for partition and possession of a share. *Held*, the causes of action being different the suit is not barred. R. 9 bars a suit where the cause of action is the same. (*Ayling and Krishnan*, JJ.) ASIA BIBI *v.* SEHU MOHAMMAD ROWTHER. **39 M.L.J. 412=60 I.C. 201=12 L.W. 431.**

Limitation.

——O. 9, R. 9—*Limitation—Failure to apply within 30 days—Application under O. 47, R. 1—Revision.*

It the plaintiff fails to apply under O. 9, R. 9 within thirty days he cannot get an extended period of limitation and apply under O. 47, R. 1, the latter is a general provision controlled by the special rule embodied in O. 9, R. 9. (*Adami*, J.) RAJAH SHEORAJ NANDAN SINGH *v.* GIRIJANAND SINGH. **58 I.C. 191=1 Pat. L. T. 573.**

——O. 9, R. 9 and O. 47, R. 1—*Limitation—Dismissal of suit for default—Application to restore barred—Application for review whether saves limitation.*

Application under O. 9, R. 9 to restore suit dismissed for default must be made within the 30 days of the order and the limitation does not cease to run by making an application for review. 2 C. W. N. 318, rel. Per *Roe*, J.—Application for review cannot be made an excuse for going into the question whether an order refusing to grant time for the production of further evidence was proper and for reviving the suit after the period of the limitation for an application in proper form, has lapsed. Per *Sharfuddin*, J.—O. 9, R. 9 applies only to original cases in appeal. 16 C. W. N. 643, diss. 29 C. 598, expl. (*Sharfuddin and Roe*, JJ.) DEODIP SINGH *v.* GOPAL SINGH. **1 Pat. L.J. 547=38 I.C. 53=3 Pat. L.W. 66.**

Probate Application.

——O. 9, R. 9—*Probate application—Restoration—Application for.*

O. 9, R. 9, is applicable to the dismissal of an application for probate which had under S. 83 of the Probate and Administration Act been treated as a suit. The applicability of the latter portion of the R. 9 is not conditional on that of the former. (*Oldfield and Seshagiri Aiyar*, JJ.) RALLABANDI VEERAMMA *v.* RALLABANDI SUBBA RAO. **52 I.C. 639.**

Res judicata.

——O. 9, Rr. 9 and 13—*Res judicata*—Ex-parte *decree—Application to set side—Dismissal for default—Subsequent application—Review—C.P. Code, O. 47, R. 1.*

C. P. CODE (V of 1908), O. 9, R. 9—Restoration.

Where a suit was decreed *inter partes* against some defendants and *ex parte* against other defendants and the latter applied to set aside the *ex parte* decree but their application was dismissed for default. *Held*, that a further application under O. 9, R. 9 asking that the dismissal of their former application under O. 9, C.P.C, for default be set aside, is not maintainable. 4 P.L.J. 135 (F.B.) followed. O. 47, C.P. Code, does not apply when the order passed is by an officer other than the officer who made the original order. S. 153, C.P.C., has no application as the dismissal order was not an error or defect in the proceedings. (*Roe and Jwala Prasad*, JJ.) RAMGHULAM SINGH *v.* SHEODEONARAIN SINGH. **(1922) Pat. 5=1922 P. 121.**

Restoration.

——O. 9, R. 9—*Restoration—Grounds for.*

When a suit was called for hearing the plaintiff who was present in Court left the Court precincts to fetch his pleader who was engaged in another Court. In the meantime the case was called and the names of the parties were called out by the Court peon. The plaintiff who was present and who must therefore have appeared went away to fetch his pleader. When the plaintiff and his pleader both arrived it was three-quarters of an hour after the case had been called and dismissed for default. *Held* that in the circumstances of the case the suit should be restored for re-hearing on condition of the plaintiff paying into the Court the costs of the defendant within a prescribed time failing which his application should stand dismissed. (*Ryves*, J.) BEHARI LAL *v.* MAQSOOD ALI. **71 I.C. 283=1923 All. 189.**

——O. 9, R. 9—*Restoration—Inherent powers.*

A Court can in its inherent powers restore a suit dismissed for default of appearance, on a ground other than 'sufficient cause for non-appearance.' (*Karamat Hussain and Tudball*, JJ.) LALTA PRASAD *v.* RAMKARAN. **34 All. 426=14 I.C. 187=9 A.L.J. 666.**

——O. 9, R. 9—*Restoration—Party appearing after a few minutes.*

Where a party appears a few minutes after the case has been called on and dismissed during his absence, he should be made to pay the costs of the application to restore the suit and his suit should be restored and heard on merits. (*Macleod*, C. J. *and Crump*, J.) IRAPPA *v.* NINGAPPA. **1923 Bom. 480.**

——O. 9, R. 9—*Restoration—Application for restoration itself dismissed for default—C. P. C., S. 151.*

There is no rule in the Code that enables the Court to restore an application made under O. IX, R. 9 which has been dismissed for want of prosecution. Even S. 151 does not apply in such a case. (*Macleod*, C. J. *and Crump*, J.) MANKE *v.* WALWEKAR. **1923 Bom. 386.**

C. P. CODE (V of 1908), O. 9, R. 9—Restoration.

——**O. 9. R. 9**—*Restoration — Inherent power—Dismissal for default.*

O. 9, R. 9 makes it compulsory on a Court to set aside a dismissal where the plaintiff satisfies the Court that there was sufficient cause for non-appearance. It cannot take away the Court's power to restore the cause for any other valid reason. 34 All. 426 foll. (*Macleod*, C. J. *and Heaton*, J.) BILASIRAI LAKSHMI NARAIN *v.* CURSONDAS DAMODARDOSS. **44 Bom 82=53 I C. 252=21 Bom. L R. 932.**

——**O. 9, R. 9**—*Restoration—Order restoring suit is not appealable—Not a 'judgment' within the meaning of cl. 15 of the Letters Patent.*

O. 9, r. 9 of the Code of Civil Procedure restoring a suit dismissed for want of prosecution is not a 'judgment' within the meaning of clause 15 of the Letters Patent and is therefore not appealable. (*Sanderson*, C.J. *and Richardson*, J.) MAHARAJ KISHORE KHANNA *v.* KIRAN SHASHI DASI.
49 Cal. 616=69 I.C. 820=1922 Cal. 407.

——**O. 9, R. 9**—*Restoration—Effect of.*

If a suit is dismissed for default but is subsequently restored on plaintiff's application the restoration relates back to the date of the application. (*Teunon and Greaves*, JJ.) ASHUTOSH ROY *v.* ANANT RAM BAHATTACHARJI. **50 I.C. 727.**

——**O. 9, R. 9**—*Restoration—Application filed within one month—Petition dismissed—Limitation Act, Art. 163.*

Where in a suit dismissed for default of plaintiff, an application for the restoration of the suit was also dismissed on failure to furnish the judgment and decree as directed by Court and a second application for restoration was made two months after the original order, the application is barred. (*Tyabji*, J.) NALU SUBBA ROW *v.* GAUTI VENKATARATNAM.
22 I.C. 689.

——**O. 9, R. 9**—*Restoration—Exonerated defendants.*

Where the plff. exonerates certain defts. from liability and the suit is subsequently dismissed for default, it cannot be restored as against the exonerated defts. (*Kanhaiya Lal*, J.C.) NAGESHAR *v.* BHAGY DOBEY.
26 O.C. 67=63 I.C. 246=1922 Oudh 160.

——**O. 9, R. 9**—*Restoration—Order rejecting plaint—No power to restore.*

An order rejecting a plaint under O. 7, R. 11, (c) of the C.P.C., operates as a decree and once the order is perfected, there is absolutely no power in the Court under its inherent jurisdiction either to alter or to add to that order save as provided by S. 152 of the Code or on review. (*Kulwant Sahay*, J.) RAMESHWAR DHARI SINGH *v.* SADHU SARAN SINGH.
4 Pat. L T. 261=72 I.C. 629=2 Pat. 504=1923 P. 354.

C. P. CODE (V of 1908), O. 9, R. 9—Scope of.

——**O. 9, Rr. 9 and 13**—*Restoration—Inherent power*—Bona fide *mistake as to date—Inherent powers.*

Under O. 9, Rr. 9 and 13, a Court is bound to restore a suit when the applicant satisfies the Court that he was prevented by sufficient cause from appearing but they do not take away or limit the Court's inherent power to restore the suit for any valid reason. The fact that the applicant was under a *bona fide* mistake as to the date of hearing of his case is a sufficient cause for restoring the case. (26 Mad. 599 and 34 All. 426, foll.) (*Maung Kin and Rigg*, JJ.) CHRISTENSEN *v.* MITCHELL. **34 I.C. 44=12 Bur. L.T. 158.**

Revision.

——**O. 9, R. 9**—*Revision—Setting aside ex parte decree.*

A revision lies against an order re-admitting a suit dismissed for default. (*Piggott*, J.) AJODHYA PERSHAD *v.* CHHABILA KOER.
29 I.C. 1004.

——**O 9, R. 9 and O. 47, R. 1**—*Review—Order of dismissal for default.*

Plff. is entitled to apply for review of judgment under O. 47, C.P.C. when his suit is dismissed for default and he has not applied under O. 9, R. 9 to set the order aside. 26 Cal. 598; 16 C.W.N. 643; foll. Pat. L. J. 547 not Foll. (*Kumaraswami Sastri*, J.) VIRUPAKSHI GOWD *v.* BANDAPA. **37 M L.J. 59=9 L.W. 311=30 I C. 327=(1919) M.W.N. 246.**

Scope of.

——**O. 9, R. 9**—*Scope of.*

O. 9, R. 9, does not bar a suit for a declaration that the rent-decree and the sale consequent thereon were fraudulent because this suit is not based upon the cause of action which formed foundation of the earlier litigation. (*Mookerjee and Walmsley*, JJ.) GIRIBALA DASI *v.* NITIYA LAL SINHA. **41 I.C. 905.**

——**O. 9, R. 9**—*Scope of—Suit on same cause of action—Bar.*

Where the dismissal of a suit takes place under the provisions of S. 102 of the old Code (O. 9, Rr. 8 and 9 of the new Code), the plaintiffs are precluded from bringing a fresh suit on the same cause of action. (*Chapman and Richardson*, JJ.) KALYAN SINGH *v.* RAM GHULAM SINGH. **29 I.C. 902.**

——**O. 9, R. 9**—*Scope of.*

When an order dismissing a suit for default is set aside under O. 9, R. 9 such order may operate in favour of all the plaintiffs, though some of them only have applied, as the court setting aside the order of dismissal may direct. (*Stuart*, A.J.C. *and Kanhaiyalal*, A.J.C.) BISHAMBHAR NATH *v.* GIRDHARI LAL.
7 O.L.J. 1=2 U P.L R. (J.C.) 46=33 I.C. 481=23 O.C. 16.

C. P. CODE (V of 1908), O. 9, R 9—Sufficient Cause.

Sufficient Cause.

———O. 9, R 9—*Sufficient cause—Application set aside—Revision.*

Courts of Small Causes should not show themselves too rigid or exacting in the case of a litigant who is acting *bona fide* in prosecuting the suit. Where neither party being present when a suit was called on, the suit was dismissed, but the plff. turned up later in the day and applied for restoration alleging that the journey took longer than he had anticipated, the application to set aside should be allowed. (*Piggott*, J.) SARFAZ KHAN *v.* PARBATIA. **41 I.C. 918=15 A.L.J. 628.**

——O. 9, R. 9—*Sufficient cause—Order of restoration—Revision.*

Where an Appellate Court restored the suit even though the plff. could not show sufficient cause for his non-appearance within O. 9, R. 9, the order of the Appellate Court was not without jurisdiction for the restoration of the suit. 35 All. 331 (P.C.), Cons. (*Newbould and Panton*, JJ.) NALLADAROO AND CO. *v.* HARI KISSEN RATHI. **48 I.C. 961.**

——O. 9, R. 9—*Sufficient cause—Restoration.*

A party who was present in Court for sometime but left it of his own accord to attend other business of his own, without even taking the precaution for instructing his pleader is not entitled to have his case restored. (*Mookerjee and Beachcroft*, JJ.) CHARU CHANDRA GHOSE *v.* CHANDI CHARAN ROY. **27 I.C. 492=19 C.W.N. 25.**

———O. 9, R. 9—*Sufficient cause—Non-appearance.*

Under O. 9, R. 9 the failure to be in time to catch a train, in order to attend a case, is not a sufficient cause. (*Harrington and Carnduff*, JJ.) KALI PROSAD TEWARY *v.* PRAYAG RAJ. **19 I.C. 234.**

———O. 9, R. 9—*Sufficient cause—Many adjournments at plaintiff's request—His absence at the last hearing—Dismissal for default.*

A suit was repeatedly adjourned at plaintiff's request, and he stated that he did not desire to prosecute the claim. On the day of the last hearing he was absent and his pleader had no instructions and thus the suit was dismissed for default. He then applied for restoration on the ground that he had no notice of the date of hearing. *Held*, that the application for restoration was properly dismissed under O. 9, R. 9. (*Abdur Rahim and Odgers*, JJ.) RAMCHANDRA *v.* RAJU.
62 I.C. 378=13 L.W. 334.

———O. 9, R. 9—*Sufficient cause—Minor—Guardian's* latches.

Minority is not in itself 'sufficient cause' for restoration under O. 9, R. 9 (1), C.P.C. unless the guardian has been guilty of latches or gross neglect of the minor's interests. The Court is bound to enquire into the question 26 M. 599; 30 M. 274, foll; 24 M.L.J. 295, dist. (*Oldfield*, J.) ADAYAPADI RAMANNA UDPA *v* KRISHNA UDPA. **25 I C. 450=27 M.L.J. 167.**

C. P. CODE (V of 1908), O. 9, R. 12.

———O. 9, R. 9—*Sufficient cause—Illness of brother—Other grounds if can be urged under.*

Illness of a brother was held not sufficient cause to set aside a dismissal for default. In an application for restoration, it is not open to attack the order on the ground that the proper course was to reject the plaint under O. 7, R 11, as that is a matter for appeal. (*Miller*, C.J., *and Kulwant Sahay*, JJ.) RAMBHANJAN SINGH *v.* PASHUPAT RAI. **2 Pat. 784=74 I.C. 847=1924 P. 271.**

———O. 9, R. 9—*Sufficient cause—Mistake as to date.*

After being satisfied of the cause for default of prosecution, the Appellate Court is bound to set aside the dismissal order. Where a man carelessly trusted his defective memory without consulting the briefs in the Advocate's office, the failure to attend an appeal on that impression is not a sufficient cause to restore it after the dismissal for default. But the Court can consider the question of restoration independently of the O. 9, R. 9, for just and sufficient cause if an appeal is dismissed for default. If the decree appealed against is unjust or wrong on merits it might be a good cause to restore the appeal on terms. (*Twomey*, J.) MAUNG PO TU *v.* CHAUNG TAIK. **15 I.C. 338=5 Bur. L.T. 72.**

———O. 9, R. 9—*Sufficient cause*—Pardanashin *lady—Neglect of agent not a sufficient cause.*

Where an appeal is dismissed owing to the default of the appellant in depositing the cost of serving notices, the order of dismissal should not be set aside except for just and sufficient cause. That the default was due to the agent's neglect or misconduct, where the principal was a *pardanashin* lady is not a sufficient cause. The propriety of an *ex parte* order setting aside an order dismissing an appeal for default, may be questioned at the hearing of the appeal and can be reconsidered at the instance of the party aggrieved. (*Fawcett*, J.C., *and Kemp*, A.J.C.) JANAT *v.* KAMILSHAH. **60 I.C. 948=14 S.L.R. 239.**

———O. 9, R. 12—*Minor—Default of appearance—Guardian.*

A defendant though a minor represented by a guardian, is a party to the suit whose production in Court can be compelled by a direction to his guardian and the failure on the part of the guardian to comply with the direction, will enable the Court to act under O. 9, R. 12. 23 M.L.J. 676, dist. (*Krishnan*, J.) AYYA NADDAN *v.* THENAMMAL.
27 M.L.T. 171=(1920) M.W.N. 241=55 I.C. 945=11 L.W. 289.

C. P. CODE (V of 1908), O. 9, R. 12.

———**O. 9, R 12**—*Power of Court to direct party to appear.*

It cannot be said that the Ccurt has no power to order a party to appear in person unless empowered by specific sections in the C. P. Code. The Court can order a party to appear in person in the interest of justice. (*Sadasiva Aiyar*, J.) RAJAGOPALA PANDARITHAR *v.* MUTHU KUMARACHETTIAR.
23 M.L J. 676=17 I.C. 762=13 M.L.T. 19.

———**O. 9, R. 12**—*Dismissal of suit—Notice to show cause.*

Before a suit is dismissed for non-appearance of plaintiff when he was ordered to appear in Court in person, he should be given an opportunity to prove the cause of his non-appearance. A dismissal of a suit without giving him opportunity, is bad. (*Kanhaiya Lal*, A.J.C.) RAMESHWAR BAKSH SINGH *v.* RASUL BEG.
38 I.C. 477=8 O.L.J. 712.

——**O. 9, R. 13.**

ABSENCE OF NOTICE.
APPEAL.
APPELLATE COURT.
APPLICATION.
CO-DEFENDANTS.
COMPROMISE DECREE.
CONDITIONAL ORDER.
COSTS.
DEAD MAN.
EFFECT OF SETTING ASIDE.
EXECUTION PROCEEDINGS.
EX PARTE DECREE.
FINAL DECREE.
FRAUD
LEGAL REPRESENTATIVE.
LIMITATION.
MISCELLANEOUS PROCEEDINGS.
PROCEDURE.
REVIEW.
RIGHT TO APPLY.
SCOPE OF.
SERVICE OF SUMMONS.
SMALL CAUSE.
SUBSTITUTED SERVICE.
SUFFICIENT CAUSE.
SUIT TO SET ASIDE.

Absence of Notice

———**O. 9, R. 13**—*Absence of notice—Decree a nullity.*

An *ex parte* decree duly passed is a good decree. But if the decree is made in the absence and without proper notice to the deft, that decree does not bind the other party or does not stand in his way of showing the true facts of the case. (*Fletcher and Richardson*, JJ.) JUGAL KISHORE *v.* CHINTAMONY.
27 I.C. 225=18 C.W.N. 1288.

——**O. 9, R. 13**—*Absence of notice—Transfer.*

Where a suit is transferred without notice to defendant, the *ex parte* decree must be set aside. (*Moti Sagar*, J.) GANGA RAM *v.* GUJAR MAL.
1923 Lah. 444.

C. P. CODE (V of 1908), O. 9, R. 13—Appeal.

Appeal.

———**O 9, R. 13**—*Appeal—Application to set aside an* ex parte *decree after dismissal of appeal for default—Maintainability.*

An order in dismissing an appeal for default, is not a decree and therefore, the decree of the Court of first instance is not superseded by it nor does it merge into it.; 39 All. 13, 36 All. 350 (P. C.) foll. Therefore if an appeal from an *ex parte* decree is dismissed for default, the first Court can allow application to set aside that *ex parte* decree. (*Banerjee*, J.) RANAQAT HUSAIN *v.* BIBI TAWAEF. **39 All. 393=39 I.C. 819=16 A.L J. 286.**

———**O. 9, R. 13**—*Appeal—Pendency of—*Ex parte *decree—Application to set aside—Appellate Court—Jurisdiction of.*

If one of the defendants who contested the suit appeals against the decree without making the other *ex parte* defts. parties to the appeal, the trial Court has jurisdiction to entertain an application by the *ex parte* defendants to set aside the *ex parte* decree, independent of the pending appeal in the High Court, because no appeal has been preferred by the applicants. If the trial Court dismisses the application, the remedy is by way of appeal to the District Judge and not by an independent application to the District Judge, to set the *ex parte* decree aside, which he has no jurisdiction to entertain. 37 All. 208, dist. (*Richards*, C.J. *and Banerji*, J.) JAGESSWAR *v.* OHUNI LAL. **39 I.C. 140.**

———**O. 9, R. 13**—*Appeal*—Ex parte *decree—Supersession by Appellate Court as regards some parties—Setting aside.*

When a decree of the lower Court is superseded by a decree of a superior Court, the former cannot alter or amend it, on the application of defendants against whom the *ex parte* decree was passed. (*Chamier and Piggott*, JJ.) MATHOORA PRASAD *v.* RAM CHARAN LAL.
37 All. 208=28 I.C. 261=13 A.L.J. 283.

———**O. 9, R. 13**—*Appeal—Order setting aside* ex parte *decree—Conditional on payment of costs on a certain date—Omission, effect of.*

Where an *ex parte* decree was set aside on condition of payment of costs by a certain date, and money was not paid on that day and the application was therefore dismissed, the Court holding that it had no power to extend time, *held* that the final order of dismissal is appealable. (*Ryves and Piggott*, JJ.) JAGARNATH SAHI *v.* KAMTA PRASAD. **36 All. 77=23 I.C. 138=12 A.L.J. 38.**

———**O. 9, R. 13 and O. 17, Rr. 2 and 3**—*Appeal*—Ex parte *decree.*

Where on the date of hearing the deft. and his witnesses were absent and the Court decided the case *ex parte* under O. 17, R. 3 after going into the merits, *held* that the remedy of the deft. was only by way of appeal against the *ex parte* decree and not by way of an

C. P. CODE (V of 1908), O. 9, R. 13—Appeal.

application under O. 9. R 13, C.P.C. (*Tudball*, J.) GANGA RAM *v.* CHIDDU SINGH.
14 I.C. 119=9 A.L.J. 763.

——— **O. 9, R. 13**—*Appeal—Pendency of—Power of lower Court to set aside decree.*

An *ex parte* decree was passed against some defts. in the suit. The other defts. appealed but the defts. against whom the *ex parte* decree was passed were not joined in appeal. The application in such case to set aside the *ex parte* decree lies to the original and not to the Appellate Court. (*Teunon and Chauduri*, JJ.) ABDUL BHAD *v.* AMDALI GAZI.
37 I.C. 969=48 Cal. 153.

——— **O. 9, R. 13**—*Appeal—Dismissal of application—Order rejecting application to set aside*—Ex parte *decree for applicant's default.*

An order rejecting an application to set aside an *ex parte* decree on the ground of the applicant's failure to appear and support the application, is appealable. (*Fletcher and Richardson*, JJ.) PAKARI PRAMANIK *v.* SARAT SUNDARI DEBYA. **37 I.C. 838.**

———**O. 9, Rr. 13 and 14, and O. 43, R. 1 (d)**—*Appeal*—Ex parte *decree — Dismissal of application to set aside for default.*

An appeal lies against an order dismissing for default an application to set aside *ex parte* decree. (*Chatterjee and Newbould*, JJ.) SACHEENI *v.* KANTA HAZI. **36 I.C. 798.**

——— **O. 9, R. 13**—*Appeal—Power of lower Courts—Appeal by the judgment-debtors who were present—Effect of.*

'A', a judgment-debtor, against whom *ex parte* decree was passed, applied to set aside the decree, by depositing in the Court the decretal amount, with the consent of the decree-holder. The judgment-debtors who were present, had appealed but had failed. *Held*, the Court passing the decree could not entertain the application. Further the absent judgment-debtor was entitled to apply as there was agreement between the parties. (*Walmsley and Roe*, JJ.) RAJ GOBINDA SINGH *v.* BEHARI PATHUK. **30 I.C. 247.**

——— **O. 9, R 13**—*Appeal—Pendency of—Jurisdiction of Court to deal with application to set aside* ex parte.

A Court passing an *ex parte* decree is competent to deal with an application to set aside such a decree even if an appeal had been subsequently preferred. 12 C.W.N. 885; 30 Mad. 535; 13 C.W.N. 846; 38 C. 394, foll. (*Mookerjee and Beachcroft*, JJ.) SHAJAN BIBI *v.* SAFIRUDDIN. **26 I.C. 412.**

———**O. 9, R. 13**—*Appeal—Pendency of—Confirmation of decree—If original Court can set aside the* ex parte *order.*

Where an Appellate Court confirms a decree passed *ex parte* against some of the defts. only and not against the others, the original Court

C. P. CODE (V of 1908), O. 9, R. 13—Appeal.

can set aside the *ex parte* decree against those who were not parties to the appeal. 5 I C. 525; 38 Cal. 525, dist. 10 I.C. 275, rel. on. (*Mookerjee and Carnduff*, JJ.) HEDLOT KHASIA *v.* KARAN KHASIANI. **13 I.C. 377=15 C.L.J. 241.**

———**O. 9, R. 13**—*Appeal—Pendency of—*Ex parte *decree—Court competent to entertain application to set aside.*

Where an *ex parte* decree is passed against some defendants only they can apply to the Court passing the *ex parte* decree to have it set aside even after an appeal is preferred and decided against the whole decree by the other defendants. The appellate decree did not affirm, modify or reverse the decree as against the applicants and therefore there was no merger of the lower Court's decree into the appellate one. It is not a general rule that the lower Court's control over the decree comes to an end as soon as an appeal is preferred. (*Mookerjee and Carnduff*, JJ.) BRIJALAL SINGH *v.* MAHADEO PRASAD. **15 C.L.J. 432=12 I.C. 669=17 C.W.N. 133.**

———**O. 9, R. 13**—*Appeal—Proceedings under—No decree passed—Effect—If bar right of appeal after decree.*

A person can take cross-objection by way of appeal against a decree passed *ex parte* if he files such objection within one month from the date of service of notice of the day fixed for hearing the appeal. (*Oldfield and Devadoss*, JJ.) BAVA LEVVAI SAHIB *v.* AMMEENAMMAL.
45 M.L.J. 803=1924 Mad. 107.

——— **O. 9, R. 13**—*Appeal—Decree against defendants some of whom were* ex parte—*Appeal by contesting defendants—Application to Appellate Court to set aside* ex parte *decree, if lies.*

Where a decree against several defendants some of whom were *ex parte* in the Trial Court was appealed against by the contesting defendants impleading the *ex parte* ones as respondents, the latter cannot maintain an application in the Appellate Court to set aside the *ex parte* decree under O. 9, R. 13 of the Code. The proper procedure for them is to get an adjournment of the hearing of the appeal and make the application to the Trial Court. (*Oldfield and Ramesam*, JJ.) PALANIAPPA CHETTY *v.* SUBRAMANYAM CHETTY. **14 L.W. 609=(1921) M.W.N 796=66 I.C. 89=42 M.L.J. 12=30 M.L.T. 181=1922 Mad. 33.**

———**O. 9, R. 13**—*Appeal*—Ex parte *decree—Evidences—Admissions.*

An *ex parte* decree will not be set aside merely because it did not appear from the record that the promissory note sued on, had not been proved especially when the point had not been taken in the memorandum of appeal and where the vakil for the plff. stated that an attestor of the note had been examined. (*Sadasiva Aiyar and Napier*, JJ.) ARUNACHELLAM CHETTY *v.* KOTHANDAPANI PILLAI. **27 I.C. 789=2 L.W. 1.**

C. P. CODE (V of 1908), O. 9, R. 13—Appeal.

——O. 9, R. 13—*Appeal—Pendency of—* Ex parte *decree—Application to set aside made before appeal preferred—Practice.*

If an *ex parte* decree has been superseded by an Appellate decree, the original Court cannot set aside the *ex parte* decree, though the application to set it aside was made before the appeal was preferred. 30 Mad. 535; 32 All. 295 at p. 300, ref. 27 Mad. 602; 32 Mad. 416 expl. and dist. If the appellate decree is passed by the High Court, it can withdraw to itself under S. 24 of C.P.C. the application made to the lower Court to set aside the *ex parte* decree. (*Drake Brockman*, J.C.) WASUDEO *v.* CHIMBA. **15 I C. 565=8 N L R. 51.**

——O. 9, R. 13—*Appeal*—Ex parte *decree on merits.*

If the evidence of some of the defts. is recorded and he makes default on an adjourned date of hearing and the Court proceeds to decide the suit on merits, although professing to pass an *ex parte* decree, the defts. can appeal and need not apply for setting aside the *ex parte* decree. (*Lindsay*, J.C.) BISMALLA BEG *v.* AZAM ALI BEG. **34 I.C. 865=3 O.L J. 127.**

——O. 9, R. 13 — *Appeal—Application under* S. 151.

Inherent powers of Court under S. 151 cannot be invoked to set aside an *ex parte* decree long after the limitation prescribed by art. 164 has passed. An order refusing exercise of such powers by court is not appealable. (*Coutts and Ross*, JJ.) AJODHYA MAHTON *v.* PHUL KUER. **1 Pat. 277=65 I.C. 341=(1922) Pat. 61=1922 P. 479.**

——O. 9, R. 13 and O. 43, R. 1 (d)—*Appeal*—Ex parte *decree—Refusal to set aside.*

In a suit for recovery of land worth Rs. 400, plff. claimed mesne profits to the extent of Rs. 5,195. The deft. failed to appear and the Court granted a decree for recovery of possession of the property in suit and also awarded Rs. 1,200 as mesne profits, having discarded the evidence of the plff. as to mesne profits but assessing it at the value of the holding itself on its own responsibility and without any evidence or principle. On an appeal by the deft. from an order asking to set aside the *ex parte* decree, the High Court did not find any reason to interfere with the lower Court's order for possession but interfered with and set aside that portion of the *ex parte* decree relating to the mesne profits and directed a further enquiry into the matter on due notice to the deft. (*Atkinson and Adami*, JJ.) BRINDHABAN CHANDER CHOUBE *v* GOUR CHANDRA RAY. **(1920) Pat. 56=56 I.C. 155=1 Pat. L T. 467.**

Appellate Court

——O. 9, R. 13—*Appellate Court—Powers of*—Ex parte *decree—Setting aside—Absent defts. not parties to appeal.*

If an applicant to set aside an *ex parte* decree is not joined in an appeal against that decree

C. P. CODE (V of 1908), O. 9, R. 13—Appellate Court.

either as appellant or respondent and the Appellate Court has not adjudicated upon his case, the decree of the lower Court does not merge in that of the Appellate Court. This question of merger largely depends on the facts of each case. The absent defts. even after decision of appeal can apply to have the *ex parte* order set aside provided they did not take part in appeal. (*Walsh and Sundarlal*, JJ.) GAJRAJ MATI TIWARIN *v.* SWAMINATH RAI. **39 All. 13=36 I.C. 307=14 A L.J. 853.**

——O. 9, R. 13—*Appellate Court*—Ex-parte *decree—Setting aside—Appeal from final decree.*

The appellate Court has no power to consider or question, in appeal from the final decree, an order of the lower Court setting aside an *ex-parte* decree, as such an order is not appealable. (*Richards*, C.J. *and Banerjee*, J.) PURAN MAL *v.* TARIF. **30 I.C. 2=18 A.L.J. 1089.**

——O. 9, R. 13 — *Appellate Court cannot entertain application to set aside* ex-parte *decree* — Ex parte *decree—Setting aside—Decree* ex parte *against one defendant confirmed on appeal—Application to be made to which Court.*

An application to set aside a decree passed *ex parte* against A and confirmed in his presence on an appeal preferred by another defendant, does not lie in the appellate court but ought to be filed in the first court. (*Oldfield and Ramesam*, JJ.) PALANIAPPA CHETTY *v.* SUBRAMANIA CHETTY. **742 M.L J. 12=14 L W. 609=66 I.C. 89=(1921) M W.N. 796=30 M.L T. 151=1922 Mad. 33.**

——O. 9, R 13—*Appellate Court—Application to set aside decree, dismissed—Appeal from decree — Propriety of dismissal cannot be questioned.*

Where an application to have an *ex-parte* decree set aside has been dismissed, the question as to the propriety of dismissal cannot be re-agitated in an appeal from the decree, nor is such a right given by S. 105 of the C.P. Code. 23 Mad. 445; 30 Mad. 54; 43 Mad. 94 (F.B.); 23 Mad. 260 expl. and dist. (*Abdur Rahim and Oldfield*, JJ.) BADVEL CHINA ASHETHU *v.* VATIPALLI KISAVAYYA. **12 L.W. 807=(1920) M W.N. 780=60 I.C. 215=32 M L J 697=29 M.L.T. 63.**

——O. 9, R. 13—*Appellate Court—Power of—Setting aside* ex-parte *decree.*

An Appellate Court can set aside an *ex parte* order passed by the original Court against some of the defts. when an appeal by the other defts. is pending before it. (30 M 535: 32 Mad. 416. foll.) (*Seshagiri Aiyar and Kumaraswami Sastri*, JJ.) SADAYA KONAN *v.* ANNAMALAI UDAYAN. **29 I.C. 458=2 L.W. 529.**

——O. 9, R. 13 — *Appellate Court—Reversal of decree on the ground that* ex parte *procedure was not justified.*

C. P. CODE (V of 1908), O. 9, R. 13—Appellate Court.

Where an appeal is preferred against an *ex parte* decree, the appellate court has jurisdiction to reverse the decree of the lower court merely on the ground that such court was wrong in proceeding to decide the case *ex parte*. 33 M. 54, foll. (*Ashworth*, C.J.) FARZAND ALI *v.* EXADASHI. **26 O.C. 10=10 O.L.J. 36=73 I.C. 591=9 O. & A.L.R. 332=1923 Oudh 177.**

——O. 9, R. 13—*Appellate Court—Confirmation of decree by Trial Court can set aside the decree.*

An original suit was decided *ex parte* against one of the defendants. The decision was upheld in appeal. The party against whom the *ex parte* decree was passed applied to the Trial Court for setting aside the *ex parte* order. The Trial Court set aside the *ex parte* order and restored the case for hearing on the merits. *Held*, it was right. (*Daniels*, J.C.) MAHABALI PARSHAD *v.* BALBHADDAR SINGH. **64 I.C. 308=24 O.C. 282.**

Application.

——O. 9, R. 13—*Applicability—Defendant absent but pleader present—If duly instructed—Taking no part in proceedings.*

Where the pleader for deft. was present but took no part in proceedings, then unless it is held that deft. appeared by duly instructed pleader, the disposal would be held *ex parte* otherwise not. If the deft. is not able to show that the pleader was not duly instructed, then it is not an *ex parte* decree. (*Shah*, A.C.J. *and Crump*, J.) MOTILAL RATANCHAND MARWADI *v.* NANDRAM DALPATRAM. **23 Bom. L.R. 1922=1924 Bom. 139.**

——O. 9, R. 13—*Application—Formalities.*

An unstamped objection against an *ex parte* order neither praying to set aside the order nor mentioning the date when he had notice of the order, is not an application to set aside the *ex parte* order. (*Ayling and Sadasiva Aiyar*, JJ.) SUBBIAH NAICKER *v.* RAMANATHAN CHETTIAR. **37 Mad. 462=26 M.L.J. 189=(1914) M.W.N. 205=22 I.C. 899=1 L.W. 231.**

Co-defendants.

——O. 9, R. 13—*Co-defendants*—Ex parte *decree against one of several defendants-mortgagors—Application to set aside.*

Semble:—Where there is an *ex parte* decree against one of the several defts. mortgagors and an application is made to set it aside, the better course would be to set it aside against all the defts. and direct the suit to be retried. (*Lord Mersey.*) ASHFAQ HUSAIN *v.* GAURI SAHAI. **33 All. 264=38 I.A. 37=15 C.W.N. 370=8 A.L.J. 332=13 C.L.J. 361=9 M.L.T. 380=13 Bom. L.R. 367=4 Bur. L.T. 121=21 M.L.J. 1140=9 I.C. 975=(1911) 2 M.W.N. 177 (P.C.).**

[Affirming 29 All. 623.]

C. P. CODE (V of 1908), O. 9, R. 13—Co-defendants.

——O. 9, R. 13—*Co-defendants—Decree set aside as against one defendant.*

An application under O. 9, R. 13 if granted will re-open the suit only as against the successful applicant and not against other defendants. (*Stanley*, C.J. *and Banerji*, J.) RAM RATAN *v.* PRAG DUTT PANDE. **9 I.C. 835=8 A.L.J. 364.**

——O. 9, R. 13—*Co-defendants—Mortgage decree*—Ex parte—*Setting aside—Effect.*

An *ex parte* mortgage decree should be set aside in its entirety even on application by some of the defendants and not only as against applicants. (*Mookerjee and Greaves*, JJ.) BRAJA NATH PAL *v.* SURENDRA KRISHNA ROY. **41 I.C. 181.**

——O. 9, R. 13—*Co-defendants—Decree* ex parte—*Setting aside—Application by some—Whole suit, if re-opened.*

A decree was passed against defendants 2 and 3 who were *ex parte*, for rent, for possession, against defendants 1 and 4. Plaintiffs executed the decree against defendants 1 and 4 and obtained possession. Defendants 2 and 3 applied to set aside the *ex parte* decree but they did not make the defendants 1 and 4 parties to the application. The Court set aside the *ex parte* decree against defendants 2 and 3 but declined to re-open the whole suit even as against the other defendants. *Held*, that there was really no question of jurisdiction or irregular exercise of it within S. 115 of the C.P.C. and that having regard to the fact that plaintiffs were satisfied with their decree against defendants 1 and 4, the decree should not be set aside in so far as those defendants were concerned. The case was not covered by the proviso to R. 13 of O. 9, as defendants 1 and 4 were not parties to the application to set aside the *ex parte* decree, the Court below should not have passed an order prejudicial to them behind their backs. (*Carnduff and Chapman*, JJ.) ALI AHMAD KHAN *v.* BROWN. **15 I.C. 260=17 C.W.N. 142.**

——O. 9, R. 13—*Co-defendants—Principal and surety*—Ex parte—*Setting aside.*

A Judge cannot set aside an *ex parte* decree against the judgment-debtor without also setting it aside as against the surety. (*Shah Din*, C.J.) MUNSHI RAM *v.* MALAVA RAM. **40 I.C. 400.**

——O. 9, R. 13—*Co-defendants*—Ex parte *decree against, if can be set aside by one—Power of Court.*

A Court cannot set aside a decree passed against a surety on an application of the principal to set aside an *ex parte* decree passed against him. (*Kensington*, J.) THE SINGER MANUFACTURING CO. OF LAHORE *v.* MUHAMMAD DIN. **24 P.L.R. 1914=27 I.C. 251=166 P.W.R. 1914.**

C. P. CODE (V of 1908), O. 9, R. 13—Co-defendants.

——— **O. 9, R. 13** — *Co-defendants—Suit against two persons—Dismissal against one—* Ex parte *decree against others.*

Where a suit against two defendants was dismissed against one and decided *ex parte* against another and in an appeal by the latter the Court re-opened the whole case even against the former, *held*, that the Court is wrong in doing so, as O. 9, R. 13 proviso, does not apply to the case of a defendant against whom the suit has been dismissed on the merits without appeal by the plaintiff. (*Kensington*, J.) GHANNU MAL *v.* SANT DAS.

91 P.L.R. 1913=18 I.C. 327=67 P.W.R. 1913.

———**O. 9, R. 13**—*Co-defendants*—Ex parte *decree against several defendants—Application to set aside by one—When can be set aside against all.*

Where in a suit for possession of separate items from separate sets of defendants, an *ex parte* decree is passed against all and an application is made by one to set aside the decree, *held*, that the decree is not such a joint and indivisible one as to allow its being set aside in favour of those who had made no application to set it aside, though there were some common issues in the suit in which all were interested. (*Krishnan*, J.) NARAYANASAMY AIYAR *v.* DORAISAMY. **65 I.C. 343=(1921) M.W.N. 795.**

———**O. 9, R. 13**—*Co-defendants—Principal and surety—Surety alone applying for setting aside of decree—Decree whether can be set aside against both.*

Where an *ex parte* decree was passed against a debtor and his surety it can be set aside against both of them on the application of the surety alone. (*Lindsay*, J.C.) MUHAMMAD RAJA *v.* MUSAMMAT BARKA. **24 I.C. 115.**

Compromise Decree.

——**O. 9, R. 13 and O. 23, R. 1 (9)**—*Compromise decree—Application to set aside.*

An application to set aside a compromise decree on the ground that the appellant was no party to the compromise and that he did not give authority to compromise on his behalf, is an application within O. 9, R. 13. An appeal lies from an order refusing such application. (*Richardson and Walmsley*, JJ.) BASIRUDDIN *v.* SADHU TANTI. **45 I.C 690=22 C.W.N. 571.**

———**O. 9, R. 13**—*Compromise decree on unauthorised person.*

A decree in terms of a compromise cannot be treated as an *ex parte* decree and set aside under O. 9, R. 13, C.P.C., on the ground that one of the parties had not authorised the compromise. (*Carnduff and Richardson*, JJ.) JADU NATH DEY *v.* ASAN MANDAL. **27 I.C. 261.**

C. P. CODE (V of 1908), O. 9, R. 13—Costs.

———**O. 9, R. 13**—*Compromise decree*—Ex parte *decree—Procedure.*

A decree based on a compromise cannot be treated as an *ex parte* decree and that consequently O. 9, R. 13, Code of Civil Procedure, does not apply. (*Stephens and Mullick*, JJ.) DAMODHAR MISRA *v.* HIRANASHI NAIK. **27 I.C. 227=19 C.W.N. 118.**

Conditional Order.

——**O. 9, R. 13**—*Conditional order—Order giving time to pay on application under.*

An order giving time to pay the decree amount, does not of itself operate as a stay of execution of the *ex parte* decree itself. (*Sadasiva Aiyar and Napier*, JJ.) SUBBARAMA AIYAR *v.* ARUNACHALAM CHETTIAR. **32 I.C. 731=3 L.W. 35.**

———**O. 9, R. 13**—*Conditional order—Harsh conditions should not be imposed.*

A Court should not as a condition precedent to setting aside an *ex parte* decree require the deposit of a large sum of money, as it will work hardship on the defendant. (*Dalal*, J.C.) INDAR SINGH *v.* GURDAYAL SINGH. **74 I.C. 86=1924 Oudh 229.**

———**O. 9, R. 13**—*Conditional order.*

In restoring a case for re-hearing under O. 9, R. 13, C.P.C., the Court may make it a condition that the decretal amount or some portion thereof be paid into Court. Where there has been no default on the part of the party asking for re-hearing, *e.g.*, where he has not been duly served, it is inequitable for the Court to impose conditions. (*Miller*, C.J. *and Das*, J.) SHYAM LAL SAHAI *v.* RAM NARAIN LAL. **57 I.C. 300= 5 Pat. L.J. 420=1 Pat. L.T. 443=2 U.P.L.R. (Pat.) 151.**

Costs.

———**O. 9, R. 13**—*Costs — Final order—Application for extension of time.*

Obiter :—Application for extension of time for payment of costs filed after the final order of Court under O. 9, R. 13 may be treated as one for review. (*Krishnan*, J.) CHANDRA GOUNDAN *v.* PALANIAPPA GOUNDAN. **23 M.L.T. 7=42 I C. 961=1917 M.W.N, 870.**

——**O. 9, R. 13**—*Costs—Order not imposing terms as to costs*—Ultra vires.

An order setting aside an *ex parte* decree under O. 9, R. 13 is not *ultra vires* if it does not impose any conditions as to costs. (*Seshagiri Aiyar*, J.) VENKATASWAMI NAIDU *v.* SHANMUGAM PILLAI. **32 I C. 984.**

———**O. 9, R. 13**—*Costs*—Ex parte *decree set aside on payment of—Costs not paid in time—Procedure.*

On a petition to set aside an *ex parte* decree, the defendant who was ordered to deposit in Court the decree amount and costs, but he neither carried out the order of the trial

C. P. CODE (V of 1908), O. 9, R. 13—Deadman.

court nor of the appellate court to deposit the costs within the time fixed. *Held* in revision, that the appellate court ought to have dismissed the appeal on non-payment of costs for payment of which time should have been fixed before disposal of the appeal. (*Kanhaiya Lal*, J. C.) SUKHAI *v.* BINDA BAKSH. 1922 Oudh 14.

Dead man.

——O. 9, R. 13—*Deadman—Application by his representative—Limitation.*

A dead man could not make a default and in such a case the representative can get the usual period of six months for applying to be brought on the record; the order of dismissal for default is inappropriate and inoperative as a bar. (*Chevis*, J.) DAULAT RAI *v.* JAGAT RAM.
47 I.C. 962=96 P.R. 1918.

Effect of setting aside.

——O. 9, R. 13—*Effect of setting aside—Decree* ex parte.

Where an *ex parte* decree is set aside by suit its effect is to restore the parties to the position they previously occupied. The *ex parte* decree thus revived may be tried by the Court, if the plff. desires to proceed with it. (*Mookerjee and Walmsley*, JJ.) DHARMIDHAR ADITYA *v* HEMANGA CHANDRA JANA. 21 C.W.N. 1087=
41 I.C. 956=27 C.L.J. 592.

——O. 9, R. 13—*Effect of setting aside—Execution sale — Decree-holder's purchase becomes void after setting aside of decree.*

A decree-holder's purchase in execution of an *ex parte* decree against judgment-debtor of his property, becomes *ipso facto* void after the decree is set aside. (*Ayling and Kumaraswami Sastri*, JJ.) SOBHANADRI APPA W *v.* GOVINDARAJU SEETARAMIAH.
31 I.C. 305=2 L.W. 1066.

——O. 9, R. 13—*Effect of setting aside—*Ex parte *decree—Decree set aside—Restitution—Right to, against original plaintiff and his representatives.*

Where an *ex parte* decree is set aside, the deft. is entitled to be restored to his original position under S. 144 of the C P. Code. (*Miller*, C.J., *and Jwala Prasad*, J.) BASANTA KUMARI *v.* BALMUKUNDA. (1923) Pat. 1=
72 I.C. 912=2 P. 277=
1 Pat. L.R. 338=1923 P. 371.

Execution Proceedings.

——O 9, R. 13—*Execution proceedings.*

Orders in execution under S. 47 are decrees as defined in S. 2 and hence *ex parte* orders are *ex parte* decrees and O 9, R. 13 is applicable. (*Ayling and Sadasiva Aiyar*, JJ.) SUBBIAH NAICKER *v.* RAMANATHAN CHETTIAR.
37 Mad 462=26 M.L.J. 189=22 I.C. 899=
(1914) M.W.N. 205=1 L.W. 261.

C. P. CODE (V of 1908), O. 9, R. 13—Ex parte Decree.

Ex parte Decree.

——O. 9, R. 13—Ex parte *decree against one defendant—Appeal by the other impleading the* ex parte *defendant—Application for setting aside—If maintainable.*

Where a decree is passed *ex parte* against one of two defendants, the mere fact that an appeal is pending at the instance of the respondent impleading him as a respondent, he has a right to apply under O. 9, R. 13 for setting aside the decree. Case-law reviewed. (*Sulaiman*, J.) MIRZA ABDULLA BEG *v.* RAMZAN KHAN.
21 A.L.J. 901=L.R. 5 A. 8=79 I.C. 381=
1924 All. 173.

——O. 9, R. 13—Ex parte *decree—Application to set aside dismissed for default—Order refusing to restore.*

Where an application to set aside a decree was dismissed for default and the court refused to set aside the order of dismissal and restore the application. *Held* no appeal lies against the order. (*Piggott and Walsh*, JJ.) SHARIF HUSSAIN *v.* HAIDAR HUSSAIN. 20 A.L.J. 819=
67 I.C. 820=1922 All. 337 (b).

——O. 9, R. 13 and O. 43, R. 1, Cl. (1)—Ex parte *decree—Application to set aside—Rejection by successor of the Judge—Appeal.*

A suit was decreed *ex parte* by a Munsif exercising small cause powers. His successor who was not invested with such small cause powers refused to set the *ex parte* decree aside on the application of the defendant. *Held*, that the decree, being final the order rejecting the application to set aside was not appealable. (*Banerji*, J.) HIRA LAL *v.* JHUNNI LAL.
20 A.L.J 208=L.R. 3 A 124=
65 I.C. 967=1922 All. 50.

——O. 9, R. 13—Ex parte *decree—Application to set aside—Knowledge—Proof of.*

The applicant must have knowledge that a particular decree has been passed against him in a particular court in favour of a particular person for a particular sum. (*Macleod*, C.J.) BAPURAO SAKHURAM *v.* SADHU BHIRBA GHOLAP. 25 Bom. L.R 74=
72 I.C. 130=47 Bom. 483=1923 Bom. 193.

——O. 9, R. 13—Ex parte *decree—Record, recitals in—Not conclusive—Appearance of defendant.*

In an application to set aside a decree on the ground of its having been made *ex parte* the recitals in the record are not conclusive as to the true character of the decree. Where defendants entered appearance and asked for time, and on the refusal thereof by the Court, the pleader retired from the proceedings, and the suit was decreed, *held*, that the decree must be deemed to have been made *ex parte*. (*Mookerjee and Beachcroft*, JJ.) SHAM LAL SAHU *v.* RAM KUMAR LAL. 20 I.C. 67.

C. P. CODE (V of 1908), O. 9, R. 13—Ex parte Decree.

——O. 9, R. 13—Ex parte *decree—Defendant's case gone into—Application for adjournment—Refusal of.*

A decree passed against a defendant, who, after the case has been entered into withdraws from the case after an application for adjournment has been refused, is not an *ex parte* decree if judgment is given on the merits. 35 Cal. 1923 Foll. (*Holmwood and Chatterjee*, JJ.) JASODA DASSI *v.* RAMESWARI DASSI. **13 I.C. 874=14 C.L.J. 603.**

——O. 9, R. 13—Ex parte *decree—Application to set aside—Non payment of process-fee—Dismissal of application—Appeal.*

Where an application to set aside an *ex parte* decree is dismissed for failure to pay process fee this is in substance a dismissal for default and an appeal lies from the order. 21 C. L. J. 628; 36 I.C. 798; 37 I.C. 835, Rel. (*Harrison*, J.) BAHADUR SINGH *v.* WASAWA SINGH. **69 I.C. 713.**

——O. 9, R. 13—Ex parte *decree—Setting aside.*

When there is transfer of territorial jurisdiction after decree, the new court can entertain application to set side *ex parte* decree. (*Spencer and Krishnan*, JJ.) SRINIWAS RAO *v.* HANUMANTHA RAO **42 M L J. 344= 15 L.W. 458=(1922) M.W.N. 349= 63 I.C. 727=31 M L.T. 79=1922 Mad. 10.**

——O. 9, R. 13—Ex parte *decree—Decree of appellate Court.*

Where an appellate Court confirms an *ex parte* decree on an appeal by the deft., the decree of the appellate Court is not an *ex parte* decree. The deft. should apply to the appellate Court to stay appeal to enable him to apply to first court to set aside the *ex parte* decree. (*Oldfield and Ramesam*, JJ.) PALANIAPPA CHETTY *v.* SUBRAMANIA CHETTY. **14 L.W. 609=66 I.C. 59= (1921) M.W.N. 798=42 M L J. 12= 30 M.L T. 161—1922 Mad. 33.**

——O. 9, R. 13 and O. 17, R. 3—Ex parte *Decree—Direction of Court—No instructions—Decree* ex parte.

Where on an adjourned date of hearing of a suit, the defendant being absent his pleader who was present represented that he had "no instructions." A decree, passed owing to defendant's default of appearance in spite of the Court's direction to him to appear on that day, amount to an *ex parte* decree under O. 9, R. 13. (*Seshagiri Aiyar*, J.) MAGETI NAGARATNAM *v.* PACHIGOLLA RAMAYYA. **27 I.C. 882=2 L W. 105.**

——O. 9, R. 13—Ex parte *decree—Application to set aside—Appeal—Effect of.*

A suit was decreed *ex parte* and the defendant filed an application under O. 9, R. 13 and also subsequently preferred an appeal. The application for re-hearing was kept pending till the disposal of the appeal. The appellate court dismissed the appeal but observed that the application for re-hearing under O. 9, R. 13 deserved consideration by the trial court, which however, held that after the appellate court had confirmed the *ex parte* decree, it had no jurisdiction to set it aside under O. 9, R. 13, and further that there was no sufficient cause for restoration. *Held* that after the *ex parte* decree had been affirmed by the appellate court, it merged in the appellate decree and the trial court had no jurisdiction to entertain the application under O. 9, R. 13, although it had been filed before the filing of the appeal. (*Bucknill*, J.) MT. AJODHYA KUAR *v.* DURGA PRASAD. **(1923) Pat. 145=71 I.C. 383= 4 Pat. L.T. 116=1923 P. 331.**

——O. 9, R. 13—Ex parte *decree when justified—Suit disposed of on day fixed for arguments on a preliminary question—Legality of.*

Where on the day fixed for hearing arguments on the question of jurisdiction the Court finding the defendant absent, heard the plaintiff's evidence and passed an *ex parte* decree, *held*, that an *ex parte* decree ought not to have been passed under the circumstances as the date was not fixed for the decision of the case. The fact that an appeal had been preferred from the *ex parte* decree does not prevent the Court from setting aside the *ex parte* decree or a court of appeal from reversing an order of the first Court refusing to set aside the *ex parte* decree. (*Abdul Raoof*, J.) FIRM OF SETH KHUDA BAKHSH *v.* GHULAM QADIR. **72 I.C. 900 (2)**

——O. 9, R. 13 and O. 17, Rr. 2 and 3—Ex parte *decree — Appearance—What is—Pleader refusing to conduct case.*

The mere sitting in Court of the Pleader of a party having no instructions but to ask for time is not an appearance and the procedure to be adopted is under O. 17, R. 2 in which case O. 9, R. 13 will be applicable. An agreement in good faith by the parties to ask for adjournment for the purpose of a compromise is a sufficient excuse for the deft. not being ready. (*Roe and Coutts*, JJ.) RAM KISHEN LAL *v.* JATADHARI LAL. **8 Pat. L.J. 481= 46 I.C. 488=(1918) Pat. 236.**

——O. 9, R. 13—Ex parte *decree—Setting aside—O. 17, R. 3.*

On a day fixed for the evidence of the defendant his pleader appeared and filed an application for adjournment which was refused. Then he withdrew from the suit and the Court proceeded with the case. *Held*, that the withdrawal of the pleader who conducted the case for two years did not make the proceedings *ex parte*. (*Parlett and Twomey*, JJ.) PALANIAPPA CHETTY *v.* MUTHU CHETTY. **10 I C. 770 (2)=4 Bur. L.T. 67.**

C. P. CODE (V of 1908), O. 9, R. 13—Final Decree.

Final Decree.

———O. 9, R. 13—*Final decree ex parte—Partition suit—Decree passed without notice to defendant—Setting aside.*

When a court adjourns a pending suit it is its duty to give notice of the adjourned date to the parties or their pleaders. Where after the preliminary decree in a partition suit the court appointed a commissioner for division by metes and bounds and on his report being received passed a final decree without notice to the defendant, the *ex parte* decree is bad and should be set aside. (*Piggott and Walsh*, JJ.) DURGA PRASAD *v.* HET RAM.

20 A.L.J. 912=77 I.C. 91=
L. R. 3 A. 626=1923 All. 79 (2).

———O. 9, R. 13—*Final decree—Accounts—Defendant unavoidably absent—Effect of.*

Where a final decree for accounts is passed when the deft. is obliged to be unavoidably absent, it is one passed *ex parte* and can be set aside. (*Holmwood and Chatterjee*, JJ.) JASODA DASSI *v.* RAMESWARI DASSI.

13 I.C. 374=14 C.L.J. 603.

———O. 9, R. 13—*Final decree*—Ex parte *—Application to set aside—Decree.*

An application to set aside a final decree in a mortgage suit, passed *ex parte*, is maintainable under O. 9, R. 13. There is nothing to limit the word decree in O. 9, R. 13 to the preliminary decree, in cases where the law contemplates preliminary and final decrees. (*Abdur Rahim and Kumaraswami Sastri*, JJ.) KANAKASUNDRAM PILLAI *v.* SOMASUNDRAM PILLAI. 48 I.C. 71=36 M.L.J. 376.

———O. 9, R. 13—*Final Decree—Mortgage setting aside.*

The proceedings in a mortgage suit after the passing of a preliminary decree and a final decree are proceedings in the suit which continues until a final decree is passed. On an application by the plff. in a mortgage suit for the passing of a final decree it is not strictly necessary that notice should be given to the mortgagor-deft. If the Court passes a final decree without such notice; it is not an illegality or irregularity and the Court is not bound to set aside the *ex parte* final decree. At the same time it is open to the deft. on showing sufficient cause under O. 9, R. 13 for his absence to apply to set it aside. (*Hallifax*, A. J. C.) ANNAJI *v.* FAKIRA. 67 I C. 282=
1922 Nag. 175.

———O. 9, R. 13—*Final decree—Setting aside—Practice.*

Where an applicant is aggrieved by the final decree having been made against him *ex parte*, the original Court which made it and not the Appellate Court which confirmed the decree, is the court for him to apply to set it aside. (*Fox*, C.J.) BADIER RAHMAN CHOWDRY *v.* M. A. R. R. M. R. M. CHETTY FIRM.

8 L.B.R. 450=35 I.C. 288=
9 Bur. L.T. 255.

C. P. CODE (V of 1908), O. 9, R. 13—Limitation.

Fraud.

———O. 9, R. 13—*Fraud*—Ex parte *decree—Setting aside.*

Ex parte decree cannot be re-opened except upon ground of fraud which must be alleged in particular form. It is not sufficient to allege general fraud or that it was obtained on false claim. (*Jwala Prasad*, J.) JANKEY KUER *v.* MAHABIR SINGH.

38 I.C. 317=2 U.P.L.R. (Pat.) 242.

Legal Representative.

———O. 9, R. 13—*Legal Representative—Heir if entitled to apply.*

Heirs of a defendant against whom an *ex parte* decree is passed before his death, have a right to apply to set aside the *ex parte* decree. 27 All. 274, doubted. (*Walsh and Ryves*, JJ.) MT. BANOO *v.* LALA HARADWARI LAL.

1923 All. 30.

——O. 9, R. 13—*Legal representatives*—Ex parte *decree—Application by executor or defendant.*

It is competent to executor of a defendant since deceased, to apply to set aside and *ex parte* decree against him. (*White*, C.J. *and Oldfield*, J.) S. VENKATA SUBBIER *v.* S. KRISHNA MURTHI. 38 Mad. 442=14 M.L.T. 396=
21 I.C. 568=(1913) M.W.N. 899.

Limitation.

——O. 9, R. 13—*Limitation—Extension of time for applying should be made on justifiable grounds.*

Under O. 9, R. 13 as amended by the Madras High Court, though time can be extended, still it should be extended on justifiable grounds. (*Oldfield and Ramesam*, JJ.) PALANIYAPPA CHETTY *v.* SUBRAMANIYA CHETTY.

14 L.W. 909=30 M.L T 151 (H C.)=
(1921) M.W N. 796=66 I C. 59=
42 M.L.T. 12=1922 Mad. 33.

——O. 9, R. 13—*Limitation—Limitation Act, S. 5.*

Lim. Act, S. 5 does not apply to applications under O. 9, R. 13, but High Court can make rules under S. 122 making it applicable. (*Coutts-Trotter* J.) SENNIMALA GOUNDEN *v.* PALANI GOUNDEN. 32 I.C. 975 (Mad.)

——O. 9, R. 13 and O. 5, R. 20—*Limitation—Setting aside* ex parte *decree—Meaning.*

The words "as effectual" in clause (2) of R. 20, O. 5 mean "as effectual for the purpose of enabling the Court to proceed with the suit". If the defendant can show that the circumstances in which substituted service could be legally made, did not exist, time for an application to set aside an *ex parte* decree, runs from the date he had knowledge of the decree. (*Batten*, A.J.C.) HABIBULLAH *v.* KARANJU.

19 I.C. 425=9 N.L.R. 35.

C. P. CODE (V of 1908), O. 9, R. 13—Limitation.

———O. 9, R. 13—*Limitation—Application barred is no ground for setting aside—Inherent powers cannot be resorted to.*

The fact that a certain application which had been decreed *ex parte* was barred by time, is not a ground for setting aside the *ex parte* decree under O. 9, R. 13. The inherent powers of a court under S. 151, C.P.C. cannot be called in aid to set aside an *ex parte* decree or to extend the time therefor. 43 Mad. 94. foll. (*Coutts and Ross*, JJ.) AJODHYA MAHTON *v.* MT. PHUL KUER. (1922) Pat. 61=65 I.C. 311= 1 P. 277=1922 P. 479.

Miscellaneous Proceedings.

———O. 9, R. 13—*Miscellaneous proceedings C. P. Code, Sch. II, Para 21 (2).*

A decree passed under Sch. II, Para. 21 (2) is a 'decree' and the provisions of R. 13 of O. 9 apply to it. (*Coutts and Macpherson*, JJ.) MAHABIR PROSAD BHAGAT *v.* BAL KISHAN DAS. 62 I.C. 927.

Procedure.

——O. 9, R. 13—*Procedure*—Ex parte *decree, when to be passed.*

Where the vakil of the defendant had asked for an adjournment, and on the same being refused took no further part in the proceedings, an *ex parte* decree should be passed. (*Mears*, C.J. *and Piggott*, J.) KRISHNA DASS *v.* RAM UGRAH SINGH. 21 A.L.J. 500= L.R. 4 A. 423=74 I.C. 845=1923 All. 549.

——O. 9, R. 13—*Procedure—Duty of court before issuing notice.*

It is the duty of the court when an application to set aside an *ex parte* decree is made, to ascertain whether the summons was served or not and whether the applicant was prevented by sufficient cause from appearing when the case was called on for hearing and then only issue notice to the other side. (*Knox and Karamat Husain*, JJ.) DALLO *v.* SIBTA KUAR. 9 I.C. 31.

———O. 9, R. 13—*Procedure—Forum—Appeal preferred against the decree.*

Though an appeal is pending against an *ex parte* decree, an application to set it aside should be made to the Court which passed the decree and not to the Court hearing the appeal. 30 Mad. 535, dist; 27 Mad. 602; 39 All. 13 and 38 Cal. 394, foll. (*Wallis* C.J. *and Oldfield*, J.) PALANIAPPA CHETTI *v.* SUBRAMANIA CHETTY. 44 Mad. 731=13 L.W. 519= 41 M.L.J. 90=62 I.C. 795= (1921) M.W.N. 309.

———O. 9, R. 13—*Procedure—Setting aside on condition of furnishing security.*

Where an *ex parte* decree is set aside on condition of defendant's furnishing security the Court must adjourn the case in order to take security and must pass final orders only after the party has tendered or failed to furnish security. (*Oldfield and Bakewell*, JJ.) VENKATASWAMI NAYUDU *v.* SHANMUGAM PILLAI. (1917) M.W.N. 815=43 I.C. 1= 6 L.W. 767.

C. P. CODE (V of 1908), O. 9, R. 13—Right to apply.

———O. 9, R. 13—*Procedure—Notice—C. P. Code, O. 3, R. 5.*

Where deft. applied to have an *ex parte* decree set aside and the Court ordered payment of process-fee at once, and the signature of the plff.'s pleader was taken on the order, but as the deft. paid no fee and no notice was served on plff. but the Court set aside the decree and ordered payment of Rs. 7-8-0 as costs to defts. for which the deft. got plff.'s property worth Rs. 400 sold for Rs. 180 and purchased it himself and the plff. sued for recovery of possession, *held*, that the *ex parte* decree could not be set aside without notice to plff. and that the plff.'s pleader did not represent the plff. after the *ex parte* decree was passed. (*Das and Adami*, JJ.) SHEIKH MAHAMED JAMIL *v.* MUSAMMAT BIBI TUFAILAN. 63 I.C. 47 (P.)

Review.

———O. 9, R. 13—*Review—Change of ground.*

Application to set aside an *ex parte* decree cannot be altered to one for review, by merely changing the description, to avoid limitation. (*Chevis*, J.) LAL DEVI *v.* AMAR NATH. 57 I.C. 15=2 U.P.L.R. (Lah.) 128.

———O. 9, R. 13, O. 47, R. 1—*Review—Limitation Act, Art.* 169—*Application to set aside*—Ex parte *decree barred—Review, if lies.*

Where the prescribed period for an application to set aside an *ex parte* decree has elapsed, the aggrieved party is not entitled to ask for review, as review can be had only if he is able to show that the judgment is incorrect. (*Johnstone*, J.) SANTU *v.* ARJAN DAS 13 I.C. 318=131 P.W.R. 1912.

———O. 9, R. 13 and O. 47, R. 1—*Review—Application for—Maintainability of.*

If the circumstances of the case bring an application for review under O. 47, R. 1, C.P.C. the fact that an application under O. 9, R. 13 could have been preferred and that it was barred on the date of the review application, is no bar. (*Spencer and Krishnan*, JJ.) CHOKKALINGAM CHETTY *v.* LAKSHUMANAN CHETTY. 38 M.L.J. 224=(1920) M.W.N. 228= 55 I.C. 444=11 L.W. 217.

Right to apply.

——O. 9, R. 13—*Right to apply—Minor defendant not represented—Setting aside decree—Duty of Court.*

In an application under O. 9, R. 13, C. P. Code, the only point which the Court has to consider is whether the defendants were prevented by any sufficient cause from appearing. If the minor defendants were not represented

C. P. CODE (V of 1908), O. 9, R. 13—Right to apply.

there is sufficient cause for their non-appearance and the Court could set aside the *ex parte* decree. (*Daniels*, J.) PEARE LAL *v.* ASHRAF KHAN. **L R. 4 All. 137=71 I C 466=21 A.L.J. 185=1923 All. 213.**

See Contra 66 I.C. 460 (Nag.)

——O. 9, R. 13—*Right to apply—Third party.*

A Court has no jurisdiction to set aside an *ex parte* decree at the instance of a person not affected by the decision, and who has been expressly exempted from the decree. (*Walsh and Ryves*, JJ.) AJODHYA PRASAD *v.* KATORI. **61 I.C. 484=3 U.P.L.R. (All.) 29.**

——O 9, R. 13—*Right to apply*—Ex parte *decree if can be set aside at the instance of person against whom there is no decree—Subsequent proceedings in such setting aside—Legality.*

An *ex parte* decree cannot be set aside at the instance of a person against whom the suit has been dismissed and, therefore, all future proceedings after such a wrong setting aside of a decree are *ultra vires* and illegal and no prosecution lies for giving false evidence at the re-hearing of the suit. (*Tudball*, J.) BABU RAM *v.* EMPEROR. **11 I.C. 141=12 Cr. L.J. 373=8 A.L J. 674.**

——O. 9, R. 13—*Right to apply—Application to set aside* ex parte *decree—Fresh vakalat unnecessary.*

A pleader duly appearing in a suit is not obliged to file a fresh vakalatnama for the purpose of an application to set aside an *ex parte* decree in the suit. Ch. IV of the Bombay Manual of Civil Circulars does not lay down that an application to set aside an *ex parte* decree is not an application connected with the suit. (*Macleod*, C.J. *and Kanga*, J.) BACHUBAI JHIRAD *v.* IBRAHIM ISAK.
24 Bom. L.R. 744=69 I.C. 169=47 B. 11=1922 Bom. 207.

——O. 9, R. 13—*Right to apply—Third party—Order setting aside an* ex parte *decree—Setting aside of.*

A Court has no jurisdiction to set aside an order, setting aside an *ex parte* decree, at the instance of a person not a party to the suit. (*Martineau*, J.) ASHGARI BEGUM *v* MUHAMMED YUSUF. **61 I.C. 534.**

——O. 9, R. 13—*Right to apply - Minor—Not properly represented in suit—Remedy—Application to set aside.*

The father of the minor deft. in a suit was appointed guardian *ad litem*, although he never appeared and consented to the appointment. The suit was afterwards decreed against them *ex parte*. In an application under O. 9, R. 13, *held*, that appointment of the father was invalid, the minors were not properly represented and could not be regarded as parties to the suit at all, the decree could not bind them, and therefore, an application from them under O. 9, R. 13, for setting it aside was incompetent. To attract the operation of O. 9, R. 13, the person applying must have been a party to the suit. 39 All. 8; 18 M.L.T. 401; 27 M.L.J. 167, dist. 38 Mad. 1076. Appl. (*Oldfield and Seshagiri Aiyar*, JJ.) EDA PUNNAYYA *v.* JANGALLA KAMA KOTTAYYA. **37 M.L J 399=26 M.L.T. 327=10 L W. 471=53 I.C. 184=(1920) M.W.N. 1.**

C. P. CODE (V of 1908), O. 9, R. 13—Scope of.

——O. 9, R 13—*Right to apply—Minor defendant — Guardian-ad litem not properly appointed—Effect of.*

Where the allegation of an applicant applying under O. 9, R. 13, C. P. Code is that he was a minor and that he was not represented by a guardian when the *ex parte* decree was passed an application under O. 9, R. 13, C.P. Code is incompetent. 31 A. 572; 37 M.L.J. 399; 24 A. 383; 37 A. 179; 39 A. 8. Ref. (*Kotwal* A.J.C.) SETH PARMANAND *v.* LAKHMICHAND.
18 N.L.R. 138=66 I.C 460=1922 Nag. 249 (2).

See Contra 1923 All. 213.

——O. 9, R. 13—*Right to apply—B T. Act, S.* 153.

S. 153 of the B.T. Act bars an application under O. 9, R. 13 or O. 47, R. 1, unless the application states the injuries sustained by the applicant on account of the decree or judgment, and he deposits in Court the amount of rent admitted by him to be due. If no rent is admitted to be due, no deposit is needed. (*Jwala Prasad*, J.) CHANDRA BHUR DEB *v.* BHOLA RAI. **2 Pat. L T. 372=62 I.C. 80=1921 Pat. 301.**

Scope of.

——O. 9, R. 13—*Scope of.*

There can be no *ex parte* proceedings against a defendant who has entered appearance and filed his defence. (*Lindsay and Sulaiman*, JJ.) RAM CHARAN LAL *v.* RAGHUBIR SINGH.
21 A.L J. 493=L.R. 4 A. 294=46 A. 618=75 I.C. 387=1923 All. 551.

——O. 9, R. 13—*Scope of*—Ex parte *decree—Setting aside—Conditions requisite.*

A Court can set aside an *ex parte* decree only under the provisions of O. 9, R. 13, under which the applicant has to satisfy the Court that summons was not duly served or that he was prevented by sufficient cause from appearing. In the absence of either of these conditions, the Court has no jurisdiction to set aside an *ex parte* decree. (*Walsh and Wallace*, JJ.) SHEIKH KALLU *v.* NADIR BAKSH.
19 A.L J. 907=64 I.C. 527=1922 All. 441.

——O. 9, R 13 *Scope of—Application for setting aside decree, dismissal for default—second application is allowable.*

An application under O. 9, R. 13 to set aside an order passed in a preceding application of the same nature lies. Proceedings under O 9 R. 13 may go on *ad infinitum*. 44 Cal. 950, Foll. Where an appeal against an order under O. 9, R. 13 is dismissed for non-prosecution, second application under O. 9, R. 13 to restore

C. P. CODE (V of 1908), O. 9, R. 13—Scope of.

the first application may be allowed subject to terms. (*Walmsley*, J.) BHOLA NATH DE *v.* NRISHIMHA PROSAD ROY. **76 I.C 533= 1923 Cal. 552.**

———**O. 9, R. 13**— *cope of—Inherent power.*

The appellate Court is not competent to set aside an *ex parte* decree under O. 9, R. 13 unless it was satisfied the defendant was prevented by some sufficient cause from appearing on the 4th August. A court has no power apart from the provisious of O. 9, R. 13 to set aside an *ex parte* decree made by itself, there being no inherent power to do so. 53 I.C. 847, Foll. (*Martineau*, J.) JAGAN NATH *v.* ABDUL HAKIM. **78 I.C. 660= 1923 Lah. 147 (1).**

———**O. 9, r. 13**—*Scope of.*

The expression "the court by which the decree was passed" in O. 9 R. 13, is so definite and precise as to create an exception to the general rule introduced by S. 150 of the Civil Procedure Code. Per *Krishnan*, J. The R. 13 of O. 9 of the C.P.C. is an enabling one which prescribes what is to be done in the ordinary course to get an *ex parte* decree set aside. It does not say that the Court that passed the decree is the only Court that can set it aside. Nor is there anything restrictive in the meaning. (*Spencer and Krishnan*, JJ.) SRINIVAS RAO *v.* HANUMANT RAO.
(1922) **M.W.N. 349=31 M.L T. 79 (H.C.) 42 M.L.J. 344=15 L.W. 488=65 I C. 727= 1922 Mad. 10.**

———**O. 9, R. 13** - *Scope of—Appearance—What amounts to.*

The word "appearance" as used in the C.P. Code has a well recognised meaning and implies that the party is present at the trial either in person or through pleader for the purpose of conducting the case. Where therefore a pleader appears and asks for an adjournment, which is refused but has no instructions to represent the client for the purpose of the suit, there is no appearance within the meaning of the Code, even though the party was present in person in Court. (*Dawson Miller*, C.J., *and Coutts*, J.) MAHANT DAMODAR DAS *v.* RAJ KUMAR DAS. **1922 Pat. 486=69 I.C. 837= 1 P. 188**

———**O. 9, R. 13**—*Scope of—Inherent powers.*

The Court, in dealing with an application to set aside an *ex parte* decree, is restricted to the provisions of R. 13; it cannot consider any other valid reason for disposing of the same, nor it has inherent powers in this case. (*Raymond*, A.J.C.) FIRM OF NOTANDAS *v.* FIRM OF PRIBHDAYAL. **63 I C. 131= 15 S.L.R. 61.**

Service of Summons.

———**O. 9, R. 13**—*Service of summons—Summons on gumasta—Onus to prove proper service.*

C. P. CODE (V of 1908), O. 9, R. 13—Sufficient cause.

Where a summons has not been personally served, but served on the *gumasta*, the plff has to prove that such service was valid since it was not so *prima facie*. (*Oldfield*, J.) NAGRAJ RASAPPA SETTI *v.* NAMBURI VENKATARATNAM. **(1913) M.W.N. 1028= 21 I.C. 922=14 M.L.T. 535.**

———**O. 9, R. 13**—*Service of summons.*

It is not legally necessary to give the defendant notice of an application by the plaintiff for a final decree in a mortgage suit. The summons mentioned in rule 13 of Order 9 is the first summons issued to the defendant giving him notice of the suit filed and the failure to appear mentioned in the same rules means failure to appear at any time during the suit and not absence at some of the hearings, even if they are all the hearings after the first at which the plaintiff may have made a number of applications of various sorts. That rule does not therefore apply to the case of a defendant who is merely not served with notice of some application made in the course of the suit. (*Batten* J.C *and Hallifax*, A.J.C.). PANJAB RAO *v.* BALIRAM. **69 I C. 549=1923 Nag. 18.**

Small Cause.

———**O. 9, Rr. 13, 14**—*Small cause—Transfer to original side.*

Where a suit is transferred from a Court of Small Cause to a Munsiff and he passes an *ex-parte* decree thereon, applications to have the *ex parte* decree set aside must be accompanied by a deposit of the amount of the decree security in respect of that amount. 13 All. 324, Foll. (*Banerjee*, J.) CHHOTELAL *v* LAKSHMI CHAND. **38 All. 423=34 I C. 113= 14 A.L J. 549.**

Substituted Service.

———**O. 9, R. 13**—*Substituted service—Proof of good service—Evidence apart from process server's return—If can be received.*

In the case of a substituted service of summons by affixing it on the door of the defendant's house the Court is not bound by the return of the process server alone, but can declare the service good from other circumstances of the case. 21 Mad. 324, foll; 17 C.W.N. 999; 24 All. 302; 29 Mad. 324 dist, 6. A.L.J. 45 Diss. (*Sadasiva Aiyar*, J.) GONTLA VENKATA PITCHAYYA *v.* MAHOMMED ABDUL KAREEM.
15 M L.T. 217=23 I C. 14= 26 M.L.J 368=(1914) M.W.N. 253.

Sufficient Cause.

———**O. 9, R. 13**—*Sufficient cause—Non-service of summons.*

Where *ex parte* decree is passed against a deft. then unless he was duly served and service declared sufficient by an order under O. 5, R. 19. The Court is bound to set aside the decree under R. 13 of O. 9. (*Richards*, C.J. *and Banerjee*, J.) CHAMPAT SINGH *v.* MAHABIR PRASAD, **43 I.C. 632.**

C. P. CODE (V of 1908), O. 9, R. 13—Sufficient Cause.

———O. 9, R. 13—*Sufficient cause--Revision.*

Where an *ex parte* decree was passed against a person in 1909 when he was in jail and an application by him to set it aside was made in 1913 after his release from jail and was granted by the Munsif, *held* that the proceedings were irregular and without jurisdiction. The Munsif ought to have considered whether the application before him under O. 9, R. 13 had been made within time or if he treated the application as one for review of judgment whether there was sufficient cause for not applying earlier. (*Chamier and Piggott*, JJ.) JANKI PRASAD *v.* PARMESHWAR DIN PANDEY.

29 I.C. 973=18 A.L.J. 482.

———O. 9, R. 13—*Sufficient cause—Summons not served.*

Appearance before registration of suit in a proceeding for appointing a guardian *ad litem* does not dispense with service of summons. (*Tudball and Rafique*, JJ.) GULABCHANDA *v.* SHANKER LAL. 35 All. 163=

18 I.C. 711=11 A.L.J. 185.

———O. 9, R. 13—*Sufficient cause—Summons not duly served—Knowledge of suit*—Ex-parte *decree—Setting aside.*

Under O. 9, R. 13, a deft. is entitled to have the *ex parte* decree set aside as against him if the summons was not duly served even when the deft. knew that the suit has been filed against him. (*Sanderson*, C.J., *Woodroffee and Mukerjee*, JJ.) KASIM EBRAHIM SALEJI *v.* JOHURMULL KHAMKE. 48 Cal. 447=

28 C.L.J. 183=34 I C. 799=

20 C.W.N. 178.

———O ,9, R. 13 and O. 47.—*Sufficient cause*—Ex-parte *decree—Setting aside.*

A deft. against whom an *ex parte* decree has been passed may instead of applying to set aside the decree under O. 9, R. 13, C. P. C. apply for a review of judgment on the ground that there was sufficient cause to prevent him from appearing on the day, fixed for the hearing of the case. 26 Cal. 598 Foll. (*Stephen and Coxe*, JJ.) CHET NARAIN SAHI *v* RAMPAL MANJHI. 15 I.C. 854=

16 C.W.N. 643.

———O. 9, R. 13—*Sufficient cause—Date not fixed for defendant's appearance.*

If no date has been fixed for the appearance of the deft. within O. 5, R. 1. the Court cannot dismiss the suit under O. 9, R. 13. A plff.'s failure to appear on a date fixed for him to attend and to find out what date has been fixed for the appearance of the deft. does not enable the Court to dismiss a suit for default. The Court should in such cases fix a date for the appearance of the deft. and even then if the plff. does not appear, the Court can dismiss the suit. (*Scott Smith*, J.) INDER SINGH *v.* SHERU.

60 I.C. 478=22 P.W.R. 1921.

———O. 9, R. 13—*Sufficient cause.*

C. P. CODE (V of 1908), O. 9, R. 13—Sufficient Cause.

On an application to set aside an *ex parte* decree the question to be considered is whether the defendant honestly intended to be present at the hearing of the suit and did his best to do so. Once the court is satisfied that he did try to be present in court in time and would have got there in time but for the intervention of an accident for which he was in no way responsible, it is the duty of the court to set aside the *ex parte* decree, muleting in proper cases, the defendant in costs. The fact that by some human possibility the defendant could have been present in time does not affect his right to have the *ex parte* decree set aside. (*Sir Walter Schwabe and Wallace*, J.) ARUNACHELLA AIYAR, *v.* SUBARAMIAH.

43 M.L.J. 632=46 Mad. 60=

31 M.L.T. 257 (H.C.)=16 L.W. 583=

(1922) M.W.N. 600=

68 I.C. 971=1923 Mad. 68.

———O. 9, R. 13—*Sufficient cause*—Ex parte *decree—Setting aside.*

An order setting aside an *ex parte* decree ran as follows "Read affidavit, heard Vakil, *ex parte* decree set aside" *Held*, that the Judge was held to have decided the question of fact on the affidavit though the order did not set down the reasons for setting aside the decree. (*Miller*, J.) NITHIANANDA MUTHUSWAMY *v.* VISVANATHA MANIGARAN.

21 I.C. 457=(1913) M.W.N. 857.

———O. 9, R. 13—*Sufficient cause—Grounds other than those enunciated in O. 9. R. 13.*

Appearance by a pleader instructed only to apply for an adjournment is not appearance by the party in person or by pleader under O. 5, R. 1. An *ex-parte* decree be set aside only on the grounds recognised therefor under the C.P.C. The merits of a case should not form an element for consideration in disposing of an application to set aside a dismissal for default or an *ex parte* decree. It is not open to the Courts to go beyond the provisions of the code. (*Sankaran Nair and Abdur Rahim*, JJ.) VENKATARAMA AIYAR *v.* NATARAJA AIYAR.

13 M L.T. 140=24 M L.J. 235=

18 I.C. 360=(1913) M.W.N. 165.

———O. 9, R. 13—*Sufficient cause—Pleader's absence.*

Mere absence of a party's pleader is not a sufficient cause for failure to appear within R. 13. (*Drake Brockman*, J.C.) GANGABAI *v.* GHANSARAM 62 I.C. 253=4 N.L.J. 16.

———O. 9, R. 13 and O. 17, R. 2—*Sufficient cause—Minor—Negligence of guardian.*

Mere bad management of a suit by the guardian is by itself not a sufficient ground for setting aside the decree against the minor, unless the conduct of the guardian amounts to fraud or gross negligence. Non-service of summons on a party is not a proper ground for instituting a suit to set aside the decree unless it is part of a scheme of fraud; the proper remedy of a minor

C. P. CODE (V of 1908), O. 2, R. 13—Sufficient Cause.

against whom an *ex parte* decree is passed is an application under O. 9, R. 13 and not a separate suit. (*Batten*, O J C.) VITHOBA *v.* SHEGO. **45 I.C. 882.**

———**O. 9, R. 13**—*Sufficient cause*—Ex parte *decree—Setting aside—Grounds for.*

Defendant applied to set aside the *ex parte* decree passed against him on the ground that he was looking for a pleader and he was accidentally prevented from being in Court. When the case was called on for hearing the Court allowed the application on this ground that there has been no proper service on the defendant. *Held*, that the Court ought not to have disposed of the case on a ground not taken by the defendant himself. (*Lindsay*, J.C.) SHEO CHARAN DAS BABA *v.* BAJI NATH SINGH. **37 I C. 563=23 O.C. 104.**

———**O. 9, R. 13**—*Sufficient cause*—Ex parte *decree—Grounds for setting aside.*

An *ex parte* decree can be set aside only when the defendant satisfies the Court that the summons was not duly served on him or that he was prevented by sufficient cause from appearing when the case was called on for hearing. In the absence of these conditions the suit cannot be restored to file. (*Chamier*, J.C. *and Evans*, A.J.C.) DURGA BAKHSH *v.* MAHABIR **11 I.C. 844=15 O.C. 111.**

———**O. 9, R. 13**—*Sufficient cause*—Ex parte *decree—Setting aside—Grounds for—Revision.*

A Court can restore a suit only when it is satisfied that defendant was prevented by any sufficient cause from appearing (*Sultan Ahmed*, J.) RAMESH PRASAD *v.* GULAB CHAUDHRY. **64 I.C. 966=1 Pat. L.T. 69.**

———**O. 9, R. 13**—*Sufficient cause—Defect in appointment of guardian.*

Per *Mullick*, J.—A minor cannot apply to set aside an *ex parte* decree under O. 9, R. 13 on the ground that a guardian *ad litem* was not properly appointed for him in the suit. For in such a case the minor was no party to the suit and there is no decree against him, while O. 9, R. 13 contemplates a valid decree but obtained by irregularity in service of summons. Per *Jwala Prasad*, J. The words of O. 9, R. 13 were wide enough to cover the present application and there was "sufficient cause" within the rule for the minor's non-appearance. (*Mullick and Jwala Prasad*, JJ.) ABHEY RAM JHA *v.* KANDARPE NARAYAN JHA. **50 I.C. 783.**

———**O. 9, R. 13**—*Sufficient cause—Minor being represented by father as guardian* ad litem.

A father can be guardian *ad litem* of his minor son for the protection of the latter's interests. The decree against a minor in a case in which he is fully represented by his father as guardian *ad litem*, though *ex parte* is binding on him. (*Mullick and Atkinson*, JJ.) INDRA DEO NARAYAN SINGH *v.* MATUKDHARI SINGH. **37 I.C. 889.**

C. P. CODE (V of 1908), O. 9, R. 13—Suit to set aside.

———**O. 9, R. 13**—*Suit to set aside* Ex parte *decree.*

A suit can be brought to set aide an *ex parte* fraudulent decree, though not preceded by an application under O. 9, R. 13. 21 Cal. 605, Rel. (*Saunders*, A.J.C.) NGA YIE *v.* NGA SO. **(1916) 2 U B.R. 106= 34 I.C. 264=10 Bur. L.T. 10.**

Suit to set Aside.

———**O. 9, R. 13**—*Suit to set aside decree*—Ex parte *decree—Application to set aside—Dismissal—Fresh suit if competent.*

The person against whom an *ex parte* decree is passed can apply to have it set aside under O. 9, R. 13, or he can appeal from the decree; but he cannot start a fresh proceeding to set aside the decree. (*Macleod*, C.J. *and Heaton*, J.) IBRAHIM HARUN JAFFER *v.* JUSUF HUSSAIN JAFFER. **57 I.C 551= 22 Bom. L.R. 798.**

———**O. 9, R. 13**—*Suit to set aside*—Ex parte *decree—Infructuous application—Effect of.*

Failure to have an *ex parte* decree set aside under S. 108, C.P.C, (1882) or to have an execution sale set aside on the ground of material irregularity, does not debar the party from seeking relief in a properly framed suit on the ground that the original suit itself was a fraudulent one and that the proceedings therein were vitiated by fraud. (*Mookerjee and Beachcroft*, JJ.) NAGENDRA NATH BASU *v.* PARBATI CHARAN KOYAL **38 I.C 339= 20 C.W.N. 819.**

———**O. 9, R. 13**—*Suit to set aside*—Ex parte *decree—Application under O. 9, R. 13—Infructuous.*

A plaintiff whose application to set aside an *ex parte* decree has proved infructuous, can maintain a suit to set aside the decree on the ground of fraud or any other valid reason. 28 Cal. 475; 29 Cal. 395, Rel. on. (*Mookerjee and Carnduff*, JJ.) BAL KISHAN LAL *v.* TOPESWAR SINGH. **15 C.L.J. 456= 14 I.C. 845=17 C.W.N. 219.**

———**O. 9, R. 13**—*Suit to set aside* ex parte *decree—Grounds.*

To impeach an *ex parte* decree on grounds other than fraud, the proper remedy is by an application under O. 9, R 13 to set it aside or an application for review or an appeal to a superior Court. A separate suit to set aside the decree will not lie. (*Shadi Lal and Wilberforce*, JJ.) JHANDA SINGH *v.* LECHHMI. **1 Lah. 314=22 P.W R. 1920= 68 P.L.R, 1920=68 I.C. 878= 2 Lah. L.J. 622.**

———**O. 9, R. 13**—*Suit to set aside decree—Fraud—Suit to set aside—Maintainable.*

A regular suit lies to set aside an *ex parte* decree obtained by fraud. (*Scott-Smith and Wilberforce*, JJ.) GODAR RAM *v.* AHMAD YAR KHAN. **55 I.C. 412.**

C. P. CODE (V of 1908), O. 9, R. 13—Suit to set aside.

———O. 9, R. 13—*Setting aside—Sufficient cause—Inherent power.*

There is no inherent power in a Court apart from O. 9, R. 13 to set aside an *ex parte* decree on an application made for that purpose. 26 Mad. 599, overruled ; 24 M.L.J. 235, affirmed. The scope of the inherent power of a court pointed out. (*Abdur Rahim*, O.C.J. *and Oldfield and Seshagiri Aiyar*, JJ.) GADI NEELAVANI *v.* MARARPPRADDIGABN. **26 M.L.T. 377= 43 Mad. 94=37 M L J. 599= 10 L W. 606=53 I.C. 847= (1920) M.W.N. 19 (F.B.).**

———O. 9, R. 13—*Suit to set aside*—Ex parte *decree — Application to set aside—Dismissal of—Maintainability of second suit to set aside decree.*

An application to set aside *ex parte* decree having been dismissed, and confirmed on appeal, a subsequent suit to set aside the decree is not maintainable. (*Abdur Rahim and Srinivasa Aiyangar*, JJ.) YOGAMBA BOI AMMANI *v.* ARUMUGA MUDALIAR. **3 L W. 572=20 M L.T. 126= 36 I.C. 128=(1916) 2 M.W.N. 63.**

———O. 9, R. 13—*Suit to set aside—Application to set aside* ex parte *decree does not bar suit to set aside decree for fraud.*

An infructious application to set aside an *ex parte* decree does not in any way bar a subsequent suit to have the decree set aside on the ground of fraud such as by non-service of summons. The questions arising in such a suit are not the same at what arises on an application under O. 9, R. 13. The issues are different and the prior decision is not *res judicata*. (*Das and Macpherson*, JJ.) MAHARANI JANKI KUER *v.* BABU THAKUK RAI. **5 Pat. L.T. 37= 76 I.C. 343 (2)=(1923) Pat. 336= 1924 P. 241.**

———O. 9, R. 13—*Suit to set aside.*

Plaintiff obtained an *ex parte* decree and got defendant's property sold under the decree. Defendant applied under R. 13 to set aside the decree, on the ground of defective service of summons but the Court found against him and dismissed the application. He then sued to set aside the decree on the ground of fraud and perjured evidence. *Held*, that both the questions had been raised and decided in the previous litigation and so the suit was barred. (*Miller*, C J. *and Ross*, J.) JANGAL CHAUDHARI *v.* LALJIT RASBAN. **1921 Pat. 3= 1 Pat. L.T. 735=6 Pat. L.J. 1=60 I.C. 124= 3 U.P.L.R. Pat. 1.**

———O. 9, R. 13—*Suit to set aside* ex parte *decree—Non-service of summons.*

If a decree is impeached on the ground that summons was not served on a party, the remedy would be by an application under O. 9, R. 13 and not by separate suit. (*Mullick and Atkinson*, JJ.) MOHAN KRISHNA DAR *v.* HAR PRASAD. **40 I.C. 2.**

C. P. CODE (V of 1908), O. 10, R. 4.

———O. 9, R. 13—*Suit to set aside—When lies—Fraud.*

Where plaintiff alleged that defendant purposely served summons on a wrong person and did not give plaintiff's father's name though he knew it and impleaded plaintiff as a partner of a firm, though he knew that he was not and got an *ex parte* decree, *held*, that a separate suit will lie to set aside the *ex parte* decree. (*Madgaonker*, A.J.C.) SHIRAM *v.* FIRM OF DATARAM MUNSHIRAM. **16 S.L R. 109= 70 I.C. 862=1923 Sind 20.**

———O. 9, R. 14—*Procedure* — Ex parte *decree, setting aside of—Notice to opposite side imperative.*

R. 14 is imperative and an *ex parte* decree against the defendant, can be set aside only after notice has been served on the plaintiff. Oral notice given to the pleader who appeared in execution proceedings in connection with the same decree but who was different from the pleader who appeared in the case, is not sufficient. (*Sankaran Nair*, J.) YERRAKAKANTLA SUBBIAH *v.* DELAVAR KHAN. **24 M.L J. 482=13 M.L.T. 344= 19 I.C. 241=(1913) M.W.N. 340.**

———O. 10, R. 1—*Pleadings not clear—Duty of Court.*

The proper way of clearing up the pleadings after the plaint and written statement have been filed is that prescribed by O. 10, R. 1, C.P. Code the provisions of which are peremptory. The Court must, under that rule, at the first hearing of the suit, ascertain from each party or his pleader whether he admits or denies the allegations of fact made by the opposite party except where such admissions or denials are already contained in the written pleadings and must record such admissions or denials. A written replication is not a substitute for this oral examination of the parties and their pleaders and it is of the utmost importance for the purpose of doing justice between the parties that this oral examination should be duly and carefully carried out by the court. (*Daniels and Lyle*, A.J.C.) ANJUMAN-UN-NISA *v* ASHIQ ALI. **8 O.L.J. 439=66 I.C. 222= 3 U.P.L.R. (J.C) 65=1922 Oudh. 178.**

———O. 10, R. 4—*Scope of.*

O. 10, R. 4 is a self-contained Code for cases where a party is ordered to attend because the Court desires to have his evidence. (*Sadasiva Aiyar and Coutts-Trotter*, JJ.) KANDOTH PUTHIYADOTH CHENGARU CHANDU *v.* PUTHIYADOTH CHENGARA RAMAN NAIR. **(1921) M.W.N. 390=63 I.C. 961= 14 L.W. 15.**

———O. 10, R. 4—*Personal attendance—Order requiring—Conditions.*

The parties to suits should not be required to attend the Court under O. 10, R. 3 unless questions material to the case which are to be answered have first been put to their pleaders and they have been unable or have refused

C. P. CODE (V of 1908), O. 10, R. 4.

to answer them. (*Stuart and Kanhaiya Lal*, A.J.Cs.) NUR-UL-ISLAM *v.* QUADIR BAKHSH. **48 I.C. 269=21 O.C. 262.**

———**O. 10, R. 4 (2)**—*Order under C.P. Code, O. 17, R. 3 and O. 9, R. 8.*

An order passed by Court, on absence of party or pleader at an adjourned hearing, is really one under O. 17, R. 2 read with O. 9, R. 8 though purporting to be passed under O. 10, R. 4 (2). (*Banerjee and Ryves*, JJ.) BHATILEY CHUNNILAL *v.* CHAKARAPAN. **42 I.C. 945.**

———**O. 10, R. 4 (2)**—*Appeal—Order against one of the parties if appealable—O. 3, R. 1.*

An order under O. 10, R. 4 (2) against one of the parties is not appealable under O. 43, R. 1, unless that order amounts to a judgment. Whether such an order amounts to a judgment will depend on the circumstances of the case. (*Piggot and Walsh*, JJ.) MADHAVA SURENDRA SAHI *v.* BITHAL DAS. **39 All. 480=39 I.C. 151=15 A.L.J. 410.**

———**O 11**—*Probate proceedings.*

Order 11 of the Code applies to proceedings in probate and a Court can on submission of interrogatives direct an enquiry. (*Holmwood and Mullick*, JJ.) AMILA BALA DASI *v.* RAJENDRA NATH DALAL. **43 Cal. 300=34 I.C. 227=23 C.L.J. 480.**

———**O. 11, R. 1**—*Interrogatories—Facts in issue—Whether can be asked.*

Under the Code interrogatories can be administered in the same manner as is done in England for discovering the facts in issue. 7 Cal. 840, Dist. (*Fletcher*, J.) BAIJNATH KEDIA *v.* RAGHUNATH PRASAD. **25 I.C. 765=41 Cal. 6.**

———**O. 11, R. 1**—*Nature of interrogatories.*

Question to extract information as to material facts in issue or for the purpose of obtaining admissions about them may be asked. The mere fact that the questions would be admissible in cross-examination does not make them good as interrogatories. Interrogatories must not be exhibited unreasonably or vexatiously or be prolix, unnecessary or scandalous nor be obviously meant for the purpose of fishing information. Deft setting up the plea of wagering should not be allowed to interrogate his opponent generally as to his business transactions (*Mookerjee and Beachcroft*, JJ.) PROSONNA KUMARI DEBI *v.* RAMACHANDRA SINGHA. **17 I.C. 155=17 C.L.J. 66.**

———**O. 11, R. 1 — '*Opposite party*'—Ex parte *defendant is not such defendant having same interest as plaintiff.***

An *ex parte* defendant does not come within the words 'opposite party' in O. 11, R. 1 of the Code. The plaintiff is not entitled to administer interrogatories to him; nor is he entitled to do so with defendants who have

C. P. CODE (V of 1908), O. 11, R. 12.

the same interest as he (the plff.) has in the the suit. (*Ayling and Seshagiri Aiyar*, JJ. KRISHNA *v.* MADHAVA. **63 I.C. 258.**

———**O 11, R. 2**—*Mortgage suit—First suit for sale—Subsequent suit for possession.*

A usufructuary mortgagee's assignee's suit for money or the sale of the mortgage property being dismissed, a subsequent suit for possession of the property is not barred. (*Richards and Tudball*, JJ.) HAZARI LAL *v.* BAM CHANDER, **10 I.C. 26.**

———**O. 11, Rr. 2 and 12**—*Interrogatories—When disallowed.*

Interrogatories should be disallowed if aimed at discovering the nature of the opponent's evidence, to ascertain what documents the deft. had and the particulars of the documents. (*Chatterjea and Newbould*, JJ.) UPENDRA NATH GHOSE *v.* SARADA SUNDARI GHOSE. **36 I.C. 883.**

———**O. 11, R. 2**—*Refusal to issue interrogatories—No revision.*

A refusal to issue interrogatories for the examination of witnesses is not a ground for revision. (*Scott-Smith*, J.) ROOP CHAND AND MELA RAM *v.* THE CHURCH MISSIONARY, TRUST ASSOCIATION. **69 I.C. 417=1923 Lah. 282 (2).**

———**O. 11, Rr. 6, 7 and 21**—*Interrogatories—Relevancy of—Procedure.*

An objection to the relevancy of interrogatories must be adjudicated upon by the Court. *Banerji and Piggott*, JJ.) BHAGWAN DAS GONDKA *v.* RAM KUMAR. **46 I.C. 660=16 A.L.J. 762.**

———**O. 11, R. 12**—*Discovery—Suit for damages against public body.*

In a suit against a public body and generally (in cases where the establishment of the plaintiff's claim depends on documents in the defendant's possession, the defendant must allow inspection of the relevant documents, to which the plaintiff has no access. (*Walsh and Stuart*, JJ.) THE MUNICIPAL BOARD, AGRA *v.* ASHARFI LAL. **44 A. 202=20 A.L.J. 1=65 I.C. 984=1922 All. 1.**

———**O. 11, R. 12**—*Documents—Production in court—Admission in evidence.*

A document directed to be produced under O. 11, Rr. 12 and 14, does not *ipso facto* become evidence in the case. It must be proved by witnesses and then marked as an exhibit on the side of the party relying on it. (*Broadway and Abdul Raoof*, JJ.) JUGALKISHORE *v.* ATTRA. **4 Lah. L.J. 385.**

———**O. 11, Rr. 12 and 14**—*Order for production of documents must follow an order as to—Affidavit of documents—Procedure.*

An order for production of documents under O. 11, R. 14, C. P. C. must follow an order as to affidavit of documents under O. 11, R. 12,

C. P. CODE 1908), O. 11, R. 12.

C. P. Code. In the absence of an order compelling defendants to file an affidavit of documents, the Court cannot on the plaintiff's application compel the defendants to produce certain account books alleged to be with them. (*Das and Kulwant Sahay*, JJ.) BAIDYANATH *v.* BHOLANATH ROY. **1 Pat. L. R. 233 = 76 I.C. 991 = (1923) Pat. 143 = 1923 P. 337.**

——**O. 11, Rr. 12 and 13**—*Affidavit—Effect of.*

The affidavit of documents required from a party under R. 15 or 13 is ordinarily conclusive on the question whether the documents are in his possession or power, unless and until the other party makes an application under R. 18 (2) of O. 11 supported by an affidavit for inspection of documents not mentioned in the pleadings or affidavits of his opponent. (*Miller* C. J. *and Mullick*, J.) RAMESWAR NARAYAN SINGH *v.* RAI KHNATH KOERI.
5 Pat L.J. 650 = 58 I.C. 281 = 1 P.L T. 668.

——**O. 11, R. 13**—*Affidavit of documents—Discovery—Inspection.*

An affidavit of document filed under R. 3 does not protect the party from an obligation to give inpection of other documents that may be proved to be in his possession. (*Stephen*, J.) BASANTA COOMAR *v.* KUMUDINI DASSEE.
38 Cal. 428 = 12 I C 12 = 16 C.W.N. 81.

——**O. 11, Rr. 14, 18-21**—*Order of production—Effect of non-compliance—Defence cannot be struck off—Powers of court how and when to be exercised.*

The non-compliance with an order under O. 11 R. 14 for the production of account books does not warrant the striking off the defence of the party which is guilty of the non-compliance of the order. The grounds on which the discretion is given to a court for striking off the defence are given in O. 11, R. 21. An order under O. 11, R. 21 can be passed only after the court has directed discovery under O. 11, R. 12 or inspection of documents under O. 11, R. 18. A strict compliance with the provisions of these later is necessary in every case before defence is struck off (*Rafique and Piggott*, JJ.) THE LYALPUR SUGAR MILLS & CO. *v.* THE RAMCHANDRA GUR SAHAI COTTON MILLS & CO.
44 All. 565 = 20 A L.J 422 = L.R. 2 A. 317 = 67 I.C. 73 = 4 U.P.L R. (A) 139 = 1922 All. 235.

——**O. 11, Rr. 14 and 18**—*Production of documents—Order when made.*

In a suit for accounts and certain other relief brought against the *mutwallis* of a mosque by certain person. the Court cannot, until the decision of the case, call on the deft. to show in detail the income of the estate and how it was realised and spent. The court can only order the production of documents under R. 14 and not the inspection. An order for inspection has to be made under R. 18. (*Stephen and Chatterjee*, JJ.) ABDUL KARIM ABU AHMDE KHAN GHAZANI *v.* ABDUS SUBBAN CHOWDHURY. **14 I.C. 51.**

C. P. CODE (V of 1908), O. 11, R. 18.

——**O. 11, R. 14**—*Order under, when made.*

No order will be made under R. 14 against a party unless he has directly or indirectly admitted the document to be in his possession or power. (*Miller*, C.J. *and Mullick*, J.) RAMESWAR NARYAN SINGH *v.* RIKANATH KOERI.
5 Pat. L.J. 650 = 58 I.C. 281 = 1 P.L.T. 668.

——**O. 11, Rr. 15 and 18**—*Immaterial — Documents — Inspection of before filing written statement.*

Where the defendant did not file written statement but took out a summons asking the plaintiff to give inspection of documents casually referred to in the plaint but not material to the case the order about the summons was discharged. (*Macleod*, C.J.) RAPAPORT *v.* KALLIANJI.
23 Bom. L R. 1255 = 66 I C. 8 = 46 B. 866 = 1923 Bom. 73.

——**O. 11, R. 15**—*Documents sued on—Documents relied on as evidence.*

As there is a distinction between documents sued upon and documents relired upon by plaintiffs a defendant under O. 11, R. 15 is not entitled as of right to have inspection of the documents relied upon by plaintiff before he files the written statement. (*Greaves*, J.) CHANDMUL GANESHMAL *v.* DHANARA GANAPAT ROY. **36 I.C. 457 = 24 C.W.N. 302.**

——**O. 11, Rr. 15 and 20**— *Order for inspection by plaintiff.*

A plaintiff can inspect documents filed by the defendant, material to the case, though enclosed in a sealed cover and deft. prays that they may be kept in the said sealed cover for the time being. No revision lies on an order of a Court granting an application for the inspection of a record where it has been passed after hearing. (*Rattigan*, J.) HARI SINGH *v.* RAM CHAND. **256 P.L.R. 1911 = 12 I.C. 506 = 185 P.W.R. 1911.**

——**O. 11, R. 15**—*Document not in the possession of party.*

It is a good cause for non-production of a document within R. 15 that the document is not in the possession or power of the person called upon to produce it. (*Miller*, C.J. *and* (*Mullick*, J.) RAMASWAR NARAYAN SINGH *v.* RIKNATH KOERI. **5 Pat L J. 650 = 58 I C. 281 = 1 P.L T. 668.**

——**O. 11, R. 18**—*Strict compliance with provisions of the rule is necessary before an order for in inspection of documents is passed.* (*Rafique and Piggott*, JJ.) LYALPUR SUGAR MILLS & CO. *v.* RAMCHANDRA GURSHAI COTTON MILLS & CO. **20 A L.J. 422 = 67 I.C. 73 = 44 All. 565 = L.R. 3 A. 317 = 4 U.P.L.R. (A) 139 = 1922 All. 235.**

——**O. 11, R. 18**—*Account books—Trade secrets—Inspection.*

A party cannot be compelled to show the whole account book to the opposite party, if his trade secrets are likely

C. P. CODE (V of 1908), O. 11, R. 21,

to be unnecessarily exposed to the opposite party. (*Johnstone*, J.) NARPAT RAI *v.* DEVI DAS. **13 P.W.R. 1911=14 I.C. 371.**

——**O. 11, R. 21**—*Non-compliance with orders for discovery or inspection does not justify a Trial Court to strike off the defence of the party so ordered.* (*Rafique and Piggott*, JJ.) LYALPURSUGAR MILLS AND CO. *v.* RAMCHANDRA GURSAHAI COTTON MILLS AND CO. **20 A.L.J. 422=44 A. 565=L.R. 3 A. 317=67 I.C. 73=4 U.P.L.R. (A) 139=1922 A. 236.**

——**O. 11, R. 21**—*Penalty for non-discovery—Effect of.*

Mere suspicion against plff. of suppressing documents relating to matters in issue, without order for discovery or inspection, is not a ground for dismissing the suit. (*Richards*, C.J. *and Piggott*, J.) KISHEN LAL *v.* SULTAN SINGH. **38 All. 6=30 I.C. 525=13 A.L.J. 831.**

——**O. 11, R. 21**—*Dismissal of suit—Non-compliance with order for discovery.*

A suit can be dismissed for failure to comply with an order for discovery or inspection of documents only when the documents are referred to in the pleading or affidavits. (*Piggott, and Chamier*, JJ.) JWALA PRASAD SAHU *v.* BIGALRAM MANDWARI. **28 I.C. 905.**

——**O. 11, Rr. 21 and 14**—*Non-compliance with order—Penalty—Notice to produce—Sufficiency of.*

Where books relating to a partnership, the business of which was carried on in different places are ordered to be produced, to penalise the failure for non-production of one out of many books by striking the defence out, is an extreme measure. The penalty provided in O. 11, R. 21 should only be imposed in extreme cases and as a last resort. 58 P.R. 1898; 59 P.R. 1892; 9 C. 923; 38 A. 5; 5 Pat L.J. 550; 14 C. 768, Ref. In an order for the production or for the inspection of books and documents, a general description would be sufficient so long as that description would suffice for the identification of the document or book sought to be produced or inspected. (*Broadway*, J.) RAM NATH *v.* PRABHU DAYAL. **63 I.C. 661.**

——**O. 11, R. 21**—*Order for discovery—Non-compliance.*

Where a party fails to comply with an order for discovery, the proper remedy is for the party seeking the discovery to apply to have the proceedings stayed or the suit dismissed. (*Miller*, C.J. *and Mullick*, J.) KUNJ LAL *v.* BANWARI LALL. **48 I.C. 711=4 Pat. L.J. 394.**

——**O. 11, R. 21**—*Striking off defence—Appeal from order—Decree passed meanwhile—Effect of.*

C. P. CODE (V of 1908), O. 12, 3.

Where a Dt. Court acting under O. 11, R. 21 struck out the defence of the deft. and fixed a date of hearing *ex parte*, but before that date an application of the deft. to set aside the order was dismissed from which dismissal an appeal was filed and before the filing of the appeal the suit was decreed *ex parte* and the appellate Court held that no appeal could lie as a decree had been passed, the lower Appellate Court was held to have treated the appeal as one from the decree and the case was remanded for trial. (*Twomey*, J.) NAVANA CHIAI MADAR *v.* A. L. M. M. CHETTY. **14 I.C 637=5 Bur. L.T. 30.**

——**O. 12, R. 1**—*Admissions must be taken as a whole.*

Admissions must be taken as a whole or not at all. All the words of the admission must be taken even if they operate in his favour. (*Napier and Odgers*, JJ.) SREEDHARAM VALIA RAJAH *v.* NARAYANA. **41 M.L.J. 525=71 I.C. 270=(1921) M.W.N. 639.**

——**O. 12, R. 6**—*Judgment on admissions—When to be passed.*

Final judgment ought not to be passed upon admissions in a pleading or an affidavit unless the admissions are clear and unequivocal. It must further be remembered that the court can pass judgments on admissions if it thinks fit and its exercise cannot be claimed as a matter of right. 23 C.W.N. 1017, Foll. (*Mookerjee and Rankin*, JJ.) GALSTAUN *v.* E. D. SASSOON AND CO., LTD. **27 C.W.N. 783=1924 Cal. 190.**

——**O. 12, R. 6**—*Judgment on admissions—Admission ambiguous.*

If the written statement taken as a whole could not be regarded as an unambiguous and unconditional admission, that a sum was due to the plff., the sum could not be recovered by the plaintiff by an application under O. 12, R. 6. (*Sanderson*, C.J. *and Woodroffe*, J.) KORAMALL RAMBULLOBH *v.* MONGILAL DALIM CHAND. **54 I.C. 836=23 C.W.N. 1017.**

——**O. 12, R. 6**—*Admission of portion of claim—Judgment—Procedure.*

Under O. 12, R. 6 though the party has no absolute right, the Court has got a discretion to pass judgment to the amount admitted and to allow the plff. to prove the balance of his claim in the ordinary way—Per *Mukerjee*, J. O. 12, R. 6 is not restricted in its operation to cases where plff. accepts the admission of the deft. in entirety or where the claim is severable into distinct portions and deft. admits liability in respect of one fragment of such claim. (*Sanderson*, C.J. *and Mookerjee*, J.) PREMSUK DAS ASSARAM *v.* UDAIRAM GUNGABUX. **45 Cal. 138=22 C.W.N. 204=44 I.C. 233=28 C.L.J. 498.**

——**O. 12, R. 63**—*Effect of order—Dismissal of claim—Want of evidence—Omission to sue—Lim. Act, Art. 11.*

C. P. CODE (V of 1908), O. 13, R. 1.

Where an objection under O. 21, R. 58 of the C.P. Code was dismissed, because the objector failed to produce any evidence and no suit was brought to challenge the validity of that order within one year from the date of the order under Art. 11 of the Lim. Act, the order becomes conclusive. The only order under O. 21, R. 58 of the C.P. Code upon which the character of finality is impressed, is an order made after an enquiry. It does not follow, however, that because a claimant does not adduce evidence or is absent, there are no materials before the Court to enable it to inquire into it. (*Piggott and Rafique, JJ.*) GOKUL *v.* MUHRI BIBI. 40 All. 325= 44 I.C. 1005=16 A.L.J. 286.

——O. 13, R. 1—*Documentary evidence not produced at first hearing—Discretion to admit in evidence.*

Documentary evidence which has not been produced at the first hearing of a suit under O. 13, R. 11, may be admitted at a later stage at the discretion of the Court. (*Ameer Ali*) IMAMBANDI *v.* MUTSADDI. 45 Cal. 878= 38 M.L.J. 422=16 A.L.J. 800= 24 M.L.T. 330=28 C.L.J. 409= 23 C.W.N. 50=5 Pat. L.W. 276= 20 Bom. L.R. 1022=(1919) M.W.N. 91= 47 I.C. 813=9 L.W. 818= 46 I.A. 73 (P.C.).

[Affirming 18 C.L.J. 621=13 I.C. 678]

——O. 13, Rr. 1 and 2—*'First hearing,' meaning of.*

'First hearing of suit' means not the day, to which the case is adjourned but the day when the case is actually gone into. It is enough if documents are filed before the latter date. (*Greaves, J.*) TARAN MANDAL *v.* RAJCHANDRA MANDAL. 50 I.C. 296.

——O. 13, Rr. 1 and 2—*Documents filed at late stage—Admissibility—Power of Court.*

Under O. 13, Rr. 1 and 2, C. P. C. unlike the corresponding provisions of S. 138 of the Old Code, there is an absolute prohibition of the reception of documents not produced at the first hearing, unless good cause is shown for their non-production at that stage. The Court may, however, admit the evidence in the interests of justice, if the court is of opinion that the reception of the evidence will enable the person tendering it to win a case, which he will otherwise lose and that the loss on the case would be an excessive penalty for failure to produce the evidence in time. (*Ashworth, A.J.C.*) SHANKAR LAL *v.* MAHBUB SHAW. 28 O.C. 286= 70 I.C. 278=1923 Oudh 69.

——O. 13, Rr. 1 and 2—*Production of documents at late stage—Admission—Discretion of court.*

Though it is left to the discretion of the trial court to admit in evidence, documents produced at a late stage still in such matters of procedure, the Court should lean to an interpretation which advances justice, rather than to a contrary interpretation. Where certain documents, had been exhibited in a case under O. XXI, R. 100, C.P. Code between the parties to the present litigation and there was, therefore, no ground for supposing that they had been fabricated and they evidently had an important bearing on the question at issue in the trial, *Held* that the Court below, erred in the exercise of its discretion in rejecting these documents. (*Ross, J.*) JAGDIP PANDEY *v.* Mt. TAIBUNNISSA. 72 I.C. 397 (1)=1924 Pat. 208.

——O. 13, Rr. 3 and 4—*Rejection of document once admitted and marked.*

Where the stamp of a Hundi was not cancelled and where there is no definite order on it, admitting the document in evidence, the question of the admissibility of the document could be gone into, at any later stage of the suit and S. 36 of the Stamp Act is no bar. The mere endorsement "Exhibit" does not amount to formal admission in evidence. (*Robertson and Rattigan, JJ.*) SUNDAR DAS *v.* PEOPLE'S BANK OF INDIA LTD. 272 P.W.R. 1912= 16 I.C. 834=169 P.L.R. 1912.

——O. 13, R. 4—*Provisions of—Imperative.*

A judge should endorse with his own hand a statement, that a document is proved or admitted by the person, against whom it is used. The Judicial Committee will not in future read, or allow to be used, documents not endorsed by the trial Judge as required by O. 13, R. 4 of the C.P. Code. (*Lord Atkinson, J.*) SADIT HUSAIN KHAN *v.* HASHIM ALI KHAN. 38 All. 627=31 M.L.J. 607= 14 A.L.J. 1248=19 O.C. 192= 18 Bom. L.R. 1037=21 C.W.N. 130= (1916) 2 M.W.N. 377=21 M.L.T. 40= 1 Pat. L.W. 157=4 O.L.J. 22= 25 C.L.J. 363=6 L.W. 378= 36 I.C. 104=10 Bur. L.T. 140= 43 I.A. 212 (P.C.).

[Reversing 14 O.C. 356=18 I.C. 888.]

——O. 13, R. 4—*Documents—Admission of, in evidence—Procedure.*

When documentary evidence is produced in a case, the judge is required by O. 13, R. 4 to endorse with his own hand, a statement on each document, that it is proved against or admitted by, the person against whom it is used, and until this is done, the document should not be filed as part of the record. The mere production of a document and the handing it over to an officer of the Court to put it on the file, is not sufficient. (*Knox, J.*) SHYAM LAL *v.* RAM CHARAN. 43 I.C. 525.

——O. 13, R. 4—*Admission of documents—Mofussil practice—Madras.*

The mofussil practice in Madras, is to remark a document when *prima facie* evidence of custody and date of a document purporting to be thirty years old are given, allowing the parties to let in evidence to prove them during the examination of witnesses. (*Sundara Aiyar and Spencer, JJ.*) RAMIEN *v.* VEERAPUDIAN. 37 Mad. 455=11 M.L.T. 69= 22 M.L.J. 217=14 I.C. 394= (1912) M.W.N. 117, 530.

C. P. CODE (V of 1908), O. 13, R. 9.

———O. 13, R. 9—*Proceedings for return of documents are ministerial.*

Proceedings for return of documents are purely ministerial. No question can arise therein, which would make, the taking of evidence on oath compulsory. (*Newbould and Ghose*, JJ.) GIRIJANANDA KALI MITRA *v.* EMPEROR. **71 I.C. 666=24 Cr. L.J. 202=26 C.W.N. 660.**

———O. 13, R. 10 and O. 41, R. 28—*Summary rejection of application to send for record—Remand—Proper trial.*

In a suit by a co-sharer against another for the settlement of accounts, deft. failed to produce the accounts and the plff. applied to the Court under O. 13, R. 10 to send for the patwari's records and to appoint a commissioner to prepare a statement of the collections made by the deft. The Court rejected the application summarily and dismissed the suit. *Held*, that the suit had not been properly tried and should be remanded to the first Court for trial according to the law. (*Banerjee and Ryves*, JJ.) MUHAMMAD ABDUL AZIZ *v.* MUHAMMAD ABDUL JALIL. **43 I.C. 57.**

———O. 14, Rr. 1 and 3—*Court cannot raise points not raised by parties.*

The Courts should confine themselves to the dispute between the parties and not go out of their way, to raise fancy points, which are not raised by the parties themselves (*Walsh*, J.) LALA LACHMAN *v.* MAJJU. **1928 All. 167.**

———O. 14, R. 1—*Issues—Not raised—Evidence inadmissible.*

An issue which does not arise upon the pleadings of the parties, ought not be raised by the Court. The fact that the parties are ready with the evidence upon the issues, does not entitle them to raise it. (*Huda*, J.) NIRAD KRISHNA PAL *v.* INDRA BUSAN GUPTA. **53 I.C. 975.**

———O. 14, Rr. 1 and 5—*Object of—Failure to frame issue—Effect.*

If the Court finds that the determination of an issue is necessary for the right decision of a suit, it must frame such an issue, but where it is not necessary to frame an issue it is not an error in law not to frame it. (*Stephen and Mullick*, JJ.) GIRDHAR DAS *v.* SITARAM NAIK. **27 I.C. 578.**

———O. 14, R. 1—*Issues—None arise where no averment or denial.*

In the absence of averment in plaint and denial in written pleas, no issues arose as to whether the land was ancestral or self-acquired and it cannot be said that the trial Court was in error in not framing an issue which did not arise on the pleadings, (*Scott-Smith*, J.) FATEH MAHOMED *v.* IMAM-UD DIN. **68 I C. 106=2 Lah. L J. 188.**

———O. 14, R. 1—*Framing of issues—Duty of Court—Evidence.*

C. P. CODE (V of 1908), O. 14, R. 2.

The Court should frame proper issues arising from the pleadings in the case, and the litigant should produce evidence in respect of issues framed but he cannot be expected to produce evidence in respect of points not covered by the issues. (*Chevis*, J.) KASTURI MAL *v.* LAJJA RAM. **60 I C. 751.**

———O. 14, R. 1—*Issues—Duty of court and parties to raise.*

Courts are not bound to raise issues on questions of fact of their own motion, where parties do not ask for them. The omission to raise such issues implies an abandonment, of such questions by the party interested. If the question is one purely of law *e.g.*, limitation or jurisdiction, it is incumbent on the Court to frame proper issues on such questions. (*Abdur Rahim and Bakewell*, JJ.) NAGAPPA *v.* SHIDDA LINGAPPA. **47 I.C. 589=35 M.L.J. 372.**

———O. 14, Rr. 1 and 2—*Issues—Finding to be given on every issue.*

A specific finding must be given on every issue though two or more issues may be discussed jointly, (*Sadasiva Aiyar and Tyabji*. JJ). APPAVU CHETTIAR *v.* NANJAPPA GOUNDAN. **14 M.L.T. 117=20 I.C. 792=25 M.L.J. 329.**

———O. 14, R. 1—*Issues—Decision different from.*

The Court should not decide a suit in a way which is not the case of either party and on a matter on which no issue is raised. (*Benson and Miller*, JJ.) SAVARIMUTHU MOOPAN *v.* SATHAN CHINNAPPAN SAVARIMUTHU. **15 I.C. 185=1912 M.W.N. 177.**

———O. 14, R. 1—*Issues—Allegations in pleadings.*

A court is not justified in framing an issue on a question about which there is no dispute in the pleadings. (*Miller*, C.J. *and Adami*, J.) RAGHUNATH KURMI *v.* DEO NARAIN RAI. **51 I.C. 981=1919 Pat. 393.**

———O. 14, R. 2—*Applicability of—Postponent of settlement of issues.*

O. 14, R. 2 does not apply to cases in which issues of fact have not been settled but applies to cases, where the Court has not postponed the settlement of issues of fact. (*Fletcher and Teunon*, JJ.) KAURMANI SINGHA *v.* WASIF ALI MURZA. **28 I.C. 818=19 C.W.N. 1193.**

———O. 14, R. 2 and O. 15, R. 3 (1)—*Mixed question of law and fact.*

A Court acts illegally, if it treats issues raising mixed questions of law and fact, as involving only questions of law and decides without taking evidence. (*Mookerjee and Beachcroft*, JJ.) YATINDRA NATH *v.* HARI CHARAN. **26 I.C. 934=20 C.L.J. 426.**

———O. 14, R. 2 and O 15. R. 3 (1)—*Preliminary issues of law—Trial on—Procedure.*

C. P. CODE (V of 1908), O. 14, R. 3.

The power to order trial on preliminary issues is contained in O. 14, R. 2, and O. 15, R. 3 (1), C. P. Code. O. 14, R. 2 C. P. Code clearly applies, when on settlement of issues the Court thinks there are issues of law upon which the case of some part thereof may be disposed of; then those issues are to be tried first and settlement of issues of fact may be postponed. O. 15, R. 3 (1), C.P.C., applies after issues have been framed and allows the court to determine issues of law, if satisfied that no further argument or evidence than the parties can at once adduce, is required upon such of the issues as may be sufficient for the decision of the suit. There is no reason to confine the power of the Court to try certain issues as issues of law to the date of first hearing. 20 C.L.J. 426 : 19 C.W.N. 1193, Ref. (*Odgers*, J.) RAMAKRISHNA PILLAI *v.* KRISHNASWAMI PILLAI.

16 L.W. 667 = (1922) M.W.N. 321 = 68 I.C. 167 = 1922 Mad. 321.

———O. 14, R. 3—*Issues—Duty of Court.*

The sole guides to a Court in framing issues for trial in a case, are not the pleadings of the parties. The Court should settle the issues on the pleadings and after hearing the pleaders. (*Fletcher and Cuming*, JJ.) SRIMATI BASINI DASI *v.* KRISHNA LAL CHATTERJEE.

51 I.C. 1007.

———O. 14, R. 3—*Allegations in plaint.*

A Court is not justified in framing an issue on a point not alleged in the plaint. (*Ayling and Spencer*, JJ.) PITTY THEAGARAYA CHETTIAR *v.* SIVAPADA MUDALI.

12 I.C. 137 = 10 M.L.T. 267 = (1911) 2 M.W.N. 276 = 21 M.L.J. 1008.

———O. 14, R. 5—*Issues—Power of Court to frame after arguments closed—Inherent power—C.P.C.* (1882), *S.* 149.

A Court trying a suit on a mortgage, can raise an issue as to the invalidity of the mortgage for want of proper attestation, even after the close of the arguments. The first part of S. 149, C.P.C. 1882 (O. 14, R. 5) leaves it to the discretion of the Court to frame such additional issues as it thinks fit, while the latter makes it imperative on the judge to frame such additional issues as may be necessary to determine the controversy between the parties. Even in the absence of S. 149, C.P.C., 1882, every Court trying Civil cases has inherent power to take cognizance of questions which cut at the root of the subject-matter of controversy between the parties. (*Ameer Ali.*) SHAMU PATTAR *v.* ABDUL KADAR ROWTHAN

16 I.C. 260 = 35 Mad. 607 = 39 I.A. 218 = 16 C.W.N. 1009 = 23 M.L.J. 321 = 12 M.L.T. 338 = (1912) M.W.N. 936 = 10 A.L.J. 259 = 14 Bom. L.R. 1034 = 16 C.L.J. 596 (P.C.).

[Affirming 31 Mad. 215 = 18 M.L.J. 219 = 3 M.L.T. 300.]

C. P. CODE (V of 1908), O. 16, R. 1.

———O. 14, R. 5—*New pleas after remand.*

Though a Court has power of framing any fresh issues before the judgment is pronounced, it ought not to do so by allowing new pleas to be raised after the case is remanded by the Appellate Court. (*Stanley*, C.J. *and Banerji*, J.) SOHAN BIBI *v.* HIRAN BIBI. **10 I.C. 230.**

———O. 14, R. 5—*New cause of action—Jagirdar—Relief based on a contract of tenancy.*

In an ejectment suit claiming as jagirdars and on a letting out of lands to defts., the jagirdars cannot obtain relief, on the basis of a contract of tenancy, if defendants 1 to 3 who are proper defts. claim only a counter-title; since under O. 14, R. 5 one cause of action could not be converted into a different one. 13 Bom. 664 and 6 All. 456. Foll. (*Mullick and Atkinson*, JJ.) JHARI SINGH *v.* PIRTHI NATH SAHU. **1 Pat. L.W. 85 = 38 I.C. 191 = 2 Pat. L.J. 69.**

———O. 15, R. 3—*Scope of.*

The application of this rule is not confined to the date of first hearing. (*Odgers*, J.) S. RAMAKRISHNA PILLAI *v.* KRISHNASWAMI PILLAI.

16 L.W. 667 = (1922) M.W.N. 321 = 68 I.C. 167 = 1922 Mad. 321.

———O. 15, R. 3 (1) Proviso—*Scope of—Final disposal of suit.*

The Judge cannot dispose of the case at the first hearing when the summons is issued for settlement of issues only, the Vakil having objected to such disposal. (*White*, C.J. *and Seshagiri Iyer*, J.) TIRUPATI VARADACHARIAR *v.* A. PARTHASARATHY IYENGAR.

25 I.C. 9 = (1914) M.W.N. 501.

———O. 16, R. 1—*Witnesses—Court need not adjourn case to enable party to procure.*

Though the Court is bound to summon witnesses on an application therefor by a party, it is not bound to adjourn the hearing to procure the attendance of the witnesses, if the party is not prompt and applies late. (*Raoof*, J.) BALMOKAND *v.* JAGAT RAM. **63 I.C. 736.**

———O. 16, R. 1—*Witnesses—Court should summon when applied for—Attendance of a witness—Summons to—Refusal to summon witness.*

The Court must summon witnesses, for whose attendance an application is made by a party, and cannot reject such an application on the ground that the application is made too late. (*Abdul Raoof*, J.) MAHAMMAD HYAT *v.* GHULAM MUHAMAD. **60 I.C. 656.**

———O. 16, R. 1—*Time for summons to be allowed.*

A Court failing to bind witnesses to attend on the adjourned date, must allow the parties a reasonable time to summon them and to enforce their attendance and grant an adjournment for the purpose. (*Sundara Iyer and Sadasiva Iyer*, JJ.) DRAKSHARAPA APPALASWAMI *v.* LA RIVE. **16 I.C. 986.**

C. P. CODE (V of 1908), O. 16, R. 1.

——— O. 16, R. 1—*Right of parties to summon witnesses—Court has no discretion to refuse.*

Under O. 16, R. 1, C.P. Code, a Court has no discretion in the matter of an application for summonses on witnesses if such application be made before the day of hearing. The hearing may not be concluded on the date fixed and an adjournment may take place in the usual course of the progress of the trial and the Court cannot refuse to allow any of the parties to reap the benefit of such an adjournment in the matter of giving evidence. 5 N.L.R. 181; 9 W.R. 530, Ref. There is nothing in the C.P. Code which expressly or impliedly, declares that witnesses must necessarily be summoned before the day fixed for the first hearing of the suit. (*Batten*, J.C. *and Hallifax*, A.J.C.) BHAGCHAND *v.* MUSAJI. **68 I.C. 272.**

———O. 16, R. 1—*Witnesses absent—Further opportunity should be allowed.*

Where a party summoned two witnesses to give evidence in the case and they were not present on the day when the Court proceeded to try the case. *Held* the Court must give an opportunity to the petitioner to call those two witnesses. (*Das and Bucknill*, JJ.) MODE NARAIN SINGH *v.* BIKRAM SINGH.
4. Pat L T. 545 = 1924 Pat. 36.

——— O. 16, Rr. 2, 3 and 4—*Witness—Government or Municipal servant—Costs of.*

Government servants and persons in Municipal or private service, cited as witnesses in civil suits, cannot claim as part of their expenses the payment of the salary which they would earn in their ordinary employment for the time which they spend in attending Court. As to the servants of the Municipal bodies and private employers. *Held*, the Court below was right in supposing the question depends on the provisions of rules 2, 3 and 4 of O. 16 of the Civil Procedure Code, and on the rules made by the High Court under clause (3) of rule 2. (*Richardson and Walmsley*, JJ.) IN THE MATTER OF REFERENCE UNDER RULE 1, O. 46, C.P.C. **38 C L J. 149.**

———O. 16, R. 4—*Default of payment—Only moveable property can be attached.*

O. 16, R. 4 authorizes the Court in default in payment to order the expenses of a witness, to be levied by attachment and sale of only the moveable property of the party obtaining the summons. His immoveable property cannot be put up to sale. (*Chatterjee and Pantan*, JJ.) MAHAMED WARISH SADAGAR *v.* RAHMAN ALI MEAH. **70 I.C. 123 = 26 C.W.N. 877.**

———O 16, R. 4—*Direction to witnesses to appear—Adjournment of hearing by Court.*

A trying Court is not bound by S. 162 of old Code, to direct the witnesses to appear at the adjourned date of hearing, when the case is adjourned by it for want of time and not at any party's request. (*Abdur Rahim and Sundara Aiyar*, JJ.) VIJAYARAGHAVA REDDI *v.* KOMARAPPA REDDI.
(1912) M.W.N. 410 = 11 M L T. 199 = 15 I.C. 367 = 22 M.L.J. 409.

C. P. CODE (V of 1908), O. 16, R. 10.

———O. 16, R. 7—*Evidence Act, Ss. 130, and 131—Cr. P. C., S. 476—Order to produce documents—Non-compliance with.*

Where under O. 16, R. 7, the Court called upon a person merely present in the Court to produce a document and on his stating that the document was not with him then, the Court instituted proceedings against him under S. 476, Cr. P. C. *Held*, that the Court was not justified in taking such proceedings and that before taking any such proceedings, it should determine whether the document in question was one, which he could be compelled to produce. (*Mookerjee and Teunon*, JJ.) BHAGABAT PRASAD SINGH *v.* EMPEROR.
11 I.C. 794 = 12 Cr. L J. 450 = 14 C.L.J. 120.

———O. 16, Rr. 10 and 12—*Procedure under.*

No order under O. 16, R. 12, can possibly be made until the procedure laid down in R. 10 had been followed, where that rule applies. (*Holmwood and Imam*, JJ.) NABADIP CHANDRA NANDI *v.* SECRETARY OF STATE.
33 I.C. 968 = 20 C.W.N. 511.

———O 16, R. 10—*Witness—Non-attendance of—Prayer for arrest—Dismissal of, without sufficient reasons—Effect of.*

Where a witness, a municipal servant, summoned to produce a document failed to attend, and a prayer for his arrest was refused on insufficient grounds. *Held*, that the witness should be compelled to produce the document and that the case must be sent down for rehearing. (*Jenkins*, C.J. *and Chatterjee*, J.) UPENDRA NATH *v.* CHAIRMAN OF THE CALCUTTA CORPORATION. **13 I.C 332 = 16 C.W.N. 116.**

———O. 16, R. 10, and O. 17, R. 3—*Power of Court under—Limitations.*

A case was adjourned after settlement of issues for taking evidence; on that date deft's. witnesses failed to appear. On this, warrants were ordered to be issued for attendance of witnesses and defts. were asked to pay the process fees. On defts'. failing to do so, the Court proceeded on the adjourned date under O. 17, R. 3, and decreed the plaintiff's claim. *Held*, (1) that it was Court's duty to see that service was effected on the first payment of the process fees and the Court could not issue warrants without complying with the terms of O. 16, R. 10 and (2) that the adjournment not being made at request of defts. but in the ordinary course for production of evidence by parties, the Court had no power to proceed under O. 17, R. 3. (*Broadway*, J.) NAGHIA *v.* UDHAM. **39 I.C. 592 = 18 P.W.R. 1917.**

C. P. CODE (V of 1908), O. 16, R. 10.

———O. 16, R. 10—*Arrest and attachment —Both cannot be ordered.*

A Court, after the issue of a warrant for arrest of a witness, for failure to produce a document, cannot afterwards order an attachment of his property. (*Seshagiri Aiyar*, J.) RANGASAMI REDDI v KONDA REDDI.
61 I.C. 967=29 M.L.T. 95.

———O. 16, R. 10—*Attendance of a witness.*

The Court is not bound to compel attendance of a witness in absence of an application by a party to that effect. (*Mitra*, A.J.C.) MANNALAL *v.* SHUKLAL. 57 I.C. 311.

———O. 16, R. 10 (2) and (3)—*Court to issue warrants.*

Where a party summons witnesses and they fail to appear and the party does not ask the Court for a warrant, etc., under O. 16, R. 10, but the Court has reason to believe that the evidence is material, the Court should take action under its own authority to pass order under O. 16, R. 10 (2) and (3). (*Knox and Pigott*, JJ.) RAM NARAIN *v.* JAGDEO MISIR.
33 All. 690=10 I.C. 903=8 A.L.J. 839.

———O. 16, Rr. 11 and 12—*Witness—Failure to appear—Fine.*

O. 16, R. 11 provides for a case where the person satisfied the Court that he has not intentionally failed to carry out the order. R. 12 applies to the alternative case of a person failing to satisfy the Court whether he appears in order to offer an explanation or not. In either case, whether the facts are those contemplated in R. 11 or R. 12, the Court can only proceed after attachment of the property. (*Beachcroft*, J.) RAM GOPAL *v.* SECRETARY OF STATE FOR INDIA. 55 I.C. 426=31 C.L.J. 363.

———O. 16, Rr. 12 and 10—*Fine—Levy of.*

A fine cannot be imposed for non-production of document in obedience to summons until after the attachment of property. (*Newbould*, J.) ASHUTOSH MULLICK *v.* SECRETARY OF STATE FOR INDIA. 57 I.C. 302.

———O. 16, R. 12—*Non-appearance in obedience to summons—Fine.*

If an order for attachment of property is made, and the person concerned fails to attend in obedience to a warrant, the court may impose upon him a fine under O. 16, R. 12. (*Beachcroft*, J.) RAMGOPAL *v.* SECRETARY OF STATE FOR INDIA. 55 I.C. 426=31 C.L.J. 363.

———O. 16, R. 12—*Fine.*

Where the witness appears, but is unable to produce the document, it is illegal to impose a fine upon him. (*Seshagiri Aiyar*, J.) RANGASAMI REDDI *v.* KONDA REDDI.
61 I.C. 967=29 M.L.T. 95.

———O. 16, R. 14—*Evidence—Witness required by Court but not wanted by party—Party not bound to pay batta—Refusal to issue summons for defendants' witness, improper.*

C. P. CODE (V of 1908), O. 17, R. 1

Where a Court desires to have the evidence of a particular witness, whom the defendant does not desire to call, the Court cannot compel the defendant to pay the amount necessary to secure attendance or evidence of the witness and on defendant's refusal to do so, it cannot refuse to issue summonses for the attendance of his witnesses. In such a case the correct procedure is to take action under O. 16, R. 14. (*Rattigan*, J.) BILLA *v.* OHHUTA. 159 P.L.R 1911=10 I.C. 35=174 P.W.R. 1911.

———O. 16, R. 15—*Search fee to witness.*

No rule of law authorises the Court to levy and grant a search fee to a witness, who had to search for all documents in the office. (*Hayward*, A.J.C.) REWACHAND *v.* LALOO.
12 I.C. 190=3 S.L.R. 44.

———O. 16, R. 19—*Applicability—Insolvency Proceedings.*

In Insolvency proceedings the Insolvency Court has power to examine witnesses resident more than 200 miles. (*Greaves*, J.) DINARAM SOMONI, *In re.*
27 C.W.N. 370=1923 Cal. 427.

———O. 16, Rr. 19 and 21—*Scope of.*

These rules have no application to a case where a party to a suit desires to give evidence of his own motion in his own favour. (*Mukerjee and Panton*, JJ.) SARAT KUMAR *v.* RAM CHANDRA CHTTARJEE. 33 C.L.J. 78=68 I.C. 9=1922 Cal. 42.

———O. 16, R. 20 — *Scope of — Plaintiff producing document but refusing to exhibit it.*

The requirement of the law under O. 16, R. 20 is fulfilled, if the document is produced and where a document is produced but refused to be exhibited, the Court cannot dismiss the suit. (*Mookerjee and Walmsley*, JJ.) RADHANATH SASMAL *v.* OTTAM CHANDRA MAITI.
46 I.C. 879=28 C.L.J. 24.

———O. 17, R. 1—*Adjournment—Discretion of court—Interference—Appeal.*

The question of granting or refusing an adjournment is one essentially for the discretion of the Court, a court of second appeal will not interfere with the exercise of such discretion. (*Piggott*, J.) PURSHOTTAM DAS *v.* KESHOSARAN. 24 I.C. 206.

———O. 17, Rr. 1, 2—*Defendant absent but pleader present—No action by pleader—Nature of decree passed.*

Where a decree was passed against a defendent, when he was absent at the hearing and his pleader being present took no part at all in the proceedings, then unless it is determined that he appeared by a pleader duly instructed, the disposal would be *ex parte* in which case, sufficient cause being shown, he can apply to have it set aside. If the defendant is unable to show that the pleader was not duly instructed then it is not an *ex parte* decree. (*Shah*, A.C.J, *and Crump*, J.) MOTILAL RATANCHAND MARWADI *v.* NANDRAM DALPATRAM, 26 Bom. L.R. 1923=1924 Bom. 139.

C. P. CODE (V of 1908), O. 17, R. 1.

———**O. 17, Rr. 1 and 3**—*Adjournment cannot be granted in the absence of—Due deligence.*

Where, if zeal and diligence had been shown, there would have been no difficulty about appellant's presenting and obtaining order on an application for transfer to the District Court before which similar cases were pending, before it closed for vacation. *Held*, no adjournment could be granted. (*Broadway and Harrison*, JJ.) FITZ HOLMES *v.* THE BANK OF UPPER INDIA LTD. **4 Lah. 258=77 I.C. 523=5 L.L.J. 438=1923 Lah. 548.**

———**O. 17, R. 1**—*Adjournment of case—Evidence — Opportunity to produce further evidence—Second appeal.*

In the course of arguments after the parties had closed their evidence, plff.'s application under O. 17, R. 1, to adjourn the case to allow him opportunity to produce further evidence in regard to a matter, which was not made clearly the subject of an issue, cannot be granted. (*Scott-Smith*, J.) GAMAN *v.* MUHAMMAD. **91 P.L.R. 1916=167 P.W.R. 1916=36 I.C. 76.**

———**O. 17, R. 1**—*Costs of adjournment.*

Where the date fixed for the hearing of the case happens to be a holiday, the Court will not be justified in taking up the case the next day and passing any order to the prejudice of a party without duly serving on him a fresh notice of the hearing. A party having good and sufficient reason for non-compliance with an order of the Court, should not be made to pay the costs of an adjournment. Where summons has not been served on the deft, it is unjustifiable to pass an *ex parte* decree, which, if passed, will be set aside unconditionally. (*Kensington*, C.J. *and Rattigan*, J.) UMAT-UL-MUGHANI BEGUM *v.* SALIG RAM. **81 P.W.R. 1915=29 I.C. 137=126 P.L.R. 1915.**

———**O. 17, R. 1**—*Adjournment — Trial Court alone has power to grant.*

A suit once begun, must go on from day to day unless the trying Judge sees reasons to adjourn it. The District Judge has no power to order the adjournment of a suit, which is part-heard before Subordinate Judge. (*Kumaraswamy Sastri*, J.) SIVAGAMI AMMAL *v.* LOUIS GNANA PRAKASA MUDALIAR. **26 I.C. 261=16 M.L.T. 504.**

———**O. 17, R. 1**—*Adjournment—Summoning of witnesses.*

Though the process fees for summoning witnesses are paid after the expiry of the date fixed, the Court ought to adjourn the case to enforce their attendance, if they are served in time and there is sufficient time for them to attend. (*Mitra*, A. J. C.) MADHODAS *v.* GIRDHARI LAL. **38 I.C. 486=16 N.L.R. 1.**

———**O. 17, R. 1**—*Adjournment—Grant of Discretion.*

C. P. CODE (V of 1908), O. 17, R. 1.

An Appellate Court should not ordinarily interfere with the discretion of the trial court in granting or refusing an adjournment. An order granting or refusing an adjournment is not appealable. (*Drake-Brockman*, J. C.) LAXMAN RAO *v.* VITOBA. **45 I.C. 898.**

———**O. 17, R. 1**—*Delay in service of summons—Non-attendance of witnesses—Duty of Court.*

The Court ought to grant adjournment if the witnesses fail to appear for non-service of summons due to vacation. (*Stuart*, J.C. *and Kanhaiya Lal*, A.J.C.) NARAYAN SINGH *v.* DY. COMMISSIONER OF PARTABGARH. **38 I.C. 890.**

———**O. 17, R. 1**—*Adjournment—Grounds for—Non-compliance with law.*

Non-compliance with a provision of law does not give a party an absolute right to insist on an adjournment. It is within the discretion of the Court to adjourn or dismiss a case for non-compliance with provision of law. (*Miller*, C.J. *and Mullick*, J.) RAMESHWAR SINGH *v.* HARIHAR JHA. **5 Pat. L.J. 390=1 Pat. L.T. 666=57 I.C. 250=1921 Pat 1.**

———**O. 17, R. 1**—*Adjournment—Discretion of Court.*

Granting adjournment is left to the discretion of the Court to be exercised after careful examination of the party's conduct in the case. Litigants should take care to provide within a reasonable time for the issue of process to witnesses for attendance on the due date, and when the Court issues process on process fee being filed only a couple of days before hearing date, it is at the risk of the party so filing. (*Sharfuddin and Roe*, JJ.) JAGABANDHU *v.* GOBEY LAL. **37 I.C. 266=1 Pat. L.J. 173.**

———**O. 17, R. 1**—*Adjournment—Discretion of Court.*

It is discretionary with the Court to grant an adjournment, but the discretion should be exercised judicially and reasonably, it not being subject to any definite rules; if a party purposely neglects to summon all his witnesses and those summoned do not appear, the party has himself to blame, if the Court passes an order adverse to him. (*Crouch and Fawcett*, A.J. Cs.) SHIVANDAS *v.* PAMANMAL MANGHARAM. **27 I.C. 942=8 S.L.R. 275.**

———**O. 17, R. 1 (2)**—*Adjournment—Condition of paying costs to other side—Default.*

When the party obtaining an order of adjournment, does not fulfil the condition of paying the cost of adjournment to the other party, subject to which the order was sanctioned, the appeal may be dismissed on the ground that the condition remained unperformed. (*Fletcher and Walmsley*, JJ.) NARENDRA NATH SANYAL *v.* UMA CHARAN GHOSH. **49 I.C. 272.**

C. P. CODE (V of 1908), O. 17, R. 1.

———O. 17, R. 1 (2)—*Scope of—Hearing of suit.*

O. 17, R. 1 draws a distinction between the hearing of a suit and the hearing of an evidence. (*Chitty and Richardson, JJ.*) MADHUSUDAN SINGHA *v.* KALI CHARAN SINHA.
46 I.C. 246=27 C.L.J. 119.

———O. 17, R. 2—*Applicability of.*

O. 17, R. 2 applies to the case where the hearing of a suit has been adjourned and on the adjourned date, the parties or any of them fail to appear. In such a case, O. 17, R. 2 enables the court if it so chooses, to deal with the case as being one under O. 9 or to make such other order as it thinks fit. (*Lindsay and Sulaiman, JJ.*) RAM CHARAN LAL *v.* RAGHUBIR SINGH. **48 A. 618—24 A.L.J. 496= L.R. 4 A. 294=78 I.C. 387= 1923 All. 351.**

———O. 17, Rr. 2 and 3—*Pleader having no instructions—Order of dismissal — Construction.*

Adjournment of a suit was granted to plaintiffs for producing witnesses: but on the adjourned date they were absent and their pleader applied for permission to withdraw the suit with liberty to file a fresh suit, which was refused. A further adjournment was then asked for and being refused, the pleader said he had no instructions to do anything further in the case, and left the court. An order was made dismissing the suit and on an application for restoration being made, the question arose whether the dismissal was under O. 17, R. 2 or O. 17, R. 3. *Held* Per *Walsh, J:*—Under whatever form the Judge may make an order disposing of a case or however he may misunderstand what he is doing or whatever mistaken language he may use in disposing of the case, the court has to look at the actual facts as things were at the time and decide under which rule the order was made. Where a party does not personally appear even though his counsel originally instructed is there, if he has failed to supply his counsel with materials or funds, and the counsel states he has no further instructions, although the situation may be drawn into the express words of O 17, R. 3, it ought to be treated as a default by the plff. for want of appearance under O. 17, R. 2, for the counsel no longer represents him and in that sense the Counsel is not present, while the plff. himself is absent. *Held* on the facts of the case, the dismissal was under O. 17, R. 3. Per *Piggott, J.*—The plffs. not being present and the pleader having said, he had no instructions to do anything further in the case left the court, a point had been reached at which it was literally true that the plffs. were absent neither appearing in person nor by counsel authorised to act on their behalf. The dismissal was under O. 17, R 2 and an application for restoration lay. (*Walsh and Piggott, JJ.*) LAL JANGPAL SINGH *v.* RAJA KUSHALPAL SINGH. **20 A.L.J. 97= 70 I.C. 942=1923 All. 183.**

C. P. CODE (V of 1908), O. 17, R. 2.

———O. 17, R. 2—*Absence of party.*

Plaintiff and pleader being absent on adjourned date, Court cannot hear case on the merits. (*Banerjee, J.*) RUKMU *v.* TARA CHAND.
20 A.L.J. 123=L.R. 3 A. 68= 66 I.C. 778=1922 All. 68.

———O. 17, R. 2—*Default of appearance.*

A party had summoned witnesses who did not appear in spite of the summons. *Held*, that this did not amount to default in appearance of the party within O. 17, R. 2. (*Knox and Piggott, JJ.*) RAM NARAIN *v.* JAGDEO MISRI.
33 All. 690=10 I.C. 903=8 A.L.J. 889.

———O. 17, Rr. 2 and 3—*Dismissal for want of prosecution.*

The hearing of a suit was fixed for 25th July, and the hearing of the applicatin for the appointment of guardian *ad litem* for the defendant on 16th July. On 16th July neither plaintiff nor any pleader appeared and the suit was dismissed for want of prosecution on his behalf. *Held*, that the date was not fixed for the hearing of the suit, but that it was fixed for the hearing of the application only and that the dismissal was bad. (*Knox, Banerjee and Karamat Husain, JJ.*) DEBI SAHAI *v.* SARASWATI.
33 All. 360—10 I.C. 313=8 A.L.J. 612.

———O. 17, R. 2—*Adjournment refused—Appeal.*

Where in the first appeal, the appellant's pleader cannot attend the hearing, owing to his sickness and time is granted to engage another pleader, and the second pleader so appointed, instead of arguing the case, asks for adjournment, which is refused and the case is proceeded with, the order refusing to grant time is no ground for a second appeal. (*Karamat Hussain, J.*) JADU BANS UPADHYA *v.* BHUNESRI UPADHYA. **10 I.C. 214.**

———O. 17, Rr. 2 and 3—*Absence of party—Court must proceed under R. 2.*

On failure of parties to appear on an adjourned date, it is the duty of Court to act under O. 17, R. 2 rather than under O. 17, R. 3, C.P. Code. (*Macleod and Shah, JJ.*) RATAN BAI *v.* SHANKAR DEOCHAND.
24 Bom. L.R. 775=68 I.C. 514= 46 Bom. 1026=1923 Bom. 27.

———O. 17, Rr. 2 and 3—*Dismissal of suit for failure to produce evidence—Refusal of adjournment.*

If a suit is dismissed for failure of the plaintiff to produce any evidence after an order refusing an adjournment, the order of dismissal is a decree and not an order. (*Chitty and Smither, JJ.*) PRAMOTHA NATH SAHA *v.* SASHI MUKHI DEBI. **45 I.C. 200.**

———O. 17, Rr. 2 and 3—*Appeal—Maintainable against decree.*

An order dismissing the suit, when both the pleader and the client who was present retired from the case is one under O. 17, R. 2 though

C. P. CODE (V of 1908), O 17, R. 2.

the decree was wrongly drawn up and it is not appealable. (*Chatterjee and Beachcroft*, JJ.) NASARAT KHAN v. MANULLA. **32 I.C. 766.**

———**O. 17, Rr. 2 and 3**—*Adjournment by Court*—Ex parte *decree — Application for setting aside.*

Where a case proceeding from day to day was adjourned to next day, owing to cross examination being unfinished, it is an adjournment by a Court and R. 2 and not R. 3 of O. 17 applies, so that an *ex parte* decree following, may be set aside in one of the modes prescribed in O. 9 (*Imam and Chapman*, JJ.) ENALLA *v.* JIBAN MOHAN ROY.
41 Cal. 956 = 18 C.W.N. 776 = 23 I.C. 769 = 19 C L J. 535.

———**O. 17, Rr. 2 and 3**— *Applicability — Dismissal for default.*

Where there is a default and there is not enough material on record to enable the Court to pronounce judgment, the Court should proceed under O. 17, R. 2. (*Shadi Lal and Wilberforce*, JJ.) HARGOPAL *v* HARISH CHANDAR. **48 P R. 1919 = 66 P.L.R. 1918 = 47 I.C. 595 = 169 P.W.R. 1918.**

———**O. 17, R. 2**—*Adjournment on payment of costs.*

A suit, adjourned on payment of costs, is liable to be dismissed, if costs are not paid. (*Shadi Lal and Le Rossignal*, JJ.) RAMCHAND *v.* ALI AKBAR. **90 P.W.R. 1916 = 35 I.C 884 = 158 P.L.R. 1916.**

———**O 17, R. 2**—*Suit adjourned for judgment—Dismissal for absence of plaintiff.*

A suit which has been tried, cannot be dismissed on the mere ground of absence of the plaintiff on the day on which it is postponed for judgment. (*Johnstone*, J.) NAND LAL *v.* SHANKRU. **165 P.W.R. 1911 = 11 I.C. 852 = 254 P.L.R. 1911.**

———**O. 17, Rr. 2 and 3**—*Pleader applying for adjournment—Refusal—Court should write judgment.*

Where on the day fixed for hearing, the plaintiff appeared by a pleader who asked for an adjournment which was refused. *Held*, that the proper procedure for the court was not to dismiss the suit for default but to proceed with the case and write a judgment. O. 17, R. 2, C. P.C. was not applicable to the case but O. 17, R. 3 did apply, 41 M. 256, Ref. (*Odgers*, J.) VISVANATHA ASARI *v.* SAMI ASARI.
18 L.W. 209 = (1923) M W.N. 802 = 73 I.C. 982 = 1924 Mad. 48.

———**O. 17, Rr. 2 and 3**— *Scope of—Parties present on the adjourned date—Procedure.*

Per *Sadasiva Aiyar and Kumaraswami Sastri*, JJ.—Rules 2 and 3 of O. 17, of the C.P.C. are independent and mutually exclusive. Where the requisites of rule 2 are satisfied, that rule and not rule 3 should be applied although in addition to the absence of the party, circumstances exist, which would satisfy the requirements of R. 3. Rule 3 applies only to cases

C. P. CODE (V of 1908), O. 17, R. 2.

where the parties are present and have not satisfied the court as to the existence of any adequate reason for their not having done what they were directed to do. 33 Mad. 241, Foll. Per *Chief Justice*:—When a case is called and the deft. is absent and the Court resolves to proceed against him *ex parte* there is nothing to prevent the court from applying the provisions of O. 17, R. 3 and disposing of the suit notwithstanding the deft.'s failure to do what he had been granted time to do, but that disposal will be none the less *ex parte*, and the decree will be liable to be set aside under O. 9, R. 13. There is no conflict between the two rules 2 and 3 and as such may be fully applied at the proper stage of the case. (*Wallis*, C J., *Sadasiva Aiyar and Kumaraswmai Sastri*, JJ.) PICHAMMA *v.* SREERAMALU. **41 Mad. 286 = 34 M.L J. 24 = 23 M.L T. 1 = 43 I.C. 566 = (1918) M.W N. 92 (F.B) [Overruling 6 I.C. 238 = 34 Mad. 97]**

———**O. 17, Rr. 2 and 3**—*Scope of.*

Where on an adjourned date of hearing, the deft.'s pleader asked for a further adjournment for getting "proper instructions" and it was refused, *held* that the appearance of the pleader was an appearance of the deft. within the meaning of O. 17, R. 3 and it made no difference that the pleader wanted further time to get proper instructions, in as much as it was not a case in which the pleader had no instructions, and that the proper remedy open to the deft. was by way of appeal and not by way of an application under O. 9. R. 13. (*Abdur Rahim*, J.) AKUTA BAKKAYYA *v.* ALURI VENKATA NARASIMHAM. **(1917) M.W.N. 565 = 39 I C. 948 = 33 M L J. 553.**

———**O. 17, Rr, 2 and 3 and O. 9, R. 4**—*Non-appearance of parties at adjourned hearing —Dismissal of suit—Restoration.*

A suit was adjourned for want of time and was subsequently dismissed on the date of rehearing on account of the failure of the parties to attend. *Held*, that the dismissal of the suit was not under O. 17, R 3, 30 Mad. 274, foll. (*Srinivasa Aiyangar*, J.) VENKATAPPA NAYANIM VARU *v.* PADI RAMAKRISHNA APPA CHETTY. **32 I.C. 714.**

———**O. 17, R. 2 and O, 9. R. 8**—*Absence of plaintiff—Judicial discretion—Dismissal for default.*

O. 17, R. 2 requires judicial discretion before disposing of a case under O. 9, R. 8, where the plff. had made out a *prima facie* case. The suit should not be dismissed but defence evidence should be recorded. (*Phillips*, J.) SUBRAMANIA OTHUVAR *v.* MUNUSAMIYA PILLAI. **31 I.C. 869.**

———**O. 17, Rr. 2 and 3**—*Suit adjourned for production of succession certificate—Default—Dismissal of suit.*

After the plaintiff had adduced all evidence on which he relies, but has failed to produce a succession certificate on the adjourned hearing

C. P. CODE (V of 1908), O. 17, R. 2.

the suit ought not to be dismissed under O. 17, R. 2, but decided on its merits, under O. 17, R. 3. (*Sankaran Nair and Ayling*, JJ.) DROUPADI AMMAL *v.* SOUTH INDIAN RAILWAY CO., LTD. **24 I.C. 353.**

———**O. 17, Rr. 2, 3**—*Instructions only to ask for adjournment—Dismissal is one under R. 2.*

Where on the day fixed for hearing the vakil of the plaintiff had only instructions to ask for an adjournment and not to go on with the case, but the same was not granted and the suit dismissed, the order was one passed under O. 17, R. 2 and not under O. 17, R. 3. An application for restoration under O. 9, R. 9, is maintainable. (*Mullick and Macpherson*, JJ.) SYED SHAH MUHAMMAD MAUDOOD *v.* MAHARAJAH SIR RAMESHWAR SINGH. **1 Pat. L.R. 281 = 74 I.C. 693 = 1923 P. 530.**

———**O. 17, R. 2**—*Scope of.*

O. 17, R. 2 contemplates the hearing of a suit at some later date to which it has been adjourned. (*Dawson Miller*, C.J. *and Coutts*, J.) MAHANT DAMODAR DAS *v.* RAJKUMAR DAS. **1 P. 188 = 69 I.C. 837 = 1922 P. 485.**

———**O. 17, Rr. 2 and 3**—*Default of plaintiff—Effect of—Failure of suit on pleadings—No jurisdiction to take defendant's evidence.*

When there are materials in the record on which the Court can decide the case, the matter falls properly under O. 17, R. 3, and not under O. 17, R. 2, C. P. Code. But where plaintiff has adduced no evidence, and his case fails on the pleadings the Court has no business to proceed to record the defendant's evidence so as to give himself jurisdiction to act under R. 3. 34 Cal. 235, Rel. Where the plaintiff's case was opened, and his witnesses being absent, a day's adjournment was allowed, and on the adjourned date a fresh adjournment was applied for and refused and the Court recorded the depositions of defendant's witnesses and dismissed the suit on the merits. *Held*, that the dismissal under O. 17, R. 3 was without jurisdiction and O. 17, R 2 was applicable to the case. (*Dass and Ross*, JJ.) SASHIBHUSAN KUMAR *v.* DWARKA PRASAD MARWARI. **3 Pat. L T. 64 = 61 I.C. 897 = 6 Pat, L.J. 313 = 1922 P. 2.**

———**O. 17, Rr. 2 and 3**—*Adjournment—refusal—Procedure.*

Where the plff. applies for an adjournment and on the refusal of the application the plff. withdraws, the Court should proceed under R. 2 and not call upon the defendant to produce his evidence in order to give itself jurisdiction to proceed under R. 3. Where there are materials on record on which the Court can decide the case it should proceed under R. 3 and not under R. 2. (*Dass and Ross*, JJ.) SHASHI BHUSHAN KUMAR *v.* DWARKA PRASAD. **6 P.L J 318 = 61 I.C. 897 = 3 Pat. L T. 65 = 1922 P. 2.**

———**O. 17, Rr. 2 and 3**—*'Hearing,' meaning of.*

C. P. CODE (V of 1908), O. 17, R. 2.

Rules 2 and 3 of O. 17 of the Civ. Pro. Code apply only to cases where the actual hearing of the suit has been adjourned and by the hearing of the suit is meant the hearing at which the Judge would be either taking evidence or hearing arguments or would have to consider questions relating to the determination of the suit which would enable him finally to come to an adjudication upon it. But in cases where it was clearly never intended that there should be a hearing of the suit in the ordinary sense of the word but merely some interlocutory matter decided between the parties as to the future conduct of the suit, the provisions of these rules have no application. (*Miller*, C J. *and Mullick*, J.) BALAMAKUND MARWARI *v.* LOCHAMI NARAIN MARWARI. **57 I.C. 748.**

———**O. 17, Rr. 2 and 3**—*Plaintiff unable to produce evidence — Dismissal of suit—Appeal.*

Unless the facts clearly indicate that there was adjudication, an order of dismissal whether it be for want of evidence or not is an order under O. 9 of the C.P. Code. Owing to the plaintiff not adducing any evidence in support of his case, his suit was dismissed for default and there was no indication that he was either willing to have the suit decided on the merits, or that the Court in any way applied its mind to the rights and liabilities of the parties. *Held*, the order was one under O. 17, R. 2 and not open to second appeal. (*Mullick and Atkinson* JJ.) SHAIKH MUHAMMAD BAKAR ALI *v.* CHULAI MAHTON. **52 I.C. 290 = 4 Pat. L.J. 712.**

———**O. 17, R. 2**—*Date fixed for appointment of Commissioner—Party not appearing.*

When on the date fixed for the appointment of a Commissioner, the deft. and his advocate failed to appear, the Court should only proceed under O 17, R. 2 and appoint a Commissioner and should not pass an *ex parte* decree. (*Maung Kin*, J.) KO TE NE *v.* MAHOMED DURBESH. **42 I.C. 837.**

———**O. 17, Rr. 2 and 3**—*Adjournment of suit—Unserved defendant—Plaintiff's failure to appear on adjourned date.*

If a suit is postponed for finding out the whereabouts of an unserved defendant, the date fixed is a date for the hearing and if the parties or any of them fail to appear on that date, the Court has to proceed under O. 17, R. 2, C. P. C. In such a case if the plaintiff fails to appear and the defendants appear, the suit shall be dismissed under O. 9, R. 8. (*Pratt*, J.C. *and Fawcett*, A.J.C.) GHULAM HYDER KHAN *v.* DIWAN TEKCHAND. **53 I C. 550 = 13 S L.R. 149.**

———**O. 17, Rr. 2 and 3 and O. 9, R. 8**—*Sufficient cause—Non-appearance on adjourned date—Dismissal—Restoration.*

If parties are not ready to proceed with the

C. P. CODE (V of 1908), O 17, R. 3

case on the date of hearing, their case must suffer, unless there was a "sufficient cause" for default of appearance. If a party absents deliberately he does so at his risk. An order dismissing a suit on an adjourned hearing after summonses had been duly served on the witnesses, on the pleader saying "no instructions" is an order under R. 2 and not under R. 3 of O. 17. In the absence of "sufficient cause" the Court should not restore the suit. (*Fawcett and Crouch*, A. J. Cs.) USTO SAHEB DINO *v.* GHULAM KADIR. **27 I.C. 924 = 8 S L.R. 241.**

———**O. 17, R. 3 and O. 9, R. 13**—*Pleader unable to proceed—Decree not necessarily ex parte.*

At the hearing of a suit the defendant being absent the trial court proceeded under O. 17, R. 3 on the merits and decreed it. The defendant applied to have the decree set aside but the application was rejected. He then appealed from the order and the decree. The appellate court dismissed the former appeal but declared in the case of the second that the trial court had no power to decide the case on the merits in the absence of the defendant and that the decree was only an *ex parte* decree. *Held*, the order of the appellate court in the latter appeal was both in substance and in form open to question. By the pleader saying that he was unable to proceed with the hearing, it cannot be said that the pleader had withdrawn himself; and the decree passed in that suit cannot therefore be regarded as an *ex parte* decree which could be set aside in the manner laid down in O. 9, R. 13. In form the order passed by the lower court was similarly open to objection. It was not open to the Judge, who heard the appeals, to take the view that the decree was an *ex parte* decree after he had dismissed the appeal which had been filed from an order refusing to set it aside, on the ground that the decree was one dealing with the suit on the merits. If he was satisfied that there was sufficient excuse for his absence, he could have passed an order setting aside the decree passed by the court of first instance and remanded the suit. If he was not satisfied that there was sufficient reason for his absence, it was still necessary for him to have examined the suit on the merits and determined whether the decree passed by the court of first instance was proper or not. (*Kanhaiya Lal*, J.) SARJU PRASAD *v.* GUJADHAR LAL. **1922 All. 497.**

———**O. 17, R. 3**—*Part-heard case—Dismissal for default—Appeal.*

In a suit which is part-heard, the plff. declined to proceed further and the Court dismissed the suit for default. *Held*, that the Court having begun the hearing should have proceeded to decide the suit on the merits. The High Court had inherent jurisdiction to hear the appeal against the order of dismissal. (*Walsh and Ryves*, JJ.) SUKHU KOERI *v.* RAM LOTAN KOERI. **41 All. 663 = 51 I.C. 850 = 17 A.L.J. 849.**

C. P. CODE (V of 1908), O. 17, R. 3.

———**O. 17, R. 3**—*Adjournment—Refusal—Discretion—Reasons—Revision.*

Where a party is in default through failure of the Court officials to serve notice or from some neglect to pay the necessary process fees, whether he should be denied a hearing or should be allowed an adjournment, is a question which must be judicially determined upon evidence and for reasons to be given by the Judge who decides deny him a hearing, so that such reasons may be reviewed, if necessary, by a higher tribunal since such decision amounts in substance to a final order and is in fact a judicial act and requires care, circumspection and judicial discretion. (*Walsh and Sundar Lal*, JJ.) SARJU PARSHAD *v.* UMANPAT GIR. **38 I.C. 464.**

———**O. 17, R. 3**—*Applicability.*

Where summons to respondent was returned unserved and time was given to appellants to take further steps but the appellant failed to do so within the time granted, the Court could proceed to decide the appeal under O. 17, R. 3. (*Knox and Rafique*, JJ.) JAISARI SINGH *v.* JAISARI SINGH. **17 I.C. 294.**

———**O. 17, R. 3 and S. 115**—*Appeal—Revision.*

Only an appeal and no revision lies against an order under O. 17, R. 3.) (*Karamat Hussain and Chamier*, JJ.) GAURA BIBI *v.* GHASITIYA. **34 All. 123 = 12 I.C. 603 = 8 A.L.J. 1265.**

———**O. 17, R. 3**—*Procedure under.*

Party's failure to request the Court to pass orders under O. 16, R. 10 (2) and (3) for getting the attendance of material witnesses, does not enable the Court to proceed under O. 17, R. 3. (*Knox and Piggott*, JJ.) RAM NARAIN *v.* JAGDEO MISIR. **33 All. 690 = 10 I.C. 903 = 8 A.L.J. 839.**

———**O. 17, R. 3**—*Dismissal of suit—Non-payment of Court-fee.*

In a suit to redeem certain property according to Dek. Agr. Rel. Act the Court found that A was not an agriculturist and ordered him to pay the requisite Court-fee within one week from the date of that finding. The order not having been complied with, the Court dismissed the suit under O. 17, R. 3. A appealed against the order of dismissal and sought to impeach the finding on the preliminary issue. *Held*, that the decree appealed from, was not a preliminary decree but a final decree on the merits and was appealable. (*Chandavarkar and Batchelor*, JJ.) GOVIND RAMCHANDRA SHEMBEKAR *v.* VITHAL GOPAL SAHASRABUDHE. **36 Bom. 536 = 16 I.C. 159 = 14 Bom. L.R. 860.**

———**O. 17, R. 3**—*Scope*—Ex parte *decree may be passed when acting under this rule.*

Where time was not granted to the appellant at his own request for the production of evidence, O. 17, R. 3, has no application. An *ex parte* decree may be passed even in a case in which the court acts under O. 17, R. 3, such

C. P. CODE (V of 1908), O. 17, R. 3.

a decree is nevertheless an *ex parte* decree and liable to be set aside as such. (*Abdul Raoof*, J.) MURLI DHAR *v.* DUNI CHAND AND GOKAL CHAND. 69 I.C. 368= 1923 Lah. 281 (1).

———O. 17, R. 3—*Process fee paid in time —Service not effected—Adjournment granted, is not time granted to a party within rule.*

Held following 51 P.R. 1915, that where a party to a suit has paid the process fee for summoning witnesses, the Court and its officers are responsible for effecting service, and an adjournment caused by the non-attendance of witnesses for want of service is an adjournment in the ordinary course and does not amount to time granted to one party within the meaning of O. 17, R. 3, C.P.C. O. 17, R. 3 merely authorises the Court to proceed to decide the suit forthwith and it does not authorise its dismissal summarily. (*Scott-Smith and Campbell*, JJ.) KARAM CHAND v. JINDA RAM. 71 I.C. 862=1924 Lah. 404.

———O. 17, R. 3—*No default by party— Court cannot proceed under this rule.*

The hearing of a case was adjourned for a fortnight to enable plff. to summon his witnesses. Within a week of the hearing the plff. paid process fee but the officer of the Court finding the time to be short did not take out the summonses. On the day fixed for the hearing the Court dismissed the suit under O. 17, R. 3, C.P.C. *Held* that having regard to the negligence of the officer of the Court there was no room for the application of the stringent provisions of O. 17, R. 3, C.P. Code. (*Shadi Lal*, C.J. *and Brasher*, J.) LILA RAM v. RAMZAN. 69 I.C. 665=1924 Lah. 272.

———O. 17, R. 3—*Dismissal for default— Evidence.*

O. 17, R. 3 is an enabling and not a mandatory rule. At the first hearing of a suit certain defts. had not been served and the Court adjourned the case and directed issue of summons to absent defts. on receipt of process fees. Plff. took no action and on the date of hearing gave no reasons for his default but asked for indulgence. The Court dismissed the suit. *Held*, that under the circumstances R. 3, O. 17 was inapplicable and should not have been applied. (*Petman*, J.) SHER ALI v. MANGU. 52 I.C. 292=160 P R. 1919.

———O. 17, R. 3—Ex parte *decree—Date not fixed for hearing of case but for producing a copy of document.*

The defendants wanted stay of the case and they were ordered to produce a copy of a certain order on a date fixed by Court. On that date an *ex parte* decree was passed on failure of defendants to appear. An application to set aside *ex parte* decree was dismissed as barred by limitation. *Held*, that the Court was not competent to pass an *ex parte* decree when no order was passed fixing the date for trial and that the case should be heard on merits on the

C. P. CODE (V of 1908), O. 17, R. 3.

date fixed. (*Scott-Smith*, J.) RAGHBIR *v.* DAULAT RAM. 111 P.L.R. 1916= 36 I.C. 32=137 P.W.R. 1916.

———O. 17, R. 3—*Scope of—Time granted— Default.*

The strict provisions of O. 17, R. 3 cannot be invoked unless time has been granted to a party specifically for performing any of the acts mentioned therein and that party has commited a default in performance thereof. If a party has paid the process fee for summoning witnesses, the Court and its officers are responsible for effecting service and an adjournment caused by the non-attendance of witnesses for want of service is an adjournment in the ordinary course and does not amount to time granted to one party within the meaning of R. 3 of O. 17. The fact that the adjournment was utilized for another purpose does not convert it into time granted to the defendants within the purview of O. 17, R. 3. (*Chevis and Shadilal*, JJ.) HARJAS RAI *v.* NARAIN SINGH. 51 P.R. 1916=29 I.C. 938= 98 P.L.R. 1916.

———O. 17, R. 3, O. 7, R. 11, and O. 6, R. 18 —*Order to refer to arbitration—Bar to suit.*

Rejection of plaint on the ground that the plaintiff had no right to bring a suit without filing an agreement to arbitrate under para. 20 of the second schedule is governed by neither O. 17, R. 3 nor. O. 7, R. 11 nor O. 6, R. 18. (*Robertson*, J.) MURLIDHAR KAUSHI RAM *v.* NARAYAN DAS. 169 P.L.R 1913= 19 I.C. 472=107 P.W.R. 1913.

———O. 17, R. 3—*Decree wrongly passed on merits—If* ex parte—*Appeal—Procedure.*

On a Court wrongly passing a decree on the merits under O. 17, R. 3, the aggrieved party cannot treat it as an *ex parte* decree and then appeal against the order refusing to set it aside, but should appeal against the decree itself. 33 Mad. 241, Foll. (*Sadasiva Aiyar and Moore*, JJ.) GUNDAN *v.* KAMAKHA RAMA CHETTY. 38 I.C. 660=3 L.W. 524.

———O. 17, R. 3—"*Forthwith*"—*Meaning of.*

A decision passed "forthwith" under O. 17, R. 3 is one on the merits as gathered from available facts. (*Sadasiva Aiyar*, J.) *In re* CHIDI PATTU SOMAYYA. 31 I.C. 807= 2 L.W. 1067.

———O. 17, R. 3—*Applicability of.*

O. 17, R. 3 applies only where on the application of one of the party's the Judge directs a particular act to be done on the adjourned hearing and the party is unable to perform that act, (*Seshagiri Aiyar*, J.) MAJITI NAGARATNAM *v.* PACHIGOLLA RAMIAH. 27 I.C. 882= 2 L.W. 105.

———O. 17, R. 3 and O. 9, R. 3—*Adjournment.*

Where by consent of parties, the decision in a suit was to follow the decision of the appellate

C. P. CODE (V of 1908), O. 17, R. 3.

Court in another suit, and after producing a copy of that decision, both parties absented themselves on the adjourned date, the proper course would be to proceed with the suit under O. 17, R. 3 and not to dismiss it under O. 9, R. 3. (*Tyabji and Spencer*, JJ.) PENAMUCHA ANANDARAJU *v.* NADIMPALLI VENKAT RAJU. **23 I.C. 819=1 L.W. 428.**

——O 17, R. 3 and O. 9, R. 6—*Absence of defendant on date of hearing—Court should proceed under O.* 17, *R.* 3.

Where the deft. absents himself on the date fixed for evidence in a case, the proper procedure for a court is to proceed under O. 17, R. 3 and not under O 9, R. 6, C. P. C. (*Simpson and Wazir Hasan*, A.J.Cs.) CHAUHARJA *v.* KALKA PANDE. **9 O.L.J. 543=72 I C. 894=1923 Oudh 18.**

——O. 17. R. 3—*Default in appearance is not covered by this rule.*

O. 17, R. 3 does not contemplate a case of default in appearance but a case in which a party who has appeared and has been given time to do some act in further prosecution of his case has failed to do so within the time allowed. The court may in such a case proceed with the suit notwithstanding the default, but the decision is not *ex-parte*. (*Dawson Miller*, C.J. *and Coutts*, J.) MAHANT DAMODAR DAS *v.* RAJ KUMAR DAS. **1 P. 188=69 I.C. 837=1922 P. 485.**

——O, 17, R 3—*Date fixed for final disposal of suit and for appointment of guardian—No steps taken by plaintiff for latter—Suit cannot be dismissed.*

Where a date is fixed for evidence and final disposal of a suit and the same date is fixed for appointment of a guardian of a minor defendant and the plaintiff takes no steps to get the guardian appointed the Court cannot dismiss the suit without giving the plff. an opportunity to adduce evidence at least against the original defendants in the suit. If it so dismisses the suit it acts without jurisdiction and such dismissal will not bar a fresh suit. (*Jwala Prasad*, A.C.J. *and Das*, J.) ABDUL RAHMAN *v.* SHIB LAL. **63 I.C. 370=2 Pat. L.T. 372.**

——O. 18, R 1—*Restitution of conjugal rights, suit for—Marriage admitted but coercion and non consent pleaded—Who should begin.*

In a suit for restitution of conjugal rights, where marriage is admitted but coercion and non-consent were pleaded, it is the deft. who ought to begin. (*Hartnoll*, O.C.J. *and Twomey*, J.) TUVURIAMMAL *v.* SANTIAGO. **7 Bur. L T. 129=23 I.C. 242=7 L.B.R. 347.**

——O. 18, R. 2—*Written arguments—Judgment.*

A case was adjourned to a certain date for arguments, but the parties were not ready and the Judge gave them liberty to put in written arguments. Then his predecessor came in and

C. P. CODE (V of 1908), O. 18, R. 5.

after a local inspection, he delivered judgment. *Held*, the parties had sufficient opportunity to argue the case and the judgment was not vitiated. (*Harrison and Zafar Ali*, JJ.) HARJI MAL *v.* DEVI DITTA MAL. **4 Lah. 364=77 I.C. 398=1924 Lah. 107.**

——O. 18, R. 2—*Plaintiff accepting onus—Court not bound to hear deft.'s case if plff. fails.*

Where the accepted issues show the burden of proof to lie on the plaintiff, he is not entitled to cast the burden on the other side in appeal; hence where the plff. failed to prove his case and the Judge dismissed the suit without insisting on deft.'s going into the witness box, the procedure was right. (*White*, C J. *and Oldfield*, J.) RUTHNA GRAMANY *v.* VEERABADRA AIYAR. **25 M.L.J. 281=21 I C. 96=(1913) M.W.N. 751.**

——O 18, R. 5—*Reading of deposition by witness—Evidence Act, S.* 80.

Reading over of the deposition by the witness himself, is a sufficient compliance with the rule, depositions so read over prove themselves under S. 80. (*Richardson and Huda*, JJ.) RAMESH CHANDRA DAS *v* EMPEROR. **46 Cal. 895=23 C.W.N. 661=50 I C. 660=20 Cr. L J. 324=29 C.L.J. 513.**

——O 18. Rr. 5 and 6—*Statement of witness—Note by Court—Preference.*

A note by Munsiff in the record of deposition as to the age of a witness at variance with his statement, cannot be made the basis of a finding as to the age by the Appellate Court. (*Beachcroft*, J.) MUHAMMAD HASAN *v.* ABDUL HAMID. **30 I.C. 431.**

——O. 18, R. 5—*Non-compliance with—Deposition, if inadmissible.*

If the provisions of O. 18, R. 5 are not followed and the deposition is not read over to the witness in the manner set forth therein, it does not make the evidence inadmissible if the document is proved otherwise than by S. 80 of the Evidence Act. The object of O. 18, R. 5 is to ensure accuracy; non-compliance with it does not go to the admissibility but to the weight. 6 C. 762; 18 Mad. 308; 42 Cal. 240 Diss. (*Richardson and Beachcroft*, JJ.) ELAHI BAKSH *v* EMPEROR. **45 Cal. 825=27 C L.J 377=45 I C. 258=19 Cr. L.J. 498=22 C.W.N. 646.**

——O, 18. R. 5—*Deposition—Record of—Evidence Act, S.* 91.

S. 91 of the Evidence Act bars the admission of the secondary evidence in proving a witness's statement, where it was not read over to him according to requirements of O. 18, R. 5. C. P. C. (*Chevis*, A. J. C.) IMAM DIN *v.* NIAMAT ULLAH. **1 Lah. 361=38 I.C. 830=21 Cr L.J. 830=10 P.W.R. 1920 (Cr.)**

C. P. CODE (V of 1908), O. 18, R. 5.

———**O. 18, R. 5** - *Object of—Omission to read out deposition—Offence.*

According to O. 10, R. 1 a Court need not examine the parties on oath but it can do so if necessary. O. 18, R. 5 requires that a statement of a witness when recorded should be read out to him. This is for a double reason. Any mistake made by deponent or by the writer may be rectified and secondly a *locus penetenti de* is provided for a person who had made a false statement. The omission to read out a statement to a deponent deprives him of the *locus penetential* afforded by the reading out and such omission renders a conviction under S. 193, I.P.C., illegal altogether. (*Chevis, J.*) KARTAR SINGH *v.* EMPEROR.
12 P.R Cr. 1917=39 I C. 847=
18 Cr. L.J. 607=18 P.W.R. Cr. 1917.

———**O. 18, R. 5**—*Deposition— Witnesses cannot be compelled to sign.*

Witnesses in civil cases are not legally bound to sign or thumb-mark their depositions. Courts cannot order them to do so, nor could they be compelled to sign under S. 151, C.P.C. (*Shah Din and Scott-Smith, JJ.*) EMPEROR *v.* FATEH ALI. **8 P.R. 1912 Cr. =**
13 Cr L J 713=37 P W.R 1912 Cr =
16 I.C. 521=245 P L.R. 1912.

———**O. 18, R. 5**—*Non-compliance with—Irregularity.*

Reading out the deposition to a witness in a room adjoining the Court hall and at a distance of 30 feet from the Judge's seat is a sufficient compliance with O. 18, R. 5, C.P.C. Such a deposition is admissible in evidence in prosecutions under S. 193, I.P.C. Irregularity in reading out the deposition goes to its weight not to its admissibility. 28 Mad. 308, Dist. (*Ayling and Phillips, JJ.*) MEANGO *v.* BAVIAH. **(1918) M W.N 239=**
7 L.W. 485=19 Cr. L J. 603=45 I C. 507=
24 M L T. 242.

———**O. 18, Rr. 5 and 6**—*Non-compliance with provisions of.*

Non-compliance with the provisions of Rr. 5 and 6 does not render the deposition inadmissible at a trial of the deponent subsequently for perjury as the rules are merely directory. (*Prideaux, J.*) MIRABAX *v.* EMPEROR.
23 Cr. L.J. 800=18 N.L.R. 192=
68 I.C. 36=1923 Nag. 89.

———**O. 18, R. 13**—*Abstract of evidence incomplete—Judgment based on it is illegal.*

Where in a judgment of a Provincial Small Cause Court the abstract of evidence is incomplete, the judgment based on such abstract, is illegal. (*Seshagiri Iyer, J.*) RATNA PATHAN *v.* PARA SUNDRAM
2 L W. 803=30 I C. 635=
(1915) M.W.N. 768.

———**O 18. R. 15**—*Evidence and arguments heard by one Judge—Judgment by successor.*

It is not necessary for the succeeding Judge to rehear the case after arguments had been heard by the predecessor. (*Sankaran Nair, J.*) KANUMOORY NIADRI RAJU *v.* KASA SUBBIAH. **12 M.L.T. 332=17 I.C. 278=**
(1912) M.W.N. 999.

C. P. CODE (V of 1908), O. 18, R. 15.

———**O. 18, R. 15**—*Scope—Applicability.*

O. 18, R. 15 applies only when the previous Judge has not concluded the trial of the case. (*Munro and Ayling, JJ.*) KRISHNA BAI *v.* COLLECTOR AND GOVERNMENT AGENT, TANJORE. **9 M.L.T. 321=9 I.C. 254=**
21 M.L J. 808.

———**O. 18, R. 17**—*Further evidence—Admission of—After close of trial.*

After the trial was closed plaintiff applied to be allowed to adduce further evidence but the application was disallowed. He applied to withdraw from the suit with liberty to bring a fresh suit but the order granting this application was set aside on revision. The plff. again applied for summons on certain persons to prove a portion of the case but the Court did not allow these persons to be produced though present. *Held*, that under the circumstances the plaintiff ought to have been allowed to tender further evidence. (*Jenkins, C.J. and Chatterjea, J.*) DURGA CHARAN CHANDRA *v.* KHORDA CO., LD. **29 I.C. 696=20 C.W.N. 254.**

———**O. 18, R. 18**—*Local inspection—Result of investigation to be recorded.*

The law as to local inspection is that, when a court bases its judgment on the result of the local inspection held by it, it ought to enter, the result of such investigation on the record in order to enable the parties to adduce evidence in respect thereof. Where, however, the Court inspects the locality merely to ascertain the correctness of a map filed by the plaintiff, the omission to put into writing the fact of the local investigation does not prejudice the parties. (*Suhrawardy and Cuming, JJ.*) HARI CHARAN CHAKRABURTHY *v.* JITENDRA NATH GANGULY. **65 I.C. 601.**

———**O. 18, R. 18**—*Local inspection by Judge—Decision should not be based solely on.*

No decision should be based solely on local inspection of the Judge. (*Abdul Raoof and Campbell, JJ.*) TIRATH RAM *v.* MD. ABDUL RAHIM. **73 I.C. 616=1923 Lah. 546.**

———**O. 18, R. 18**—*Finding based on personal inspection—Validity.*

A judgment should not be based solely on the result of the personal inspection by the Judge. The inspection which a Judge makes should be used by him only to test the accuracy and value of the evidence let in. He should not, without submitting himself to the test of cross-examination, make his knowledge the sole evidence for determining the question raised before him. (*Seshagiri Aiyar and Kumaraswami Sastry, JJ.*) AHMED SAHIB SHUTARI *v.* MAGNESITE SYNDICATE, LTD.
39 Mad. 801=28 M L J. 598=
2 L.W. 460=29 I C. 60=
17 M.L.T. 387.

C. P. CODE (V of 1908), O. 18, R. 18.

——— **O. 18, R. 18**—*Inspection by District Munsif—District Judge's sanction necessary.*

O. 18, R. 18, authorises every Court to inspect any property or thing without the sanction of its superior Court. (*Miller*, J.) NALLABOLTU BODI NAIDU *v.* CHENGAMA NAIDU.

(1914) M.W.N. 79 = 23 I.C. 297 = 26 M.L.J. 9.

——— **O. 18, R. 18**—*Result of local inspection.*

Under O. 18, R. 18 a Judge is empowered to make a local inspection and use the result in his judgment and place the result of his inspection on record but failure of his placing the result on record being a formal defect does not vitiate his judgment. (*Jwala Prasad*, J.) RAMACHANDRA RAO *v.* NARAYAN LAL.

58 I.C. 909.

——— **O. 18, R. 18** — *Local inspection — Examination of witness.*

At the instance of plaintiff, the Munsif held a local inspection, and in the course thereof at the instance of both the parties he examined a person whose statements he used as confirming his impression formed independently of them. *Held*, that it was not open to any of the parties afterwards to turn round and say that the Munsif ought not to have used those statements. (*Miller*, C.J. *and Mullick*, J.) NARAIN SINGH *v.* BABA.

4 Pat. L.W. 189 = 44 I.C. 262 = 1918 Pat. 131.

——— **O. 19**—*Affidavit—Evidence.*

An affidavit is ordinarily not evidence unless the person seeking to use it complies with the requirements of O. 19 of the Code. (*Ayling and Seshagiri Aiyar*, JJ.) KRISHNA *v.* MADHAVA.

63 I.C. 258.

——— **O. 19, R. 1**—*Foreign company.*

There is nothing in R. 1, O. 19, to exclude from its operation a foreign company incorporated in a foreign country. (*Rattigan*, J.) SINGER MANUFACTURING COMPANY, DELHI *v.* YAR MUHAMMAD KHAN.

8 P.R. 1912 = 150 P.L.R. 1911 = 10 I.C. 141 = 251 P.W.R. 1911.

——— **O. 19, R. 3**—*Affidavit—Contents and essentials.*

An affidavit must contain only facts known to the person making it personally or upon information which he believes to be correct; the contents of the affidavit should be read over to the defendant in a language which he understands and should be acknowledged by him to be correct. (*Knox*, J.) MANGAL *v.* EMPEROR.

36 All. 18 = 22 I.C. 740 = 15 Cr. L.J. 164 = 11 A.L.J. 986.

——— **O. 19, R. 3**—*Issue of injunction on affidavit—Sufficiency of affidavit.*

An affidavit stating certain facts upon information and belief without stating the source thereof isinsufficient evidence, upon which to grant an injunction. (*Walmsley and Greaves*, JJ.) SATYA KUMAR *v.* MANAGER, BENARES BANK. **46 I.C. 335 = 22 C.W.N. 700.**

C. P. CODE (V of 1908), O. 20, R. 1.

——— **O. 19, R. 3**—*Affidavit—Ignorance of deponent.*

An affidavit as to the points argued in a case and sworn by a person, who cannot understand the language in which the argument was made, has no value. (*Fletcher and Richardson*, JJ.) AKIYANNESSA *v.* ABDUL GANI SADAGAR.

41 I.C. 1.

——— **O. 19, R. 3**—*Affidavit — Sources of information.*

A statement which merely recites facts but not the source of the deponent's information, is not an affidavit and cannot be used as evidence in any judicial proceedings. (*Sankaran Nair and Ayling*, JJ.) DURAISWAMI CHETTY *v.* GOVINDU CHETTY. **1 L.W. 394 = 23 I.C. 377 = 15 M.L.T. 377.**

——— **O. 19, R. 3**—*Affidavits should clearly specify what statements are made on knowledge and what on belief.*

Every affidavit should clearly express how much is a statement of the deponent's knowledge and how much a statement of belief, in which case the grounds of belief must be stated. Failure to distinguish between the two would be taken to mean they are swearing to facts within their own knowledge, which will entail all its necessary consequences. (*Miller*, C.J. *and Kulwant Sahay*, J.) CHANDRIKA PRASAD SINGH *v.* HIRA LAL.

5 Pat. L.T. 124 = 73 I.C. 721 = 1924 P. 312.

——— **O. 20**—*Judgment—Contents of.*

The omission in a judgment to make special mention of oral evidence is not in itself sufficient to show that, as a matter of fact, the Judge did not consider the evidence. (*Teunon and Newbould*, JJ.) MATIWOR RASUK *v.* DHANU MOLLA. **39 I.C. 963.**

——— **O. 20, R. 1**—*Assessors—Opinion of—Irrelevant.*

It is not legal for a Judge trying a Civil suit, to ask two members of the bar to act as assessors presumably to appraise the value of the evidence and to base his judgment on that opinion. (*Rafique*, J.) KUNTHU LAL *v.* JHOMMI LAL. **21 I.C. 427.**

——— **O. 20, Rr. 1 to 3**—*Contravention of—Judgment pronounced by another Judge—Effect.*

A judgment though pronounced, dated and signed in contravention of the specific provision of O. 20, Rr. 1 to 3 constitutes an irregularity waived by the parties not objecting at the time and does not afford any ground for the reversal of the decree based on the judgment. The mere fact that the Court acted in a manner contrary to that prescribed by the Code, does not necessarily show that what was done, was a nullity. 35 Cal. 61, Ref. The effect depends upon the nature, scope and object of the particular provision which has been violated. (*Mookerjee and Walmsley*, JJ.) FORT GLOSTER JUTE MANUFACTURING CO. *v.* CHANDRA KUMAR DAS. **46 Cal. 979 = 61 I.C. 405 = 29 C.L.J. 438.**

C. P. CODE (V of 1908), O. 20, R. 1.

———O. 20, R. 1—*Posting of result of appeal on notice board is not a pronouncement —Compromise petition.*

The posting of a notice on the notice board, announcing the result of the appeal, is not a pronouncement of judgment in open Court as required by O. 20, R. 1 of the Code and the posting of such a notice does not preclude the parties from putting in a compromise petition as the appeal is still pending for want of a pronounced judgment. (*Spencer and Ramesam*, JJ.) NAGIAH *v.* SESHAMMA.
(1921) M.W.N. 866=41 M.L.J. 385=
66 I.C. 82=14 L.W. 514.

———O. 20, R. 1—*Omission to give notice.*

Omission to give notice of the date on which judgment is to be pronounced is a serious irregularity if not an illegality. 7 All. 857, Foll. (*Sankaran Nair*, J.) KANUMOORY NILADRI RAZU *v.* KASA SUBBIAH. 12 M.L.T. 332=
17 I.C. 278=(1912) M.W.N. 999.

———O. 20, R. 1—*Notice of judgment.*

When a Court does not pronounce judgment at once after the case has been heard, it should give notice to the parties of the day of delivery of judgment. (*Maung*, J.) MA HLA DUN *v.* MAUNG SHU YA. 38 I.C. 875=
9 Bur. L.T. 250.

———O. 20, R. 2—*Judgment—Pronouncement of, can be made by successor.*

A Judge may pronounce a judgment written but not pronounced by his predecessor notwithstanding that the latter wrote it when he had ceased to be the Judge of the Court in which the case was tried. (*Tudball and Rafique*, JJ.) LILAWATI KUAR *v.* CHOTEY SINGH.
42 All. 362=61 I.C. 932=18 A.L.J. 356.

———O. 20, R. 2—*Judgment written after judge ceased to be Judge—Pronouncement by successor.*

A Judge may write a judgment after he ceases to be a Judge in the district. It may be pronounced by his successor. (*Richards and Banerji*, JJ.) BASANT BEHARI *v.* SECRETARY OF STATE. 35 All. 368=19 I.C. 788=
11 A.L.J. 411.

———O. 20, R. 2—*Judgment delivered by successor.*

A judgment written by one Judge and delivered by another, in the absence of the former, is valid. (*Beachcroft*, J.) ABDUL MAJID *v.* NUR MUHAMMAD. 50 I.C. 651.

———O. 20, R. 2—*Judgment written and signed by one Judge—Pronounced by another.*

A judgment written and signed by the Judge who heard the case does not become invalid merely because it was read out in open Court by his colleague, a Judge presiding in another Court, whom he requests to read out the judgment. Such a procedure is at the most a mere irregularity not affecting the merits of the case and is covered by S. 99, C.P.C. (*Fletcher and Huda*, JJ.) ALA BUX *v.* KHIDIR AHMAD.
46 I.C. 618=29 C.L.J. 568.

C. P. CODE (V of 1908), O 20, R. 3.

———O. 20, R. 2—*Judgment written after transfer.*

In the absence of an order of transfer of the case by a competent authority a Judge who is transferred has no power to deal with it. Per *Raoof*, *J.*—A judgment and decree passed by the trial Judge after his transfer from the District, cannot be said to be *ultra vires*. Per *Chevis*, *J.*—The validity of a judgment written after his transfer from the district, and after the Judge has ceased to exercise jurisdiction in respect of the case is doubtful. O. 20, R. 2 merely provides for the pronouncing of a valid judgment which the writer has been unable to deliver himself. (*Chevis and Raoof*, JJ.) KRISHNA BAI *v.* BUDHU RAM. 80 P.R. 1919=
49 I.C. 724=35 P.W.R. 1919.

———O. 20, R, 2—*Judgment after transfer.*

A judgment of a Judge after his transfer is not illegal if it is written and pronounced by him. (*Johnstone*, C.J.) DAYARAM *v.* JATTI.
80 P.R. 1916=128 P.W.R. 1916=
35 I.C. 938=43 P.L.R. 1917.

———O. 20, R. 2—*Order on an issue by one Judge—Delivery of order by another.*

An order written by a Judge deciding an issue is a judgment with S. 2 (9) of the Code and can be pronounced by his successor even though the order was written after the Judge had ceased to exercise jurisdiction in the place. 30 Bom. 241; 34 Cal. 293; 35 Cal. 756, Foll. (*Johnstone*, J.) NARPAT RAI. *v.* DEVI DAS.
14 I.C. 371=13 P.W.R. 1911.

———O. 20, R. 2—*Judgment written by Judge hearing evidence.*

Unless the parties affected by the decision are prejudiced and objection is taken promptly at the earliest opportunity, it would not be illegal even if a judgment written by an officer who heard and recorded the evidence, is pronounced by his successor in office. (*Jwala Prasad and Adami*, JJ.) LAKHIAMA JIN *v.* LOKANATH DASS. 1 Pat. L.T. 77=38 I.C. 437=
3 Pat. L.J. 147.

———O. 20, R. 2.—*Uncertified or unrecorded adjustment.*

An uncertified or unrecorded adjustment should be ignored by the executing Court. (*Atkinson and Adami*, JJ.) M. IMAMUDDIN KHAN *v.* BINDUBASINI PRASAD.
1 P.L.T. 149=3 P.L.J. 70=33 I.C. 890=
1921 Pat. 360.

———O. 20, R. 3—*Judgment—Alteration of.*

O. 20, R. 3 is a distinct prohibition against any alteration of a signed judgment except as provided by S. 152 or on review. (*Rattigan and Chevis*, JJ.) MUSAMMAT HUSAINA *v.* MUSAMMAT SAHIB NUR. 254 P.L.R. 1913=
20 I.C. 3=159 P.W.R. 1913.

———O. 20, R. 3 — *Judgment dictated to short-hand writer—Transcript cannot be amended.*

O. 20, R, 3 of the C. P. Code as amended by the Madras Rules does not authorise the Judge

C. P. CODE (V of 1908), O. 20, R. 3.

to revise the transcript and to substitute fresh words for the words, which fell from his mouth to any extent he may deem necessary. Where a judgment is dictated to a shorthand writer the revision contemplated cannot be of the effective part of the judgment and must be of the nature referred to in S. 152, and one relating to "clerical and arithmetical mistakes arising from any accidental slip or omission." (*Oldfield*, J.) HARI KRISHNA PILLAI *v.* ARUR PANDITHER.
18 L.W. 105=72 I.C 688=
(1923) M.W.N. 354=
1923 Mad. 663.

———**O. 20, R. 3**—*Judgment written by Judge after transfer—Delivered by successor—Legality of.*

The Judge who had heard the evidence and arguments in a case was succeeded by another Judge. The former subsequently wrote out and signed a judgment in the case, which was pronounced by his successor after notice to the parties, *held*, the judgment was valid. 35 Cal. 756; 2 C L J. 438, Fol. (*Jwala Prasad and Adami*, JJ.) LAKHIAMA JIN *v.* LOKNATH DAS.
3 Pat. L.J. 147=58 I.C. 137=
1 Pat. L.T. 77.

———**O. 20, Rr. 3 and 7**—*Date of judgment—Conditional judgment.*

Where a Court gives a judgment but refuses to pass a decree till the successful party complies with a certain condition, the judgment is only a provisional judgment, which does not become operative until the decree is passed. (*Pratt*, J.C. *and Boyd*, A.J.C.) KHUDADAD *v.* MORIA KOHAN.
34 I C. 867=
9 S.L.R. 193.

———**O. 20, Rr. 4 and 5**—*Findings to be clear and specific.*

Judges, whatever reasons they may give in judgments must make specific and precise statements of their findings. (*Walsh and Stuart*, JJ.) BALAK *v.* ALEY HASAN.
37 I.C. 304.

———**O. 20, R. 4**—*Judgment—Personal inspection by Judge alone is not sufficient material for.*

Where a Judicial officer decides a dispute solely on knowledge gained by him on personal inspection and without any reference to the evidence in the case, the judgment is liable to be set aside in revision. (*Woodroffe and Ghose*, JJ.) ABDUL HUQ *v.* MAHOMED DIN.
67 I.C. 302=1923 Cal. 311.

———**O. 20, R. 4**—*Judgment—Small Cause Court—Contents.*

A Judge of Small Cause Court need not state more than the points for decision and the decision thereon *seriatim*. (*Suhrawardy and Cuming*, JJ.) BAUL CHANDRA ADDYA *v.* SHEIKH ABDUL MATLEB.
67 I.C. 851.

———**O. 20, R. 4**—*Judgment of Small Cause Court—Contents of—Revision.*

Where in accordance with O. 20, R. 4 the judgment of a Court of Small Causes contains the points for determination and the Judge's decision thereon, but omits to give reasons for the decision, the High Court will not interfere with it. No decision of any Court can get over, add to, or alter the clear words of a Statute. (*Fletcher and Walmsley*, JJ.) PROTAP CHANDRA DUTT *v.* ABHIMANINI SURINI.
48 I.C. 782.

C. P. CODE (V of 1908), O. 20, R. 4.

———**O. 20, R. 4**—*Judgment—Contents of—Unsatisfactory—Remand.*

Where the judgment of a trial court is meagre, unsatisfactory and unintelligible, the appellate court could remand the case for the recording of a proper judgment after hearing arguments afresh. (*Shadi Lal and Wilberforce*, J.) HARBHAGWAN *v.* AHMAD.
4 Lah. L.J. 56=1922 Lah. 122 (1).

———**O. 20, R. 4**—*Judgment of Small Cause Court—Contents of.*

O. 20, R. 4, C. P. Code, is self-contained and a judgment of a Small Cause Court need not contain more than the points for decision and the decision thereon. 12 L W. 285, dissented from. (*Spencer and Krishnan*, JJ.) KOMAPPA KURUP *v.* VELAYI CHETTICHIAR.
42 M L J 583=16 L W. 642=
31 M.L.T. 124 (H.C.)=1922 Mad. 360.

———**O. 20, R. 4**—*Judgment—Contents of.*

The duty of the lower Court to write their judgments without unnecessary prolixity and repetition of pleadings was pointed out. (*Abdur Rahim and Oldfield*, JJ.) RAJAGOPALAN *v.* T. S. SUBBARAMA AIYAR.
38 I.C. 334=
(1919) M.W.N. 356.

———**O. 20, R. 4**—*Judgment—Contents of—Following prior judgment.*

A Court in its judgment, stated that it adopted the reasons given in a judgment in a previous suit between the same parties; the evidence being almost the same, *Held*, this does not amount to using the previous judgment as evidence in the case and the judgment is one in accordance with law (*Sundara Aiyar and Ayling*, JJ.) AKKU *v.* RAMAPPA RAJU.
15 I C. 431=(1912) M.W.N. 900.

———**O. 20, R. 4**—*Judgment of Small Cause Court.*

Small Cause Court Judge can reduce his remarks to intelligible minimum containing points of determination. (*Bucknill*, J.) SRIMATI SURADHANI DEBI *v.* HARI CHARAN MAHTO.
1921 Pat. 298.

———**O. 20, R. 4**—*Judgments of Small Cause Court should contain reasons for decision.*

As a matter of practice, it is usual even in cases tried by Courts of Small Causes, except in comparatively unimportant cases of everyday occurrence such as those for the recovery of petty debts, to say out the particulars of the suit and to give reasons for the decision arrived at, thus enabling the High Court, in revision, to satisfy itself that the decree or order was according to law without the necessity of perusing the whole record.

C. P. CODE (V of 1908), O. 20, R. 4 (1).

The words "need not" in O. 20, R. 4 were not meant to be read as "shall not". (*May Oung*, J.) MAUNG SA *v.* MA U MA. **1 Rang. 274 = 2 Bur. L.J. 108 = 76 I.C. 600 = 1928 Rang. 252.**

——O. 20, R. 4 (1)—*Judgment—Validity.*

When the issue was whether the consideration for a bond was paid and the judgment simply said "consideration not proved, suit dismissed", *held*, that the judgment was not according to law and did not deal with the case and that it ought to be set aside. (*Robertson*, J.) SHAH JAHAN *v.* JHANDE KHAN. **109 P.L.R. 1918 = 18 I.C. 216 = 119 P.W.R. 1918.**

——O. 20, R. 4 (1)—*Provincial Small Cause Courts Act, S. 25—Judgment of Small Cause Court—Contents of.*

The judgment of a Small Cause Judge should contain a brief statement of the reasons for the decision, to satisfy the High Court that the Judge did apply his mind to the matters before him. (*Seshagiri Aiyar*, J.) KANDASAMI CHETTY *v.* RAMALINGA CHETTY. **59 I.C. 906 = 12 L.W. 286.**

(But see 15 L.W. 642.)

——O. 20, R. 4 (1)—*Small Cause Court—Judgment—Contents of.*

The requirements of O. 20, R. 4 are imperative and a judgment omitting to supply them is not a legal decision. A judgment of a Court of Small Causes which omits to set out specifically the points for determination, is not a legal decision of the suit. (*Stanyon*, A.J.C.) HASANKHAN *v.* JASRAJ. **12 I.C. 740 = 7 N.L.R. 146.**

——O. 20, R. 4 (1)—*Judgment—Small Cause Court.*

The judgment of a Court of Small Causes need not contain more than the points for determination and its decision thereon but where the point for determination is obvious, the omission to state it in judgment, cannot be deemed to cause failure of justice. (*Maung Kin*, J.) KO KYAW ZAN *v.* DAW MYA. **40 I.C. 890.**

——O. 20, R. 4 (2)—*Judgment based on conjecture—Validity.*

Conjecture is not a sound basis for judicial decision. (*Jenkins*, C.J. *and Mookerjee*, J.) NILMADHAB *v.* RAJKISHORE DAS. **21 I.C. 413 = 18 C.L.J. 220.**

——O. 20, R. 4 (2)—*Judgment—Contents of.*

A Court's judgment based on a question neither raised in written statement nor included in any issue is bad. (*Mookerjee and Carnduff*, JJ.) SAJJAD HOSSAIN *v.* RAMLAL. **15 I.C. 159.**

——O. 20, R. 4 (2)—*Judgment—Non-compliance with provisions—Remand.*

Where it appeared that the judgment of the lower Appellate Court was delivered in contravention of the provisions of the law,

C. P. CODE (V of 1908), O. 20, R. 7.

Chief Court in second appeal set it aside and remanded the case for decision on its merits. (*Wilberforce*, J.) MAHOMED AZIM *v.* BHAI KHAN. **35 P.L.R. 1919.**

——O. 20, R. 5—*Decree—Execution—Condition imposed on.*

Courts deciding a suit have no right to impose a condition as to the mode of execution of the decree. (*Chitty and Smither*, JJ.) CHANDRA KUMAR ROY CHOWDHURY *v.* ASWINI KUMAR DAS. **45 I.C. 250.**

——O. 20, R. 5—*Judgment—Practice—High Court.*

The High Court set aside the judgment of the first court for uncertainty in the judgment as it could not know what the judgment meant. (*Jenkins*, C.J. *and Mookerjee*, J.) DEVENDRA NATH *v.* ANNADA HUDI. **25 I.C. 576 = 19 C.L.J. 546.**

——O. 20, R. 5—*Appealable case—Lower Court to pronounce opinion on all issues.*

In appealable cases the Lower Court should as far as possible pronounce its opinion on all the issues raised. 5 W.R. 53 (P.C.), Foll. (*Tyabji and Spencer*, JJ.) PALANIANDI CHETTY *v.* KAMBARAYA CHETTY. **24 I.C. 87 = 1 L.W. 416.**

——O. 20, R. 6, S. 33—*Judgment and decree should be distinct.*

In the case of an original civil suit the decree must be quite distinct from the judgment. It must be embodied in a separate form in order to be a decree according to C. P. Code. (*Scott-Smith and Le Rossignol*, JJ.) GELA RAM *v.* GANGA RAM. **70 P.W.R. 1921 = 64 I.C. 913 = 1 Lah. 223.**

——O. 20, R. 6—*Decree—Validity of.*

No decree should be passed by the courts which on the face of it is improper. (*Batten*, O.J.C.) GOVIND RAO *v.* GANPATHI. **45 I.C. 425 = 14 N.L.R. 97.**

——O. 20, R 6 (2)—*Costs.*

A decree ought to be drawn by the Court deciding a case, showing all the costs incurred by both the parties. (*Mookerjee and Sharfuddin*, JJ.) SAGAR CHANDRA MANDAL *v.* DIGAMBAR MANDAL. **10 I.C. 858 = 38 Cal. 125.**

——O. 20, R. 7—*Date of decree—Final decree—Application.*

Where a decree was ordered to be passed in accordance with an award, in 1897, but was not actually drawn up till 1899, *held*, that the decree must be deemed to have been dated 1897 under O. 20, R. 7, C.P.C. (*Batchelor*, C.J. *and Kemp*, J.) NARASINGARAO *v.* BANDU KRISHNA. **42 Bom. 309 = 46 I.C. 107 = 20 Bom. L.R. 481.**

——O. 20, R. 7—*Date of decree.*

Where a person has the judgment of the Court that he shall have a decree, he then obtains his decree. The decree, when drawn up

C. P. CODE (V of 1908), O. 20, R. 7.

afterwards, relates back to that time. 17 Cal. 347, Ref. (*Chatterjee and Panton*, JJ.) RAM KANAI PAL *v.* PUNNA CHANDRA.
65 I.C. 650=34 C.L.J. 494.

——O. 20, R. 7—*Date of decree.*

A decree has to bear the same date as that of the order making it and not the date on which it is signed by the Court. (*Sharfuddin and Teunon*, JJ.) ANANDRAM *v.* NITYA NANDA BARHAM. **32 I.C. 744.**

——O. 20, R. 7—*Court's duty to prepare a decree—Right of appeal.*

A decree must follow the judgment and it is the duty of the Court to comply with the provisions of the law and failure to prepare a decree cannot, therefcre, deprive the parties of their right to appeal. (*Wilberforce and Martineau*, JJ.) MANOHAR LAL *v.* NANAK CHAND. **52 I.C. 479=66 P.R. 1919.**

——O. 20, R. 7—*Limitation Act, S. 12 (2), Sch. I, Art. 152—Date of decree—Judgment.*

The 'date of the decree' for calculating time for appeal is the judgment but when the decree is drafted later, owing to time being granted for extra Court-fee, the time given must be excluded under S. 12 (2), Lim. Act. (*Ayling and Napier*, JJ.) NARAYANASWAMI TEVAN *v.* KRISHNASWAMI PILLAI. **28 I.C. 67.**

——O. 20, R. 7—*High Court—Original Side—Date of decree and judgment.*

A decree of the High Court on its original side should bear the same date as the judgment and limitation should not be calculated from the date when the decree is signed by the Registrar. (*Sadasiva Aiyar*, J.) HAJOO ABOOBUCKOR RAHIMTULLA SAIT *v.* THE OFFICIAL ASSIGNEE OF MADRAS. **(1913) M.W.N. 868=21 I.C. 545=26 M.L.J. 560.**

——O. 20, R. 7—*Date of decree—Decree drawn up after judgment.*

The date of a decree is the date on which judgment is pronounced. This is so even if the decree is drawn up subsequently and the decree must be deemed to have come into existence on the date when the judgment was pronounced. (*Kotval*, A.J.C.) NARAIN *v.* RAMDULARE.
66 I.C. 7=1922 Nag. 118.

——O. 20, R. 7—*Date of decree is date of delivery of judgment.*

A judgment written and signed on a particular date but not delivered in open Court till some time later must be deemed to have been delivered on the day on which it was pronounced in open Court. The decree should bear the date on which the judgment was actually pronounced in open Court and not when it was written and signed. For purposes of limitation for appeal time should be calculated from the date on which the judgment was actually pronounced in Court. (*Miller*, C.J. *and Mullick*, J.) SAGARMAL MARWARI *v.* LACHMISARAN MISIR. **1 P. 771=75 I.C. 879=1923 P. 129.**

C. P. CODE (V of 1908), O. 20. R. 11.

——O. 20, R. 8 and O. 41, R. 30—*High Court—Judgment.*

The judgment of one of the two Judges forming a Division Bench of the High Court which heard on appeal written and signed by him after retirement is a good judgment if it is read out and delivered on his behalf by the other Judge. (*Sanderson*, C.J. *and Mookerjee*, J.) ADVAITYA CHARAN *v.* SORAJRANJAN.
34 I.C. 584.

——O. 20, R. 8—*Part-heard case—Power of successor to reconsider issues.*

The Judge deciding a case on the conclusion of all the evidence is not bound by the previous decision on certain issues of a Judge who has tried a part of the case. The prior decision can be reconsidered though given by consent. (*Robinson*, J.) OFFICIAL ASSIGNEE *v.* HAJI-MAHOMED HADDY.
47 I.C. 566=11 Bur. L.T. 97.

——O. 20, R. 11 and O. 34, R. 6—*Supplemental decree for balance of mortgage amount—Power of Court to order instalment payment.*

A supplemental decree under O. 34, R. 6, for the unrealised mortgage money is a personal decree and the Court can order the payment of such decree amount by instalments. (*Casperss and Sharfuddin*, JJ.) BIDHU SEKHAR BANERJEE *v.* MAHATABUDDIN.
11 I.C. 736=15 C.W.N. 1083.

——O. 20, R. 11—*Instalment decree—Grounds.*

The fact that the estate of the defendants has been brought under the management of the Court of Wards, is not a reason for allowing instalments. (*Martineau and Moti Sagar*, JJ.) WALI DAD KHAN *v.* MANI RAM.
78 I.C. 800=5 Lah. L.J. 571=1923 Lah. 266.

——O. 20, R. 11—*Execution proceedings—Power to postpone execution of—What court has such power.*

The Court which passed the decree is the court which can postpone the execution of decree under O. 22, R. 11. (*Abdur Rahim Offg.* C.J., *Seshagiri Iyer and Phillips*, JJ.) CHIDAMBARAM CHETTIAR *v.* KRISHNA VATHIYAR. **21 M.L.T. 24=5 L.W. 182=(1917) M.W.N. 44=32 M.L.J. 13=37 I.C. 836=40 M. 233 (F.B.)**

——O. 20, R. 11—*Subsequent order for instalments.*

An order postponing executions of a decree or ordering payment by instalments under S. 210, C.P.C. (1882) or under O. 20, R. 11 of the C.P.C. is virtually an order amending the decree. (*Sadasiva Aiyar and Moore*, JJ.) PERUMAL NAICKER *v.* DAWOOD ROWTHER.
34 I.C. 393.

——O. 20, R. 11—*Time fixed by decree—Decree for specific performance.*

A plff. to whom a conveyance is due under a decree, is not entitled to apply beyond the

C. P. CODE (V of 1908), O. 20, R. 11.

period allowed by the Court, where the deft. is to convey the properties only if he received the money within the time allowed by the Court. 31 Mad. 28, Foll. (*Abdur Rahim and Spencer*, JJ.) SHANMUGHAM ASARI *v.* SAIYID NATHADU SAHIB. **31 I.C. 457.**

——**O. 20, R. 11**—*Scope of—Refers to order passed by the Court which passed the decree and not executing Court.*

The subsequent order, directing payment in S. 48, Cl. (*b*), means on order made by the Court which passed the decree acting as that Court and not as an executing Court. O. 20, R. 11 also refers to an order passed by the Court, which made the decree. (*Coutts and Adami*, JJ.) GOVARDHAN PRASAD *v.* BISHUNATH PRASAD. **2 Pat. L.T. 80 = 58 I.C. 893 = 1920 Pat. 229.**

——**O. 20, R. 11**—*Instalment decree—Grounds for lenient treatment.*

The burden of proving that the defendant is entitled to the indulgence of a decree in instalments rests upon him. Where he has resisted the suit on frivolous grounds and has subsequently to the institution fraudulently disposed of the property and the interest agreed upon between the parties was moderate, *held* that there was no ground for passing a decree for payment of the amount by instalments. (*Pipon*, J.C.) GELA RAM *v.* JHANGI RAM. **71 I.C. 303.**

——**O. 20, R. 11**—*Order refusing instalments—Appeal.*

An order refusing to allow the decretal amount to be paid by instalments is not appealable. (*Hartnoll*, O.C.J. *and Young*, J.) MOHAMED IBRAHIM *v.* SUBBIAH PANDARAM. **6 Bur. L.T. 133 = 20 I C. 673 = 7 L.B.R. 71.**

——**O. 20, R. 12**—*Decree for possession—Plaintiff is entitled also to mesne profits.*

Where possession is decreed to a plaintiff, he is entitled to a further decree for mesne profits from the date of the suit up to the date of taking possession. (*Banerji and Tudball*, JJ.) MUHAMMAD JUNAID *v.* AULIA BIBI. **42 All. 497 = 61 I.C. 947 = 18 A.L.J. 613.**

——**O. 20, Rr. 12 and 18**—*Not exhaustive as to cases of preliminary decree.*

The cases mentioned in O. 20 of the C.P. Code are not exhaustive of the orders which may form the basis of final decrees. (*Mookerjee and Rankin*, JJ.) RAJA PEARE MOHAN MOOKERJEE *v.* MANOHAR MOOKERJEE. **27 C.W.N. 989 = 38 C.L.J. 265 = 74 I.C. 373 = 1924 Cal. 160.**

——**O. 20, R. 12**—*'Three years'—Calculation must be made from date of appellate decree.*

The period of three years for payment of mesne profits after suit should be calculated from the date of the ultimate decree on appeal, which is the only decree capable of execution. In no case can the plff. claim mesne profits for

C. P. CODE (V of 1908), O. 20, R. 12.

any period subsequent to an offer by the deft. to restore him possession. (*Mookerjee and Panton*, JJ.) RAJA SASHIKANTA *v.* RAJA SARAT CHANDRA. **70 I.C. 6 = 34 C.L.J. 415.**

——**O. 20, R. 12**—*Alternative claim for possession.*

Even when there is an alternative claim for possession and the statement of the claim for mesne profits is not clear, mesne profits could be decreed. (*Sanderson*, C.J. *and Mookerjee*, J.) SHEIKH YAKUB *v.* TAZIMUDHI MULLICK. **41 I.C. 842 = 26 C.L.J. 105.**

——**O. 20, R. 12**—*Mesne profits ascertained in suit itself—Not in execution.*

The assessment of mesne profits being in the suit itself and not in execution, they are included in the money to be recovered under the decree and no decree can be passed directing ascertainment of mesne profits in execution. 19 Cal. 132; 16 C.L.J. 3, Foll. (*Fletcher and Richardson*, JJ.) GANGA PRASAD DUTTA *v.* HEMANGINI DEBI. **37 I.C. 997.**

——**O. 20, Rr. 12, and 13**—*Execution—Power of Court to leave matter to execution.*

A question, not essential to be decided in a suit, may be left to be decided in execution proceedings. (*D. Chatterjee and Beachcroft*, JJ.) BARATH CHANDRA DAS *v.* RAMA NANDA DEB. **32 I C. 862.**

——**O. 20, R. 12**—*Mesne profits exceeding pecuniary jurisdiction of Court decreeing suit, application for—Decreeing Court, jurisdiction of—Remedy.*

A suit for recovery of possession of immoveable property with mesne profits, *pendente lite* and, thereafter up to the date of delivery exceeded his pecuniary jurisdiction was decreed by Munsiff. *Held*, that as regards mesne profits from the institution of suit to the date of the delivery of possession, the Munsiff had no jurisdiction. 15 C.W.N. 506, Foll; 21 Cal. 550, Not foll. (*Holmwood and Imam*, JJ.) HIRAMATI DASSYA *v.* ANANDA PRASAD GHOSH. **32 I.C. 788.**

——**O. 20, R. 12**—*Scope of—Co-defendants.*

O. 20, R. 12, does not contemplate the determination of anything but the relation between the plaintiff and the defendant. There is nothing in this rule to suggest that it applies between co-defendants. (*Fletcher and Roe*, JJ.) SURENDRA NARAIN MITRA *v.* DEJINDRA PROSAD MITRA. **29 I.C. 464 = 23 C.L.J. 215.**

——**O. 20, R. 12**—*Mesne profits—Decree for, when becomes operative.*

A decree for mesne profits does not become operative till the amount has been ascertained by the court and the court-fee paid thereon under S. 11 of the Court Fees Act. (*Mookerjee and Beachcroft*, JJ.) JITENDRANATH ROY *v.* RASIK LAL SEN. **27 I.C. 300.**

C. P. CODE (V of 1908), O. 20, R. 12.

——O. 20, R. 12—*Mesne profits—Jurisdiction of Courts.*

Where a decree is passed in a suit for the recovery of possession of landed property with the direction, that the claim for mesne profits will be determined by the executing Court, the claim if exceeding Rs. 1,000 and below Rs. 5,000 can be determined by a Munsif. (*Brett and Sharfuddin, JJ.*) PANCHORAM THEKADAR *v.* KINU HALDAR.

13 I.C. 252=40 Cal. 56.

——O. 20, R. 12—*Determination of principle for ascertaining mesne profits—Appeal.*

Where a Court by an order determines the principle for ascertaining mesne profits, such an order is one made in a pending suit and is therefore not appealable. 19 Cal. 132; 5 I.C. 272, Rel. on. (*Mookerjee and Carnduff, JJ.*) DALGLIESH *v.* NANDAN MISSER. **13 I.C. 186.**

——O. 20, R. 12—*Suit for possession by heir—Enquiry into mesne profits from date of suit should be directed.*

Where a person claiming as heir to an estate obtains a decree for possession against an alienee from the widow of the last male owner, the preliminary decree should direct an enquiry into mesne profits from the date of suit till delivery of possession. (*Wilberforce and Martineau, JJ.*) MUSSAMMAT NISIB UN-NISA *v.* MT. AHMADI-UN-NISA.

66 I.C. 494=2 Lah. 383.

——O. 20, R. 12—*Decree for possession—Duty of appellate Court is to pass preliminary decree itself.*

In cases falling within O. 20, R. 12 of the C. P. Code the proper course for the appellate Court to take, is not to remand the suit where it finds that a person is entitled to possession but to pass a preliminary decree so far as possession is concerned and direct an enquiry as to the mesne profits in cases where the lower Court has not dealt with the question. Where an appellate court can pass a preliminary decree it is its duty to do so and a remand as to matters which can be the subject-matter of the preliminary decree is not warranted. (*Kumaraswami Sastri and Devadoss, JJ.*) SUBBE GOUNDAN *v.* KRISHNAMACHARI.

45 Mad. 449=42 M.L.J. 372=30 M.L.T. (H.C.) 217=15 L.W. 537=(1922) M.W.N. 269=68 I.C. 869=1922 Mad. 112.

——O. 20, R. 12—*Partition—Mesne profits—Decree for.*

In a partition suit the award of profits prior to plaint should be made in the decree which gives possession that is the final decree, and the profits after it, may be the subject of a direction in that decree for an enquiry and of a separate final decree after its conclusion. Where an enquiry is ordered for later profits without notice to the opposite party specifically the High Court can interfere under S. 115. (*Oldfield, J.*) VENKAMAMIDI MAHALAKSHMAMMA *v.* VENKAMAMIDI RAJAMMA.

43 I.C. 488.

C. P. CODE (V of 1908), O. 20, R. 12.

——O. 20, R. 12—*Possession and mesne profits—Execution of decree.*

When a decree is passed both for possession and mesne profits decree for possession only must be executed first. (*Oldfield and Sadasiva, Iyer, JJ.*) VEERARAGHAVA ROW *v.* MALLAPRAGADA GURUMADHA ROW. **2 L.W. 688=30 I.C. 246=(1915) M.W.N. 793.**

——O. 20, R. 12—*Old Code and new—Difference between—Future profits—Not given in decree—Suit subsequent, whether lies.*

Under S. 211 of the old C.P. Code, the granting of future mesne profits was discretionary with the Court, and no cause of action would accrue in respect of them; but under the new Code, O. 20, rule 12, the Court has equal powers to grant future mesne profits as it has for giving decree for possession and past mesne profits. The subsequent suit for future mesne profits not granted in a decree in a previous suit for possession and future mesne profits does not lie, the point being *res judicata*. (*Ayling and Hannay, JJ.*) RAMASWAMI IYER *v.* SRIRAMAGARANA IYENGAR.

26 I.C. 622=2 L.W.

[Overruled by 42 I.C. 929=41 Mad. 188 F.B.]

——O. 20, R. 12—*Mesne profits—Period not prescribed—Construction.*

In the absence of a period for the calculation of mesne profits in a decree awarding mesne profits, the decree should be construed as awarding mesne profits for three years. (*Bakewell and Spencer, JJ.*) VENKATA KUMARA MAHIPATI SURYA RAO *v.* SUBBAYAMMA RAO. **24 I.C. 484=1 L.W. 443.**

——O. 20, R. 12—*Mesne profits exceeding pecuniary jurisdiction—Court can grant decree for.*

The proper Court in which one has to institute proceedings for the ascertainment of mesne profits is the Court passing the decree even though the claim exceeds its ordinary pecuniary jurisdiction. (*Das and Ross, JJ.*) SURAJ PRASAD PANDAY *v.* SOMRA MAHTON.

68 I.C. 903=2 Pat. L.T. 648

——O. 20, R. 12—*Application for Assessment of mesne profits—Dismissal for default, operates as res-judicata.*

Where in a suit for partition and possession together with a claim for mesne profits, the claim for partition and possession is effectively disposed of, and an application for the determination of mesne profits is dismissed for default, no fresh application for the assessment of the mesne profits can be entertained. (*Atkinson and Das, JJ.*) KAPILMAN MISSER v. KOKILMAN MISSER. **62 I C. 747=1921 Pat. 25.**

——O. 20, R. 12—*Mesne profits—Amount exceeding jurisdiction—Court has power to pass decree for.*

Under R. 12, a Court which can pass a decree for possession can also make inquiry into

C. P. CODE (V of 1908), O. 20, R. 12.

the mesne profits *pendente lite* and pass a decree therefor though the sum actually found due exceeds the pecuniary jurisdiction of the Court. (*Das and Adami*, JJ.) DINANATH SAHAI *v.* MAYAWATI KOER.

6 Pat. L.J. 54=60 I.C. 346=2 P.L.T. 148=1921 Pat. 69.

——**O. 20, R. 12**—*Mesne profits—Court-fee.*

On an application for mesne profits the Court-fee payable is an *ad valorem* fee. 3 Pat. L.J. 67, Foll. (*Miller*, C.J. *and Imam*, J.) RAM BILAS SINGH *v.* AMIR SINGH.

55 I.C. 24=1 Pat. L.T. 235.

——**O. 20, R. 12**—*Mesne profits—Assessment of—Privy Council decree.*

Where there has been an appeal to the Privy Council, it is the Privy Council decree that has to be executed and mesne profits have to be calculated for three years from the date of that decree. (*Chapman and Jwala Prasad*, JJ.) NANDA KUMAR SINGH *v.* BILASRAM MARWARI. **4 Pat L.W. 100=3 Pat. L.J. 116=43 I.C. 855=1917 Pat. 377.**

——**O. 20, R. 12**——*Future mesne profits—Court-fee.*

Fees are payable on the difference between the amount paid on the mesne profits claimed in the plaint and the amount ascertained to be due subsequent to the filing of the suit. (*Rigg*, J.) DAWOOD *v.* RAHMAN.

10 L.B.R. 276=62 I.C. 176=13 Bur. L.T. 165.

——**O. 20, Rr. 12 to 18**—*Preliminary decree—What amounts to—Objection to jurisdiction—Where to be taken—Suit for possession and specific performance—Distinction.*

A decision on one out of a number of issues, cannot be a preliminary decree unless it decides the matter in controversy as contemplated by Rr. 12 to 18 of O. 20. A vendor suing for specific performance is not suing for land or for the determination of any other rights or interest in immoveable property. (*Twomey and Ormond*, JJ.) A. G. MADARI *v.* R. MISSER.

36 I.C. 431=9 Bur. L.T. 119.

——**O. 20, Rr. 12 to 16 and 18 and O. 34 Rr. 2 and 5**—*Preliminary and final decree—When passed.*

Preliminary decrees are passed when after decision of the suit, the Court has to stay its hand in order to work out the consequences on which the complete disposal of suit depends. These consequences may be, arithmetical as in an account suit, ministerial as in a partition suit, or contingent as in a mortgage suit. (*Pratt*, J.C. *and Crouch*, A.J.C.) UDHARAN *v.* SECRETARY OF STATE.

19 I.C. 922=6 S.L.R. 287.

——**O. 20, R. 12 (1)**—*Mesne profits—Old and New Code compared.*

The word "may" in R. 12 (1) of O. 20 indicates that the C power is discretionary

C. P. CODE (V of 1908), O. 20, R. 12 (1).

though in R. 12 (1) (2) "May" means 'shall.' The rule does not bar a suit for mesne profits from the date of suit to the date of delivery of possession, though a previous decision, in a suit for possession and past and future mesne profits, grants only past profits and is silent as to future profits. (*Wallis*, C.J. *Ayling and Kumaraswami Sastri*, JJ.) DORAISWAMY IYER *v.* SUBRAMANIA IYER.

41 Mad. 188=22 M.L.T. 484=33 M.L.J. 699=(1917) M.W.N. 847=6 L.W. 784=42 I.C. 929 (F. B.).

——**O. 20, R. 12 (1) (b)**—*Mesne profits—Limitation.*

Quœre:—Whether a plea of limitation can be taken in a suit for recovery of mesne profits instituted by a successful appellant against the respondent who has obtained possession after a decree had been passed in his favour. (*Mookerjee and Beachcroft*, JJ.) RAGHU SINGH *v.* SHEW PRASAD RAI.

16 C.L.J. 135=17 I.C. 121.

——**O. 20, R. 12 (1) (c)**—*Nature of application under—Limitation Act, Art.* 181—*Applicability.*

An application for mesne profits to be ascertained under the inquiry under order 20, rule 12 (1) (c) is not an application made under the Code of Civil Procedure nor an application in execution. It is an application to the Court to proceed from the stage or preliminary decree to a final decree and Art. 181 of the Limitation Act does not apply. (*Pratt and Marten*, JJ.) THANA ZALAJI SHET MARWADI *v.* DHANA JAWHRJI. **77 I.C. 497=1923 Bom. 268.**

——**O. 20, R. 12 (1) (c)**—Mesne profits—*Liability for period between date of judgment debtor's relinquishment of possession with private notice to decree-holder and date of formal delivery through Court.*

Where after the passing of a decree for mesne profits against them, the judgment-debtor relinquished possession with private notice to the decree-holder but the decree-holder claimed mesne profits upto the date of formal delivery of possession through Court under O. 20, R. 12 (1). *Held*, that as the decree-holder did not refuse the notice unless it is given through Court he cannot claim mesne profits in respect of the period subsequent to the relinquishment. Mesne profits include profits which the judgment-debtor "might with ordinary diligence have received" but mesne profits are in the nature of damages which the Court may mould according to the justice of the cause. (*Richardson and Huda*, JJ.) SHAMBHU NATH KHETTRI *v.* SATISH CHANDRA. **66 I.C. 49=25 C.W.N. 369.**

——**O. 20, R. 12 (1) (c) and (2)**—*Possession, Delivery of—What is.*

The plaintiff is entitled under the decree to mesne profits till the delivery of possession. The putting of the petition referred to above cannot be taken to be tantamont to delivery of

C. P. CODE (V of 1908), O. 20, R. 12 (2).

possession to the plaintiff. (*Ayling and Sundara Iyer*, JJ.) MALLADI *v.* BRUNDAVANAM.
12 I.C. 272=(1911) 2 M.W.N. 258.

——O. 20, R. 12 (2)—*Question of boundaries—Determination in execution.*

It is no error to leave the ascertainment of boundaries to be decided in execution proceedings. (*Chatterjea and Beachcroft*, JJ.) BHARAT CHANDRA DAS *v.* RAMANANDA DEB.
32 I.C. 862.

——O. 20, R. 12 (2)—*Mesne profits—Application for inquiry into.*

The inquiry as to mesne profits is a part of the proceedings in the suit consequent on the preliminary decree and is terminated by a final decree after the mesne profits are ascertained. The Court which passes the decree for mesne profits has jurisdiction to enquire into the amount of mesne profits although the amount claimed in the application for inquiry or that found by the inquiry may exceed the pecuniary limits of the jurisdiction of the trying Court which had jurisdiction to try the suit as originally laid. (*Chapman and Jwala Prasad*, JJ.) MAHOMED ABDUL GHAFOOR *v.* MAHTAH. 41 I.C. 31=2 Pat. L.J. 394.

——O. 20, R. 13—*Administration—Secured by unsecured creditors—Crown debts—Priority.*

In the administration of an estate under a decree of Court, the same rules have to be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities proveable, as are in force in respect to estates of insolvents. When the administration is under a decree of the High Court under S. 49 of the Pres. Towns. Insol. Act, all debts due to the Crown shall be paid in priority to all other debts. (*Chaudhuri*, J) THE BANK OF UPPER INDIA *v.* THE ADMINISTRATOR-GENERAL OF BENGAL.
45 Cal. 653=47 I.C. 529=22 C.W.N. 793.

——O. 20, R. 13—*Administrator-General appointed to administer insolvent's estate—Applicability.*

O. 20, R. 13 does not apply where the Administrator-General has obtained letters of Administration of the estate of a deceased insolvent. (*White*, C.J. *and Oldfield*, J.) NAVAJEE *v.* ADMINISTRATOR-GENERAL OF MADRAS.
22 I.C. 566=38 Mad 500.

——O. 20, R. 13—*Administration suit—Mahomedan Estate—Dues by heir to the Estate—Limitation, effect of—Burden of proof.*

In a suit for the administration of a Mahomedan Estate, the Court is entitled to retain in its hands the amount of any debt ascertained or subject to account though time-barred, due to the estate from any heir and the person who seeks administration, must prove such a debt. (*Hartnol*, O. C. J. *and Ormond*, J.) MOMEIN BEE BEE *v.* ARIF IBRAHIM.
5 Bur. L. T. 5=14 I.C. 508=
6 L.B.R 34.

C. P. CODE (V of 1908), O. 20, R. 14.

——O. 20, R. 14—*Pre-emption—Decree—Mesne profits—Right to—Accrual of—Mahomedan law.*

The rights of a pre-emptor are different from those of an ordinary purchaser. If a suit is brought for pre-emption, the rights of the parties are regulated by S. 214 (O. 20, R. 14), which in this respect embodies the Mahomedan law. Under a pre-emption decree the right to possession of the property and the consequential right to mesne profits accrue to the pre-emptor only from the date when he pays the amount of purchase price finally declared by the Court. (*Lord Buckmaster.*) DEONANDAN PRASAD *v.* RAMDAS.
44 Cal. 875=32 M.L.J. 459=
1 Pat. L.W. 527=15 A.L.J. 375=
21 C.W.N. 786=25 C.L.J 573=
19 Bom L.R. 487=6 L.W. 65=
(1917) M.W.N. 470 and 811=22 M.L.T. 196=
39 I.C. 958=44 I.A. 80 (P.C.).

——O. 20, R. 14—*Court can extend time for payment.*

A Court has discretion to extend the time for payment of pre-emption money in Court. Where the date fixed for payment happened to come in vacation, the money was allowed to be deposited on the day the Court opened. 13 A. 189 and 10 A. L. J. 421, Ref. (*Rafiqus and Lindsay*, JJ.) GIRDHARI SINGH *v.* BHUPAL SINGH. 45 A. 456=74 I.C. 745=1923 All. 516.

——O. 20, R. 14—*Vendee not entitled to possession—Rule does not apply.*

Where the vendee is not entitled to prevent possession the provisions of O. 20, R. 14, C. P. Code are not applicable. (*Lindsay and Daniels*, JJ.) RAGHUBIR SINGH *v.* JODHA SINGH. 45 A. 482=73 I.C. 646.
21 A.L.J. 417=L.R. 4 A. 223=1923 All. 507.

——O. 20, R. 14—*Pre-emption — Satisfaction of decree—Limitation.*

If the decree-holder in a pre-emption suit fails to deposit the decretal amount on the last day fixed, it being Sunday, he does not comply with the decree as the payment on the next Monday is beyond time. Then automatically under O. 21, R. 14 (c) his suit for pre-emption stands dismissed. 41 All. 47, followed. (*Ryves*, J.) FATEH MAHOMED CHAUDHURI *v.* M. SITA CHAUDHRAIN. 1922 All. 278.

——O. 20, R. 14—*Pre-emption—Decree conditional.*

Where plff. obtained decree for pre-emption conditional on payment into Court of the pre-emption money within a certain period, *held*, it was sufficient compliance with the terms of the decree, if the amount was raised by a simple mortgage of the decreed property itself and paid into Court. (*Richards*, C. J *and Banerjee*, J.) LAKHPAT SINGH *v.* BABU RAM.
40 I.C. 35.

——O. 20, R. 14—*Failure to deposit money by mistake.*

When the decree-holder in a pre-emption

C. P. CODE (V of 1908), O. 20, R. 14.

suit fails by mistake to deposit the full price in Court the judgment-debtor is entitled to apply for possession of the property by restitution if he is already dispossessed and the contention that the mistake was made by an official of the court is unsound where it cannot be said with certainty which of the officials of the Court had made the calculation and whether it was made under the authority of the Court. (*Abdul Raoof*, J.) MEHR DIN *v.* BRIJ LAL. 1923 Lah. 250.

——O. 20, R. 14—*Pre-emption—Appeal—Failure of pre-emptor to pay extra sum directed by Appellate Court.*

In an appeal by the vendee, the pre-emptor came to know that he had been directed by the Appellate Court to pay into Court an extra sum within the time fixed by the Original Court. The pre-emptor had twelve days to comply with the order within which the amount could be paid into Court, but he failed. *Held*, that the decree became final and that his suit must be dismissed. (*Rattigan*, *C. J.*) TARA BAZ *v.* HAMID AND CO.
48 I.C. 470=92 P.L.R. 1918.

——O. 20, R. 14—*Compromise decree in a pre-emption suit.*

A compromise decree having been given in a pre-emption suit requiring the plaintiff to hand over to the deft. certain land within a certain period, *held*, that the decree could not, in the first place be a decree in a pre-emption suit under R. 14, O. 20, C.P.C., and that the plff.'s action in ceasing to cultivate the land before the expiration of the prescribed period with a view to giving possession to the deft. is a sufficient compliance with the decree, even if it was a decree in a pre-emption suit. (*Johnstone*, C.J. *and Shah Din*, J.) JAM HAMID ALI *v.* KAIM DIN. 37 I.C. 806=26 P.W.R. 1917.

——O. 20, R. 14—*Pre-emption decree—Failure to deposit whole amount by mistake.*

A pre-emptor who has not deposited the full amount by mistake within time, will not be allowed to make up the deficiency, and the vendee may compel the pre-emptor to give up possession of the property if it had been taken possession of, by the latter in execution of his decree. S. 151, C.P.C. is not applicable to such a case. (*Chevis*, J.) KANHAIYA LAL *v.* MOHAMAD SHAFI KHAN. 3 P.W.R. 1913=18 I.C. 600=141 P.L.R. 1918.

——O. 20, R. 14—*Decree silent as to standing crops—Plaintiff entitled to them on paying money into Court.*

Where a decree was passed for possession but there was no mention as to crops in the decree. *Held* that the defendant could have removed the crops before the pre-emption money was paid into Court. After it was paid he had no right to them. As soon as the plaintiff paid the pre-emption money he became the owner of the land with its legal incident, the crops attached to it. (*Kotval*, A.J.C.) BAPU *v.* VITHOBA. 76 I.C. 193=1923 Nag. 327.

C. P. CODE (V of 1908), O. 20, R. 14.

——O. 20, R. 14—*Pre-emption decree—Costs not directed to be deposited—Effect.*

Where the decree directs pre-emption on depositing a certain amount in court and though costs are awarded, the same is made in a separate order, costs need not be deposited along with the pre-emption amount. (*Kanhaiya Lal*, J.C.) NILKANTH *v* MAHABIR SINGH.
26 O.C. 345=74 I.C. 558=9 O. & A.L.R. 207=1924 Oudh 104.

——O. 20, R. 14—*Decree—Conditional decree—Pre-emption.*

A decree with a condition attached on the fulfilment of which the decree-holder is to enjoy the fruits of the decree is a complete disposal of the suit. The Court having passed such a decree, has no further judicial function to perform in respect of the suit. A decree in a pre-emption suit, with a condition that unless the purchase-money is paid within time fixed therefor the suit shall stand dismissed, is a complete decree and a subsequent order dismissing the suit is not a decree against which an appeal can be preferred. (*Wazir Hasan*, A.J.C.) JANGA SINGH *v.* LACHMI NARAIN.
7 O.L.J. 378=23 O.C. 234=37 I.C. 488=2 U.P.L.R. (J.C.) 171.

——O. 20, R. 14—*Pre emption—Payment of money—Order by Court—Appeal.*

Where an application for payment of pre-emption money was made on the last day and the Court permitted the money to be accepted, but the money could not be deposited until after the expiry of the period fixed owing to the laxity of Court. *Held*, that the deposit of money was good, as the party could not be prejudiced by an error of the Court. (*Stuart*, A.J.C.) GAYA BAKSH SINGH *v.* TILAK SINGH. 28 I.C. 379=2 O.L.J. 151.

——O. 20, R. 14 (1)—*Tender of money on the last day—Money not deposited through mistake of officer of Court—Next day holiday, payment on the next re-opening day, if sufficient.*

In a pre-emption decree, on the last day for payment, the pre-emptor came to the Court and applied for permission to make payment in compliance with the decree passed in his favour. The money though tendered was not deposited on that day but on the next re-opening day as there were two holidays intervening, through a mistake of the Court or its officers. The vendee objected that the payment was not made by the pre-emptor within time and such a payment was not sufficient compliance with the decree, hence it could not be executed. *Held*, that the tender within the specified time should be deemed as a due compliance with the terms of the decree and the pre-emptor is entitled to execute it. 8 A, 850, Ref.; 31 P.R. 1880, Foll. (*Shadi Lal*, J.) PRABHU *v.* NIHALA. 123 P.W.R. 1916=36 I.C. 183=72 P.L.R. 1917.

——O. 20, R. 15 and O. 26, R. 12—*Partnership—Accounts—Production and discovery of*

C. P. CODE (V of 1908), O. 20, R. 15.

For the purpose of working out a partnership decree each party to the action is bound to produce and discover all documents in his possession relating to the partnership. Accounts taken by a Commissioner appointed for that purpose, without production or discovery of partnership books and documents are not properly taken. (*Lord Parker.*) DWARKANATH SIRKAR *v.* MAHOMED AKBAR.

18 C.W.N. 1025=27 M.L.J. 192=1 L.W. 697=(1914) M.W.N. 876=16 M.L.T. 521=21 C.L.J. 1=24 I.C. 307=17 Bom. L.R. 3 (P.C.).

[On appeal from 14 C.W.N. 1106=6 I.C. 63=11 C.L.J. 658.]

———**O. 20, R. 15**—*Partnership--Dissolution—Death of partner leaving minor representative.*

A suit by a surviving partner against the representative of a deceased partner for partnership accounts is maintainable even though the representative happens to be a minor ; the procedure laid down in O. 20, R. 15, C.P.C. is to be followed. (*Richards*, C.J. *and Banerji*, J.) SHANKAR LAL *v.* RAM BABU.

40 All. 446=45 I.C. 31=16 A.L.J. 305.

———**O. 20, R. 15**—*Dissolution of partnership and account—Preliminary and final decree—Accounts.*

In a suit for dissolution of a partnership and for accounts, sufficient time should be given to the parties to produce accounts. A final decree should be passed on evidence by the Court. It will not do to pass an *ex parte* final decree on the mere statements of the plaintiff. (*Rattigan*, C.J. *and Shah Din*, J.) RADHA KISSEN *v.* TIRATHRAM. **41 P.L.R. 1918=43 I.C. 718=31 P.W.R. 1918.**

———**O. 20, R. 15**—*Dissolution of partnership—Date of.*

In fixing a date from which the partnership should stand dissolved, the court must on the decree, fix either the date of notice given in that behalf by one of the partners of the date of the plaint and not the date of the judgment especially when the parties had been at arms' length from the date of institution of the suit. (*Ayling and Seshagiri Ayyar*, JJ.) SAMBASIVA AIYAR *v.* GANAPATHI AIYAR. **45 I.C. 727.**

———**O. 20, R. 15**—*Preliminary decree—Scope of.*

A Court has discretion either to pass or not a preliminary decree, but a preliminary decree ought not to be passed for determining points agreed upon already by the parties. (*Stuart*, A.J.C. *and Kanhaiya Lal*, J.) MST. MERHA *v.* KUNDAN LAL. **25 I.C. 156=17 O.C. 193.**

———**O. 20, R. 16**—*Suit for money—Accounts—Preliminary decree.*

In a suit in which the amount of money due to or from the parties must be ascertained, a preliminary decree ought to be passed at the first instance. (*Richards*, C.J. *and Rafique*, J.) FATEH LAL *v.* CHARLES EDWARD GREY. **36 I.C. 210.**

C. P. CODE (V of 1908), O. 20, R. 16.

———**O. 20, R. 16**—*Suit for accounts—Preliminary decree.*

It is not necessary to pass a preliminary decree directing accounts to be taken, in every suit for accounts. It is only where it is necessary in order to ascertain the amount of money due to or from any parties, that an account should be taken, that the Court shall before passing the final decree, pass a preliminary decree directing such account to be taken as it thinks fit. (*Chamier and Piggott*, JJ.) HAR NARAIN *v.* BALWANT SINGH. **28 I.C. 462.**

———**O. 20, R. 16**—*Decree for accounts—Contractual liability.*

In a suit for dissolution of partnership and appointment of a Receiver and payment to the plaintiff of his share of the profits it was found that plaintiff had financed the business which the defendant carried on as a contractor and defendant also undertook "to keep full and true accounts of the income and expense of the business." *Held*, the plaintiff had established his rights to a rendition of the accounts which will be directed only where the relationship between the parties is such that it is the only relief which would enable the claimant to satisfactorily assert his legal right. (*Shadi Lal and Wilberforce*, JJ.) F. A. GREGORY *v.* ALBERT. **49 I.C. 441=21 P.W.R. 1919.**

———**O. 20, R. 16**—*Suit on accounts between principal and agent is within the operation of the rule.*

The rule also applies to suit on an account between a principal and the agent. The rule is wide enough to include cases where the Court instead of settling the account considers it necessary to stay its hand to ascertain the money due to or from any party by having an account taken before a Commissioner. (*Fawcett* J.C. *and Raymond*, A.J.C.) HARJIMAL AND SONS *v.* DHANPATMAL DEWACHAND.

62 I.C. 537=15 S.L.R. 16.

———**O. 20, R. 18**—*Partition suit—Final decree in first instance.*

There is no reason why in a partition suit, where the claim is for a certain share in a joint property a final decree should not be passed in the first instance if the share can be ascertained without difficulty in execution. A decree for possession by partition of a definite share is executable. (*Rattigan*, J.) SULTAN SINGH *v.* BAHADUR SINGH.

17 I.C. 330=246 P.L.R. 1912.

———**O. 20, R. 18**—*Suit for partition—Difference between old Code and new—Interlocutory order—Order ascertaining sharers and their rights—Appeal.*

Under the C. P. Code of 1882 there was but one decree in a suit for partition, the decree passed after the report of the commissioners

C. P. CODE (V of 1908), O. 20, R. 18.

making the actual division. The order ascertaining the several parties interested in the property to be divided and their several rights therein, though treated as a decree in practice and styled as such, was not a preliminary decree but was only an interlocutory order. On an interlocutory application made by plaintiff in a suit for partition under the Code of 1882, for appointment of a commissioner and for the taking of other necessary steps in the suit in pursuance of the order ascertaining the several parties interested in the suit property and their several rights therein, the court passed an order negativing the plaintiff's right to profits in his share of the properties on the ground that the preliminary decree did not award to him such profits though he had prayed for them in the plaint. *Held* that the order was not appealable, being an interlocutory order and that the plaintiff was not therefore precluded in his appeal from the final and only decree in the suit from contesting its validity. (*Oldfield and Venkatasubba Rao*, JJ.) T. RAMASWAMI AIYAR *v.* T. SUBBAMANIA AIYAR.
43 M.L.J. 406=16 L.W. 297=46 M. 47=74 I.C. 805=1923 Mad. 147.

———**O. 20, R. 18**—*Partition—Preliminary decree—Omission to direct enquiry into mesne profits—Final decree, if can award.*

Where a preliminary decree in a partition suit has either intentionally or inadvertently omitted to direct an enquiry in to *mesne profits*, the final decree cannot award mesne profits or direct an enquiry regarding the same 43 I.C. 458, Diss; 41 Mad 188, Ref. The "further directions" in O. 20, R. 18 do not authorise an order or inquiry into mesne profits after the preliminary decree. (*Ayling and Krishnan*, JJ.) GULUSAM BIBI *v.* AHMADSA ROWTHER.
42 Mad. 296=(1919) M.W.N. 284=51 I.C. 140=9 L.W. 541.

———**O. 20, R. 18**—*Preliminary decree for partition—Severance of status.*

A preliminary decree for partition affects the severance of the members of a joint Hindu family and if a plaintiff in partition suit dies issueless, after the passing of such decree, his proper legal representative is his widow. (*Hannay*, J.) MAMMA REDDI SATIRAJU *v.* MAMMA REDDI AMMAYI.
28 I.C. 543=2 L.W. 325.

———**O. 20, R. 18**—*Partition—Moveables—Preliminary decree.*

Before a Court passes a preliminary decree for partition of moveables it must determine whether they exist, if so in whose possession, what their value is, and whether the jewels on the persons of the ladies of the family should be divided. (*Kanhaiya Lal*, A.J.C.) RAM SAMUGH SINGH *v.* BIKRAMAJIT SINGH.
50 I.C. 876=6 O.L.J. 142.

———**O. 20, R. 18 (2)**—*Properties not assessed to land revenue—Applicability.*

O. 20, R. 18 (2) applies only to the properties other than those assessed to the payment of land revenue to the Government. In cases of partition of properties assessed to land revenue, the Court cannot pass a final decree but only a decree declaring the shares of the parties and directing the Revenue Courts to give effect to its decree and no further. (*Lindsay*, J.C.) SOM NATH *v.* RAM BILAS.
24 I.C. 113=1 O.L.J. 193.

C. P. CODE (V of 1908), O. 21, R. 1.

———**O. 20, R. 19**—*Set-off.*

O. 20, R. 19 prescribes the *form* of decree in a suit in which a set-off is allowed. Only one decree should be drawn up in a suit in which a set-off is claimed and that decree could only be drawn up when all the matters in controversy between the parties had been decided. (*Shadi Lal and Broadway*, JJ.) FIRM OF SHEO PRASAD RADHA KISHEN *v.* INDORE MALWA UNITED MILLS.
65 P.W.R. 1917=39 I.C. 508=62 P.R. 1917.

———**O. 21**—*No applicability to—Sale under adminstrative order.*

A sale of property under administrative orders is not governed by O. 21, C.P. Code. (*Martineau*, J.) FIRM OF KAHNA MAL BANARSI DASS *v.* BISHAN DAS.
69 I.C. 718=40 P.L.R. 1922.

———**O. 21, R. 1**—*Payment of money into court—Order for payment—No notice to decree-holder.*

Where money paid into Court by a judgment-debtor is ordered to be paid out to persons other than the decree-holder and the latter applies for payment of the money to him on the ground that he had no notice of the application for payment on which the court passed the order, it is not competent to the court to direct the decree-holder to file a suit for the amount and the persons who drew the money out of court to furnish security. It should have treated the application of the decree-holder as one to set aside the *ex parte* order authorising payment to be set aside. (*Walsh and Sturat*, JJ.) BITHAL DAS *v.* JIWAN RAM.
20 A.L.J. 353=L.R. 3 A. 331=4 U.P.L.R. (A) 89=66 I.C. 744=1922 All. 190.

———**O. 21, R. 1 and O. 24, R. 3**—*Deposit in Court—Cessation of interest.*

When the decretal amount is paid into Court under O. 21, R. 1, the interest ceases when the decree-holder receives notice thereof. 35 Mad. 44, Dist. (*Oldfield and Seshagiri Aiyar*, JJ.) RAMARAYA SHANBOGUE *v.* SHERBETT VENKATARAMAYYA.
42 Mad. 576=(1919) M.W.N. 458=50 I.C. 410=26 M.L.T. 295.

———**O. 21, Rr. 1 and 89**—*Payment into Court by stranger.*

A payment into Court by a person, who is not the debtor or his agent or his pleader duly authorised in that behalf, does not operate as a satisfaction of the decree unless the decree-holder consents to receive the amount deposited. A payment into Court of the whole decretal amount not on behalf of the judgment-debtor

C. P. CODE (V of 1908), O. 21, R. 1.

but on his own behalf by a person who lays claim to the immoveable property sold in execution, does operate as a valid satisfaction of the decree. (*Sadasiva Aiyar and Napier*, JJ.) KASTHURI IYENGAR *v.* ARUNACHALAM CHETTIAR. **34 I.C. 350 = (1916) 1 M.W.N. 195.**

——**O. 21, R. 1**—*Deposit of decree amount—Court bound to order notice to and to inform decree-holder.*

Where the judgment-debtor deposits the decree amount in Court with the permission of the Court it is the duty of the Court to give the notice required by O. 21, R. 1, cl (2) to the decree-holder. If the Judge orders notice it is then necessary for the judgment-debtor to pay the necessary process fee. But even if he did not pay the Court was bound to inform the decree-holder of the payment when he applies for execution of the decree. (*Hallifax*, A.C.J.) NARAYAN *v.* GANPATRAO. **67 I.C. 242.**

——**O. 21, R. 1**—*Money decree—Decree for mesne profits.*

A decree for mesne profits is a decree for money within the meaning of O. 21, C. P. C. (*Mullick and Thornhill*, JJ.) LACHMAN OJHA *v.* CHARITER OJHA. **4 Pat. L.J. 336 = 48 I.C. 183 = 5 Pat. L.W. 191 = 1918 Pat. 257.**

——**O. 21, R. 1 (2)**—*Mortgage decrees—Rule does not apply.*

O. 21, R. 1 (2) is not applicable to mortgage-decrees. (*Spencer and Devadoss*, JJ.) AMBI *v.* VALIA THAMBURATI. **45 M.L.J. 687 = 18 L.W. 686 = 33 M.L.T. 101 (H.C.) = (1923) M.W.N. 753 = 75 I.C. 566 = 1924 Mad. 102.**

——**O. 21, R. 1 (2)**—*Deposit in court—When takes effect.*

Judgment-debtor depositing money in a court, without notice of the assignment of the decree or of petition put in by assignee of execution, the deposits serves as discharge. (*Miller*, C.J. *and Kulwant Sahay*, J.) TATA IRON AND STEEL CO., LTD. *v.* BAIDYANATH LAIK. **76 I.C. 55 = 2 Pat. 754 = 1924 P. 118.**

——**O. 21, R. 2.**

ADJUSTMENT AND UNCERTIFIED ADJUSTMENT.
CERTIFICATION AND OMISSION TO CERTIFY.
CONSENT DECREE.
DECREE FOR POSSESSION.
DISCHARGE BY OPERATION OF LAW.
EFFECT OF CERTIFICATE.
ENQUIRY.
FORM OF CERTIFICATE.
FRAUD.
LIMITATION.
MORTGAGE DECREE.
PARTITION DECREE.
PAYMENT.
REFUND OF MONEY.
RIGHT TO APPLY.
TENDER OF MONEY.
UNCERTIFIED PAYMENT.

C. P. CODE (V of 1908), O. 21, R. 2—Adjustment and Uncertified Adjustment.

Adjustment and Uncertified Adjustment.

——**O. 21, R. 2**—*Uncertified Adjustment—Recognition.*

An adjustment of a decree not certified to Court cannot be recognised by the Court executing the decree. (*Piggott and Walsh*, JJ.) TAJ SINGH *v.* JAGAN LAL. **38 All. 289 = 38 I.C. 234 = 14 A.L.J. 370.**

——**O. 21, Rr. 2 and 16**—*Adjustment—Rights of assignee of decree—Recognition of assignment—Payment by judgment-debtor not certified to Court—Recognition of.*

Whether attachment proceedings are already commenced at the instance of the decree-holder or not, the assignee or transferee of the decree cannot continue any proceedings previously commenced, nor can he institute any fresh proceedings for the execution of the decree unless he makes an application under O. 21, R. 16 to the Court which passed the decree. That application will be heard by the Court not as a Court executing the decree, but as a Court which passed the decree, and until on order is made by the Court which passed the decree that execution may proceed at the instance of the transferee, it is not open to the transferee to execute the decree, nor is there any Court which is executing the decree. The provisons of O. 21, R. 2 (3) would not be applicable as that only enacts that a payment or adjustment, which has not been certified or recorded as aforesaid should not be recognised by any Court executing the decree. When an application is made to the Court which passed the decree by a transferee or assignee of the decree from the original decree-holder under O. 21, R. 16 the application is made to the Court as a Court which passed the decree, and not as a Court which is executing the decree; and it is open to the judgment-debtor to plead that the claim has already been satisfied even though the formalities prescribed by O. 21, R. 2 (1) and (2) have not been followed. 35 M. 659; 40 M. 296, Ref. (*Macleod*, C.J. *and Crump*, J.) RAGHUNATH *v.* GANGARAM. **47 Bom. 643 = 25 Bom. L.R. 474 = 75 I.C. 893 = 1923 Bom. 404.**

——**O. 21, R. 2**—*Adjustment—Agreement to give time to judgment-debtor—Validity.*

The effect of the repeal of S. 257-A of the C.P.C. (1882) is to make an agreement to give time to judgment-debtor, an agreement, the legality of which must be tested like other agreements. It must be supported by consideration, though its validity will not be affected by the fact that the consideration is not reasonable or that it has not received the sanction of the Court. (*Mookerjee and Beachcroft*, JJ.) DEBENDRA NARAIN SINHA *v.* SOURINDRA SINHA. **24 I.C. 391.**

——**O. 21, R. 2 (1) and (3)**—*Adjustment—Part performance—Execution.*

The judgment-debtor performed some of the conditions provided for in a compromise but

C. P. CODE (V of 1908), O. 21, R. 2—Adjustment and Uncertified Adjustment.

as the quantity of the land and the rent payable thereon were not determined by the landlords, he could not perform the third. *Held*, that the decree had not been adjusted finally, and the decree-holder was entitled to proceed with execution. Time was granted to the judgment-debtor to execute the *kabuliyat*. (*Mookerjee and Casperss*, JJ.) JATINDRA NATH ROY *v.* CHANDRA NATH BANERJEE. **16 I.C. 972 = 16 C.L.J. 101.**

———**O. 21, R. 2**—*Uncertified adjustment—If valid—Objection of judgment-debtor if can be treated as an application under O. 21, R. 2.*

No payment or adjustment which has not been certified can be recognised and an uncertified adjustment is no answer to an application for execution of a decree and the objection of the judgment-debtor cannot be treated as an application under O. 21, R. 2. (*Harrington and Chatterjee*, JJ.) BAJRANG BIHARILAL *v.* LACHMI NARAIN. **13 I.C. 944 = 15 C.L.J. 88.**

———**O. 21, R. 2**,—*Uncertified adjustment—Saving of limitation—Effect of.*

The Court will not recognise a payment or adjustment which has not been certified for any purpose as for example to extend the period of limitation for execution. (*Caspersz and Chatterje*, JJ.) KUTUBULLAH SARKAR *v.* DURGA CHARAN RUDRA. **13 I.C. 424 = 16 C.W.N. 396.**

———**O. 21, R. 2**—*Adjustment before decree—Not known to Court—Inconsistent decree.*

Where a prior compromise unknown to the Court, is made and is inconsistent with the decree subsequently passed and where the decree is time-barred a person in whose favour a certain lease was executed as a result of the compromise cannot in law recover the sum of the lease money which he might have got by execution of the decree. (*Chevis*, A.C.J. *and Wilberforce*, J.) HEM RAJ *v.* DO MUHAMMAD. **1 L. 445 = 2 U.P.L.R. (L) 117 = 136 P.L.R. 1920 = 57 I C. 153 = 3 Lab. L.J. 10.**

———**O. 21, R. 2 (3)**—*Adjustment out of Court—Recognition.*

It is not open to an executing Court to investigate the fact of payment in respect of the decretal amount of the adjustment of the decree out of Court in execution proceedings. The determination of this question is taken out of the purview of S. 47, C. P. C. by O. 21, R. 2 (3), C. P. C. 36 Mad. 357 and 24 C.L.J. 462, Rel. on, 34 Bom. 575 and 40 Bom. 333. Diss. from. (*Abdul Raoof*, J.) PARMA RAM *v.* LEHNA SINGH. **53 I.C. 443 = 136 P.R. 1919.**

———**O. 21, R. 2**—*Adjustment—Suit for declaration—Limitation.*

A suit for declaration that a decree has been adjusted and is capable of execution is maintainable, Arts. 97, 115 or 120 being applicable to it. (*Kensington*, J.) MUSAMMAT JAMNA AND SHIBBA MAL *v.* BELI RAM. **190 P.W.R. 1913 = 21 I.C. 587 = 330 P.L.R. 1913.**

———**O. 21, R. 2**—*Adjustment not certified—Effect.*

Even where an adjustment of a decree is not certified the judgment-debtor can prove that he is discharged. (*Spencer and Venkatasubba Rao*, JJ.) KALAGARA SRIRAMA ROW *v.* BAPAYYA. **18 L.W. 453 = 76 I C. 845 = 1924 Mad. 189.**

———**O. 21, R. 2**—*Adjustment—Arrangement pending appeal that original decree should be inexecutable in part—Whether a bar to execution of appellate decree.*

An arrangement made pending an appeal that the original decree (which is the subject of appeal) should be inexecutable in part is one that cannot be pleaded in bar of execution of the appellate decree. 43 M. 725; 40 M. 233, dist. (*Oldfield and Venkatasubba Rao*, JJ.) RAMANATHAN CHETTIAR *v.* VENKATACHELLAM CHETTIAR. **17 L.W. 635 = 44 M.L.J. 599 = (1923) M.W.N. 297 = 32 M.L.T. (H.C.) 401 = 72 I.C. 836 = 1923 Mad. 619.**

———**O. 21, R. 2 (3)**—*Uncertified adjustment—Attaching Court cannot recognise.*

Where satisfaction of a decree is not certified to or recorded by the court passing the decree it is not open to another court attaching the decree at the instance of a third person to recognise the satisfaction and refuse to proceed with the execution. 36 M. 357; 42 M. 338; 10 L.W. 179; 5 L.W. 644, Rel. (*Ramesam*, J.) ARUNACHALAM CHETTIAR *v.* PANCHALI PADAYACHI. **(1922) M.W.N. 189 = 16 L.W. 290 = 65 I.C. 830 = 1922 Mad. 66.**

———**O. 21, Rr. 2 and 16**—*Uncertified adjustments—Transfer of decree—Application by transferee.*

An uncertified adjustment is not a ground for refusing to recognise the transfer of a decree and where the transferee decree-holder applies for execution, the Court has no discretion to refuse execution, on the ground that there had been an adjustment though not certified to the Court. 26 I.C. 944; 36 Mad. 357; 38 Cal. 13, Foll. (*Ayling*, J.) ANANTHARAMA IYER *v.* KUMARASWAMI PANDARAM. **34 I.C. 922 = 10 L W. 179.**

———**O. 21, R. 2**—*Adjustment—Agreement that no decree should be obtained—Enquiry into—Legality of.*

An executing Court cannot enquire into the existence of a prior alleged agreement between the parties that no decree should be obtained in the suit. 40 Mad. 233, Dist. (*Sadasiva Aiyar and Napier*, JJ.) DORAISAMI MOOPAN *v.* SUBBALAKSHMI. **8 L.W. 205 = 46 I.C. 880 = (1918) M.W.N. 547.**

C. P. CODE (V of 1908), O. 21, R. 2—Adjustment and Uncertified Adjustment.

———O. 21, R. 2—*Adjustment—Agreement to give time—Breach—Damages.*

An agreement to give time for the satisfaction of the judgment debt is void, if it is not certified by the Court and not sanctioned by it, for want of proper consideration. A suit for damages for breach of such an agreement is not maintainable. 26 Mad. 19, Foll. (*Abdur Rahim and Napier*, JJ.) SISTU SEETARAMAYYA *v.* TADAPALLI SODEMMA.
7 L.W. 503=(1918) M.W.N. 292=45 I.C. 16=24 M.L.T. 16.

———O. 21, R. 2—*Adjustment — Inchoate contract—Effect of.*

An inchoate contract, which, if completed would bar the execution of a decree, cannot be pleaded as a bar to the execution. The judgment-debtor cannot claim that the contract should be completed and then be evoked in bar of execution. (*Seshagiri Aiyar and Bakewell*, JJ). RAMAKRISHNA KADIRVELUSAMI *v.* EASTERN DEVELOPMENT CORPORATION, LTD. **43 I.C. 587.**

———O. 21, R. 2—*Uncertified adjustment.*

An adjustment of a decree out of Court, cannot be recognised unless certified by Court. 36 Mad. 357, Fol.; 34 Bom. 575, *Diss.* (*Wallis*, C.J.) MATHAR DRAVIA SAHAYA ELA NIDHI CO., LTD. *v.* SUBBRAMANIA PILLAI.
40 I.C. 889=6 L.W. 644.

———O. 21, Rr. 2 and 16—*Adjustment—Assignment of decree—Application by transferee—Plea that he is* benamidar *for one of the judgment-debtors—Bar.*

Where the transferee of a decree was only a *benamidar* for one of the judgment-debtors by whom the decree amount had in fact been paid a plea by the other judgment-debtor that the transferee had no title to execute the decree is not barred by O. 21, R. 2 (3) of the C. P. Code. (*Sadasiva Aiyar and Moore*, JJ.) BAYYANA RAMAYYA *v.* NIDAMRATI KRISHNAMURTHI.
40 Mad. 296=19 M.L.T. 124=(1916) 1 M.W.N. 133=32 I.C. 952=3 L.W. 186,
[Also 35 Mad. 659=12 I.C. 657.]

———O. 21, R. 2—*Uncertified Adjustment—Not to be proved.*

O. 21, R. 2 probibits proof of an uncertified payment and also of an agreement to release the judgment-debtor from liability on payment of a consideration which was not certified within 90 days prescribed by law. (*Oldfield and Tyabji*, JJ.) SALICHEEMALA VENKATASWAMI NAIDU *v.* GUNTURU RANGAPPA NAIDU. **26 I.C. 944=2 L.W. 109.**

———O. 21, R. 2—*Adjustment—Recognition of—Application for an enquiry into a compromise—Counter-affidavit.*

Under O. 21, R. 2 the executing Court has authority to recognise a payment or adjustment. If a judgment-creditor applies for an enquiry into the terms of an alleged compromise, the Court has no power under O. 21, R. 2, to undertake such enquiry. A counter-affidavit of judgment-debtor cannot be treated as an application under O. 21, R. 2. (*White* C.J. *and Oldfield*, J.) GOVIND DOSS *v.* RAMDASS VISHNUDOSS. **(1912) M.W.N. 1245=17 I.C. 752=24 M.L.J. 88.**

———O. 21, R. 2—*Adjustment—Assignment of decree — Assignee* benamidar—*Execution by assignee who is* benamidar *for judgment-debtor.*

Where the assignee of the decree is *benamidar* for the decree-holder, the decree cannot be executed by the assignee, the assignment being adjustment, and in such cases it is not necessary to enquire into the assignee's title. (1918) M.W.N. 226, Ref. (*Abdur Rahim and Sundara Aiyar*, JJ.) PONNUSWAMI NADAR *v.* LECHMAN CHETTIAR.
35 Mad. 659=10 M.L.T. 442=(1911) 2 M.W.N. 568=22 M.L.J. 170=12 I.C. 657=12 Cr. L.J. 567,
[Also 40 Mad. 296=32 I.C. 952.]

———O. 21, R. 2—*Adjustment—Services.*

If the decree-holder and the judgment-debtor agree that a portion of the debt should be discharged for the services rendered by the latter, this amounts to a receipt of the amount. (*Sundara Aiyar and Phillips*, JJ.) LAKSHMINARASIMMA *v.* LAKSHMAMMA.
12 I.C. 169=11 M.L.T. 380.

———O. 21, R. 2—*Adjustment—Agreement superseding decree.*

An agreement to the effect that a decree should no longer be executed and that the rights under the agreement should supersede the decree is an adjustment of the decree. 37 Mad. 462, Foll.; 28 M.L.J. 488, Dist. (*Benson and Sundara Aiyar*, JJ.) KUMARA VENKATA PERUMAL *v.* THATHA RAMASWAMI CHETTY.
35 Mad. 75=(1911) 1 M.W.N. 290=9 M.L.T. 487=9 I.C. 875=21 M.L.J. 709.

———O. 21, R. 2—*Adjustment—Evidence to prove may be oral.*

S. 92 of the Evidence Act does not bar the oral evidence to prove an agreement by way of adjustment of a decree as the R. 2 of O. 21, C.P. Code, contemplates the taking of evidence to prove the adjustment. (*Mitra*, O. J. C. *and Hallifax*, A.J.C.) RANGLAL *v.* CHUNNI LAL. **60 I.C. 316=16 N.L.R. 204.**

———O. 21, R. 2—*Uncertified adjustment—Execution sale—Separate suit to set aside.*

A separate suit does not lie on uncertified adjustment for setting aside an execution sale held under the satisfied decree. Relief likely to interfere with execution of decree cannot be asked for in a suit based on an uncertified adjustment. (*Mitra*, A.J.C.) ASARAM *v.* YESHWANT RAO. **60 I.C. 956=16 N.L.R. 158.**

C. P. CODE (V of 1908), O. 21, R. 2—Adjustment and Uncertified Adjustment.

——O. 21, R. 2 and O. 23, R. 3—*Adjustment—Prior to decree—Bar of execution.*

An agreement not to execute a decree, if effect is sought to be given to such agreement in execution proceedings, must be a transaction between the parties subsequent to the decree and not one which would make the decree itself void as being in its contravention. (6 C.W.N. 796, F.; 22 Bom. 463, Dis. The words "adjustment of a suit" in O. 23, R. 3 of C.P.C. refer not only to the form in which the decree is to be drawn up but also to the manner in which the rights of the parties are to be enforced in the execution proceedings of the suit. (*Mittra*, O.A.J.C.) HUKAM CHAND *v.* RADHA KISAN. **29 I.C. 838=11 N.L.R. 110.**

——O. 21, R. 2 (1)—*Adjustment—Agreement not to execute.*

R. 2 (1) covers an agreement extinguishing the right of execution. (*Stanyon*, A.J.C.) SUKHANANDAN *v.* LAKHMICHAND.
12 I.C. 364=7 N.L.R. 136.

——O. 21, R. 2—*Uncertified adjustment—Power of Court to take cognizance.*

Where an adjustment is not certified by the Court which passed the decree within the time allowed by law under O. 21, R. 2 of the C.P.C. the court has justification to take cognizance of the alleged adjustment. (*Kanhaiya Lal*, J.C. *and Simpson*, A.J.C.) HARIHAR PRASAD *v.* BABU SHANKAR DAYAL.
10 O.L.J. 351=77 I.C. 837=1924 Oudh 208.

——O. 21, R. 2—*Adjustment—Compromise after decree—Terms not embodied in decree but acted on by parties and the Court.*

Where a compromise was entered into at the time of execution; although the compromise was not incorporated in the decree it must be considered and treated as such if the parties and the Court treated it as one. (*Stuart*, A.J.C.) NANKU *v.* JADU NATH. **57 I.C. 591.**

——O. 21, R. 2—*Adjustment—Award of arbitrators.*

An award of arbitration on a reference made during the execution proceedings is binding upon the parties as an adjustment of the claim. (*Chapman and Jwala Prasad*, JJ.) RAJ KUMAR LAL *v.* BULAKI MYAN.
42 I.C. 467=8 Pat. L.W. 146.

——O. 21, R. 2—*Adjustment—Release of some of the judgment-debtors.*

Under O. 21, R. 2 a decree-holder and his judgment-debtor can adjust their respective rights and liabilities in any manner including the discharge of the judgment-debtor and there is nothing in this or any other rule in the C.P.C. to prevent the release by the decree-holder of some of the judgment-debtors from their liability under the decree. 25 M.L.J. 586 and (1915) M.W.N. 225, Dist. (*Chapman and Jwala Prasad*, JJ.) LALJI SINGH *v.* GIRJA PRASAD SINGH. **40 I.C. 1.**

C. P. CODE (V of 1908), O. 21, R. 2—Adjustment and Uncertified Adjustment.

——O. 21, R. 2—*Uncertified adjustment—Question relating to execution — Power to recognise—Fraud.*

The provisions of O. 21, R. 2 (3) are not to be rendered nugatory by the application of the general provisions of S. 47, C.P. Code. O. 21, R. 2, C.P. Code, was enacted to prevent the courts being flooded with false defences to applications for execution setting up a payment or adjustment in part or in whole, which would be made merely to gain time. The decree-holder is bound to certify an adjustment, and the judgment-debtor is also given a right to apply to the court to certify an adjustment. If the adjustment be not certified, it is entirely the fault of the judgment-debtor, and he does not deserve the consideration of the Court if he fails to make the very ordinary precaution of seeing that payment or adjustment made by him is certified to the Court. There is no reason why this should not apply also in the case of an alleged fraud. (*Robinson*, C.J. *and Macgregor*, J.) P.R.P.L. CHETTY FIRM *v.* G. LON. POU.
1 Bur. L.J. 226=68 I.C. 924=11 L.B.R. 363=1923 Rang. 103.

——O. 21, R. 2 (3)—*Adjustment—Private satisfaction.*

The embargo under that rule is limited to a "court executing the decree". There would be no prohibition in case where a court, which was not executing the decree was dealing with the matter. (*Duckworth*, J.) MA MA GYI *v.* MA NYO PO AND ANOTHER. **1 Bur. L.J. 171=1923 Rang. 44 (1).**

——O. 21, R. 2—*Uncertified adjustment—Whether can be recognised by executing Court.*

An executing Court has no power to recognise a payment or adjustment made out of Court and not duly certified; neither can such a Court enquire into such payment where the time allowed to an application under Art. 174, Lim. Act, has expired. (*Shaw*, J.C.) SAYYID MUHAMMAD NUR *v.* KO LAW PAN.
22 I.C. 963=(1913) 1 U B R. 191.

——O. 21, R. 2—*Uncertified adjustment—If can be recognised.*

An uncertified adjustment cannot be recognised by the Court but a written statement of judgment-debtor alleging such an adjustment should be treated as an application under O. 21, R. 2 and disposed of according to law. (*Twomey*, J.) U PO THALING *v.* MAUNG BA U.
11 I.C. 780=4 Bur. L.T. 162.

——O. 21, R. 2—*Adjustment—Subsequent execution—Effect.*

After the decree had been satisfied and satisfaction was in fact certified there is no subsisting decree and any subsequent sale in execution thereof is void and liable to be set aside. (*Moore*, J.) MAUNG PO KYIN *v.* ANNAMALAY CHETTY.
9 I.C. 462=4 Bur. L.T. 12.

C. P. CODE (V of 1908), O. 21, R. 2—Adjustment and Uncertified Adjustment.

———O. 21, R. 2 (3)—*Uncertified adjustment—Executing Court not entitled to recognise.*

Under R. 2 (3) of O. 21 of the C.P. Code a Court cannot recognise the payment and adjustment of a decree out of Court unless such payment is certified by it. The question of payment is, however, a question which the Court executing the decree must, under S. 47 of the Code, inquire into and decide. (*Pratt*, J.C. *and Fawcett*, A.J.C.) ALLAHRAKHIO ABDULLA *v.* LADKIK SACHOO.

51 I.C. 567 = 13 S.L.R. 71.

Certification and omission to certify.

———O. 21, R. 2—*Certification — Joint decree-holders—Certified by manager of Hindu family.*

A managing member of a joint Hindu family can have satisfaction of a decree certified so as to bind the other members of the joint family. 31 All. 156, Dist.; 34 All. 549, Cons. (*Ryves and Lyle*, JJ.) ACHHAIBAR SINGH *v.* RAM SARUP SAKU. **35 All. 380 = 19 I.C. 645 = 11 A.L.J. 463.**

———O. 21, R. 2—*Omission to certify.*

The provisions of O. 21, R. 2 of the C.P.C., 1908, are not confined to money decrees. "Any" decree is provided for. A decree may provided for the payment of money or for any kind of relief other than the payment of money. But if either money is paid or the decree is otherwise adjusted, then the payment or adjustment must be certified. The principle of the rule is that the Court executing the decree shall not be troubled with any disputes between parties with regard to any payment or adjustment unless the same has been duly recorded and certified. If there is a case of fraud, then the party defrauded will have his right of action. (*Macleod*, C.J. *and Shah*, J.) GHARRY *v.* GOWRYA. **46 Bom. 226 = 23 Bom. L.R. 931 = 64 I.C. 490 = 1922 Bom. 380.**

———O. 21, R. 2—*Certification—Mere statement in execution application is not.*

A mere statement in an execution application that payments towards the decree have been made out of Court, cannot be treated as an application for certification. (*Walmsley*, J.) DWARIKA NATH PAUL *v.* BEPIN RISHI, **64 I.C. 32 = 1922 Cal. 200.**

———O. 21, R. 2—*Certification—Part payment.*

A decree-holder may certify part payments towards a money decree in an application for execution. (*Chatterjee and Suhrawardy*, JJ.) MADAN MOHAN BANIKYA *v.* HARU LAL KANDU. **26 C.W.N. 534 = 64 I.C. 72 = 35 C.L.J. 566.**

———O. 21, R. 2, Cl. (3)—*Certification—Recording of payment.*

C. P. CODE (V of 1908), O. 21, R. 2—Certification and omission to certify.

It is sufficient if the payment or adjustment is either certified or recorded. (*Mookerjee and Beachcroft*, JJ.) TARAK NATH SARKAR *v.* NATABAR MANDAL. **30 I.C. 45 = 21 C.L.J. 362.**

———O. 21, R. 2—*Omission to certify payment of decree amount out of Court—Attempt to execute decree—Payment of amount over again.*

A judgment-debtor is entitled to recover amounts paid by him out of Court when as a consequence of non-certifying of such payment he has had to pay the same over again. (*Chitty and Chatterjee*, JJ.) SHYAMA CHARAN *v.* CHAITANYA CHARAN. **11 I.C. 1.**

———O. 21, R. 2—*Omission to certify—Execution—Transfer of decree—Damages.*

A decree-holder not certifying an adjustment and again realising the money in execution of decree is liable in a suit in damages for repayment of the amount realised. The cause of action is either the breach of a promise or the breach of a statutory duty to certify. If however the decree-holder transfers the decree after such adjustment and the assignee executes the decree he is not liable to repay the decretal amount realised in execution of decree even though he has knowledge of the adjustment, for there is no privity of contract between the parties. The assignees' knowledge of the adjustment does not prevent his execution if there was no certificate of adjustment. 15 Mad. 302; 30 Mad. 545; 21 Bom. 463; 20 All. 254; 20 Mad. 369; 12 C.L.J. 312, Rel. (*Abdur Rahim, Oldfield and Seshagiri Aiyar*, JJ.) KRISHNA AIYAR *v.* SAVURIMUTHU PILLAI. **36 M.L.J. 376 = 50 I.C. 584 = 9 L.W. 443 = (1919) M.W.N. 248 = 42 Mad. 338.**

———O. 21, R. 2—*Omission to certify—Payment out of Court—Damages—Limitation.*

The judgment-debtor can sue the decree-holder for damages for omission to certify or credit the amount received out of Court for the decree. Such a suit is one for breach on the implied promise to certify payment to the Court and to make it effectual in execution. Such a suit is governed by Art. 115 and not by Art. 120. The filing of the execution petition itself gives a cause of action though no money might have been realised and successive applications constitute fresh breaches. (*Phillips and Krishnan*, JJ.) GOPALASWAMI NAICK *v.* NAMMALWAR NAICK. **(1919) M.W.N. 3 = 48 I.C. 810 = 36 M.L.J. 175.**

———O. 21, R. 2—*Certification — Money payable under decree.*

Money realised by a usufructuary mortgagee in possession of land according to the terms of a decree is not money payable under the decree within rule 2. The payments need not be certified to Court. (*Abdur Rahim and Spencer*, JJ.) GAJJALA YELLA REDDI *v.* MUHAMMAD ALI. **38 I.C. 675 = 39 Mad. 1026.**

———O. 21, R. 2—*Certification—Filing of certificate—Where to be filed—Filing in wrong Court.*

C. P. CODE (V of 1908), O. 21, R. 2—Certification and omission to certify.

Under O. 2, R. 2, C.P.C. a certificate of payment or adjustment should be filed in the Court which has to execute the decree, that is the Court which passed the decree and not the Appellate Court before which an appeal is pending, 13 I.C. 63. Diss. from. The filing of a compromise petition under O. 23, R. 3, C.P.C. cannot be treated as the filing of the certificate of satisfaction under O. 21, R. 2, C.P.C. The filing of a certificate of satisfaction in the wrong Court and obtaining an order "recorded" from that Court cannot be treated as legally valid. (*Spencer and Sadasiva Aiyar*, JJ.) VAKIYIL PUTHAN VEEKITILKELU NAIR *v.* MEENAKSHI. **25 M.L.J. 586=21 I.C. 639=14 M.L.T. 574.**

———**O. 21, R. 2**—*Certification admission by decree-holder—Execution of decree—Power of Court.*

Where a decree is admitted by the decree-holder to be satisfied it ceases to exist as a decree capable of execution. The very foundation of the powers of a Court to execute a decree, namely, the existence of a decree capable of execution having disappeared the court's powers in execution also cease and the confirmation of the sale, which is a proceeding in execution, should not be ordered. 35 Bom. 516; 10 All. 332, Ref. (*Kotval*, A. J. C.) NILKANTH *v.* YESHWANT. **18 N.L.R 134=66 I.C. 331=1922 Nag. 248.**

———**O. 21, R. 2**—*Certification—Application for—Dismissal appeal.*

An order dismissing an application for certifying payments out of court is of the nature of a decree and as such is appealable. (*Jwala Prasad and Bucknill*, JJ.) JADUNANDAN SINGH v. SHEONANDAN PRASAD.
3 P.L.T. 487=(1922) Pat. 200=1 P. 644=68 I.C. 645=1922 P. 276.

———**O. 21, R. 2**—*Omission to certify—Procedure.*

There is no time prescribed for a decree-holder to certify any adjustment out of Court. It is his duty to state in his execution petition under O. 21, R. 11 (*e*) any such adjustment or payment. The judgment-debtor might also under O. 21, R. 2 (2) inform the Court of it. Unless it is brought to the notice of the Court within the prescribed time it cannot be recognised by the Executing Court and the decree-holder can execute the decree as if no payment out of Court has been made. (*Jwala Prasad and Adami*, JJ.) RADHA KANT LAL *v.* PARBATI KUER. **6 P.L.J. 337=63 I.C. 535=2 Pat. L.T. 765.**

———**O. 21, R. 2**—*Omission to certify—Remedy of judgment-debtor.*

Omission on the part of the decree-holder to certify the adjustment of the decree does not amount to fraud so as to gave the judgment-debtor a right to relief by suit or otherwise. O. 21, R. 2 (3) is imperative that a Court executing a decree is absolutely prohibited from

C. P. CODE (V of 1908), O. 21, R. 2—Consent decree.

entertaining directly or indirectly an uncertified adjustment of the decree. (*Atkinson and Adami*, JJ.) IMAMUDDIN KHAN v. BINDUBASINI PRASAD. **5 Pat. L.J. 70=55 I.C. 890=1 Pat. L.T. 149.**

———**O. 21, R. 2**—*Certification—Notice to judgment-debtor — Certificate of payments—Time for.*

It is not necessary for a decree-holder to issue a notice to the judgment-debtor before certifying payment. The decree-holder can certify payment in his execution application and he can certify at any time. (*Mullick and Jwala Prasad*, JJ.) ILAHI BUX *v.* NAWAB LALL. **4 Pat. L.J. 159=50 I.C. 364=1919 Pat. 260.**

———**O. 21, R. 2**—*Certification—Failure to certify satisfaction of decree—Execution and realisation of decree—Remedy of judgment-debtor.*

Under O. 21, R. 2, where a decree has been satisfied the decree-holder shall certify the payment to the court whose duty it is to execute the decree and the court shall record the same accordingly. (*Maung Kin*, J.) MAUNG MYO *v.* MAUNG KHA. **1 Bur. L.J. 207=11 L.B.R. 429=70 I.C. 115=1923 Rang. 88.**

Consent Decree.

———**O. 21, R. 2**—*Consent decree—Payment to third party under terms of—If within mischief of section.*

The words of O. 21, R. 2 are very general and there is nothing in them to limit the payment to the decree-holder only—Where a compromise decree directed the payment of money to a third party and the payment was not certified to court the same cannot be relied upon in execution. (*Ryves and Gokul Prasad*, JJ.) MAHADEO PRASAD *v.* HAMIDAN. **48 A. 304=21 A.L.J. 97=L.R. 4 A. 117=71 I.C. 457=1923 All. 271 (1).**

———**O. 21, R. 2**—*Consent decree—Performance of conditions—Remedy.*

Where a consent decree has been passed, the only remedy of a party who has fulfilled his own part of the contract for non-performance of its terms by the other party is to apply for execution of the decree. It is not open to the party to apply under O. 21, R. 2, C. P. Code stating that he has performed the conditions. (*Mookerjee and Beachcroft*, JJ.) LIGRAJ PATJOSI *v.* MAHADEB RAM.
53 I.C. 882=30 C.L.J. 118.

———**O. 21, R. 2 (2)**—*Consent decree—Record of adjustment—Execution of decree—Judgment-debtor pleading satisfaction application out of time—Order striking of the execution application by consent of decree-holder—Consent by mistake—Effect of.*

On an application by a decree holder-for execution, though the judgment-bebtor filed a petition after expiry of time prescribed in O. 21,

C. P. CODE (V of 1908), O. 21, R. 2—Decree for possession.

R. 2 for pleading complete satisfaction by payment out of Court, the execution application was dismissed on 12-11-1909 by consent of the decree-holder and when the decree-holder again applied for execution on 15-7-1914 after allowing an intervening application to be dismissed, the judgment-debtor objected that the present application was barred by reason of the Court's order of 12-11-1909. The decree-holder contended that his consent for dismissal having been given under mistake and as the defendant's petition was barred the said order was a nullity. *Held*, (1) the order of Court of 12-11-1909 was a record of an adjustment certified to court recognisable under O. 21, R. 2 (2). (2) The mistake of the decree-holber in giving consent did not vitiate the order, his remedy being by way of review. (3) Though the defendant's petition setting forth the adjustment was out of time, the order was not a nullity and the course open to the decree-holder was to have appealed against the order and as this was not done the decree became final. (*Parlett*, J.) MAUNG PO MAYAING *v.* PALANIAPPA. **35 I.C. 369=10 Bur. L.T. 80.**

Decree for Possession.

———O. 21, R. 2—*Decree for possession—Application to complex decrees.*

O. 21, R. 2 applies to complex decrees in which immoveable property is ordered to be delivered. 25 M.L.J. 586, Diss. (*Sadasiva Iyer and Napier*, JJ.) SETHU RAM SAHIR *v.* CHOTTA RAJAH SAHIB. **40 I.C. 820= (1917) M.W.N. 327.**

———O. 21, R. 2 (1)—*Decree for possession—Uncertified payment—Satisfaction of a decree—Scope explained—Distinction between the Old and New Code.*

An uncertified payment of money in satisfaction of a decree for delivery of immoveable property cannot be recognised under O. 21, R. 2, Cl. (1) as it applies to decrees of all kinds under which money is payable and the distinction in the Old Code between decrees for mere payment of money and other decrees having been done away with by the present Code. (*Wallis and Ayling*, JJ.) ABDUL LATIFF SAHIB *v.* BATHULA BIHI AMMAL. **(1914) M.W.N. 346=23 I.C. 530= 15 M.L.T. 338.**

———O. 21, R. 2—*Decree for possession—Satisfaction.*

O. 21, R. 2 does not prohibit an enquiry by the executing Court whether a decree for possession of lands has been satisfied. (*Sadasiva Aiyar and Spencer*, JJ.) KELU NAIR *v.* MEENAKSHI. **25 M.L.J. 586= 21 I.C. 639=14 M.L.T. 374.**

Discharge by Operation of Law.

———O. 21, R. 2—*Discharge by operation of law.*

Where a mortgage decree was obtained against two persons and in execution of another decree against one of them, the property was put up for sale and the mortgage decree-holder applied that half the money due under his decree was a charge on the property and himself purchased the property, his decree was held to have been satisfied to the extent of one half. 20 All. 23; 28 All. 593, Dist. (*Rafique and Piggott*, JJ.) BALWANT SINGH *v.* CHET SINGH. **23 I.C. 848.**

Effect of Certificate.

———O. 21, R. 2—*Effect of certificate—Objection by judgment-debtor that the certificate as to payment was wrong.*

A judgment-debtor challenging the correctness of a certificate for the money realised by the creditor from one of the judgment-debtors, must prove that it was wrong. (*Griffin*, J.) SALTANT JAHAN *v.* JASWANT SINGH, **12 I.C. 580.**

———O. 21, R. 2—*Effect of certificate—Re-opening of*—Bona fides—*Onus—Duty of Court to inquire.*

When a decree held by a judgment-debtor is attached by his decree-holder creditor and the former applies for entering up satisfaction of such decree and such application is opposed by the attaching creditor on the ground that it is collusive and fraudulent, the onus lies on him to prove the fraud and not on the judgment-debtor to prove the *bona fides* of the certificate. If a Court is seized of an application to enter up satisfaction of a decree it must make an enquiry and see whether the decree has been satisfied. The application should not be allowed to be withdrawn. (*Seshagiri Iyer*, J.) PATHAR *v* RANGASWAMI REDDIAR. **51 I.C. 411=35 M.L.J. 252.**

———O. 21, R. 2—*Effect of certificate—Satisfaction of decree—Procedure—Limitation—Notice to judgment-debtor.*

O. 21, R. 2 of the C. P. Code does not contemplate an inquiry being made into the truth of the statements made by the decree-holder where he comes to Court to certify a payment and the judgment-debtor has no *locus standi* to question the right of the decree-holder to certify satisfaction. No particular time is fixed during which the decree-holder in bound to give this information to the Court. When the decree-holder comes and informs the Court that certain payments have been made all that the Court has to do is to make a note of the statements made by the decree-holder and no notice need issue to the judgment-debtor even if the decree-holder asks this to be done. Certificates of satisfaction are not conclusive in any way and the judgment-debtor is entitled to show either that no such payments were in reality made and they do not operate to extend the period of limitation for execution of the decree. (*Lindsay*, J.C.) HAIDAR MIRZA *v.* KAILASH NARAIN DAR. **5 O.L.J. 482= 47 I.C. 177=21 O.C. 161.**

C. P. CODE (V of 1908), O. 21, R. 2—Enquiry.

Enquiry.

———O. 21, R. 2—*Enquiry — Recording satisfaction.*

In recording an adjustment out of Court, the Court must enquire, if there has been in fact an adjustment and secondly if there is anything still due to the decree-holder. (*Piggott and Walsh*, JJ.) MUHAMMAD KAZIM *v.* RUKIA BEGUM. **41 All. 443=50 I.C. 65=17 A.L.J. 677.**

———O. 21, R. 2—*Enquiry—Certification by decree-holder.*

A payment out of Court can be certified by the decree-holder at any time. Where the decree-holder certifies a payment and the judgment-debtor denies such payment, the Court should take evidence on the point and then come to a conclusion one way or the other. (*Macleod*, C.J. *and Hecton*, J.) PANDURANG BALKRISHNA *v.* JAGYA BHAU. **46 Bom. 91=59 I.C. 399=22 Bom. L.R. 1120.**

———O. 21, R. 2 (2), S. 141—*Enquiry—Dismissal of application for certification—C.P.C., O. 9, R. 9 if can be applied.*

O. 9, R. 9 does not apply to an application under O. 21, R. 2 (2) and no appeal lies from an order dismissing an application for revival of a petition under O. 21, R. 2 (2) which was dismissed for default. S. 141 does not make O. 9, R. 9 applicable to O. 21, R. 2 (2). (*Sanderson*, C.J. *and Richardson*, J.) HANSESWARI DASI *v.* RADHIKA PRASAD. **63 I.C. 855**

———O. 21, R. 2—*Enquiry—Admission of payment—Proof of payment—Proof of payment by judgment-debtor not necessary—Certificate—Form of.*

When a decree-holder admits payment of a sum of money towards satisfaction of the decree, the Court is bound to recognise the fact of payment and cannot call upon the judgment-debtor for proof of payment. In the absence of a reasonable explanation, the decree-holder cannot be allowed to retract the admission. There is no particular form prescribed, in which a decree-holder must certify his payment to the Court. (*Wilberforce*, J.) GAMEN SHAH *v.* JHANGI RAM. **54 I.C. 257=55 P.L.R. 1919.**

———O. 21, R. 2 (2)—*Enquiry—Mode of.*

The Court should enquire into the petition for recording an adjustment of a decree, where the parties do not agree in some questions of fact. The phrase "show cause" in para. 2, O. 21, R. 2 means to allege cause and prove it and not only to allege cause. (*Sadasiva Aiyar, and Moore*, JJ.) DAVUD ROWTHER *v.* PARAMASWAMI PILLAI. **35 I.C. 70=31 M.L.J. 207.**

———O. 21, R. 2—*Enquiry—Court's duty to enquire into the correctness.*

C. P. CODE (V of 1908), O. 21, R. 2—Form of Certificate.

The rule should be construed as not to defeat justice. The Court's duty is to enquire into the correctness of the statement of the decree-holder and the exact amount sought to be certified against the judgment-debtor. No particular words are essential for certifying a payment or adjustment to the Court. (*Seshagiri Aiyar and Kumaraswami Sastri*, JJ.) LODD GOVINDA DOSS *v.* RAJAH OF KARVETNAGAR. **30 I.C. 351=29 M.L.J. 219.**

———O. 21, R. 2—*Enquiry—Scope of—Adjustment of decree—Meaning of—Transaction.*

An adjustment of a decree is a transaction which extinguishes the decree as such in whole, or in part and results in a satisfaction of the whole or a portion of the decree in respect of the particular relief or reliefs granted by the decree. A transaction by which the parties agree to vary the mode by which the reliefs granted by the decree are to be realised in execution in that suit, or the time when the decree becomes executable, is not an adjustment of the decree but is a transaction which attempts to vary the terms of the decree, leaving the altered terms to stand in place of the terms of the decree so as to constitute a new executable decree. Enquiries in a suit or in execution proceedings should be confined to matters, the decision with reference to which could be taken advantage of, by parties to the proceedings in the suit or execution itself. (*Sadasiva Aiyar and Napier*, JJ.) LODD GOVINDA DOSS *v.* RAMDASS VISHONDASS. **17 M.L.T. 222=28 I.C. 376=(1915) M.W.N. 225.**

Form of Certificate.

———O. 21, Rr. 2 and 3—*Form of certificate—Payment inserted in execution application—Whether amounts to.*

O. 21, R. 2 of the C.P.C. points to a definite proceeding with a petition, on the part of the decree-holder and a formal act by the Court. The wording of the rule signifies that a decree-holder shall come forward and in some special speech or writing, certify payment; so that a mere insertion of the payment in execution application at an unusual place is not a proper certificate of payment. (*Knox*, J.) GOKUL CHAND *v.* BHIKA. **23 I.C. 753=12 A.L.J. 387.**

———O. 21, R. 2 (1)—*Form of Certificate.*

O. 21, R. 2 (1), C.P. Code, deals with a case where the decree-holder seeks to certify a payment made to him out of Court by the judgment-debtor. The application need not be distinct from an application for execution of decree. (*Mookerjee and Panton*, JJ.) BALEY MAHAMMA SAHI *v.* AIJANMAL. **38 C.L.J. 71=26 C.W.N. 529=68 I.C. 780=1922 Cal. 30.**

———O. 21, R. 2—*Form of certificate—Formal order by Court.*

A decree-holder may apply to certify payment on his application for execution of the decree and when such application is acted upon by

C. P. CODE (V of 1908), O 21, R. 2—Form of Certificate.

the Court, no formal recording of the certification is necessary. (*Woodroffe and Newbould*, JJ.) ESUFF ZUNAN SARKAR *v* SANCHIA LAL NAHATA. **43 Cal. 207 = 20 C.W.N. 272 = 34 I C. 606 = 23 C L J. 390.**

———**O. 21, R. 2 (3)**—*Form of certificate—Limitation.*

There is no definition of what certifying or recording is. The practice is that the decree-holder certifies the part-payments in his application for execution and thereupon, the Court having recorded the whole of the petition, directs execution to issue for the balance. There is no period of limitation fixed within which the decree-holder must certify. (*Fletcher and Richardson*, JJ.) LAKHI NARAIN GANGULI *v.* FELAMANI DASI. **27 I.C. 11 = 20 C.L.J. 131.**

———**O. 21, R. 2**—*Form of certificate—Appeal by judgment-debtor and stay of execution—Withdrawal of appeal and acquiescence by decree-holder if sufficient compliance with the section.*

Where a judgment-debtor made an application to the Court of appeal for stay of execution in the lower Court and also made another application, stating that the case had been adjusted and asking for leave to withdraw the appeal and the decree-holder waived his right to costs. *Held* that the conduct of the judgment-debtor was a sufficient compliance with the requirements of O. 21, R. 2. (*Mookerjee and Carnduff*, JJ.) BIROOGORAIN *v.* JAINURAT KOER. **16 C.W.N. 923 = 13 I.C. 63 = 16 C.L.J. 174.**

———**O. 21, R. 2**—*Form of certificate—Satisfaction—Part admission by decree-holder—Effect of.*

There being no particular form under O. 21, R. 2 in which a decree-holder must certify payment to Court, a mere admission by him of part satisfaction and its record by Court is legally sufficient. (*Wilberforce*, J.) GAMEN SHAH *v.* JHANGI RAM. **54 I.C. 257 = 55 P.L R. 1919.**

———**O. 21, R. 2**—*Form of certificate.*

Mere mention of payment in execution application is certifying within R. 2. Absence of recording satisfaction will not prevent Court from recognising the payment. (*Sadasiva Aiyar and Napier*, JJ.) THIMMA REDDI *v.* SUBBA REDDIAR. **49 I C. 141 = (1918) M.W.N. 507.**

———**O. 21, R. 2**—*Form of certificate—Payment not recorded.*

A Court executing a decree can take evidence for considering whether the decree-holder has certified satisfaction of the decree. O. 21, R. 2, Cl. (2) of the C.P. Code enables a Court to recognise a payment or adjustment which has been certified but not recorded. (*Das*, J.) RAM PROSAD ROY *v.* KIRIT ROY. **52 I.C. 764.**

C. P. CODE (V of 1908), O. 21, R. 2—Fraud.

———**O. 21, R. 2**—*Form of certification—Casual reference in pleadings.*

For a proper satisfaction under O. 21, R. 2 of the C.P. Code, the adjustment should be notified to the Court, whose duty it is, to execute the decree in a form which will come before it in its execution work. A casual reference to such an adjustment in a plaint or other civil proceeding is not sufficient. (*Fawcett*, J. C. *and Raymond*, J.C.) MAHOMED KHAN *v.* NONUMAL. **52 I.C. 901 = 13 S.L.R. 130.**

Fraud.

———**O. 21, Rr. 2 and 11 (e)**—*Fraud—Uncertified payment—Adjustment—Stated as non-existing—Duty of executing Court.*

The Court acting under S. 47 would not allow execution of a decree where the decree-holder is fraudulently denying satisfaction of the decree, made out of Court. (*Scott*, C.J. *and Hayward*, J.) HANSA GODHAJI *v.* BHAWA JOGAJI. **40 Bom. 333 = 33 I.C. 232 = 18 Bom. L.R. 22.**

———**O 21, R. 2**—*Fraud—Admission of decree-holder—Right of sons of decree-holder.*

The sons of a decree-holder cannot execute a decree after his death, if he had, during his lifetime exempted the judgment-debtor from all liability, though he has not certified the adjustment to the Court. (*Brett and Sharfuddin*, JJ.) BAHAR ALI BISWAS *v.* SHIBHIR KUMAR BOSE ROY. **14 I.C. 574 = 16 C.W.N. 951.**

———**O. 21, R. 2**—*Fraud—Limitation Act, Art. 174—Uncertified adjustment—Effect of.*

In cases where fraud is alleged, the judgment-debtor must so inform the Court and protect himself, but he cannot be allowed to evade the provisions of Art. 174 of the Act and obtain a decision not properly coming under S. 47. The judgment-debtor has his remedy by a suit properly framed. (*Caspersz and Chatterjee*, JJ.) KUTUBULLAH SARKAR *v.* DURGA CHARAN RUDRA. **13 I.C. 424 = 16 C.W.N. 396.**

———**O. 21, R. 2** — *Fraud — Fraudulent arrangement between decree-holder and judgment-debtor—If should be certified.*

An arrangement between the decree-holder and the judgment-debtor, by which certain properties instead of being sold out of Court are brought to be sold in execution on account of collusive default on the part of the judgment-debtor, is an adjustment of the decree and must be certified under O. 21, R. 2 which applies even when the decree-holder is guilty of fraud. (*Coxe and Chatterjee*, JJ.) SHAM LAL CHATTERJEE *v.* HAZARIMAL BABU. **13 I.C. 326 = 15 C.L.J. 451.**

———**O. 21, R. 2, and S. 47**—*Fraud—Uncertified payment—Effect of—Fraud of decree-holder, if can be gone into in execution.*

An executing Court will not take notice of a payment or adjustment which has not been certified under O. 21, R. 2. In such a case the

C. P. CODE (V of 1908), O. 21, R. 2—Fraud.

question of fraud on the part of the decree-holder cannot be gone into. 12 C.W.N. 485, Expl.; 4 I.C. 402; 7 I.C. 625, Foll. (*Mookerjee and Carnduff*, JJ.) BIROO GORAIN *v.* JAINURAT KOER. **16 C.W.N. 923 = 13 I.C. 68 = 16 C.L.J. 174.**

——— **O. 21, R. 2—*Fraud—Satisfaction—Not certified.***

Failure to certify the satisfaction of a decree out of Court is a fraud upon the Court. Subsequent purchase of the judgment-debtor's property in the execution of the same decree is vitiated by fraud and is a nullity. (*Lindsay*, J.C.) GHASI RAM *v.* DALEL SINGH. **45 I.C. 222 = 5 O L.J. 92.**

———— **O. 21, R. 2—*Fraud — Payment not certified—Judgment-debtor committing fraud.***

Even where a judgment-debtor has been guilty of fraud, the executing Court will refuse to recognize the payment or adjustment, if it is not certified as required by R. 2. (*Kincaid*, J. C. *and Kennedy*, A.J.C.) SOJHRO *v.* CHANGOMAL. **63 I.C. 238 = 18 S.L.R. 77.**

Limitation.

———— **O. 21, R. 2—*Saving of limitation—Uncertified payment—Not effective to save limitation.***

An uncertified payment under a decree cannot be recognised for any purpose and certainly not for the purpose of saving of limitation for execution of the decree. (*Chamier*, J.) AMIR SINGH *v.* CHHATTAR SINGH. **29 I.C. 274 = 13 A.L.J. 666.**

——— **O. 21, R. 2—*Saving of limitation—Uncertified payment, whether can save limitation.***

An uncertified payment or adjustment cannot prolong the period of limitation for applying for execution under the Limitation Act, nor can the decree-holder certify payments after the decree has been barred; a mere mention of payment in the execution application does not amount to a certificate. 21 Bom. 122, Dist. (*Piggott*, J.) BHAJAN LALL *v.* CHEDA LALL. **24 I.C. 215 = 12 A.L.J. 825.**

——— **O. 21, R. 2—*Saving of limitation—Uncertified payment.***

An uncertified payment, though it cannot be recognised as a payment by the executing Court is available to the decree-holder for meeting the plea of limitation. (*Griffin and Chamier*, JJ.) BADRI NARAYAN *v.* KUNJ BEHARI LAL. **33 All. 178 = 18 I.C. 731 = 11 A.L.J. 224.**

—— **O. 21, R. 2—*Limitation.***

The part-payments and the certification must however take place before the application for execution is barred by limitation. Although the decree-holder may either apply to certify payments before the execution or may do so in his application for execution, the provisions of section 20 of the Limitation Act

C. P. CODE (V of 1908), O. 21, R. 2—Limitation.

are in no way affected. (*N. R. Chatterjee and Suhrawardy*, J.) MADAN MOHAN BANIKYA *v.* HARU LAL KUNDU. **26 C.W.N. 824 = 64 I.C. 72 = 35 C.L.J. 866.**

—— **O. 21, R. 2—*Limitation—Satisfaction of decree—Record of satisfaction—Application by decree-holder.***

Art. 174 applies only to a case under O. 21, R. 2 (2), namely, where judgment-debtor seeks to inform the court of a payment alleged to have been made by him out of court to decree-holder. In such case, the period is 90 days but this period does not govern an application by decree-holder himself. (*Mookerjee and Panton*, JJ.) BALEY MAHAMMAD SAHI *v.* AIJANMAL. **26 C.W.N. 829 = 35 C.L.J. 71 = 68 I.C. 780 = 1922 Cal. 80.**

——— **O. 21, R. 2—*Limitation—Time for certification.***

Certification of payment by a decree-holder may be made at any time. But he cannot certify after 3 years and claim to save the decree from the bar of limitation. (*Fletcher and Shamsul Huda*, JJ.) BHAOO BALA ROY *v.* JOGESH CHANDRA. **50 I.C. 242 = 23 C.W.N. 820.**

—— **O. 21, R. 2—*Saving of limitation—Uncertified payment***

An uncertified payment cannot operate to extend the period of limitation for an application for execution. (*Mookerjee and Walmsley*, JJ.) BIRESWAR MOOKERJEE *v.* AMBIKA CHARAN BHATTACHARJEE. **42 I.C. 472 = 46 Cal. 680.**

——— **O. 21, R. 2—*Saving of limitation—Acknowledgment of liability—Payment of interest.***

The rule does not stand in the way of payment of a sum by the judgment-debtor to the decree-holder by way of interest on the judgment debt operating to save limitation, when that payment though not certified separately, but was notified to the executing Court by a subsequent application of the decree-holder for execution and was acted upon by that Court. (*Woodroffe and Newbould*, JJ.) ESUFF-ZEMAN SARKAR *v.* SANCHIA LAL NAHATA. **43 Cal. 207 = 20 C.W.N. 272 = 34 I.C. 606 = 23 C.L.J. 390.**

——— **O. 21, R. 2—*Limitation—Application by decree-holder—No recital as to alleged adjustment—Effect—Limitation.***

An execution application by the decree-holder which did not recite the terms of an alleged adjustment cannot be an application as contemplated by O. 21, R. 2 (2), when the application did not otherwise, embody an acknowledgment of the right of the judgment-debtor to apply to the Court to have the adjustment recorded as certified. (*Mookerjee and Beachcroft*, JJ.) JOGENDRA NATH SARKAR *v.* PROBHAT NATH CHATTERJEE. **21 I.C. 926 = 19 C.L.J. 126.**

C. P. CODE (V of 1908), O. 21, R. 2—Limitation.

———O. 21, R. 2—*Saving of limitation—Form of certificate.*

Per *Ayling*, J.—Nothing is prescribed in O. 21, R. 2 as to the time within which or the manner in which the decree-holder must certify payment. A statement by the decree-holder in his application for execution, of the fact of his having received a portion of the decree amount, within 3 years of the application can be accepted as a certificate of payment under O. 21, R. 2, Cl. (1) of the C. P. Code so as to save limitation under S. 20 of the Limitation Act. 39 Mad. 923; Foll. Per *Kumaraswami Sastri*, J.—An uncertified payment of a portion of the decree amount, if made before the expiry of the period of limitation is sufficient to save the decree from the bar of limitation. (*Ayling and Kumaraswami Sastri*, JJ.) MASILAMANI MUDALIAR *v.* SETHUSWAMI AIYAR.

33 M.L.J. 219=
22 M.L.T. 115=41 I.C. 701=
(1917) M.W.N. 502=41 Mad. 281.

———O. 21, R. 2—*Limitation—Certification.*

It is open to a decree-holder to certify satisfaction of a decree at any time. A transferee from the decree-holder is not precluded from receiving payment from the judgment-debtor, due under the decree by the mere fact that he had not paid some portion of the consideration to his transferor. (*Sundara Aiyar and Sadasiva Aiyar*, JJ.) DHARANI MUDALI *v.* MEENAMBA BAI. 17 I.C. 617=12 M.L.T. 392.

———O. 21, R. 2—*Limitation—Adjustment out of Court—Subsequent application for execution—Failure to certify.*

In a subsequent application for execution, the judgment-debtor pleaded complete satisfaction out of Court three years before and applied for its being recorded. *Held*, that the decree-holder cannot be compelled to certify it as the application was not within 90 days. (1918) M.W.N. 507, Ref. (*Sundara Aiyar and Ayling*, JJ.) ALATHOOR BADRUDDIN *v.* GULAM MOHIDEEN. 10 M.L.T. 396=
(1911) 2 M.W.N. 473=12 I.C. 562=
24 M.L.J. 541=36 Mad. 357.

———O. 21, R. 2—*Saving of limitation—Acknowledgment of liability—Uncertified payment.*

The uncertified or unrecorded payment as required by O. 21 R. 2, cannot be recognised by a Court executing a decree even for limitation purposes. (*Piggott*, J.C. *and Lindsay*, A.J.C.) RAM SARUP *v.* JAGANNATH PRASAD.

15 I.C. 523=15 O.C. 234.

———O. 21, R. 2—*Limitation—Payment out of Court—Creditors mentioning payment in application—Effect—Limitation.*

There is no period of time within which payments have to be certified by the judgment-creditor. It is sufficient for certification under O. 21, R. 2 (1) for the decree-holder to mention the payments in his application for execution. (*Pratt* J.C., *Fawcett and Kemp*, A.J.Cs.) KAZI SHAFI MAHOMED *v.* CHOITHRAM.

52 I.C. 804=13 S.L.R. 37.

C. P. CODE (V of 1908), O. 21, R. 2—Mortgage decree.

Mortgage Decree.

———O. 21, R. 2 and O. 34, Rr. 4 and 5—*Mortgage decree—Uncertified adjustment—Preliminary and final decree.*

An uncertified adjustment of the preliminary decree in a mortgage suit cannot be pleaded in bar to the execution of the final decree, though the adjustment took place in pursuance of an arrangement entered into, before the passing of the preliminary decree. 25 C.L.J. 553; 35 M.L.J. 572, Rel.; 40 Mad. 283, Dist. (*Ayling and Krishnan*, JJ.) SAMBASIVA AIYAR *v.* THIRUMALAI RAMANUJA THATHACHARIAR.

34 I.C. 137=37 M.L.J. 366.

———O. 21, R. 2 and O. 34, Rr. 2 and 3—*Mortgage decree—Private adjustment notified by judgment-debtor—Recognition by court.*

O. 21, R. 2, C.P.C. applies even to a final decree in a mortgage suit and such a decree, like any other, is capable of adjustment. Where the judgment-debtor has informed the court, that the decree has been adjusted, the court must under O. 21, R. 2 (2) issue a notice to the decree-holder to show cause why the adjustment should not be recorded as certified. (*Batten*, J.C. *and Hallifax*, A.J.C.) LACHMAN SINGH *v.* MARDAN SINGH. 68 I.C. 443=
1923 Nag. 20.

———O. 21, R. 2 and O. 34, Rr. 2 and 5—*Mortgage decree — Payment outside Court—Certification.*

Where an application is made in time to compel the decree-holder to certify payment made out of Court in satisfaction of the mortgage decree, it is a payment into Court within O. 34, Rr. 2 and 5. (*Mittra*, A.J.C.) MUSAMMAT BAYA BAI *v.* PURUSHOTTAM.

27 I.C. 919=11 N.L.R. 16.

———O. 21, R. 2—*Mortgage decree—Payment out of Court—Deduction of amount in passing final decree.*

The Court to which an application is made for a decree absolute, is not a Court executing the decree and therefore O. 21, R. 2, cl. (3) is no bar to the Court recognising a payment or adjustment made out of Court although such payment or adjustment had not been satisfied. A mortgage decree falls within the operation of O. 21, R. 2, and the decree-holder or judgment-debtor can certify payments made out of Court. 21 C. W. N. 920, Not foll. (*Jwala Prasad and Adami*, JJ.) MANGAR SAHU *v.* BHATOO SINGH. 5 Pat. L.J. 672=37 I.C. 473=
1 Pat. L.T. 416.

[But *see* 40 I.C. 845=21 C.W.N. 920.]

C. P. CODE (V of 1908), O. 21, R. 2—Partition Decree.

Partition Decree.

———**O. 21, R. 2**—*Partition decree—Adjustment by sale of share in some lands.*

O. 21, R. 2, C. P. C. applies to partition decrees which provide for the payment of money as well as for other relief such as a partition of immoveable property and to adjustment with regard to such property. Such an adjustment cannot be recognised unless certified or recorded. 15 M. L. T. 338; (1917) M. W. N. 327; 25 M. L. J. 596, Not foll. (*Oldfield and Seshagiri Aiyar*, JJ.) MAZUMDAR RAMKRISHNA RAO PANTULU *v.* MAZUMDAR BAL KRISHNA RAO PANTULU. **43 Mad. 476 = (1920) M.W.N. 261 = 56 I.C. 289 = 27 M.L.T. 279.**

Payment.

———**O. 21, R. 2**—*Part payments—Certified—To be recognised.*

A Court is bound to recognise the payments previously made and Section 20 of the Limitation Act comes in to save limitation. (*Abdur Rahim and Spencer*, JJ.) RAJAM AIYAR *v.* ANANTARATHNAM AIYAR. **29 M.L.J. 669 = 18 M.L.T. 475 = 31 I.C. 318 = (1916) 1 M.W.N. 127.**

———**O. 21, R. 2**—*Payment in kind.*

O. 21, R. 2 does not refer to payments in kind, which need not therefore be certified to the Court but refers only to payments of money. The rule should be strictly construed. (*Benson and Sundara Aiyar*, JJ.) KRISHNA HANDE *v.* PADMANABHA HANDE. **14 M L.T. 233 = (1913) M.W.N. 802 = 21 I.C. 177 = 25 M.L.J. 442.**

Refund of Money.

———**O. 21, R. 2**—*Refund of money—Overpayment by judgment-debtor out of Court—Question whether can be gone into in execution proceedings.*

A Court cannot, in execution proceedings, go into the question of payments made by the judgment-debtor out of Court and allow a refund of the same where there is any overpayment, there being no machinery to that effect in the Code of Civil Procedure; but the party may seek such remedy as he has in law, to claim such a refund. (*Chitty and N.R. Chatterjee*, JJ.) AKHIL CHANDRA BISWAS *v.* MATHURIA DEBYA. **11 I.C. 200.**

———**O. 21, R. 2 3)**—*Refund of money—Court executing the decree.*

A Court other than a Court executing a decree can recognise an uncertified payment or adjustment of a decree, and direct a refund of the amount in a suit brought for that purpose. (*Shadi Lal*, J.) AMIN LAL *v.* RAMJI LAL. **39 I C. 15 = 12 P.L R. 1917.**

———**O. 21, R. 2**—*Refund of money—Decree satisfied by one of the Judgment-debtors—Payment by another Judgment-debtor into court—Money drawn out by decree-holder—Liability to refund.*

Where one of the judgment-debtors paid the decretal amount to the plaintiff decree-holder and had the payment certified under the provisions of O. 21, R. 2, C.P.C. and subsequently another judgment-debtor not knowing that the decree-holder's claim had been satisfied, paid the money into court and it was taken out by the decree-holder and having subsequently discovered that the decree had previously been satisfied by one of his co-debtors, made an application to the executing Court, for a refund of the money. The lower courts decided that as the matter had been disposed of, the executing court had no jurisdiction. *Held* that the executing Court had jurisdiction to entertain the application notwithstanding the fact that the decree had in fact been executed before. 24 All. 291, foll. (*Dawson Miller*, C.J. *and Jwala Prasad*, J.) GOPAL RAI *v.* RAMBHANJAN RAI. **1 Pat. 336 = 3 Pat. L T. 754 = 4 U.P.L R. (Pat) 17 = 65 I.C. 307 = (1922) Pat. 53 = 1922 P. 166.**

Right to Apply.

———**O. 21, Rr. 2 and 23 (6)**—*Right to apply—Attachment of decree without notice to judgment-debtor—Decree satisfied—Effect.*

Where a decree is attached without notice to the judgment-debtor, bound by it and the latter pays the decree-amount to the decree-holder, he is entitled to have satisfaction entered up under R. 2 of O. 21 and it is not open to the person who attached the decree to question the entering up of satisfaction of the decree. (*Seshagiri Aiyar*, J.) NAGU REDDIAR *v.* VEERAPPA MUDALIAR. **61 I.C. 815 = 13 L W. 34.**

———**O. 21, R. 2**—*Right to apply—Auction-purchaser.*

An auction purchaser of property in execution of a money decree, has a *locus standi* to apply for entering up satisfaction of a decree affecting the property which would otherwise endanger it. 30 Mad. 537, Foll. (*Seshagiri Aiyar*, J.) MATHARASAPPA CHETTIAR *v.* MUTHU CHETTIAR. **30 I C. 931 = 9 L.W. 596.**

Tender of Money.

———**O. 21, R. 2**—*Tender of money—Stopping of interest.*

A plea of tender so as to disentitle the opposite party to his interest can be pleaded in execution proceeding. Interest ceases to run from the date when tender was made. (*Ayling and Seshagiri Aiyar*, JJ.) BIDURUKOTA PEDDA VEERANNA *v.* GONDIMALLA VEERANNA. **(1917) M.W.N. 308 = 38 I.C. 293 = 5 L.W. 748.**

C. P. CODE (V of 1908), O. 21, R. 2—Uncertified Payment.

Uncertified Payment.

———**O. 21. R. 2**—*Uncertified adjustment—Executory oral contract—Executing Court cannot recognise.*

An adjustment of a decree on the basis of an oral agreement set up by the judgment-debtor but denied by the decree holder and not yet performed by either party could not be set up so as to bar execution of the decree. The remedy of the judgment-debtor was by a suit for specific performance of the alleged oral agreement. An inchoate contract cannot be pleaded in bar of execution under O. 21, R. 2 and the judgment-debtor cannot insist on the contract being completed and then plead it in bar of execution. (*Piggott and Walsh*, JJ.) LACHMI DAS *v.* BABA KALI KAMILI WALA RAMANATH.
34 A. 258 = 20 A.L.J. 65 = L.R. 3 A. 61 = 64 I.C. 990 = 1922 All. 13.

———**O. 21, R. 2**—*Uncertified payment—Admission of—Proof.*

If the judgment-debtor admits making payments though uncertified, it is not necessary to prove them. Under the circumstances of the case, the question of certifying payments did not arise and the application for execution was in time. (*Banerjee and Wallach*, JJ.) QADAM SINGH *v.* NATHU SINGH. **32 I.C. 362.**

———**O. 21, R. 2**—*Uncertified payments—Effect of.*

Payment on account of a decree, but not certified to the Court executing the decree cannot be recognised by the Court for any purpose. (*Richards*, C. J. *and Rafique*, J.) CHATTAR SINGH *v.* AMIR SINGH.
38 All. 204 = 32 I.C. 890 = 14 A L.J. 132.

———**O. 21, R. 2**—*Uncertified payment—Proof of, in execution.*

Only those payments can be proved in execution of a decree which had been certified under O. 21, R. 2, within the prescribed period. (*Tudball*, J.) JANKI PRASAD *v.* THAKUR DAS. **13 I.C. 21.**

———**O. 21, R. 2**—*Uncertified payment—Not to be recognised by executing Court—Remedy of judgment-debtor.*

Where a payment by the judgment-debtor is not certified under O. 21, R. 2, C. P. Code, the Court executing the decree, could take no cognisance of that payment, but if the creditor by taking out a dharkhast recovered the amount again, that would not bar the judgment-debtor from seeking to recover the amount which he had paid to his creditor without its being certified. (*Macleod*, C. J. *and Crump*, J.) GANESH MAHADEV *v.* YESHWANT.
25 Bom. L R. 247 = 1923 Bom. 253 (1).

———**O. 21, R. 2**—*Uncertified payment—Execution against surety of judgment-debtor.*

A surety for the judgment-debtor is bound so long as the judgment-debtor is bound. The judgment-debtor is bound so long as any payments which he may have made are not certified to the court and consequently, the surety cannot set up such payments in bar of execution against him. (*Woodroffe and Ghose*, JJ.) ONKARMAL AGARWALA *v.* NRITYA GOPAL CHAKI. **67 I.C. 885 = 1923 Cal. 313 (1).**

C. P. CODE (V of 1908), O. 21, R. 3.

———**O. 21, R. 2**—*Uncertified payment—Adjustment—Executing Court—Not to recognise.*

A Court executing a decree cannot touch the question of jurisdiction, when such payment or adjustment has not been certified to the Court under O. 21, R. 2, C. P. C. (*Beachcroft*, J.) PRASANNA KUMAR *v.* LALMIAN.
55 I.C. 669.

———**O. 21. R. 2**—*Uncertified payment—Not valid.*

A uncertified payment cannot be taken into consideration for showing that the decree has been satisfied. (*Fletcher and Walmsley*, JJ.) ROMESH CHAND *v.* KALA GANJI.
50 I.C. 331.

———**O. 21, R. 2**—*Uncertified payment—Transferee of decree.*

Payments out of Court whether made before or after the date of transfer of a decree cannot be recognised by any executing Court unless certified. (*Sadasiva Aiyar and Moore*, JJ.) BOLLA BRAHMADU *v.* RUDDARAJU VENKATARAJU. **33 I.C. 71.**

———**O. 21, R. 2**—*Uncertified payment—Value of—Payment for decree out of Court.*

Payment out of Court if not certified can be ignored only in execution of the decree, but not otherwise. (*Macnair*, A.J.C.) MATHURA *v.* CHOTU. **58 I.C. 123.**

———**O. 21, R. 2**—*Uncertified payment—Satisfaction or adjustment not recorded.*

Where money is paid out of Court by the judgment-debtor, he is, nevertheless, not entitled in the execution proceedings under the decree, to claim the benefit of the payment unless he has complied with O. 21. R. 2 (3) of the C.P. Code. (*Miller*, C.J. *and Mullick*, J.-MUSSAMMAT SUKHDEI KUMARI *v.* MAHAMAYA PRASAD SINGH. **48 I.C. 765.**

———**O. 21, R. 3**—*Jurisdiction to sell—None except as provided by r. 3.*

Where a court has no jurisdiction over immoveable property, it cannot validly sell it in execution of a decree except in the one case provided by O. 21, R. 3, C.P. Code. Where a court sells immoveable property entirely outside its jurisdiction, the sale is a nullity. (*Mukerjee and Chotzner*, JJ.) KUNJA MOHAN CHAKRAVARTHY *v.* MANINDRA CHANDRA ROY CHOWDHURY. **77 I.C. 253 = 27 C.W.N. 542 = 1923 Cal. 619.**

C. P. CODE (V of 1908), O. 21, R. 4.

———O. 21, R. 4—*Foreign Courts.*

O. 21, R. 4 applies equally to decrees of foreign Courts. (*Seshagiri Aiyar*, J.) SRINIVASA AIYANGAR *v.* NARAYANA AIYANGAR.
(1917) M.W.N. 498=6 L.W. 361=40 I.C. 670=33 M.L.J. 539.

———O. 21, R. 5—*Transfer of decree to another district for execution—Decree sent direct to Sub-Judge—Dismissal of petition by Sub-Judge—Whether legal.*

Where a decree is sent for execution to a Subordinate Judge direct, instead of through the District Judge of the district, the Subordinate Judge ought to send the papers back to the Judge that sent them for adopting the correct procedure and not dismiss the execution application. (*Stephen and Mullick*, JJ.) PRAKASH CHANDRA SARKAR *v.* PANDE BALDEO RAM. 22 I.C. 682.

———O. 21, R. 5—*Transfer of decree for execution—Procedure—Whether decree can be sent direct.*

A Subordinate Judge has no jurisdiction to execute a decree sent direct to him for execution by the trial Court in another district. The decree should be sent in the first instance to the Dt. Judge (or in the Sonthal Parghanas, the Deputy Commissioner.) Where a decree has not been sent first to the Dt. Judge, it is open to the parties at any stage to question the jurisdiction of the Subordinate Judge to execute it. (*Mullick and Imam*, JJ.) KUNJA BEHARI SINGH *v.* TARAPADA MITRA.
49 I.C. 374=4 Pat. L.J. 49.

———O. 21, Rr. 6 and 7 and S. 44—*Decree of foreign Court—Powers of executing Court in British India—Decree of Court in Native State—Whether foreign decree.*

The decree of a Native State coming within the purview of S. 44 does not cease to be a foreign judgment. The section alters the procedure by which such a judgment is executable in British India. The British India Court has the power to see whether the foreign Court had jurisdiction. In a personal action, a decree passed by a foreign Court *in absentem*, the absent party not having submitted himself to its authority is by International law a nullity. R. 7 applies only to British Courts, if Rr. 6 and 7 are read together in the light of definitions in S. 2. (*Batchelor and Shah*, JJ.) JIVAPPA JAMAPPA BIJAPUR *v.* JEERJI MURGEAPPA. 40 Bom. 551=36 I.C. 363=18 Bom. L.R. 486.

———O. 21, R. 6—*Certificate issued by Court passing decree—Notice of execution can be issued only by court of transfer.*

Where under R. 6, a certificate is issued by the Court passing the decree, transferring it to another district for execution, notice to execute the decree can only be issued by the latter Court. (*Chatterjee and Newbould*, JJ.) HAZARI LAL *v.* BAIDYANATH SAHA. 63 I.C. 116=26 C.W.N. 292.

C. P. CODE (V of 1908), O. 21. R. 10.

———O. 21, Rr. 6, and 11 and S. 39—*Transfer of execution—Fresh application to Court of transfer is not necessary.*

Where a decree has been transferred to another Court for execution, there is nothing in the law which compels the decree-holder to make a second application for execution in the court to which the decree has been transferred, if an application has already been made to the court which passed the decree. Where it is not known whether the application in the first court was only for transfer or whether it was for execution, the fact that notice was issued under O. 21, R. 22 shows that it must have been in form and substance, one for execution. (*Mullick and Foster*, JJ.) DUTT *v.* TARAPRASANNA ROY CHAUDHURI 2 Pat. 909=5 Pat. L.T. 11=(1923) Pat. 280=74 I.C. 753=1924 P. 120.

———O. 21, R. 7—*Executing Court, if can question jurisdiction of Court which passed the decree.*

An executing Court cannot under O. 21, R. 7, question the jurisdiction of the Court which passed the decree. 38 Bom. 194, Rel. (*Scott-Smith*, J.) SHEO PAT RAI *v.* WARAK CHAND.
42 P.L.R. 1918=93 P.W.R. 1918=46 I.C. 419=22 P.R. 1919.

———O. 21, R. 7—*Foreign decree.*

Per *Sundara Aiyar*, J.—O. 21, R. 7 does not apply to a foreign decree transmitted to a British Court. (*Sundara Aiyar and Sadasiva Aiyar*, JJ). VEERARAGHAVA AIYAR *v.* MUGA SEIT.
(1913) M.W.N. 605=20 I.C. 704=14 M.L.T. 96.
[On appeal from 26 I.C. 287=27 M.L.J. 533.]

———O. 21, R. 7—*Executing Court—Jurisdiction of Court passing the decree, whether can be questioned.*

An executing Court cannot under O. 21, R. 7, question the jurisdiction of the Court which passed the decree. (*Saunders*, A.J.C.) MA ME *v.* MAUNG AUNG MIN. 10 Bur. L.T. 159=36 I.C. 10=(1916) 2 U.B.R. 119.

———O. 21, R. 8, and Ss. 38, and 39—*Court of competent jurisdiction—Meaning of execution—Property outside jurisdiction—Whether can be sold by the Court.*

Even if a decree is transmitted by a Court, having jurisdiction over the property to which it relates, to a Court having no jurisdiction over it, the latter court cannot execute the same. For in execution, apart from the special and exceptional procedure by precept a court cannot act through its officers except within its territorial jurisdiction, though this may not necessarily be the rule in case of trials of suit. (*Abdur Rahim and Oldfield*, JJ.) KASI VISVANATHAN CHETTY *v.* MURUGAPPA CHETTY.
33 M.L.J. 750=23 M.L.T. 24=43 I.C. 79=(1918) M.W.N. 132.

———O. 21, R. 10—*Scope of.*

O. 21, R. 10 only governs applications made to continue a suit. Consequently applications

C. P. CODE (V of 1908), O. 21, R. 11.

presented after the termination of the suit are not within the rule. (*Seshagiri Aiyar and Napier*, JJ.) S. V. SITARAMASWAMY *v.* NARASAMMA. **8 L.W. 21=48 I.C. 840=41 M. 510.**

——**O. 21, R. 11**—*Omission to state date of disposal of prior application is not a material defect, but omission to state existence of cross-decree is,*

Material defects would vitiate an application for execution. Where there had been two prior applications for execution, but the date of disposal of the first application for execution was one stated but not that of the second, though the numbers of execution cases were stated with regard to both the previous applications ; *held* that the omission of the date of the disposal of the second previous application for execution was not a material defect. The omission to mention the existence of cross-decrees however may be a material defect. (*Chatterjee and Panton*, JJ.) PROSANNA KUMAR CHAKERBURTI *v.* JOTINDRA NATH BOSE. **71 I.C. 1054=1924 Cal. 398.**

——**O. 21, Rr. 11 and 57**—*Amendment—Execution—Decree-holder not wishing to proceed with—Application to amend—Interruption of proceeding—Erroneous order of Court—Inherent power.*

An application for execution of a decree proved infructuous and the decree-holder stated that he did not want to proceed with it. *Held*, that the proceeding arising out of the application, *ipso facto* came to an end The absence of a formal order striking off the application did not matter. An application to amend a previous application, though not in the form prescribed by O. 21, R 11 but which, when read with the previous application, supplies all the information required by that rule should be treated as a fresh application. Where an erroneous order of the Court has prevented the decree-holder from proceeding with the execution of his decree, the Court may treat a subsequent application to amend the previous one as a fresh application itself. (*Newbould and Cuming*, JJ.) HARIDAS BASAK *v.* RAJ KUMAR DEY. **53 I.C. 111.**

——**O. 21, R. 11**—*Mortgage decree—Execution against some of the owners of the equity of redemption.*

A mortgage decree cannot be executed against some of the owners of the equity of redemption. (*Fletcher and Huda*, JJ.) SATISH MOHINI DEBYA *v.* PATNA BANK, LTD. **47 I.C. 907.**

——**O. 21, R. 11, Cl. (2) (j)**—*Defective application for execution—Application liable to be dismissed.*

If an application for the execution of a decree does not contain any specification of the mode in which the assistance of the Court is required, it is a defect in it and unless it is cured, the application is liable to be dismissed. When such a defective application is made, the court should not enter into the question

C. P. CODE (V of 1908), O. 21, R. 11.

whether the decree is capable of execution. (*Casperss and Sharf-ud-din*, JJ.) SATISH CHANDRA MOOKERJEE *v.* PURNA CHANDRA DUTT. **11 I.C. 696 (1).**

——**O. 21, R. 11**—*Execution—Temporary alienation of land.*

O. 21, R. 11 (2) makes no mention of a temporary alienation of land, the reason probably being that the Court of execution when refusing to order the sale of the property, is expected to direct instead, a temporary alienation thereof without any specific prayer to that effect. (*Shadi Lal and Broadway*, JJ.) SIRDARANI DATAR KAUR *v.* RAM RATAN.
2 U.P.L.R. (Lah) 96=115 P.L.R. 1920=58 I.C. 603=2 Lah. L.J. 398.

——**O. 21, Rr. 11 and 17**—*Amendment—Execution application—Defects—Rejection.*

An executing Court must ascertain whether an application for execution, complies with the requirements of the rules and if it does not, it must either reject the application or allow it to be amended then and there, or within a fixed time. (*Petman*, J.) GANESH DAS *v.* FATEH CHAND. **2 Lah. L.J. 104=2 U.P.L.R. (Lah.) 46=55 I.C. 16=31 P.W.R. 1920.**

——**O. 21, R. 11**—*Formal defects—Effect of.*

An application for execution containing formal defects is an application in accordance with law. A wrong computation of the pleader's fee or failure to file encumbrance certificates or a draft sale proclamation are instances of formal defects. (*Ayling and Seshagiri Aiyar*, JJ.) NATESA PILLAI *v.* GANAPATHIA PILLAI.
40 Mad. 949=38 I.C. 136=21 M.L.T. 257=5 L.W. 648=32 M.L.J. 621.

——**O. 21, R. 11**—*Amendment*—Bona fide *mistake.*

A decree-holder believing in good faith that he has a right to do so, under the decree applied for attachment of other than the mortgaged properties. *Held*, he can be allowed to amend the application by praying for sale of the hypotheca. (*Sadasiva Aiyar and Spencer*, JJ.) VARADIAH *v* KUMARA VENKATAPERUMAL.
14 M.L.T. 530=26 M.L.J. 83=21 I.C. 782=(1914) M.W.N. 157.

——**O. 21, Rr. 11 and 17**—*Concurrent execution may be allowed by Court—Amendment.*

O. 21, R. 11 of the C.P. Code is no bar to the maintenance of concurrent execution. It is open to the Court to allow the amendment of the application for execution already filed by the addition of other properties to the list of the properties sought to be attached and O. 21, R. 17 does not bar any such amendment. 27 C.L.J. 398, Ref; 17 Cal. 631, dist. (*Mullick and Kulwant Sahay*, JJ.) RAM SUMRAN PRASAD *v.* BABURAM BAHADUR. **4 Pat. L.T. 99=2 Pat. 328=71 I.C. 751=1923 Pat. 61=1923 P. 224.**

C. P. CODE (V of 1908), O. 21, R. 11.

——**O. 21, R. 11**—*Defective application.*

Application for execution omitting to specify amount of decree and costs is not a step in-aid. (*Adami*, J.) GURU MAHADEVA ASHRAM PRASAD SHAHI *v.* MAHABIR SUKUL.
65 I.C. 120.

——**O. 21, R. 11 (2)**—*Joint decree-holders —Verification of execution application—Mode of.*

Where there are a number of decree-holders, some of whom are not acquainted with the facts of the case all the law requires is that the application should be verified by some person proved to the satisfaction of the Court to be acquainted with the facts of the case. It would be straining the language of the rule too far to say that where there are more applicants than one the verification should be signed even by those who are not acquainted with the facts of the case or that where one or more acquainted with the facts of the case verify their verification is not sufficient. (*Miller*, C.J. *and Kulwant Sahay*, J.) BHAGWAT PRASAD SINGH *v.* DWARKA PRASAD SINGH. **2 Pat. 809 = 4 Pat. L.T. 513 = 1 Pat. L.R. 463 = 74 I.C. 174 = 1923 Pat. 229 = 1924 P. 23.**

——**O. 21, R. 11 (2)**—*Non-compliance.*

Non-compliance with immaterial provisions of O. 21, R. 11 (2) will not vitiate an execution application. (*Kennedy and Raymond*, A.J.Cs.) SUHIGRAM *v.* TOWER GUL. **66 I.C. 14 = 16 S.L.R. 156 = 1922 Sindh 29.**

——**O. 21, R. 11 (2) (i)**—*Execution of decree—Persons not parties—Liability.*

A decree not incorporating the relief granted by the Appellate Court against the defendants who are not parties to the appeal, cannot be executed against them. (*Chamier*, J.) BHAGWANT *v.* RAJAB. **27 I.C. 804 = 13 A.L.J. 136.**

——**O. 21, R. 11 (2) (J)**—*Mode of execution —Procedure—Substantive right.*

The right as to the method of executing a decree is one of procedure and not a substantial right. (*Tudball*, J.) PAYNE AND CO. *v.* BRAHMDEO. **9 I.C. 800.**

——**O. 21, R. 11 (2) (J)**—*Execution—Arrest of judgment-debtor.*

A judgment-debtor should ordinarily be arrested in execution only when he shows bad faith and negligence in not satisfying the decree; in other cases he should in the first instance be given an opportunity for paying up the monies due. Evading payment for a number of years is a ground for arrest. (*Johnstone*, J.) BISHEN DAS *v.* JAIVA RAM.
183 P.W.R. 1911 = 11 I.C. 858 = 246 P.L.R. 1911.

——**O. 21, R. 11 (2) (J)**—*Money decree—Ejectment.*

Execution of a money decree by ejectment of a tenant is a method provided by S. 61 of the Oudh Rent Act in addition to the particular

C. P. CODE (V of 1908), O. 21, R. 14.

method of execution provided by the Code. (*Lindsay*, J.C. *and Rafique*, A.J.C.) DEPUTY COMMISSIONER, FYZABAD *v.* UDIT SINGH.
19 I.C. 38 = 15 O.C. 381.

——**O. 21, R. 11 (2) (J)**—*Modes of execution—Attachment—Attachment and sale.*

Sale without attachment is one method of execution; attachment of a decree or debt is another, falling under the general heading "Otherwise as the nature of the relief may require." An application for execution by one method cannot be converted into one for execution by the latter method. (*Piggott*, A.J.C.) MOHAMAD SADIK *v.* TIKARAM. **9 I.C. 240.**

——**O. 21, R. 12**—*Interest in bond—Date wrongly given.*

O. 21, R. 12 only requires a reasonably accurate description of what is sold. The fact that the date of the bond sold is wrongly given would not affect the validity of the title acquired at such sale. 30 Cal. 699, Dist. (*Benson and Krishnaswamy Aiyar*, JJ.) PALANIAPPA THEVAN *v.* SADAGOPA MUDALIAR.
(1911) 1 M.W.N. 133 = 9 I.C. 729 = 9 M.L.T. 319.

——**O. 21, R. 13**—*Description of property —Amendment.*

Where in an application for execution, the property sought to be attached has not been described as required by R. 13, the Court can require an amendment in this particular and call upon the decree-holder to furnish the necessary particulars. (*Chevis and Shadi Lal*, JJ.) BALDEO SAHAI *v.* KANHAYA LAL.
66 P.L.R. 1916 = 34 I.C. 955 = 202 P.W.R. 1916.

——**O. 21, R. 13**—*Execution—Description of property in decree made clear in the execution application—Terms of sale.*

Where, the decree being not clear regarding proclamation of property, the decree-holder gave an amplified description of it in his execution application, the proper course is to advertise for sale the right, title and interest of the judgment-debtors in the property as described in the decree putting under a footnote the amplified description of the property as that forwarded by the decree-holder, so that the intending purchasers might have an idea of the value of the property. (*Sharfuddin and Roe*, JJ.) RAGHUNATH TEWARI *v.* RADHESSOR KUAR. **35 I.C. 368.**

——**O. 21, R. 14**—*Mortgage decree—Application for attachment unnecessary in execution.*

A preliminary attachment is not necessary where an application is made for sale in execution of a decree passed for sale of mortgaged property. Therefore O. 21, R. 14 does not apply to such an application. (*Daniels*, A.J.C.) IQBAL NARAIN *v.* JASKARAN.
47 I.C. 689 = 5 O.L.J. 514.

C. P. CODE (V of 1908), O. 21, R. 15.

———O. 21, R. 15—*Adjustment of rights of decree holders—Discretion—Joint decree—Discharge cannot be given by one of the decree-holders.*

O. 21, R, 15 of the C.P. Code allows a wide discretion to the Court, which has authority to make such adjustments of the rights of the decree-holders *inter se* as it may think equitable and proper. A decree for costs passed in a partition suit in favour of several plaintiffs can only be executed by all the decree-holders jointly or by some only of the decree-holders subject to the provisions of O. 21, R. 15, C.P. Code. It is not competent to one of several joint decree-holders to grant full discharge of the decree out of Court or to certify to the Court complete satisfaction of the decree without the concurrence of all the decree-holders. (*Piggott and Walsh*, JJ.) UMRAO BEG. *v.* MUKHTAR BEG. **45 A. 401 = L.R. 4 A. 516 = 21 A.L.J. 398 = 74 I.C. 687 = 1923 All. 494.**

——O. 21, R. 15—*Joint decree-holder—Application by one for order absolute—Practice.*

A joint decree was passed under S. 88, T.P.A. in favour of two persons B and K.B. died after the decree and his sons alone applied for an order absolute without joining K as applicant on the allegation that she did not like to join. *Held*, that they were entitled to apply subject to such orders as the Court might see fit to pass to safeguard the rights of K. (*Knox and Piggott*, JJ.) RAWAT GAYAN SINGH *v.* BANWARI LAL. **8 A.L.J. 1229 = 11 I.C. 700 = 34 All. 72.**

———O. 21, R. 15—*Decree for sale—Joint decree-holders—Application for execution by one on behalf of all—Purchase by applicant—Right of others to recover their share—Equity.*

Where in execution of a decree for sale in favour of joint decree-holders, one of them purchases the property with previous leave of the Court, to execute the decree on behalf of all, the other joint decree-holders have in equity a right to recover from him their share. (*Knox, Banerji and Richards*, JJ.) KESRI *v.* GANGA SAHAI. **8 A.L.J. 616 = 11 I.C. 517 = 33 All. 563.**

———O. 21, Rr. 15 and 19—*Cross-claims under the same decree—Execution.*

Where a decree is passed in favour of the plff. and of certain *pro forma* defts. who are co-sharers with the plff., the Court can allow execution of the decree at the instance of the *pro forma* defts. providing safeguards for the rights of the plff. (*Teunon and Newbould*, JJ.) RAMLAL MANDAL *v.* ASUTOSH MANDAL. **44 I.C. 445.**

———O. 21, Rr. 15 and 16—*Rights of transferee of portion of a decree.*

The only persons who can execute a decree are the original decree-holder or the transferee as per S. 49 and O. 21, R. 16. Although portions of a decree can be legally transferred,

C. P. CODE (V of 1908), O. 21, R. 15.

the decree must be executed as a whole. (*Johnstone*, C.J.) MOKHAN CHAND *v.* GANGA RAM. **39 I.C. 684 = 15 P.R. 1917.**

———O. 21, R. 15—*Joint Hindu family—Power of manager to give discharge.*

A joint decree-holder except as the manager of a joint Hindu family, is not entitled to bind by his acts the other joint decree-holders and his compromising or receiving payments from a judgment-debtor and giving him a discharge beyond his share does not bind the other decree-holders. (*Rattigan*, J.) RAM SINGH *v.* NANAK CHAND. **10 P.W.R. 1915 = 27 I.C. 603 = 60 P.L.R. 1915.**

———O. 21, Rr. 15 and 16—*Order under—No appeal.*

No appeal is provided against an order under O. 21, R. 15 or R. 16, C. P. C. 23 Bom. 620, Referred to. (*Spencer and Odgers*, JJ.) BUDARAJU HANUMANTHA RAO *v.* ALLAMNENI KRISHNAMMA. **32 M.L.T. (H.C.) 118 (2) = 70 I.C. 329 = 1924 Mad. 618.**

———O. 21, R. 15—*Partition decree—Joint decree—Share awarded to defendant.*

Similarity between the rights of each of the parties does not make partition decree a joint decree in favour of co-sharers. (*Oldfield and Venkat Subba Rao*, JJ.) WASUDEV MUTHA SHASTRI *v.* VITHAL SHASTRI. **16 L.W. 292 = (1922) M.W.N. 518 = 43 M.L.T. 379 = 70 I.C. 296 = 31 M.L.T. 311 = 1922 Mad. 456.**

——O. 21, R. 15—*Joint decree-holders—Assignee from some of them—Right to execute.*

Where only some of several decree-holders assigned a decree, the assignee does not get an interest even in a fraction of the decree amount. Even if he acquires the status of a joint decree-holder he must apply for execution on behalf of himself and the remaining decree-holders and not on his own behalf. But if the certificate is given on behalf of all the decree-holders and there is in fact a discharge of the decree, the other decree-holders or their transferees cannot execute the decree. (*Sadasiva Aiyar and Napier*, JJ.) THIMMA REDDI *v.* SUBBA REDDIAR. **49 I.C. 141 = (1918) M.W.N. 507.**

——O. 21, R. 15—*Joint decree-holders—Death of one—Right of survivors to execute decree.*

On the death of one of several decree-holders the surviving decree-holders are entitled to execute the decree for their own benefit and for the benefit of the legal representatives of the deceased joint decree-holder, under O. 21, R. 15. If in the course of execution, any person raises the question, to his heirship, the Court should enquire into the matter and dispose of it according to law. (*Abdur Rahim and Oldfield*, JJ.) BOTTAMMA *v.* AUDINARAYANA, **43 I.C. 1008.**

C. P. CODE (V of 1908), O. 21, R. 15.

——— **O. 21, Rr 15 and 19**—*Joint and several decrees—Separate provision.*

Where in a joint and several decrees against B and C, they were individually awarded costs as against A, A is entitled to execute his decree against only one of the judgment-debtors, without deducting the costs of both, but after deducting the costs due to him. (*Sadasiva Aiyar and Moore*, JJ.) KOTIGARI RANGIAH CHETTY *v.* CHINTELA PALLI NARASAYYA.
34 I C. 388=3 L.W. 267.

———**O. 21, R. 15**—*Hindu joint family—Execution by Manager.*

The Manager of a joint Hindu family alone might take out execution. A payment to the managing member, of money due under the decree is a valid discharge but not a payment to the junior members. 21 M.L.J. 1008, Foll. (*Benson and Sundara Aiyar*, JJ.) KRISHNA HANDE *v.* PADMANABHA HANDE.
14 M.L T. 233=(1913) M.W.N. 802=21 I.C. 177=25 M.L.J. 442.

———**O. 21, R. 15**—*Joint decree-holders—Application by one for execution.*

On an application by one of the decree-holders for execution, the judgment-debtor applied that the other should be made to join. The judge has a discretion to allow one of the several decree-holders to execute the decree but where the judgment did not show that the judge allowed the applicant to execute the decree the order allowing the execution cannot be sustained. (*Sundara Ayiar and Ayling*, JJ.) ALATHOOR BADRUDDIN *v* GULAM MOHIDEEN. **36 Mad 357=10 M.L.T. 393=(1911) 2 M.W.N. 473=12 I C 562=24 M L J. 341.**

———**O. 21, R. 15**—*Transfer of decree for execution—Legal representative—Bringing on record.*

A Court to which a decree is transferred for execution has no jurisdiction to entertain an application for bringing on the record the legal representative of a deceased decree-holder. The application must be made to the Court which passed the decree *Obiter*: The execution of a decree so transferred need not necessarily be stayed because the application must be made to the Court which passed the decree. (*Prideaux*, A.J.C.) SHRIRAM *v.* DURGAPRÁSAD.
35 I.C. 136.

———**O. 21, R. 15**—*Joint decree-holders—Execution by one—Objection.*

O. 21, R. 15 allows one of several decree-holders to apply on behalf of all and it is not for the judgment-debtor to say that sufficient steps have not been taken to safeguard the interest of the other decree-holders when they themselves have made no complaint whatever. (*Mitra*, A J.C.) AMIR ALI *v.* GOPAL DAS.
34 I.C. 924.

———**O. 21, R. 15**—*Joint decree-holders, if one of several, can give a valid discharge.*

C.P. CODE (V of 1908), O. 21, R. 16.

Ordinarily one of several joint decree-holders cannot give a valid discharge for the amount of the joint decree 28 All. 252, Rel. on. (*Kanhiya Lal*, A.J.C.) AJUDHIA PRASAD *v.* YASIN ALI KHAN. **20 I.C. 457=16 O.C. 146.**

———**O. 21, Rr. 15 and 22**—*Defective application.*

Application though defective saves limitation. (*Coutts and Das*, JJ.) GOBARDHAN DAS *v.* SATISHCHANDRA. **1 P. 609=69 I C. 668=4 Pat. L.T. 263=1922 P. 397.**

———**O. 21, R. 15**—*Joint decree-holders—Decree on appeal.*

Where different persons were entitled to costs of the trial Court, High Court and the Privy Council, and the decree-holders filed three separate execution applications in respect of the costs awarded by the said three Courts. *Held*, that the execution was not irregular. The Privy Council decree alone was being executed but to avoid confusion three applications had been filed. (*Coutts and Adami*, JJ.) RAI BAHADUR BAIJNATH GOENKA *v.* SIR RAVENESHWAR PRASAD SINGH.
58 I C. 212=1 Pat. L.T. 426.

———**O. 21, R. 15**—*Joint decree-holders—Execution of decree.*

If there are more than one decree-holder any one of them may, unless the decree imposes a condition to the contrary, apply for execution of the whole decree. (*Sharfuddin and Coxe*, JJ.) GAJADHAR PERSHAD SAHU *v.* BINDUBASHINI PERSHAD. **29 I.C. 181.**

——— **O. 21, Rr. 15 and 17**—*Joint decree-holders—Execution by one—Amendment.*

A joint decree cannot be executed by one of the several joint decree-holders in respect of his own share. Much less can it be executed by one of the decree-holders in respect of the entire decree unless it is on behalf of all the decree-holders or for the benefit of them all. An application for the execution of the joint decree by one of the decree-holders was not made for the benefit of all. Nor was the decree allowed to be executed by one of the decree-holders nor did the Court pass any order for protecting the interest of the other decree-holders. *Held*, the execution petition was invalid and incompetent. O. 21, R. 17 does not include R. 15 in it and the application cannot be allowed to be amended. (*Atkinson and Jwala Prasad*, JJ.) A. J. MEIK *v.* THE MIDNAPORE ZAMINDARY CO., LTD.
4 Pat. L J. 575=53 I.C. 803=1919 Pat. 349.

———**O. 21, R. 16.**

APPLICABILITY.
ASSIGNMENT OF DECREE.
AUCTION PURCHASER.
BENAMI ASSIGNEE.
CONSIDERATION.
DECREE FOR MONEY.

C. P. CODE (V of 1908), O. 21, R. 16—Applicability.

EFFECT OF ASSIGNMENT.
ENQUIRY.
LEGAL REPRESENTATION.
NON-COMPLIANCE.
NOTICE OF ASSIGNMENT.
ORAL ASSIGNMENT.
RECOGNITION.
RIGHTS OF ASSIGNEE.
TRANSFER OF DECREE.

Applicability.

———O. 21, R. 16—*Applicability—Transferee of property but not of decree cannot apply under this rule.*

No one can execute a decree except the decree-holder or a person to whom the decree has been transferred by assignment in writing or operation of law. A transferee of the property forming the subject of a suit who has not obtained a transfer of the decree cannot execute it. 17 I.C. 512, foll. (*Stuart*, J.) SHIB CHARAN DAS *v.* RAM CHANDER.
66 I.C. 878=1922 All. 98.

———O. 21, R. 16—*Applicability—Award filed in court.*

The provisions of O. 21, R. 16 can apply to an award filed in court, and the assignee of such an award can apply for execution of the same and the recognition of his rights. (*Greaves*, J.) GLADSTUNE WYLLIB & CO. *v.* JOOSUB PEER MAHOMED. **27 C.W.N. 666=77 I.C 868=1924 Cal. 117.**

———O. 21, R. 16 and O. 22, R. 10 (1)—*Applicability—Transfer of part of decree—Right of transferee to execute is not affected.*

S. 146 of the C.P. Code recognizes the validity of a transfer of a part of a decree and execution thereof by a transferee. O. 21, R. 16 is no bar to the application of the section. Such transferee is like a joint decree-holder and can, under O. 21, R. 15 protect his rights either by executing the decree himself or by joining or intervening in the execution by his transferor. An agreement by the transferee of part of a decree that the transferor shall conduct execution proceedings and may compromise the same as he thinks fit, only constitutes the transferor the agent of the transferee and the agency is revocable. (*Wallis*, C.J., *Spencer and Kumaraswami Sastri* JJ.) MUTHIAH CHETTIAR *v.* GOVINDOSS KRISHNADOSS.
44 Mad. 919=(1921) M.W.N 649=41 M.L.J. 816=69 I.C. 337=14 L.W. 287 (F.B.)

———O. 21, R. 16—*Applicability of—Money decree—Assignment to one of several judgment-debtors.*

Per *Sundara Aiyar*, J.—O. 21, R. 16 does not apply to other than money decrees. (*Sundara Aiyar and Sadasiva Aiyar*, JJ.) ARUMUGA MUDALIAR *v.* YOGAMBA BAI AMMANI.
17 I.C. 323=13 M.L.T. 227.

C. P. CODE (V of 1908), O. 21, R. 16—Assignment of decree.

———O. 21, R. 16—*Applicability—Transfer of property which is the subject of decree—Transferee cannot apply.*

Where property forming the subject of a decree is transferred, the transferee cannot execute the decree unless his name has been substituted in the suit in the place of his vendor. O. 21, R. 16, C. P. Code, does not apply to the case nor does S. 146, C.P. Code, enable the transferee to apply for execution. 17 M.L.J. 391; 17 I.C. 512; 30 I.C. 831. (*Adami and Bucknill*, JJ.) THAKURI GOPE *v.* MALIK MOKHTAR AHMAD.
3 Pat. L.T. 625=1922 Pat. 256=69 I.C. 959=1922 P. 363.

Assignment of Decree.

———O. 21, R. 16—*Assignment of decree—"Transfer by assignment or operation of law"—Meaning of.*

The words "transfer by assignment in writing or by operation of law" in O. 21, R. 16 mean a transfer of all the transferor's interest in the decree. Unless the whole interest is exhausted there is not a transfer within the meaning of the rule. (*Ryves and Stuart*, JJ.) MAZHAR HUSSAIN *v.* MT. AMTUL BIBI.
L.R. 3 A 297=66 I.C. 679=1922 All. 101.

———O. 21, R. 16—*Assignment when effective—Instrument in writing.*

An assignment in writing may be secured after application is made for execution and relates back to the date of application. (*Batchelor and Rao*, JJ.) SALEKHAN *v.* VISHVANATH. **9 I.C. 349=13 Bom. L.R 22.**

———O. 21, R. 16—*Assignment of decree.*

Where in execution of a mortgage-decree, the properties were sold "with all arrears of rent" and were purchased by the mortgagee decree-holder himself and subsequent thereto the mortgagor obtained rent-decrees against tenants *held*, that the mortgagee should be treated as an assignee of the decree under O. 21, R. 16, though there was no assignment of the decrees in so many words. (*Chatterjea and Panton*, JJ.) ANANDA MOHUN *v.* PROMOTHA NATH.
57 I.C. 874=25 C.W.N. 863.

———O. 21, R. 16—*Assignment of decree—Bona fides—Determination of—Application for execution.*

If the assignee of a decree does not make an application for the execution of the decree it is not the duty of the Court *suo motu* to determine the question of assignment and make the assignee a party to the decree. Where, however, no formal application for execution had been made by the assignee in the lower Court but the assignee decree-holder wanted to execute the decree, the absence of a formal application under O. 21, R. 16 is a mere irregularity and does not prevent the Court from deciding the validity of the assignment. (*Shadi Lal*, C.J.) HARDITTA *v.* NIGAHIA MAL.
14 Lah. L.J. 269=1922 Lah. 396.

C. P. CODE (V of 1908), O. 21, R. 16—Assignment of Decree.

———**O. 21, R. 16**—*Assignee of decree—Preliminary decree—Redemption—Sale of land—Rights of vendee.*

A vendee of lands forming the subject of a mortgage suit in which a preliminary decree for sale has been passed, before the decree, is not an assignee of the decree under O. 21, R. 16, C.P.C. especially when the sale-deed contains no reference to the decree. 35 All. 204, Rel. (*Shadi Lal and Broadway*, JJ.) AHMAD SHAH *v.* FAUJDAR KHAN.
2 Lah. L J. 1=11 P.W.R. 1920=56 I.C. 983=28 P.L.R. 1920.

———**O. 21, R. 16**—*Assignment prior to decree—Execution.*

An assignment of rights prior to the decree does not give any right to execute the decree subsequently obtained. (*Wallis*, C. J. *and Seshagiri Aiyar*, J.) PEER MAHOMED ROWTHEN *v.* RORUTHANAMBALAM. **30 I.C. 831.**

———**O. 21, R. 16**—*Assignment of decree—Objection by judgment-debtor—Court's duty to inquire.*

On the application for execution by a subsequent transferee of a decree, the Court shall inquire into the objections of the judgment-debtor that the transfer is fraudulent and not summarily refuse to recognise the assignment. (*Sankaran Nair and Ayling*, JJ.) KOTHANDAPANI NAIDU *v.* KUPPUSAWMY NAICKEN.
23 I.C. 951=1 L.W. 206.

———**O. 21, R. 16**—*Assignment of decree—Application by assignee.*

An application by the assignee of a decree is not a fresh application but merely one for bringing on record the assignee and for continuing the pending execution proceedings. (*Dass and Adami*, JJ.) GULAB KUAR *v.* MOHAMMAD ZAFFAR HASSAN KHAN.
2 Pat. L.T. 619=32 I C 30=6 Pat. L.J. 358.

Auction Purchaser.

———**O. 21, R. 16**—*Auction purchaser—Mortgage decree holder—Execution by purchaser of other decrees—Effect.*

A mortgage decree-holder who in execution of his decree, becomes the purchaser of certain other decrees of his judgment-debtor obtains the whole interest of the judgment-debtor in those decrees and can execute them as a transferee under O. 21, R. 16 of the C. P. C. (*Abdur Rahim and Spencer*, JJ.) KUPPUSWAMI IYANGAR *v.* SUBBARAYYA ROWTHAR. **(1912) M.W.N. 1=13 I C. 324=22 M.L.J. 161=11 M.L.T. 18.**

Benami Assignee.

———**O. 21, R. 16**—Benami *assignee—Right to execute.*

A *benamidar* transferee of a decree is entitled to execute it. Cases reviewed. (*Chamier and Piggott*, JJ.) KAMTA PRASAD *v.* INDOMATI.
37 All. 414; 29 I.C. 593=13 A.L.J. 557.

C. P. CODE (V of 1908), O. 21, R. 16—Benami Assignee.

———**O. 21, R. 16**—Benami *assignee—Right to execute.*

A *benamidar* assignee of a decree for mesne profits can apply to the Court for the ascertainment of the mesne profits. (*Chatterjea and Walmsley*, JJ.) PRASANNA KUMAR *v.* ASHUTOSH ROY. **20 I C 688=18 C.W.N. 450.**

———**O. 21, R. 16**—Benami *assignee—Execution.*

On an application for execution of a decree by a transferee the Court can enquire whether the transferee is really a *benamidar* for the judgment-debtor. Where the transferee of a decree is found to be a *benamidar* for the judgment-debtor, the Court is bound to refuse execution. 40 Mad. 296, Foll. (*Scott Smith*, J.) GURU DITTA MAL *v.* PERTAB SINGH.
32 I.C. 952=40 M. 296=2 U.P.L.R. (Lah.) 42=34 I.C. 944. also 35 M. 659=12 I.C. 657.

———**O. 21, R. 16 Proviso**—*Benami Assignee—Decree against several debtors—Assignment* benami *for one—No execution can be had against others.*

Where a decree for payment of money against several persons personally and out of the assets in the hands of another judgment-debtor is assigned to a stranger *benami* for one of the judgment-debtors, the decree is incapable of execution against the other judgment-debtors. 31 B. 308 not foll. O. 21, R. 2, C. P. Code, is no bar to the recognition of the adjustment of the decree in a case like the present. 40 M. 296; 4 C.W.N. 534 *Foll.* (*Spencer and Venkatasubba Rao*, JJ.) SADAGOPA AIYENGAR *v.* SELLAMMAL. **43 M.L.J. 761=16 L.W. 788=31 M L.T. 463=1922 Mad. 510.**

———**O. 21, R. 16**—Benami *assignee—Right to execute decree—Matter to be enquired into by the Court.*

Per *Sadasiva Iyer*, J.—An assignee of a decree who is a *benamidar* of the real decree-holder assignor is entitled to execute the decree in his own name at least in cases where no title to immoveable property is in question. Per *Bakewell*, J: The question how far a person to whom a decree is transferred by assignment can execute the decree is concluded by O, 21, R. 16, of the Civ. P. Code. The only matter for enquiry by the Court in an application for execution by such assignee is any objection by the assignor of the debtor to the assignment. (1918) M.W.N. 507, Ref. (*Sadasiva Iyer and Bakewell*, JJ.) CHELLAM CHETTI *v.* SEENI CHETTI. **(1918) M.W.N. 226=43 I.C. 801=7 L.W. 201.**

———**O. 21, R. 16**—Benami *assignee—Execution.*

The assignee of a decree, when he is found to have taken it *Benami* for one of the judgement-debtors, must prove his title before he

C. P. CODE (V of 1908), O. 21, R, 16—Benami Assignee.

can execute his decree. (*Spencer and Krishnan*, JJ.) MOHAMAD ROWTHER v. PICHAI ROWTHER. **35 I C. 624=4 L.W. 834.**

———**O. 21, R. 16**—Benami *assignee—Right to execute—Decree for money against several persons—Meaning of.*

The execution of a decree by a benamidar for one of the judgment-debtors is barred under O. 21, R. 16, C. P. C. The expression "decree for money against several persons" is not restricted in its application to a personal decree for money against two or more defendants. (*Baker*, O. J. C.) NANHELAL *v.* MANGILAL. **19 N.L.R. 151=78 I.C. 872=1924 Nag. 41.**

———**O. 21. R. 16**—Benami *assignee—Substitution of name.*

The Executing Court can substitute the name of the assignee of a decree and permit him to execute it, though the assignment is *benami*. (*Rigg*, J) LALL DWARKADAS *v.* BURMA RAILWAYS CO. **10 L.B.R. 280= 62 I.C. 299=13 Bur. L.T. 173.**

Consideration.

———**O. 21, R. 16**—*Consideration—Judgment debtor if can contest assignment on ground of inadequacy of consideration.*

A judgment-debtor cannot challenge an assignment of the decree on the ground of want or inadequacy of consideration for the assignment, as that is a matter between the assignor and the assignee. 35 Cal. 420 (P. C.) Ref. to (*Chatterjee and Walmsely*, JJ.) PRASANNA KUMAR *v.* ASHUTOSH ROY. **20 I.C. 685=18 C.W.N. 460.**

———**O. 21, R. 16**—*Consideration—If necessary.*

In the absence of any allegation of fraud, it is immaterial whether there was consideration or not if the transferor and transferee are before the Court and the transferor admits the transfer and declares himself satisfied. But the judgment-debtor is entitled to appeal against an order recognising a transfer of a decree as it would be *res judicata* in subsequent proceedings. (*Oldfield and Tyabji*, JJ.) SALICHEEMALA VENKATASWAMI NAIDU *v.* GUNTURU RANGAPPA NAIDU. **26 I C. 944=2 L.W. 109.**

———**O. 21, R. 16**—*Consideration—Assignment of decree—Plea of fraudulent nature of—If executing Court should enquire into.*

On the application for execution by a subsequent transferee of a decree the Court should inquire into the objection of the judgment-debtor that the transfer is fraudulent and not summarily refuse to recognise the assignment. (*Sankaran Nair and Ayling*, JJ.) KOTHANDAPANI NAIDU *v.* KUPPUSAWMY NAICKER. **23 I.C. 981=1 L.W. 206.**

Decree for money.

———**O. 21, R. 16 (2)**—*Decree for money—Provision for sale.*

C. P. CODE (V of 1908), O 21, R. 16—Legal Representation.

A decree for money against several persons in S. 232 proviso (c) of C. P. C. (1882) signifies a personal decree for payment of money against two or more persons jointly, so that a decree to pay decretal amount and providing that in default mortgaged properties should be sold is a decree for sale and not for money. (*Mookerjee and Carnduff*, JJ.) LALDHARI SINGH *v.* MANAGER BHABAIPURA ESTATE. **14 C.L.J. 689=12 I.C. 70=16 C.W.N. 132.**

Effect of Assignment.

———**O. 21, R, 16**—*Effect of assignment—Decree-holder transferring dominant tenement—Whether entitled to execute after transfer, a decree relating thereto.*

A decree holder who has transferred to a third party the dominant tenement in respect of which an easement existed, is nevertheless entitled to execute a decree relating to easement, if the transferee is not on the record or has not applied for execution of the decree. An executing Court is bound to allow execution at the instance of the decree-holder who has transferred the decree if the transferee does not apply for execution to it. 18 Cal. 639; 30 All. 28, Foll. (*Abdur Rahim and Spencer*, JJ.) SILU PEDAYELLIGADU *v.* SURYA RAO BAHADUR ZAMINDAR GARU. **2 L W. 1122= 18 M.L.T. 494=29 M.L.J 693= 31 I.C. 542=(1916) 1 M.W.N. 119.**

———**O. 21, R. 16**—*Effect of assignment—Execution by original decree-holder.*

In an application for execution by the original decree-holder, the judgment-debtor, cannot plead that the decree had been transferred; and O. 21, R. 16 does not prevent the original decree-holder from executing the decree. (*Piggott*, J.C.) EJAZ HUSSAIN *v.* SHAH ZAMAN MIRZA. **18 I.C. 97=16 O.C. 70.**

Enquiry.

———**O. 21, R. 16**—*Enquiry—Bad faith of transferee decree-holder.*

The soundness of ruling in 19 Mad. 230 that enquiry should be held as to the alleged bad faith of the transferee upon recognising the transfer doubted. (*Sadasiva Aiyar and Moore*, JJ.) BOLLA BRAHMADU *v.* RUDDARAJU VENKATARAJU. **33 I.C. 71.**

Legal Representation.

———**O. 21 R. 16**—*Legal Representation—Transfer to Revenue Court—Recognition of assignment—Power to execute.*

Under O. 21, R. 16 of the C.P.C. the heirs of a deceased decree holder may apply for execution to the Court that passed the decree, and under S. 42 of the C.P.C. they can do so equally to any court to which that decree has been transferred for execution. It may also be that the right to apply for execution in these circumstances includes the right to carry on an execution already initiated by the deceased decree-holder. But both these things can be done only in a Civil Court. The Tahsildar as Revenue Officer

C. P. CODE (V of 1908), O. 21, R. 16—Legal Representation.

has certain powers in the execution of a decree by ejectment, but he cannot execute such a decree in favour of any one but the person named in it. When it is ordered to give possession of a holding to a certain person who is then alive, he has no more power to give possession to anybody else whom he considers to be the heir of that person than a *Mazkuri* would have in the same circumstances. (*Hallifax*, A.J.C.) MT. KRISHNA BAI *v* DEBI SINGH.
71 I.C. 409=1923 Nag. 195.

———**O. 21, R. 16**—*Legal Representation—Transfer by operation of law—Assignment not necessary.*

Where the trustee of certain lands obtained a decree for rent against certain tenants but before the execution of the decree the trust was declared invalid and thereupon the owner of the properties applied to execute the decree. *Held*, he must be deemed to have become an assignee of the decree by operation of law and was competent to execute decree although there was no formal assignment from the ex-trustee. (*Jwala Prasad and Foster*, JJ.) GOBIND SINGH *v.* MAHARAJA KUMAR GOPAL SARAN NARAIN SINGH. **4 P.L.T. 731=2 Pat L.R. 27=1924 P. 393.**

Non-compliance.

———**O. 21, R. 16**—*Non-compliance.*

The provisions of O. 21, R. 16 of the C. P. Code are of a mandatory nature and non-compliance with the provisions thereof renders all proceedings in execution void. 36 Bom. 58; 9 All. 46, foll. (*Wilberforce and Abdul Quadir*, JJ.) NOTAN DAS *v.* LACHMAN SINGH. **3 Lah. L.J. 434=2 Lah. 230=63 I.C. 884.**

———**O 21, R. 16**—*Non-compliance with—Effect of.*

The omission to comply with the provisions of O. 21, R. 16, C. P. C. makes all subsequent proceedings void. (*Wilberforce*, J.) GUL MUHAMMAD *v.* BANDU. **56 I.C. 461.**

Notice of Assignment.

———**O. 21, R. 16**—*Notice of assignment—Assignee applying for execution—Attachment before hearing judgment-debtor's objection—Legality of.*

An assignee of a decree applied under R. 16 for notices to the transferor and judgment-debtor and at the same time applied for attachment of property. The notice as well as warrant for attachment were issued and executed. The judgment-debtor objected but the Court held that the assignee was entitled to execution and also allowed the attachment already made. It was held that as the objections of the judgment-debtor were not heard the attachment was unlawful and must be set aside as contrary to express provisions of law. (*Scott*, C.J. *and Batchelor*, J.) KASSUM GOOLAM HUSAIN *v.* DAYABHAI AMIRSI.
13 Bom. L.R 973=12 I.C. 847=36 Bom. 58.

C. P. CODE (V of 1908), O. 21, R. 16—Notice of Assignment.

———**O. 21, R. 16**—*Notice of assignment, if essential.*

Under O. 21, R. 16 an assignee of a decree must give notice of his application for execution both to the assignor and the judgment-debtor before the execution of the decree can take place. If an assignee applies for execution without notice to either judgment-debtor or assignor, and judgment-debtor's property is attached the judgment-debtor cannot be said to have acquiesced when he appeals against the order of attachment. (*Shah Din*, C. J.) PARTAP SINGH *v.* GURUDITTA MAL.
75 P.W.R. 1917=39 I C 952=118 P.L.R 1917.

———**O. 21, Rr. 16 and 17**—*Notice—Substituted service by affixing to the door of the defendant's house—When good.*

Where the serving officer understands that the defendant had gone to another village, he need not wait till the defendant returns, nor pursue him to that village but may affix to the outer door. (*Ayling*, J.) VELLURI BASAVAYYA *v.* PERURI KISTNA BRAHAMAN.
23 I.C. 219=1 L.W. 351.

———**O. 21, R. 16**—*Notice of assignment—Reasons for giving.*

The assignee must, under R. 16, give notice not of the assignment but of the execution proceedings to the judgment-debtor and transferor. (*Das and Adami*, JJ.) GOLAB SINGH *v.* MOHAMMAD ZAFFAR HASSAN KHAN.
2 Pat. L T. 619=62 I.C. 30=6 P.L J. 358.

———**O. 21, Rr. 16 and 90**—*Notice—Want of—No objection in prior execution proceedings—Application to set aside.*

A judgment-debtor not raising objection as to the want of notice or its proper service under O. 21, R. 16 in the previous execution proceedings cannot do so in his application to set aside the sale under O. 21, R. 90; 8 Cal 51, Appl.; 14 C.W.N. 114; 14 C.W.N. 433, Foll. (*Coutts and Sultan Ahmad*, JJ.) BRIJI LAL MARWARI *v.* ATKINSON. **5 Pat. L.J. 639=57 I.C. 707=1 Pat. L.T. 505.**

———**O. 21, R. 16**—*Notice not served on assignor—Delay.*

Where a decree-holder transfers his interest, the decree cannot be executed until notice has been served upon the assignor in accordance with O. 21, R. 16, C.P.C The fact that a notice purporting to be under S. 158-B (2), B. T. Act, (1885), has been shown to the assignor will not dispense with the necessity of complying with the rule. Where a party has had plenty of time to comply with the provisions of the law in O. 21, R. 16, C.P.C., but has omitted to do so, he has no absolute right to insist upon an adjournment in order to allow him to rectify his own omission. (*Miller*, C.J. *and Mullick*, J.) MAHARAJA SIR RAMESHWAR SINGH *v.* HARIHAR JHA.
1 Pat. L.T. 666=5 Pat. L J. 390=57 I.C. 250=1921 Pat. 1.

C. P. CODE (V of 1908), O. 21, R. 16—Oral Assignment.

Oral Assignment.

——— **O. 21, R. 16**—*Oral assignment—Writing essential to enable transferee to execute—C. P. Code* (1882), *S.* 232.

Where there is a mere contract for the sale of a decree without an assignment in writing in favour of the purchaser he cannot execute the decree. The purchaser in such a case does not get a title to the decree by operation of law. (*Sir John Edge.*) JATINDRA NATH BASU *v.* PEYER DEYE DEBI. **43 Cal. 990 = 43 I A. 108 = 14 A L J 527 = 20 C.W.N 866 = (1916) 1 M.W.N. 403 = 18 Bom. L R. 509 = 24 C.L J. 67 = 20 M L T 25 = 3 L W. 583 = 34 I.C. 69 = 31 M.L.J. 248 (P.C.).**

———**O. 21, R. 16**—*Oral assignment—Assignment of decree—Partition.*

Assignment of decree by a partition is not by operation of law and must be in writing. (*Batchelor and Rao, JJ.*) SALIKHAN *v.* VISHWANTH. **9 I.C. 349 = 13 Bom. L.R. 22.**

——— **O. 21, R. 16**—*Oral assignment—Whether assignee can execute.*

Unless the assignment is in writing, an assignee of a decree cannot apply for executing it. An oral transferee cannot execute the decree transferred. If a decree obtained by the managing member of a joint Hindu family is allotted to another member at the family partition, the latter is in no sense an assignee of the decree by operation of law, his exclusive right of the appellant to the decree being only treated by an act of all the co-parceners of the family. (*Sundara Iyer and Sadasiva Iyer*, JJ.) RAMANATHAN CHETTIAR *v.* RAGHAVENDRA ROW. **16 I.C. 807.**

———**O. 21, R. 16**—*Oral assignment—Application for execution if a step-in-aid.*

An application for execution based on an oral assignment of a decree is not one in accordance with law and is not a step-in-aid of execution. 15 Bom. 307, Foll.; 20 Cal. 755, Not appr.; 19 Cal. 482; 16 All. 26, Dist. (*Abdur Rahim, J.*) RAMANATHAN CHETTIAR *v.* SOKANATHA GOUNDAN. **(1911) 2 M W N 389 = 13 I.C. 78 = 10 M.L.T. 532.**

Recognition.

———**O. 21, R. 16**—*Recognition—Transfer of decree—Right to execute.*

Till the transfer of a decree is recognised by the Court the decree-holder on record can apply for its execution. 31 I.C. 542; 29 M. L. J. 494, Foll. (*Sadasiva Aiyar and Moore, JJ.*) ARICHETTY *v.* THERTHA MALI CHETTY. **34 I.C. 791 = 3 L.W. 521.**

——— **O. 21, R. 16**—*Recognition by Court—Effect of.*

A transfer of a decree by an unrecognised transferee and is deemed to pass a good title to the transferee and is seldom objected to in

C. P. CODE (V of 1908), O. 21, R. 16—Rights of Assignee.

practice by Courts. (*Sadasiva Aiyar and Moore, JJ.*) MIAN SAHIB LEVVAI *v.* GOPALIER. **33 I C. 558.**

———**O. 21, R. 16 and S. 47**—*Recognition of transfer.*

When the plff. transferee decree-holder has been recognised in a proper execution application by him but the application itself is subsequently dismissed for some particular default, the subsequent dismissal does not take away the right of the judgment-debtor to appeal under S. 47 against the order recognising the transfer. An application by a transferee decree-holder under O. 21, R. 16 is an application for execution and not one for mere recognition as transferee. (*Sadasiva Aiyar and Moore, JJ.*) BOLLA BRAHMADU *v.* RUDDARAJU VENKATARAJU. **33 I.C. 71.**

——— **O. 21, R. 16**—*Recognition—Assignee from assignee—Refusal to recognise transfer, without enquiry—Validity.*

Where an execution application by a transferee from a transferee of a decree was opposed by the judgment-debtor on the ground that the transfer of fraudulent, and the Court, without enquiring into the validity of the transfer, refused to recognise it. *Held*, the order was illegal. (*Sankaran Nair and Ayling, JJ.*) KOTHANDAPANI NAIDU *v.* KUPPUSWAMI NAIKER. **24 I.C. 766 = 1 L.W. 206.**

———**O. 21, R. 16**—*Recognition by Court—Application to recognise transfer merely—Not competent—Amendment.*

An application by the transferee of a decree-holder not praying for execution but merely for recognition of his right of execution is legally incompetent and should be rejected. 31 Mad. 234, Foll. An amendment of such application by adding a prayer for execution will not be allowed on appeal. 17 Cal. 731 (F. B.), Foll. (*Sadasiva Aiyar and Spencer, JJ.*) ALAGAPPA CHETTY *v.* RAMASWAMY CHETTY. **(1913) M.W.N. 1003 = 21 I.C. 609 = 14 M.L.T. 513.**

Rights of Assignee.

——— **O. 21, R. 16**—*Rights of assignee—Assignee of a portion—Decree for dower and costs—Not divisible.*

Decree for dower and costs in a suit against the heirs of the husband is one and indivisible, although a portion of the sum decreed is made recoverable only from the assests of the deceased. The transferee of a portion of an indivisible decree cannot execute it even partially. (*Tudball and Rafique, JJ.*) RAMCHANDER NAIK KALIA *v.* ABDUL HAKIM. **33 All. 204 = 19 I.C. 304 = 11 A.L.J. 249.**

———**O. 21, R. 16**—*Rights of assignee—Assignee of a portion—Right to execute.*

O. 21, R. 16 only applies when the whole of a decree has been transferred or when the whole interest of any decree-holder out of several has been transferred and it does not give power to

C. P. CODE (V of 1908), O. 21, R. 16—Right of Assignee.

apply for execution of decree to a transferee of a small portion of any one individual decree-holder's rights. (*Johnstone*, C.J.) MOKHAN CHAND *v.* GANGA RAM. **39 I.C. 664 = 16 P.R. 1917.**

———**O. 21, R. 16**—*Rights of assignee—Execution of decree.*

The absence of consideration for the assignment of a decree is immaterial and will not deprive the assignee of his rights to execute the decree if the assignment is not a sham transaction. 43 I.C. 801, Foll. (*Sadasiva Aiyar and Napier*, JJ.) THIMMA REDDI *v.* SUBBA REDDIAR. **49 I.C. 141 = (1918) M.W.N. 507.**

———**O. 21, R. 16**—*Rights of assignee—Right to execute appellate decree.*

What is really transferred when the decree is assigned is not the decree itself but the interest of the decree-holder in the decree as finally determined. An assignee of a decree *pendente lite* is entitled to execute the decree passed on appeal therefrom in favour of the assignor. (*Spencer and Kumaraswamy Sastri*, JJ.) PONNUSWAMI PILLAI *v.* CHIDAMBARAM CHETTIAR. **35 M.L.J. 294 = 23 M.L.T. 213 = (1918) M.W.N. 194 = 44 I.C. 849 = 7 L.W. 566.**

——**O. 21, R. 16 and O. 22, R. 10 and O. 34, R. 5**—*Rights of assignee—Preliminary mortgage decree for sale—Transferee, whether can apply for execution—Procedure.*

Where a decree-holder applied under O. 21, R. 16, C. P. Code, for execution and also prayed for the passing of a final decree and for sale. *Held*, that there was no executable decree and the application for execution was *premature* but as there was a prayer for passing a decree for sale, the applicant must be directed to amend the petition as one falling under O. 22, R. 10, Cl.(1) and O. 34, R. 5 of the C.P. Code. (*Sadasiva Aiyar and Moore*, JJ.) KANNIAH NAIDU *v.* CHENGAMMA NAIDU. **32 I.C. 981.**

——**O. 21, R. 16**—*Rights of assignee—Transfer to judgment-debtor.*

A joint judgment-debtor who has obtained a transfer of the decree in his own name is not entitled to execute it. (*Sankaran Nair and Spencer*, JJ.) ANNABATULLA VENKATARATNAM *v.* ANNABATULLA NAIDU. **28 I C. 906.**

———**O. 21, R. 16**—*Rights of assignee—Attachment by transferor—Transferee's right—Abandonment—Right to execute for further sums.*

A transferee can rely on an attachment obtained by his transferor and subsisting at the date of his transfer. There may be a presumption of abandonment when a second application for attachment is made but it may be rebutted by the conduct of the parties. The conception of execution for recovery of distinct sums payable to the same decree-holder on different dates as involving distinct attachments is unsound. The reference in S. 235 (*j*)

C. P. CODE (V of 1908), O. 21, R. 16—Transfer to judgment-debtor.

of the old C.P.C. to 'such other methods' indicates that the provision explicitly made, is not exhaustive. There is no prohibition in law against an application asking for an order in execution directing the recovery, by means of an existing attachment, of a further sum which has become due under the decree in addition to the sum for which execution was originally sought. (*White*, C.J. *and Oldfield*, JJ.) KURU CHA GANGU NAIDU *v.* KOVVURI BASAVA REDDY. **(1913) M.W.N. 821 = 18 I.C. 691 = 13 M.L.T. 145.**

——**O. 21, R. 16**—*Rights of assignee.*

A transferee decree-holder may apply to enter up satisfaction of a decree without an application for execution. (*Sundara Aiyar and Sadasiva Aiyar*, JJ.) DHARANI MUDALI *v.* MEENAMBA BAI. **17 I.C. 617 = 12 M.L.T. 592.**

———**O. 21, Rr. 16 and 53**—*Right of assignee—Attachment—Effect of.*

An assignee of a decree which has been attached has, under O. 21, R. 53 the right to execute the decree notwithstanding the attachment. 13 I.C. 659, Diss; 21 M.L.J. 577; 24 Cal. 778, Ref. But such right is subject to the right of the attaching creditor. (*Sundara Aiyar and Sadasiva Aiyar*, JJ.) ARUMUGA MUDALIAR *v.* YOGAMBA BAI AMMANI. **17 I.C. 323 = 13 M.L.T. 227.**

Transfer to Judgment-debtor.

———**O. 21, R. 16**—*Transfer to judgment-debtor's pleader—Right of transferee to execute—Pleader and client.*

The effect of the purchase of a decree by the pleader for the judgment-debtors is not to satisfy the decree and to release the judgment-debtors from liability, although the pleader holds the decree assigned to him in trust for his clients, and, if called upon by his clients, to do so, is bound to assign the decree to them. No court will, however, decree such a re-conveyance except upon equitable terms. (*Mookerjee and Walmsley*, JJ.) NAGENDRA BALA DASSI *v.* DEBENDRA NATH MAHIS. **22 C.W.N. 491 = 44 I.C. 13 = 27 C.L.J. 388.**

——**O. 21, R. 16**—*Transfer to judgment-debtor—Whether can execute decree—Rights of other mortgagors.*

A judgment-debtor who is assignee of the mortgaged decree can execute it by putting up the mortgaged property to sale. (16 C.W.N. 132, Foll.) The purchase by one of several mortgagors of the mortgagee's interest, does not entitle the other mortgagors to apportionment of their debts so as to enable them to redeem their own shares in the mortgaged property but the assignees mortgagors cannot sell the mortgaged property for their own share of debt. (*Beachcroft and Walmsley*, JJ.) JAGABANDHU PAL *v.* HALADHAR PAL. **41 I.C. 269 = 27 C.L.J. 110.**

C. P CODE (V of 1908), O 21. R. 16—Transfer to judgment-debtor.

———O. 21, R. 16—*Transfer to judgment-debtor—Purchase by one—Rights of.*

One of several judgment-debtors who purchases the decree, cannot execute it against the other judgment-debtors, but can sue them for contribution under S. 69 of the Contract Act. (*Coxe and Ray*. JJ.) RAMLAL MANDLAL *v.* KHIRODA MOHINI DASI. **20 I C. 569 = 18 C.W.N. 113.**

———O. 21, R. 17—*Application for execution rejected—Not a step-in-aid.*

Under Art. 182 of the Limitation Act, limitation is not saved by an application for execution of the decree, when the application is rejected under O. 21, R. 17, sub-rule (1). (*Fletcher and Richardson*, JJ.) JOYANUDDIN KHAN *v.* JAMIRUDDIN SARKAR. **37 I C. 916 = 21 C.W.N 835.**

———O. 21, R. 17—*Limitation—Execution of decree—Application for permission to file list of immoveable properties—Permission granted but no time fixed—List filed after period of limitation—Execution application, if barred.*

Where before the period of limitation, a decree-holder applied under O. 21, R. 17, for permission to file a list of immoveable properties and permission was given but no time was fixed within which the list was to be filed and the list itself was filed after the limitation period, the necessary formalities of law were not carried out in time and the effect of limitation could not be excluded and the execution application itself was barred. (*Stephen and Mullick*. JJ.) SALIMULLA BAHADUR *v.* SAINADDI SARKAR **22 I.C. 337 = 18 C.L.J. 538.**

———O. 21, R. 17—*Amendment—Power of court—Amendment after 12 years, but application within time—Effect.*

O. 21, R. 17 does not take away the power of court to amend an application for execution at any time before its disposal. An application so amended is one in accordance with law and must be decreed to have been presented at the date of the original presentation itself. An application for execution was filed within 12 years of the decree but it required an amendment, which however was made at a time when the decree was more than 12 years old. *Held* nevertheless, the application is not barred under S. 48. (*Spencer and Devadoss*, JJ.) VEMURI PITCHAYYA *v.* RAJA YARLAGADDA. **43 M.L.J. 651 = 18 L.W. 739 = 33 M.L.T. (H.C.) 125 = 76 I.C. 750 = 1924 Mad. 367.**

———O. 21, R. 17—*Amended application—Application in accordance with law.*

Defective applications subsequently amended are deemed applications in accordance with law with effect from the date of first presentation under O. 21, R. 17. (*Spencer and Krishnan*, JJ.) KAMATCHI AMMAL *v.* PICHU AIYAR. **4 L.W. 108 = (1916) 2 M.W.N. 162 = 35 I.C. 876 = 31 M.L.J. 561.**

C. P. CODE (V of 1908), O. 21, R. 17.

———O. 21, R. 17—*Order for amendment—Non-compliance—Rejection.*

Under R. 17 of O 21 of the present Code, the Court is not expressly bound to reject an application not amended in accordance with its orders, as it was under S. 245 of the Old Code, but the effect of the rule is that the Court is bound to reject it, unless it is duly amended within the time or the extended time allowed by the Court, or the decree-holder can show that it does not require amendment. An application that is rejected *in limine* has no more been presented than one that the applicant has taken with him into Court but has omitted to offer to the Judge or to the proper officer. (*Hallifax*, A.J.C.) MEGHRAJ *v.* ABDUL MAJID. **17 N.L.R. 179 = 63 I.C. 971 = 4 N.L.J. 71.**

———O. 21, R. 17—*Amendment—Inclusion of prayer for attachment of more properties is not an amendment.*

Where an execution application has been registered under O. 21, R. 17, C.P.C., no amendment is possible thereafter. An application to file fresh list of properties against which execution is also prayed for, is not an amendment of the execution petition. (*Miller*, C.J. *and Kulwant Sahay*, J.) CHAURASI MAHASARICK *v.* BHAGAN SAHU. **2 Pat. 787 = 74 I C. 144 = 1923 Pat. 209 = 1924 P. 20.**

———O. 21, R. 17—*Court can allow amendment or reject application for non-compliance of provisions.*

Under O. 21, R. 17, C.P. Code, whenever an execution application is put in court which does not conform to the provisions of rules 11 to 14 of order 21, the court has the power either to reject the application or to allow the defect to be remedied. It does not impose upon the court the duty to calculate interest due under the decree. (*Das and Adami*, JJ.) CHOWDHURI CHINTAMONI MAHAPATRA *v.* SRIMATI MONMOHINI DEBI. **1 P. 149 = 69 I.C. 200 = 1922 P. 409.**

———O. 21, Rr. 17 (2) and 18—*Application for execution—Filing of a fresh list of properties—Continuation of original application.*

A supplemental list of properties sought to be attached and sold, filed later on, should be taken as part of the original application under O. 21, R. 17 (2). If a fresh application were at all necessary then the subsequent application furnishing a supplementary list of properties should be treated as one made in continuation of the application first presented. In this view no question of limitation arose and the decree-holder would be at liberty to proceed with an execution as on his prior applications. 17 Cal. 631; 18 C.L.J. 538, Ref. (*Teunon and Newbould*, JJ.) GNANENDRA KUMAR ROY CHOWDHURY *v.* SHAYAM SUNDER JEN. **22 C.W.N. 540 = 44 I.C. 563 = 27 C.L.J. 398.**

———O. 21, Rr. 17 (2) and 11—*Limitation—Execution application — Presentation by Mukhtear—Omission to give particulars.*

C. P. CODE (V of 1908), O. 21, R. 17.

The fact that the applicant's power of attorney was not filed with the application, that notice was not given to the judgment-debtor and that no mention was made of such particulars as whether any money had beeen realised or any settlement arrived at, or whether any previous execution had been sought out, are not such grave defects as could not be cured by an amendment so as to save limitation under O. 21, R. 17 (2). (*Broadway, J.*) KANJI MAL *v.* KIDAR NATH. **49 I.C 983=32 P.W.R. 1919.**

———**O. 21, R. 17 (2)**—*Application for execution by agent without power of attorney—Subsequent filing of power—Court's duty.*

Where an application for execution was presented by an agent without a power of attorney, who on objection filed a power of attorney subsequently *held*, that the Court should accept it and treat the application as having been presented on the date of production of the power on the principle of O. 21, R. 17 (2). (*Reid, O.J.*) GANGARAM *v.* DINA NATH.
118 P.R. 1912=81 P.W.R. 1913=18 I.C. 526=86 P.L R. 1913.

———**O. 21, R. 18**—*Cross decrees—Set-off—Different capacities.*

The decree-holders in a suit for possession applied for execution of a decree for costs in their favour; the judgment-debtors had obtained mortgage decrees against a number of persons including one decree-holder who was a purchaser of a small share of the mortgaged property. *Held*, that under O. 21, R. 18, no set-off can be allowed as the applicants filled distinct characters in the two cases nor could there be a set-off where the judgment-debtor was a puisne mortgage or an attaching decree-holder. (*Walsh and Sunder Lal, JJ.*) SHEO SHANKER *v.* CHUNNI LAL. **38 All. 669=36 I.C. 948=14 A.L.J. 776.**

———**O. 21, R. 18**—*Cross decrees—Separate suits—Set-off.*

Two cross decrees in separate suits and not in course of execution by the same Court cannot be set-off one against the other. (*Banerji, J.*) AFZAL-UN-NISSA *v.* NURUL HUDA.
21 I.C. 32=11 A.L.J. 768.

———**O. 21, Rr. 18 and 19**—*Cross decrees—Appellate Court—Execution.*

A deft. in a suit to whom a smaller amount is due from the plff. as costs of the appeal is not entitled to execute his decree for costs against the plff. where a larger amount decreed by the lower Court remains unpaid to the latter by the former. (*Mookerji and Beachcroft, JJ.*) BEPIN BEHARI SEN *v.* KRISHNA BEHARI SEN. **46 Cal. 168=45 I.C. 241=27 C.L.J. 392.**

———**O. 21, R. 18**—*Pre-emption decree with costs—Plaintiff can set off costs against deposit amount.*

Where a suit for pre-emption is decreed and plff. is awarded costs he is entitled to deduction

C. P. CODE (V of 1908), O. 21, R. 18.

of costs from deposit made by him. (*Chevis and Scot-Smith, JJ.*) KUPURIA MAL *v.* WALI MUHAMMAD. **2 Lah. 294=4 Lah L J 854=65 I.C. 280=23 P.L.R. 1922=1922 Lah. 142.**

———**O. 21, R. 18**—*Cross decrees—Execution application in one suit—Order passed but execution stayed to enable the other decree-holder to apply—Application made by the other party—Both pending—Execution how made.*

Where in the case of cross-decrees, on an application for execution of one decree, an order was passed directing execution but allowing it to be stayed to enable the other decree-holder to apply for the execution of his cross-decree, and the other party files an execution application, both decrees, may be taken up together and satisfaction of the larger decree may be entered to the extent of the smaller. (*White, C.J. and Oldfield, J.*) RUKMANI *v.* SEETHAMMAL, **(1914) M.W.N. 83=22 I C. 78=1 L W. 3.**

———**O. 21, R. 18**—*Cross-decrees—Execution—Application, if necessary.*

O. 21, R. 18, contemplates that the decrees on both sides are before the Court for execution, *i.e.*, that both sides should have taken out execution. But where the High Court when affirming one of the decrees for rent said that execution should not issue until the amount of mesne profits due under the decree in favour of the appellants had been ascertained, the intention was that the decrees should be set-off against each other and therefore set-off was allowed although the judgment-debtor did not apply for the execution of the decree. (*Chamier, C.J. and Sharfuddin, J.*) HIRA LAL SINGH *v.* RAMJI RAM. **52 I.C. 746=1919 Pat. 372.**

———**O. 21, R. 18 and S. 49**—*Equities of judgment-debtor against decree-holder—Set-off.*

When at any time one party has a decree in his favour which he can execute against another and the latter has one which he can validly enforce against the former, then a set-off may be ordered and execution directed to issue only for the balance due by the one to the other after making such a set-off. (*Ormond, J.*) GIRDHARI LAL *v.* MULLA MAHOMED.
12 I.C. 203=4 Bur. L.T. 254.

———**O. 21. R. 18 (1) (b)**—*Barred claim—Set-off—Decree.*

The form of execution by setting off cross-decrees in given is C. P. C. and no equitable considerations can add to or detract from the provisions of the statute. Hence a statute barred debt cannot be set-off against the claim of the plff. (*Fletcher and Richardson, JJ.*) MUNSUR ALI *v.* ABHOY CHARAN DAS.
40 I.C. 816=21 C W N. 1147.

———**O. 21, R. 18, Cl. (4)**—*Decrees not inter parties—Right of set-off.*

A mortgage decree can never be termed a "joint" and "several", decree within O. 21, R. 18 (4) and, therefore, there cannot be a

C. P. CODE (V of 1908), O. 21, R. 19.

set-off of two mortgage decrees between the same parties; but if they are between the same parties it is doubtful whether they can be set-off against each other. (*Richards*, C.J. *and Banerjee*, J.) RAMCHANDAR UPADHYA *v.* MAHABIR SINGH. **39 I.C. 560 = 16 A.L.J. 327.**

———**O. 21. R. 19**—*Cross-claims—Mesne profits—Costs—Recovery barred by limitation—Set-off.*

Though the opponents would be barred by limitation from recovering the larger sum awarded to them under the decree that circumstances could not avail to enable the appellant to take out execution in a manner expressly forbidden by O. 21, R. 19, and to execute for the smaller sum. (*Batchelor and Hayward*, JJ.) MADAPPA GANAPPA *v.* JAKI GHOSAL. **40 Bom. 60 = 30 I.C. 893 = 17 Bom. L.R. 689.**

———**O. 21, R. 19 and S. 151** — *Cross-claims—Decree entitling two persons to recover unequal sums from each other—Party entitled to execution.*

When a decree entitles two persons to recover unequal sums from each other, the person entitled to the greater sum has the right to take out execution, for the balance after deducting the smaller sum under O. 21, R. 19. If he fails to make this deduction, the Court can under Sec. 151 order the refund of the sum taken in excess. (*Chatterjee and Panton*, JJ.) ANNADA MOHAN *v.* ATUL CHANDRA, **56 I.C. 753 = 24 C.W.N. 466.**

———**O, 21, R. 19**—*Jurisdiction.*

Where the claim sprang from a compromise entered into between the parties, the object of which was to put an end to all disputes between them and it was never contemplated that another action should be brought in respect of any of the matters which formed the subject-matter of the settlement: *Held* the execution Court has jurisdiction, though the decree merely declares the rights of the parties *inter se* and does not direct any act to be done. (*Shadi Lal*, C.J. *and Abdul Qadir*, J.) HAJI MAHOMMED TAQI *v.* HAJI ABDUL. RAHMAN. **1923 Lah. 151.**

———**O. 21, R. 19** — *Cross-claims under a decree.*

Where the plaintff obtained a decree against the fourth defendant for a sum of money which she was entitled to as her own Stridhanam, and under the same decree she was liable to the fourth defendant for a larger amount in respect of her mother's estate as her mother's heiress, and the plaintiff's husband as the legal representative of the plaintiff to her Stridhnam sought to execute the decree for the smaller amount against the fourth defendant while the heir in respect of the plff.'s mother's estate was the first defendant, the plaintiff's brother, *held*, that the decree was inexecutable in the hands of her husband and that O. 21, R, 19, C. P. C. applied and consequently the decree was satisfied to the extent of the smaller amount. 40 Bom. 60, Referred to. (*Oldfield and Venkatasubba Rao*, JJ.) VENKATANARAYANA *v.* PURVADA NARASIMHA ROW. **44 M.L.J. 590 = 17 L.W. 648 = 32 M.L.T. (H.C.) 341 = (1923) M.W.N. 474 = 72 I.C. 865 = 1923 Mad 638.**

C. P. CODE (V of 1908), O. 21, R. 22—Application under.

———**O. 21, R. 19** — *Pre-emption decree — Costs cannot be set off against deposit amount.*

A vendee against whom a decree for pre-emption has been passed subject to a certain amount being deposited, is not a person who can recover the purchase-money from the plaintiff unless he chooses to deposit it. He cannot compel the plaintiff to exercise his rights under the decree for pre-emption and the case does not fall under O, 21, R. 19. Hence costs awarded cannot be set off against the amount to be deposited as pre-emption money. (*Kanhaiya Lal*, J.C.) NILKANTH *v.* MAHABIR SINGH. **26 O.C. 348 = 74 I.C. 558 = 9 O. & A.L.R. 207 = 1924 Oudh 104.**

———**O. 21, Rr. 19 and 20**—*Cross-claims—Nature of—Set-off.*

Rule 19 is not limited in application to cross-claims which are of precisely the same nature for cases where the parties fill the same character; even costs awarded to the judgment-debtor can be set-off. (*Lindsay*, J.C. *and Kanhaiya Lal*, A.J.C.) SADIK HUSAIN KHAN *v.* HUSHIM ALI KHAN. **24 I.C. 376.**

———**O. 21, R. 21**—*Money decree against some and mortgage decree against others—Nature of the decree.*

Where a decree in 1897 provided for a money decree against some of the defts, and a mortgage decree against another, and the decree-holder applied for execution against the first set of defts. in 1910. *Held*, (Per *Karamat Hussain*, J.) that the decree being a money decree was barred by O. 21, R. 21. Per *Chamier*, J.—The decree was not barred because a decree cannot ba split up when different reliefs are given. (*Karamat Hussain and Chamier*. JJ.) PARABHU NARAIN SINGH *v.* LAJI SINGH. **13 I.C. 187 = 9 A.L.J. 79.**

———**O. 21, R. 22.**

APPLICATION UNDER.
DEAD PERSON.
LEGAL REPRESENTATIVE.
NOTICE ESSENTIAL.
REVIVOR OF DECREE.

Application under.

———**O. 21, R. 22**—*Application under.*

Application for issue of notice upon the judgment-debtor or his representative, is a step-in-aid. (*Mukerjee and Panton*, JJ.) SADAY CHANDRA JANA *v.* PORESH NATH. **38 C.L.J. 82 = 65 I.C. 871 = 1922 Cal. 45.**

———**O. 21, R. 22**—*Application for transmission of decree — Issue of notice— Decree*

C. P. CODE (V of 1908), O. 21, R. 22—Application under.

capable of execution—Order, if judicial and may be delegated.

An application for transmission of a decree is not an application for execution and no notice under O. 21, R. 22 can properly be issued on such an application. The notice required by that section must on transmission of the decree be issued by the executing Court and the same Court should decide whether the application is capable of execution. To determine whether the decree is capable of execution, is a judicial act, which the Registrar cannot do. (*Sanderson*, C.J., *Woodroffe*, *Mookerjee*, *Chitty and N. R. Chatterjea*, JJ.) CHUTTERPUT SINGH *v.* SAIT SURARI MAL.
43 Cal. 903=20 C.W N. 889=23 C.L.J. 645=36 I.C. 602. (F B.).

——O. 21, R. 22—*Application under—Step-in-aid—Irregular or defective application—Limitation.*

The issue of a notice under O. 21, R. 22 starts limitation anew even though the preceding application upon which the notice was issued was defective or irregular. 8. I.C. 377, *Foll.* (*Stuart*, A.J.C.) SRI RAM *v.* MOHAN LAL, **34 I.C. 280=19 O. C. 17.**

Dead Person.

——O. 21, R. 22—*Dead person—Order against, invalid.*

An order in execution passed against a person dead at the time as well as the subsequent proceedings are a nullity. (*Rattigan*, J.) ABDUR RAHMAN *v.* KISHNA MAL.
161 P.W.R. 1911=11 I.C. 869=247 P.L.R. 1911.

——O. 21, Rr. 22, 90—*Dead person—Death of judgment-debtor after attachment and order for sale, but before sale. Legal representative not brought on record—Effect.*

Where after attachment and order for sale the judgment-debtor dies but without his legal representative being brought on record, the sale takes place, it is not null and void on that account. The case where want of notice under O. 21, R. 22 constitutes a material irregularity is quite different. (*Spencer and Krishnan*, JJ.) MINOR DORAISWAMY *v.* CHIDAMBARAM PILLAI. **18 L.W. 577=45 M.L J. 413=33 M L.T. (H C.) 25=(1923) M.W.N. 817=47 Mad. 63=75 I.C. 46=1924 Mad. 130.**

Legal Representative.

——O. 21, R. 22—*Legal Representative—Deceased judgment-debtor—True legal representative not brought on record—Notice to intermeddler—Objection.*

An execution creditor can serve notice on an intermeddler of the estate of the deceased judgment-debtor and that would be a service on the legal representative; but he is liable to be met with objection, afterwards, that the person who was served with notice, was not really an intermeddler or that, in fact there was a true

C. P. CODE (V of 1908), O. 21, R. 22—Notice Essential.

legal representative in existence at the time. (*Macleod*, C.J. *and Shaw*, J.) SHANKER DAJI NAIK *v.* DATTATREYA. **45 Bom. 1186=63 I.C. 248=23 Bom. L.R. 814.**

——O. 21, R. 22 (1) (b)—*Legal representatives—Not brought on record — Objection—Execution sale.*

When an execution sale which had become final was impeached in the Appellate Court as a nullity on the ground that one of the two judgment-debtors had died and the sale was held without notice to his heirs. *Held*, that the point not having been taken at any stage of the suit and no opportunity having been given of showing that the surviving judgment-debtor was entitled to represent the heirs of the deceased, it was impossible to say that the sale was a nullity. (*Mullick and Jwala Prasad*, JJ.) BHADDAI SAHU *v.* MANOWAR ALI.
4 Pat. L J. 645=52 I.C. 125=1920 Pat. 91.

Notice Essential.

——O. 21, R. 22, (1882, S. 248)—*Notice essential—Omission to issue notice of execution—Sale void.*

A notice under S. 259 of the C.P. Code, (1882) (O. 21, R. 22) is necessary in order that the Court should obtain jurisdiction to sell the property by way of execution against the legal representative of the judgment-debtor. Pending an attachment of the properties of the judgment-debtor, the latter became an insolvent, and his properties thereupon vested in the Official Assignee. The decree-holder served a notice on the Official Assignee to show cause why he should not be substituted for the debtors but there was no notice under S. 248 of the C.P. Code requiring him to show cause why the decree should not be executed against the properties of the debtor in his hands and yet the property was sold in execution. *Held*, that the sale was void and the purchaser obtained no title. 27 I.A. 216. Dist. (*Lord Parker.*) RAGHUNATH DAS *v.* SUNDAR DAS KHETRI.
42 Cal. 72=18 C.W.N. 1058=24 I.C. 804=1 L.W. 567=27 M L J. 150=16 M.L.T. 333=(1914) M W N 747=16 Bom. L.R. 814=20 C.L.J. 555=13 A.L J 154=41 I A. 251 (P.C).
[O. A. from 15 I.C. 288.]

——O. 21, R. 22 and S. 11—*Notice—Absence of—Order not binding.*

Judgment-debtor can in a subsequent application object to the amount claimed in a previous application if he had been given no opportunity to do so in the first application. (*Banerjee*, J.) RATAN LAL *v.* BIBI KUNRIA.
34 I.C. 144.

——O. 21, R. 22—*Notice essential—Execution proceedings without notice is a nullity.*

An order for execution without notice under S. 248 of the Code of 1882 is without jurisdiction and a nullity and the execution sale cannot

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stand. A mere issue of a notice is not sufficient under the section. It must be served. (*Chatterjea and Newbould*, JJ.) GURUDAS BISWAS *v.* THAKAMANI. **64 I.C. 476=26 C.W.N. 972.**

——— **O. 21, R. 22**—*Notice—Minor judgment-debtor—Sufficiency.*

O. 21, R. 22, is sufficiently complied with, in case of all the co-tenant judgment-debtors living in the same house if the notice is delivered to all of them at their house even if some of them be minors whose guardians *ad litem* have died and no new appointment has been made in the execution proceedings. (*Sanderson*, C.J., *and Richardson*, J.) FANI BHUSAN *v.* SURENDRA NATH. **64 I.C. 25=36 C.L.J. 9.**

——— **O. 21, R. 22**—*Notice essential—Notice not given—Effect.*

The omission to serve a notice under O. 21, R. 22, C. P. C. will render an execution sale void for want of jurisdiction. 42 Cal. 72, Ref. (*Mookerjee and Walmsley*, JJ.) RAM KINKER TEWARI *v.* STHITI RAM. **46 I.C. 221=27 C.L.J. 528.**

——— **O. 21, R. 22**—*Notice essential—Omission to issue—Effect on execution sale.*

A sale in execution of a decree made without notice to the legal representative of a deceased judgment-debtor is not valid as against other judgment-debtors. O. 21, R. 17 has nothing to do with the invalidity of a sale made to a stranger, who bought without notice of the fact that the amount realised by a previous sale of other lots of the property attached was more than sufficient to satisfy the decree in execution. (*Fletcher and Huda*, JJ.) SURENDRA NATH SAHA *v.* BOLA RAM PODDAR. **48 I.C. 699.**

——— **O. 21, R. 22**—*Notice essential—Omission—Effect of.*

Where notice is necessary to be issued under the section, any order for execution without such notice is without jurisdiction and is a nullity. Per *Sanderson*, C. J.—An order granting an application of decree-holder for transmission of the decree to another Court for execution is not an order passed on a previous application for execution under S. 248. Per *Mookerjee*, J.—Notice of transmission does not mean notice of application for execution. (*Sanderson*, C. J. *and Mookerjee*, J.) MAHARAJ BAHADUR SINGH *v.* INDAR CHAND BOTHRA. **26 C.L.J. 180=41 I.C. 853=22 C.W.N. 390.**

——— **O. 21, R. 22**—*Notice essential—Omission—Effect of.*

Notice under the rule is mandatory, without which Court cannot proceed against the property of the judgment-debtor. The omission renders the proceedings wholly void. Even where the rule does not apply, the Court should issue notice on the judgment-debtor and hear his objection before it grants execution of a conditional decree on the mere statement of the decree-holder that the condition has

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happened. The order in the case when judgment-debtor was entitled to notice by an express provision of law, may be revoked at the instance of the party affected thereby if he had no notice thereof. (*Mookerjee and Cuming*, JJ.) SHYAM MANDAL *v.* SATINATH BENARJEE. **44 Cal. 954=21 C.W.N. 776=38 I C. 493=24 C.L.J. 523.**

——— **O. 21, R. 22**—*Notice essential—Improper service—Effect of.*

An erroneous order for execution of a decree passed after notice does not bind the judgment-debtor where the service of the notice has not been in accordance with law and the judgment-debtor has not been aware of the execution proceeding. (*Sharfuddin and Teunon*, JJ.) ANAND RAM *v.* NITYANANDA BARHAM. **32 I.C. 744.**

——— **O. 21, R. 22**—*Notice essential—Omission to serve—Effect of.*

Non-service of notice under S. 248, C. P. C. (1882), will vitiate the sale. (*Chatterjea and Walmsley*, JJ.) MAHARAJA BAHADUR SINGH *v.* SURENDRA NARAYAN SINGH. **28 I.C. 898=19 C.W.N. 152.**

——— **O. 21, R. 22**—*Notice essential—Omission to issue notice—Effect of.*

Obiter.—The omission to issue a notice to the judgment-debtor under O. 21, R, 22, C. P. C, is not a material irregularity. 32 Bom. 572, Rel. (*Carnduff and Beachcroft*, JJ.) BEPIN BEHARI BEJALI *v.* KANTI CHANDRA MANDAL. **18 I.C. 716.**

——— **O. 21, R. 22**—*Notice essential—Sale without notice—Sale, if void.*

Omission to serve a notice under O. 21, R. 22, is not by itself sufficient to render a sale void. Such omission would constitute a serious irregularity entitling the judgment-debtor to vacate the sale by proving that substantial injury has been the result of it. 25 Bom. 337, Foll; 21 Cal. 23, Not foll. (*Brett and Chatterjea*, JJ.) RASARAJ KUNAI *v.* PROSONNA KUMAR ROY. **16 I.C. 506=40 Cal. 46.**

——— **O. 21, R. 22**—*Notice essential Insolvency—Official Assignee—Substitution of—Sale without notice—Voidable.*

A sale of the judgment-debtor's property after he became an insolvent and with notice of the execution to the Official Assignee is operative against him, though his substitution in place of judgment-debtor is incorrect. (*Chitty and Teunon*, JJ.) SUNDER DAS *v.* RAGHUNATH DAS. **15 I.C. 288.**

[On Appeal *See* 42 Cal. 72=27 M.L.J. 180=24 I.C. 304=41 I.A. 251 (P.C.).]

——— **O. 21, R. 22**—*Notice essential—Non-service of notice on judgment-debtor—Effect.*

An execution sale is bad where there is an omission to give notice under O. 21, R. 22, C.P.C. such a sale is not however void altogether and can only be set aside at the instance of the

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judgment-debtor on proof that he had been prejudiced thereby. 25 Bom. 337; 11 C. L. J. 489 (P. C.). Rel. on. (*Mookerjee and Teunon, JJ.*) SHAM SUNDAR SINGH *v.* JHUMAT SHAH.
11 I.C. 893=20 C.L.J. 337.

——O. 21, R. 22—*Notice essential—Absence of notice—Objection.*

An Appellate Court may entertain an objection to an execution sale on the ground that notice has not been served as required under O. 21, R. 22 though it is raised before it for the first time, (*Mookerjee and Cranduff, JJ.*) LAKSHIMI CHARAN SEN *v.* SRISHCHANDRA ROY. 9 I.C. 584=13 C.L.J. 162.

——O. 21, R. 22—*Notice essential—Omission of—Judgment-debtor given opportunity to show cause.*

Although an application for the execution of a compromise decree was made after the expiry of one year from the date of the decree, yet inasmuch as the judgment-debtor had been given an opportunity to show cause why the decree should not be executed against him the mere fact that no notice was served on him under O 21, R. 22 did not vitiate the proceedings. (*Shadi Lal, J.*) KORA LAL *v.* PUNJAB NATIONAL BANK, LTD.
2 U.P.L.R. (Lah.) 91=118 P.L.R. 1920=55 I.C. 816=6 L.L.J. 67.

——O. 21, R. 22—*Notice setting aside without—Appeal.*

An appeal lies from an order setting aside execution sale without notice to the auction-purchaser at the instance of the auction-purchaser. (*Scott-Smith, J.*) GUL BANO *v.* MUHAMMAD ZAKAR KHAN. 3 Lah. L.J. 463.

——O. 21, R. 22—*Notice essential—Failure to record reasons for—Illegality or irregularity.*

The provisions of O. 21, R. 23, Sub-S. (2) requiring the Court to record its reasons is only discretionary and the failure to issue a notice is necessarily fatal to the validity of the subsequent proceedings. In an appeal against an order refusing to set aside an execution sale on the ground of want of notice under O. 21, R. 22 it would ordinarily be open to the appellant to ask the appellate Court to consider the executing Court's use of its discretion on its merits. (*Oldfield and Ramesam, JJ.*) KASIVISVANATHAN CHETTY *v.* SOMASUNDARAM CHETTY. 42 M.L.J. 422=(1922) M.W.N. 178=70 I.C. 611=45 M. 876=1922 Mad. 93.

——O. 21, R. 22—*Notice essential—Non-service of notice on defendant after attaining majority—Sale in execution—Effect.*

The non-service of notice under O. 21, R. 22 upon a defendant after he attains majority is, though it does not render the subsequent proceedings a nullity, a serious irregularity which, until met by a valid defence, is sufficient to set aside the subsequent sale in execution. The burden is on the decree-holder to make out such a defence. One such defence might be established by proving that the defendant's interests were fully represented, to the knowledge of the defendant, by some other party to the proceedings. (*Sadasiva Aiyar and Napier, JJ.*) KRISHNASAMY AIYANGAR *v.* SOORIKUTTY GANAPATHY AIYAR.
(1921) M.W.N. 394=63 I.C. 903=14 L.W. 638.

——O. 21, Rr. 22 and 90—*Notice essential—Notice not given to judgment-debtor—Attachment subsisting—Execution sale not void.*

The dismissal of an application for the sale of property does not put an end to the attachment. Where there is a subsisting attachment and on an application made more than a year from the date of the decree for sale of the properties, the Court sells the properties without notice to the judgment-debtor under S. 248 of the C.P. Code, 1882, the sale is not without jurisdiction but is merely irregular and liable to be set aside under S. 311. (*Abdur Rahim and Bakewell, JJ.*) VUPPU SEETHARAMAYYA *v.* MINCHULA GOPALAKRISHNA AMMA.
43 Mad. 57=37 M.L.J. 216=10 L.W. 190=53 I.C. 257=(1919) M.W.N. 568.

——O. 21, R. 22—*Omission to issue notice—Reasons.*

O. 21, R. 22 is imperative and if notice is dispensed with under cl. (2), reasons must be recorded. (*Seshagiri Aiyar, J.*) SRINIVASA AIYANGAR *v.* NARAYANA AIYANGAR.
(1917) M.W.N. 498=6 L.W. 361=40 I.C. 670=33 M.L.J. 539.

——O. 21, Rr. 22 and 23—*Notice—Attachment without notice is not invalid.*

The issue of an attachment before the service of the notice issued under O. 21, R. 22 of the Code of Civil Procedure, is, in the absence of any sufficient cause justifying an apprehension that the property sought to be attached would be removed or transferred, a mere irregularity and the execution proceeding is not thereby rendered invalid. If there was any reason for the issue of an attachment before an order was passed under O. 21, R. 23 of the Code, it should have been recorded at the time. The failure to record the reason does not, however, *per se* render the attachment invalid. (*Kanhaiya Lal, J.C.*) GIRWAR SAHAI *v.* MANGAL.
26 O.C. 288=9 O. & A.L.R. 92=73 I.C. 241=1924 Oudh 120.

——O. 21, R. 22—*Notice essential—Omission to issue notice—Irregularity.*

The sale in execution of a mortgage decree is not rendered null and void simply owing to the omission to issue notice under O. 21, R. 22. (*Kanhaiya Lal and Daniels, A.J.Cs.*) KANIZ MEHDI BEGAM *v.* RASULBEG.
48 I.C. 39=6 O.L.J. 551.

——O. 21, R. 22—*Notice—When necessary—Object of.*

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O. 21, R. 22 requires the decree-holder to issue only one notice upon the Judgment-debtor or his legal representative. The object of the rule is merely to protect the judgment-debtor or his legal representative from being lulled into a sense of security. Once a notice is served, the rule does not contemplate that a fresh notice should be served for every execution application made more than one year after the last order against the judgment-debtor. (*Mullick and Bucknill*, JJ.) MAHADEO SINGH *v.* DHOBI SINGH. **2 Pat. 916 = 4 Pat. L.T. 721 = 1923 Pat. 283 = 74 I.C. 838 = 1924 P. 111.**

——— **O. 21, R. 22**—*Notice, when necessary—Omission to give notice, effect of.*

Under O 21, R. 22 the executing court is required to issue the notice therein required only in cases where the application is made more than one year after the date of the decree. *Quære*—Whether the omission to issue the notice in cases in which it has to be issued renders the sale null and void. (*Miller*, C.J. *and Adami*, J.) BALDEO SINGH *v.* MEGHU SINGH. **74 I.C. 202.**

——— **O. 21, R. 22**—*Notice essential.*

The omission to issue the notice under O. 21, R. 22 render the sale to be without jurisdiction inasmuch as the notice under O. 21, R. 22 is the foundation of the execution of a decree presented more than a year after the date of the decree. But an irregularity in the service of the notice is quite a different thing from the absence of the issue of such notice. The former relates to procedure and the latter goes to the root of the jurisdiction of the Court. (*Jwala Prasad and Adami*, JJ.) DAS NARAYAN SINGH *v.* MIR MAHAMAD YUSUF. **3 U.P.L.R. (Pat.) 23 = 2 Pat. L.T. 401 = 6 P.L.J. 319 = 61 I.C. 823 = 1921 Pat. 181.**

——— **O. 21, R. 22**—*Notice essential—Omission to give—Effect of.*

Under O. 21, R. 22, the executing Court is required to issue the notice therein required only in cases where the application is made more than one year after the date of the decree. *Quaere*:—Whether the omission to issue the notice in cases in which it has to be issued renders the sale null and void. (*Miller*, C.J. *and Adami*, J.) BALDEO SINGH *v.* MEGHU SINGH. **(1919) Pat. 386.**

Revivor of Decree.

——— **O. 21, R. 22** — *Revivor of decree—Notice.*

Parties against whom a decree is sought to be revived must be given notice on the analogy of C.P.C. and on the reason of the thing. Revivor of decrees of the original side is not concerned with Art. 182. (*Wallis*, C.J. *and Oldfield*, J.) KRISHNAYA *v.* GYENDRA NAIDU. **40 I.C. 608 = 6 L.W. 290 = 22 M.L.T. 20 = 33 M.L.J. 533 = 40 Mad. 1127.**

——— **O. 21, R. 25**—*Warrant of attachment—Seal—Absence of.*

C. P. CODE (V of 1908), O. 21, R. 31.

The injunction that a warrant of attachment should be sealed with the seal of the Court, is imperative and unless it is complied with, the warrant and the attachment under it are illegal. Resistance to the attachment is not an offence. (*Mullick and Thornhill*, JJ.) KHIDIR BUX *v.* EMPEROR. **3 Pat. L.J. 636 = 49 I.C. 171 = 20 Cr. L.J. 139.**

——— **O. 21, R. 24 (3)**—*Warrant—Resistance to—Illegal—Officer executing not authorised.*

A warrant of execution not bearing a date, on or before which it should be executed, is not a good warrant. The Nazir of a Court has no authority to execute a warrant when it is directed to a bailiff. It is not an offence to resist a bad warrant. (*Atkinson and Kingsford*, JJ.) MOHINI MOHAN BANERJI *v.* EMPEROR. **1 Pat. L.J. 550 = 36 I.C. 871 = 18 Cr. L.J. 39 = 3 Pat. L.W. 64.**

——— **O. 21, R. 25**—*Warrant—Date fixed by Court—Earlier date fixed by Nazir—Execution between the dates, whether legal.*

A warrant for the attachment of moveable property of the judgment-debtor issued, by the Court to be executed by bailiff endorsed by the Nazir to a peon with a direction to execute it at a date earlier than that fixed by the Court and executed by the peon between the two dates, is executed rightly. (*Harrington and Coxe*, JJ.) SABID ALI *v.* EMPEROR. **40 Cal 849 = 19 I.C. 706 = 14 Cr. L.J. 274 = 17 C.W.N. 941.**

——— **O. 21, R. 29**—*No suit pending—Court cannot stay execution.*

The executing Court had no power to stay the execution under order XXI, rule 29 of the Civil Procedure Code if at that time no suit was pending before it against the decree-holder on the part of the judgment-debtor. (*Scott-Smith* J.) FITZHOLMS *v.* WARYAN SINGH. **75 I.C. 419 = 1923 Lah. 514.**

——— **O. 21, R. 30**—*Decree for money—Attachment when necessary.*

In the case of a decree for money when it is provided that if it is not paid by a certain date specific immoveable property should be sold, no attachment is necessary under O. 21, R. 30. It is only in cases of decrees formoney which do not affect any specific immoveable property that the rule applies. (*Miller* C.J. *and Kulwant Sahay*, J.) JAGANNATH SAO *v.* DEBI PRASAD DHANDHANIA. **2 Pat. 768 = 73 I.C. 698 = 1924 P. 258.**

——— **O. 21, R. 31**—*Applicability of.*

To enforce a decree by the stringent methods provided in O. 21. R. 31. plff. should allege and prove facts necessary to bring the case under S. 11 of the Sp. Rel. Act. (*Wallis*, C.J., *Ayling and Sadasiva Iyer*. JJ.) VENKATASUBBA RAO *v.* THE ASIATIC STEAM NAVIGATION COMPANY OF CALCUTTA. **39 Mad. 1 = 29 M L.J. 342 = (1915) M.W N. 644 = 30 I.C. 850 = 18 M.L.T. 236 = 2 L.W. 605 (F.B.).**

C. P. CODE (V of 1908), O. 21, R. 32.

——O. 21, R. 32—*Injunction—Execution—Hereditary office—Legal representative—Appointment of Commissioner.*

O. 21, R. 32 prescribes the mode of executing a decree for an injunction and the Court is not justified in ordering the Police to interfere in the matter, nor is it justified in appointing a Commissioner to see that the decree-holder performs without obstruction the duties appertaining to his office. Cl. (5) of R. 32, O. 21 does not authorize the passing of such orders and provides for a different state of things. The decree related to a hereditary office which the plaintiff claimed and which the defendants resisted and was not passed against the defendants as individuals but as descendants of the original founder, and could therefore, be enforced against their legal representatives also. (*Banerjea and Ryves*, JJ.) GOSWAMI GORDHAN LALJI *v.* GOSWAMI MADHUSUDAN BALLABH.
40 All. 648=48 I.C. 26=16 A.L.J. 700.

——O. 21, R. 32—*Decree for demolition of wall—New one erected after demolition—Remedy is only by a suit.*

Where a wall is directed by a decree to be demolished as being an obstruction to a right of way, and is so demolished in execution of the decree, but the judgment-debtor erects another wall obstructing the right of way, *held*, that the proper remedy of the decree-holder is a suit for injunction. He cannot get the second wall demolished in execution of the first decree. (*Martineau*, J.) MALUKA *v.* SUNDAR SINGH.
59 I.C. 594=20 P.W.R. 1921.

——O. 21, Rr. 32 and 34—*Compromise decree—Breach of terms—Damages.*

A suit for compensation for failure to carry out the terms of a compromise decree is not maintainable since the proper remedy is by way of execution under O. 21, R. 32 or 34. 35 Cal. 1100; 31 Mad. 37; 7 I.C. 248, Dist. (*Oldfield and Sadasiva Aiyar*, JJ.) MUTHU KARANVENAALAGAPPA CHETTIAR *v.* KANAKASABAI PILLAI. 24 M.L.T. 34=(1918) M.W.N. 333=45 I.C. 689=7 L.W. 663.

——O. 21, R. 32—*Power of Court to enforce obedience to decree by punishment.*

The Court can under O. 21, R. 32 secure enforcement of decree by permanent injunction and by punishing the person disobeying, either by imprisonment of forfeiture of property but the Court cannot order a security bond. (*Phillips*, J.) AIYANA CHARIAR *v.* VATHIAR RAMANUJA. 3 L.W. 161=19 M.L.T. 132=32 I.C. 698=(1916) 1 M.W.N. 147.

——O. 21, Rr. 32 and 33—*Restitution of conjugal rights — Minor wife — Execution against parents.*

Though R. 33 (1) of O. 21 has qualified R. 32 in enforcing decrees for restitution of conjugal rights, still a Court can pass an effective decree; so that where the wife is a minor, her parents can be directed to hand her over, and in default,

C. P. CODE (V of 1908), O. 21, R. 33.

execution can proceed against their person and property. 1 All. 501, Dist. (*White*, C.J. *and Oldfield*, J.) SIVARAMA PILLAI *v.* VEERAPPA PILLAI. 23 I.C. 828.

——O. 21, R. 32—*Injunction—Meaning of—Order to furnish account.*

An order to furnish an account which was contained in a preliminary decree, is not an injunction within O. 21, R. 32. The word "injunction" as used in O. 21, R. 32 has a more extended meaning than it has in the Specific Relief Act. It is not every order of a Court directing a person to do a certain act, that is an injunction. In its essence an injunction is a relief consequential upon an infringement of a legal right. (*Mullick and Atkinson*, JJ.) ARJUN SUIE *v.* EMPEROR. 44 I.C. 787=19 Cr. L.J. 385=3 P.L.J. 106.

——O. 21, R. 32 (3)—*Subsisting attachment.*

In cases under S. 260, C.P.C., (1882) a valid subsisting attachment is an indispensable precedent to a sale under the section. (*Reid*, C.J. *and Johnstone*, J.) BADRI PERSHAD *v.* FAKIRA. 170 P.L.R. 1911=127 P.W.R 1911=10 I.C. 341=69 P.R. 1911.

——O. 21, R. 33—*Decree for restitution of conjugal rights — Execution — Detention in prison should not be ordinarily ordered.*

Ordinarily a court passing a decree for restitution of conjugal rights against a wife ought, under O 21, R. 33 of the Code, direct that the decree shall not be executed by the detention of the wife in prison. The fact that the wife had already been in jail under the sentence of a Criminal Court and that it would be no violence to her feelings to be sent to jail if she disobeys the decree is no ground to refuse to exercise the discretion to be exercised by the court under R. 33. (*Macleod*, C.J., *and Heaton*, J.) BAI PARAVATI *v.* MANSUKH JETHA. 44 Bom. 972=39 I.C. 361=22 Bom. L.R. 1097.

——O 21, R. 33—*Decree for restitution of conjugal rights—Detention of females in jail.*

Though the tendency of modern legislation is against sending women to jail in civil matters, in a case where a husband has obtained a decree for restitution of conjugal rights which the wife refuses to obey, but she persists in leading an immoral life she must be detained in jail in execution of the decree. (*Moti Sagar*, J.) JAGAN NATH *v.* BASANT RAM.
75 I.C. 24=1923 Lah. 393 (2).

——O. 21, R. 33—*Decree for restitution of conjugal rights—Women not to be ordinarily sent to jail.*

The tendency of modern legislation is against sending women to jail in civil matters. The Courts should sparingly exercise their power of sending women to jail. (*Abdul Raoof*, J.) MT. AMIR BIBI *v.* NUR MAHOMED.
73 I.C. 716=1924 Lah. 244.

C. P. CODE (V of 1908), O 21, R. 33.

———O 21, R. 33—*Decree for restitution of conjugal rights—Form.*

A decree in a suit for restitution of conjugal rights, against the wife and other defendants who prevented her from going to her husband, should declare the husband's right and direct that the other defendants do refrain from preventing the plaintiff's wife from returning to him. (*Jwala Prasad*, J.) BISWESHWAR RAM *v.* PALTU RAM KAHAR. 59 I.C. 887.

———O. 21, R. 33 (1) and (2)—*Imprisonment of a woman.*

In executing a decree for restitution of conjugal rights a Court ought, in the exercise of its discretion under O. 21, R. 33 (1), to decline to enforce the decree by the detention in prison of the wife, especially when she has been charged with adultery by the husband. (*Pratt*, J.C.) KARAM ALLAHI *v.* NARAIN. 10 I.C. 177.

———O. 21, R. 34—*Decree for specific performance—Defendant can execute.*

A decree for specific performance can be executed by the defendant. (*Macleod*, C J. *and Coyajee*, J.) KARIMA BIBI DAND BHAI *v.* ABDER REHMAN SAYAD BANU.
24 Bom L.R. 496=46 B. 990=
67 I.C. 667=1923 Bom. 26.

———O. 21, R. 34—*Compromise decree providing for execution of document can be enforced under this rule.*

Where a suit for a declaration of title to a property, which has been attached in execution of a decree in another suit, is compromised and a condition of the compromise was the execution of a mortgage-bond by the plaintiff in the suit to the executing decree-holder of the other suit, the decree embodying the compromise, can be enforced in the execution itself under O. 21, R. 34 and no separate suit is necessary. (*Chatterjea and Panton*, JJ.) SOUDAMINI DASSI *v.* BEHARI LAL BISWAS.
61 I.C. 535=26 C.W.N. 68.

———O. 21, R. 34—*Decree—Transfer of shares—Registration of.*

A decree directing deft. to execute a transfer of half of the shares in a Company in favour of plff. and to lodge the transfer together with the share certificates with the Company for registration, is an executable decree, on deft.'s failure to obey the directions under the rule. (*Fletcher and Newbould*, JJ.) BROJENDRA KUMAR SAHA *v.* KALI NATH SAHA.
41 I.C. 77.

———O. 21, R. 34—*Specific performance—Execution of decree.*

Action taken by the Court in executing a decree for specific performance of a contract of a lease is a proceeding in the suit itself and *lis pendens* does not cease. (*Drake-Brockman*, J.C.) PANDU *v.* SITAL PRASAD. 48 I C. 188=
14 N.L.R. 176.

———O. 21, R. 35—*Co-sharer—Possession can only be symbolical.*

C. P. CODE (V of 1908), O. 21, R. 35.

One co-sharer can have only symbolical joint possession as is referred to in O. 21, R. 35 of the Code as against another co-sharer in actual enjoyment. (*Lindsay and Kanhaiyalal*, JJ.) SARBJIT SINGH *v.* RAM KUMAR.
19 A.L.J. 783=63 I.C. 806=
3 U P.L.R. (A.) 146.

———O. 21, R. 35—*Joint possession—If can be given.*

An action for joint possession is maintainable and joint possession must be given under a decree unless it is unreasonable in the circumstances of the case. 28 All. 161, Diss; 26 All. 588; *Foll*; 18 Cal. 10 (P.C.), Ref. to. (*Banerjee and Tudball*, JJ.) JAGARNATH *v.* RAMPHAL.
34 All. 150=13 I.C. 79=8 A.L J. 1312.

———O. 21, R. 35—*Scope.*

O. 21, R. 35 only lays down the manner of executing a decree for joint possession. It does not confer on the Civil Courts any new power of granting a decree for joint possession. (*Tudball*, J.) SHEO PHER SINGH *v.* BHOLA SINGH. 11 I.C. 87.

———O. 21, Rr. 35 and 95—*Symbolical possession—Nature of.*

Symbolical possession is not real possession nor is equivalent to real possession under the Code except when the Code expressly or by implication declares it to be so. (*Scott*, C.J. *and Russell*, J.) MAHADEO *v.* JANNU NAMJI.
36 Bom. 373=14 I C. 447=
14 Bom. L.R. 115.

———O. 21, R. 35—*Dismissal of application after delivery of formal possession—Application for delivery of physical possession.*

A decree-holder in a partition suit who was put in formal possession of his share of the property in execution of his decree, can again apply under O. 21, R. 35 (1), C.P.C. to be put into actual possession of the same property. The dismissal of a prior application for actual possession after delivery of formal possession is no bar to a subsequent fresh application for the same. (*Richardson and Beachcroft*, JJ.) KHETRA MOHAN KUNDU *v.* JOGENDRA CHANDRA KUNDU. 46 I.C. 7.

———O. 21, R. 35—*Execution—Writ of possession—Forcible removal.*

Under the provisions of either the English Common law or the Code of Civil Procedure, a reasonable degree of force may be used in order to direct the removal of persons bound by decree and refusing to vacate or deliver possession of property. (*Sharfuddin and Teunon*, JJ.) H. MIR DUTT *v.* SANJI BANI DASI.
42 Cal. 313=28 I.C. 1000=
16 Cr. L J. 424=19 C.W.N. 278.

———O. 21, R. 35—*Symbolical possession—Failure to affix warrant vitiates.*

The provisions of the Code as to how symbolical delivery is to be effected must be strictly complied with. Failure to affix a copy of the

C. P. CODE (V of 1908), O. 21, R. 35.

warrant for delivery of possession to the place vitiates the symbolical delivery. (*Moti Sagar*, J.) NIDHI RAM *v.* PARSA RAM.
1923 Lah. 693=74 I.C. 1=5 Lah. L.J. 507.

——O. 21, Rr. 35 and 95 — *Formal delivery—Judgment debtor in possession—Interruption of adverse possession.*

Where the judgment-debtor is in actual possession, actual possession must be given in execution in accordance with O. 21, R. 35, C.P.C. Where merely formal possession of immoveable property is given to a purchaser at an execution sale it cannot prevent limitation running in favour of the judgment-debtor where the latter remains in actual possession, and the property is not in the occupancy of a tenant or other persons entitled to occupy the same. 43 A. 520; 36 B. 373, referred to. (*Scott-Smith*, J.) SARDARKHAN *v.* ABDULLAH KHAN.
71 I.C. 885=1924 Lah. 801.

——O. 21, Rr. 35 and 36—*Decree for possession.*

Whose possession is not obtained subsequent suit for possession, is not maintainable. (*Martineau*, J.) RAM CHAND *v.* JANA.
3 Lah. L.J. 138=69 I.C. 770=
38 P.W.R. 1921.

——O. 21, Rr. 35 and 36—*Procedure—Symbolical delivery.*

If the law prescribes a definite procedure for delivery of possession purely symbolical, that must be strictly followed and no deviation from it can be permitted. Where the execution proceeding records are available, there can be no presumption, that the procedure laid down by the law had been followed. Where plffs. never obtained actual possession of the lands and they had not followed the procedure laid down in Ss. 263 and 264, C.P.C., (1882), they cannot be treated as dispossessed subsequently by the judgment-debtor and they cannot institute a fresh suit for possession. (*Shadi Lal and Broadway*, JJ.) KHUB RAM *v.* SURAT.
26 P.L.R. 1917=20 P.R. 1917=
39 I.C. 783=22 P.W R. 1917.

——O. 21, Rr. 35 and 36—*Applicability—Decree-holder—Enjoyment of property delivered in execution—Disturbance by person without any right—Suit for damages.*

Where a decree-holder, who has obtained delivery in execution of a decree for possession of immoveable property, is disturbed in his peaceful enjoyment thereof by a person who, according to the decree-holder himself, has no right legitimately derived from any competent person to do so, his remedy is either in criminal prosecution or in a suit for damages. The person disturbing cannot be regarded as tenant against whom there can be an order for delivery under O. 21, R. 35, C. P. Code. (*Oldfield and Venkatasubba Rao*, JJ.) IBRAHIM SAHIB *v.* KONAMMAL.
43 M.L.J. 179=21 M.L T. 356 (H.C.)=
70 I.C. 75=1923 Mad. 25.

C. P. CODE (V of 1908), O. 21, R. 35.

——O. 21, R. 35—*Second application.*

The decree-holder cannot file a second application for possession under O. 21, R. 35 after he is once granted possession in accordance with an order passed on a previous application under the same order and rule. 4 All. 184; 17 M.L.J. 598, Foll. and Ref. (*Sadasiva Iyer and Napier*, JJ.) THANDAVARAYA MUDALI *v.* SUBRAMANIA GURUKAL.
32 I.C. 44=29 M.L J. 504.

——O. 21, R. 35—*Usufructuary mortgagee of father's share—Joint possession with son.*

A usufructuary mortgagee is not entitled to a decree placing him in possession under O. 21, R. 35 (2) but only to a decree declaring his rights to possession and entitling him to institute a suit for partition. (3 Cal. 198, Foll. (*Oldfield and Napier*, JJ.) KOTA BALABHADRA PATRI *v.* KHETRA DOSS.
25 I.C. 401=16 M.L.T. 229.

——O. 21, R. 35—*Delivery of possession to agent.*

Delivery of possession can be made to any person orally authorised by the decree-holder though he does not hold a power of attorney from the latter. (*Mitra*, A.J.C.) LAVA *v.* EMPEROR. 13 N.L.R. 87=40 I.C. 689=
18 Cr. L.J. 689.

——O. 21, R. 35—*Symbolical possession—Interruption of—Adverse possession.*

Where the provisions of S. 263 are substantially complied with, the transfer of possession is complete, whether it is called symbolical possession or not; such delivery of possession would have the effect of interrupting the judgment-debtor's adverse possession and his possession after such delivery is a fresh act of trespass giving rise to a new cause of action. 36 Bom. 373, Diss.; 5 Cal. 584; 7 Cal. 418; 24 Cal. 715, Ref. (*Mitra*, O.A.J.C.) DHANSINGH *v.* GANPAT. 24 I.C. 850=10 N.L.R. 60.
[Also 43 I.C. 268=34 M.L.J. 97. (P.C.)]

——O. 21, Rr. 35 and 36—*Symbolical possession delivered by mistake — Effect on parties.*

Though symbolical possession is delivered where actual possession should have been given, still so far as the judgment-debtor and other persons bound by the decree are concerned, it operates as delivery of actual possession. 24 C. 715; 17 M.L.J. 598, Rel. (*Adami*, J.) MAHARAJA PRATAP UDHI NATH SAHI DEO *v.* BHAIANI SUNDER-BANKS KOER.
24 Cr. L.J. 279=71 I.C. 999=
3 Pat. L.T. 628=1923 P. 76.

——O. 21, Rr. 35 (2), 95 and 96—*Purchaser in auction of undivided share—Actual possession to be given.*

A purchaser of an undivided share of property at a Court auction comes within the purview of O. 21, Rr. 35 (2) and 95 of the C. P. Code and is entitled to be given actual possession of the share purchased. The case does not come

C. P. CODE (V of 1908), O. 21, R. 35.

under R. 96 of the same order. (*Ryves and Piggott*, JJ.) SARVI BEGUM *v.* TAJ BEGUM.
36 All. 181=22 I.C. 971=12 A.L J. 259.

——— **O. 21, Rr. 35 (2) and 36**—*Compliance with—What amounts to.*

Where the persons concerned have been made aware of the delivery of possession in the course of execution proceedings and the publicity, which is the object of the provisions of the law, has been clearly achieved, it must be held that there has been substantial compliance with it. 20 P.R. 917 dist. (*Leslie Jones and Dundas*, JJ.) JUHR LAL *v.* PEMAN. **68 I.C 182= 2 Lah. L. J. 563.**

———— **O. 21, Rr. 35 (2) and 36**—*Delivery of possession—Symbolical possession—Failure to affix warrant.*

O. 21, Rr. 35 and 36, C.P.C. imperatively requires that a copy of the warrant of the Court for delivery of possession should be affixed in some conspicuous place on or near the property, the object of the provision being that co-sharers and tenants may know that possession has been transferred to the decree-holder. Failure to comply with the procedure laid down in the Code is fatal to the delivery of possession. 20 P.R. 1917, Foll.; 10 N.L.R. 60, Dist. (*Scott-Smith*, J.) JAUHRI LAL *v.* PEMAN.
2 U.P.L.R (Lah.) 47=55 I.C. 19= 2 Lah L.J. 202.

———— **O. 21, Rr. 35 (2) and 96**—*Possession taken under is symbolical possession.*

There can be no symbolical possession as between the parties to a decree where the property, is immoveable property which is capable of immediate actual possession and comes within the scope of the direction in O. 21, R. 35 (1), C.P. C. Either the decree-holder is put in possession or not. Symbolical possession is the term properly applied where the property is of a kind which can be taken possession of in execution only under O. 21, R. 35 (2), 36 and 96. Formal delivery under the provisions of O 21, R. 35 (1) is actual delivery. 10 N.L.R. 60, followed. (*Batten*, J.C.) PANDURANG *v.* SAMPAT. **6 N.L.J. 157=72 I.C. 318= 1923 Nag. 237.**

———— **O. 21, R. 36**—*Suit for pre-emption by usufructuary mortgagee in possession—Whether possession should be claimed.*

A usufructuary mortgagee in possession having obtained a pre-emption decree of a sale the equity of redemption, becomes full owner of the property by operation of law on depositing pre-emption price and being himself in possession need not seek anything further in execution of the decree. (*Tudball*, J.) SITARAM *v.* MADHAO PANDE.
23 I.C. 876=12 A.L.J. 521.

———— **O. 21, R. 36**—*Symbolical possession—Grant of, in a case not contemplated by the Code is not effective.*

The delivery of symbolical possession is effective only in cases where the Code recognises

C. P. CODE (V of 1908), O. 21, R. 37.

symbolical possession. Nor does the delivery of such possession affect persons impleaded as parties to the suit against whom however there is no decree for possession. 36 B. 273, foll; 20 Bom. L.R. 502, P.C., dist. (*Pratt and Kanga*, JJ.) RAGHUNATH WAMAN *v.* KONDIBA BABAJI. **24 Bom. L.R. 499= 68 I.C. 91=46 B. 932=1922 Bom. 2.**

———— **O. 21, Rr. 36 and 97**—*Delivery of possession—Claim for residence.*

Where the objector is found to have a right of residence in the property the possession of which is asked for in execution of a decree, delivery thereof should be made according to O. 21, R. 36. (*Chatterjee and Mullick*, JJ.) JIBAN KRISHNA GHOSAL *v.* SEMRIKHA KOER.
20 I.C. 571.

———— **O. 21, R. 36**—*Failure to comply with rule—Effect of.*

When the provisions of the rule have not been complied with, and the property is in possession of tenant, the possession is not legally transferred. (*Broadway*, J.) KAHAN CHAND *v.* JAWANDI
41 I.C. 752=53 P.W.R. 1917.

———— **O. 21, R. 36**—*Ejectment—Mortgagee in possession—Limitation Act (XV of 1877), Sch II, Arts. 142 and 144.*

In a suit in ejectment against A, his usufructuary mortgagee B was impleaded on his statement, that he was in possession. But B's name as a party was added after more than 12 years' dispossession of the plaintiff by A. *Held*, plaintiff's suit was barred against B under Arts. 142 or 144; that plaintiffs can obtain decree against A for possession, and as B acquired only prescriptive mortgage right, the plaintiff can redeem him after getting possession against A. (*Sundara Aiyar and Sadasiva Aiyar*, JJ.) THEKHEIAN RANGACHARLU CHETTIYAR *v.* MUTHUKARNAPAN KOTHAN.
16 I.C. 420=(1913) M.W.N. 134.

———— **O. 21, R. 36**—*Property in the possession of mortgagee.*

O. 21, R. 36, C. P. C. covers delivery to a person while the property is in the rightful possession of a mortgagee, but such delivery is in fact no delivery and has no effect beyond being a notice to the mortgagee that the decree-holder is entitled to redeem. (*Ashworth*, A.J.C.) LACHMI NARAIN *v.* RAJ NARAYANA.
34 I.C. 269=22 O.C. 278.

———— **O. 21, R. 37**—*Presumption—Application for arrest.*

An application for the issue of the warrant may be presumed when the warrant of arrest is issued in the presence of decree-holder's pleader. (*Scott*, C.J. *and Chandavarkar*, J.) CHINAPA KARSAPPA *v.* LADASAHEB BABASAHEB
19 I.C. 394=15 Bom. L.R. 205.

———— **O. 21, R. 37**—*Arrest, when may be ordered.*

A decree-holder is not justified in applying for the arrest of the judgment-debtor in the

C. P. CODE (V of 1908), O. 21, R. 37.

first instance without trying to obtain execution of the decree by other means available to him, *i.e.*, by the attachment and sale of his property other than land. (*Shah Din*, J.) BAHADUR KHAN *v.* VIROO MAL.
73 P.L.R. 1916=29 I.C. 152=
93 P.W.R. 1915.

———O. 21, R. 37—*Notice—Ill-health.*

Grounds for belief that the judgment-debtor is not in a fit state of health to undergo confinement are sufficient for the Court to exercise its discretion to issue notice in the first instance. (*Chamier*, J.C. *and Evans*, A.J.C.) DIP CHAND *v.* NAUSHAD ALI KHAN.
9 I.C. 746=14 O.C. 36.

———O. 21, R. 37—*Arrest of judgment-debtor—Application for—Residence out of jurisdiction.*

The fact that the judgment-debtor does not reside within the territorial jurisdiction of the Court is not a sufficient reason for refusing to issue a warrant for his arrest, although such a warrant can be executed only within the Court's territorial jurisdiction. In issuing such a warrant the Court should fix a date for its return. (*Chamier*, C.J. *and Sharfuddin*, J.) KRISHNA PRASAD *v.* BIDYA NANDA.
44 I C. 296=3 Pat. L.J. 95.

———O. 21, R. 40 — *Arrest of judgment debtor—Imprisonment—Property of.*

Where all the moveable and immoveable properties of the judgment-debtor had been sold in execution of decrees obtained by other persons and is not able to pay off the whole or any portion of the decree debt, it would be improper to order his imprisonment. (*Martineau*, J.) LALA DAS *v.* MINAMAL.
4 Lah. L.J. 266=1922 Lah. 259.

———O. 21, R. 40—*Poverty—Burden of proof—When Court should refuse to direct release of judgment-debtor.*

The burden of proving poverty and inability to pay under O 21, R. 40 lies on the judgment-debtor and if the judgment-creditor shows that the debtor is in a position to pay a substantial part of the decretal amount or instalment, the Court should refuse to direct his release. (*Hartnoll*, O.C.J *and Twomey*, J.) CHAS R. COWIE & CO. *v.* W.H.A. SKIDMORE.
7 Bur. L.T. 242=23 I.C. 833=7 L.B.R. 339.

———O. 21, R. 40 (2) (d)—"*Some part thereof*"—*Meaning of.*

The words "some part thereof" in R. 40 (2) (d) of O. 21, refer to decree for p ayment of money generally and are not limited to instalment decrees only. (*Hartnoll*, O.C.J. *and Twomey*, J.) CHAS R. COWIE & CO. *v.* W.H.A. SKIDMORE. 7 Bur L.T. 242=23 I.C. 833=
7 L.B.R 339.

———O. 21, R. 41—*Application for judgment-debtor's examination—Late stage.*

An application for the examination of the judgment-debtor can be made at any stage of the execution proceedings. It is not compulsory on the decree-holder to exhaust all the usual methods of execution before applying under this rule. When the judgment-debtor has been summoned *ex parte*, he can make an application to set it aside. This procedure must be resorted to only when there is any difficulty about obtaining sufficient particulars of the judgment-debtor's property. (*Chaudhari*, J.) NATIONAL BANK OF INDIA, LTD. *v.* GHUZNAVI. 34 I.C. 287=43 Cal. 285.

C. P. CODE (V of 1908), O. 21, R. 43.

———O. 21, R. 42—*Scope of—Accounts in scheme suit.*

An inquiry into the state of accounts under S. 92, C.P.C., with a view to ascertain the liability of the trustee if any towards the trust fund, is an inquiry into a matter *ejusdem generis* with an inquiry into the question of mesne profits and is covered by the rule. (*Piggott and Walsh*, JJ.) JAI NARAIN *v.* BANKEY LAL. 41 I.C. 89.

———O. 21, R. 43—*Surety for attached moveables can be provided against in execution.*

A surety, for attached moveables, who agrees to produce it when called upon to do so, can be proceeded against in execution if he fails to so produce. R. 43 does not affect his liability. (*Gokul Prosad*, J.) MADHO PROSAD *v.* PEARI LAL. 62 I.C. 719=19 A.L.J. 247.

———O. 21, Rr. 43 and 57—Sapurdar *of attached property—Responsibility for the production.*

A *sapurdar* of attached property is responsible to the Court for its production and if he is unable to produce it when called on to do so, he is liable to pay the value. A dismissal of the execution proceedings for default does not release him from his liability, although the attachment thereby comes to an end. (*Broadway*, J.) DARBARI MAL *v.* KANSHI.
74 P.L.R. 1919=51 I.C. 653=60 P.R. 1919.

———O. 21, R. 43—*Surety for attached property—Execution against—Procedure.*

Where in execution of a decree, the property is made over to a third person for safe custody on his executing a bond with sureties to produce it when required the decree-holder on failure to produce cannot, proceed to enforce the bond against the sureties but should get the bond assigned to himself and sue on it. (*Abdur Rahim and Napier*, JJ.) RAJA OF VENKATAGIRI *v.* SURAKRISHNA REDDI.
12 L.W. 329=39 M.L.J. 472=
60 I.C. 134=(1920) M.W.N. 784.

———O. 21, R. 43—*Depository of live-stock—Security—Enforcement of—Suit or execution.*

The security given by a depository for the safe custody of live-stock which has been attached cannot be realised by summary process in execution. 13 C. P. L. R. 104, Foll.; 12 C. P. L. R. 149, Diss. (*Mitra*, A. J. C.) KHETSI DAS *v.* HARBA. 47 I.C. 956=16 N.L.R. 178.

C. P. CODE (V of 1908), O. 21, R. 45.

——— **O. 21, Rr. 45 and 46**—*Applicability Attachment of*—*Agricultural produce in the hands of third parties.*

O. 21, R. 46, C.P. Code, and not R. 44 or R. 45 applies to the attachment of agricultural produce in the hands of a third party. (*Kincaid and Raymond*, A. J. Cs.) BIKCHAND *v.* SAJANDAS. **64 I.C. 1007 = 15 S.L.R. 128.**

———**O. 21, R. 46**—*Money deposited by a third person as due to judgment-debtor — Payment to decree-holder—Effect of deposit.*

The decree-holder applied for attachment of a debt due to the judgment-debtor. The debtor objected to pay but admitted that on taking accounts the sum would be found due by him to the judgment-debtor. The Court directed payment of the debt into Court and on failure directed the debtor's house to be sold. The debtor, therefore, deposited the sum into Court but it was shared by the decree-holder along with another decree-holder. He then sued the decree-holders for the sum. *Held*, that as by his admission, he was bound to pay that sum to the judgment-debtor, he could not recover. (*Piggott and Walsh*, JJ.) MAHADEO PRASAD *v.* DIRGBIJAI SINGH.
43 All. 272 = 60 I C. 881 = 19 A L J. 41.

———**O. 21, Rr. 46 and 54**—**(Ss. 268 and 274, Old Code)**—*Mortgage debt—Usufructuary mortgage.*

O. 21, R. 46 does not apply to the case of a purely usufructuary mortgage where there is no debt payable by the mortgagor. The procedure should be by attachment under S. 274 of the interest in immoveable property and its sale in accordance with the Code. (*Scott*, C.J. *and Batchelor*, J.) MANIOLAL *v.* MOTIBHAI.
38 Bom. 288 = 10 I.C. 812 = 13 Bom. L.R. 283.

———**O. 21, Rr. 46, 54 and 64**—*Execution sale—Absence of attachment.*

The absence of attachment, though an irregularity does not render sale, absolutely void. (*Chatterjee and Richardson*, JJ.) TARAK NATH *v.* SYAMA CHARAN. **36 I.C. 292.**

———**O. 21, Rr. 46 and 52**—'*Debt,*' *meaning of—Annuity, whether can be attached.*

The term 'debt' in O. 21, R. 46, C. P. C. is legally construed as meaning debt either due or accruing due. An annuity cannot be attached when it does not fall due, as also money expected to reach a public officer, but not actually come to his hands. (*Mookerjee and Carnduff*, JJ.) PADMANAND SINGH *v.* RAMA PRASAD. **14 C.L.J. 127 = 11 I.C. 422 = 16 C.W.N. 14.**

———**O. 21, R. 46** — *Prohibitory order against, person out side jurisdiction—Legality.*

An executing Court cannot order an attachment of a debt due to a judgment-debtor by a person outside its jurisdiction. (*Mookerjee and Carnduff*, JJ.) BEGG, DUNLOP & CO. *v.* JAGANNATH. **39 Cal. 104 = 14 C.L.J. 228 = 11 I.C. 417 = 16 C.W.N. 402.**

C. P. CODE (V of 1908), O. 21, R. 46.

———**O. 21, R. 46**—*Right to sue for debt—Attachment of debt.*

Obiter.—A judgment-debtor can sue for his debt though attached by a decree-holder but cannot recover the debt until the decree against him is satisfied. (*Mookerjee and Caspersz*, JJ.) AMRIT LAL *v.* SHYMA CHARAN. **10 I.C. 369.**

———**O. 21, R. 46**—*Prohibitory order—competency of a Court to pass order.*

A Court, in whose jurisdiction the judgment-debtor does not reside, cannot pass a prohibitory order under the rule. (*Chevis*, J.) GREGORY *v.* THOMPSON. **177 P.L.R. 1915 = 30 I.C. 487 = 116 P.W.R. 1915.**

———**O. 21, R. 46**—*Attachment of debt—Payment to decree-holder—Liability of debtor.*

A debtor is not absolved from liability by the fact that he paid the debt to a decree-holder of his creditor who attached the debt in execution of his decree, when he was not entitled to recover the debt. In such cases the debtor must contest his liability to pay to the decree-holder. (*Shadi Lal*, J.) HARI RAM *v.* HUKAM CHAND.
28 I.C. 317 = 50 P.L.R. 1915.

———**O. 21, Rr. 46 and 90**—*Mortgage debt—Execution sale—Immoveable property.*

A mortgage debt is itself immoveable property for purposes of an execution sale. So long as it is charged on immoveable property. (*Kensington*, J.) SEWA RAM *v* DHERU SHAH.
125 P.L.R. 1913 = 18 I.C. 318 = 79 P.W.R. 1913.

———**O. 21, R. 46**—*Insolvency of judgment-debtor—Discharge—Interest.*

A dispute between an Official Assignee appointed by one Court and a Receiver appointed by another Court does not take away the liability of the debtor to pay interest. He can obtain a valid discharge by payment into Court and a prohibitory order under S 268 (*a*), C. P. C. (1882), does not debar him from doing so. (*Beadon*, J.) THE FIRM OF KANHAYA LAL *v.* SETH RADHAKISHEN.
112 P.L R. 1913 = 18 I.C. 205 = 92 P.W.R. 1913.

———**O. 21, Rr. 46, 76, 79 and 80**—*Company—Shares—Execution sale—Rights of purchaser.*

Where shares are sold in execution of a decree and the sale is confirmed nothing further is left to be done by the court or the transferee, the only thing left to be done is for the company either to recognise the transfer or refuse to recognise. (*Kumaraswami Sastri and Devadoss*, JJ.) NAGBHUSHANUM *v.* RAMCHANDRA RAO. **42 M.L.J. 449 = 45 M. 537 = 15 L.W. 470 = (1922) M.W N. 331 = 70 I.C 659 = 30 M.L.T. 231 = 1923 Mad. 241.**

———**O. 21, R. 46**—*Debts due to judgment-debtor—Suit by purchaser—Debt bond wrongly described in execution—Evidence to identify debt—Admissibility.*

In a suit to recover the amount of a debt purchased in execution of a decree, only a

C. P CODE (V of 1908), O. 21, R. 46 and 54.

reasonable amount of certainty as regards the debt is all that can be expected having regard to the knowledge and the circumstances of the plff.; extraneous evidence can be given to prove identity. (*Ayling and Seshagiri Aiyar*, JJ.) VISVANATHA PANDARA *v.* SOUTH INDIA BANK, TINNEVELLY. **6 L.W. 712 = 42 I.C. 609 = (1917) M.W.N. 879.**

——**O. 21, Rr. 46 and 54**—*Mortgage debt—Attachment—Procedure.*

An attachment of the mortgagee's interest in mortgaged property should be made under O. 21, R. 46, C.P.C. and if not so made, notice will not be presumed against him. (*Ayling and Tyabji*, JJ.) RAMASWAMI MOOPAN *v.* SRINIVASA AIYAR. **39 Mad. 889 = 28 I.C. 284 = 28 M.L J 338.**

——**O. 21, R. 46**—*Attachment of debt—Receiver—Madras Civil Rules of Practice, R.* 189.

Where an application for attachment of a debt is made, the Court is not bound to satisfy itself as to the existence of the debt and if it appoints a receiver under R. 189 of the Civil Rules of Practice, it does not act irregularly in the exercise of its jurisdiction. (*Hannay*, J.) SURYANARAYANA *v.* VENKATA RATHAMMA. **27 I.C. 812.**

——**O. 21, R. 46**—*Mortgage debt—Attachment.*

An attachment of a debt secured by a simple motgage should be made under O. 21, R. 46 and the fact of the mortgagee remaining in possession either actual or constructive makes no difference. (*Wallis and Ayling*, JJ.) CHULLILE PEETIKAYIL NAMMAD *v.* OTHENAM NAMBIAR. **26 I.C. 808 = 27 M.L J. 289.**

——**O. 21, R. 46**—*Suit for money debt due to judgment-debtor—Attached and realised by decree-holder—Suit by assignee of debt before attachment — Limitation — Limitation Act, Sch.* 1, *Arts.* 29,36, 62 *and* 120—*Applicability*

Where a debt due to a judgment-debtor was attached and he realised by his decree-holder, a suit by an alleged assignee of the debt before attachment is governed by either Article 62 or 120 of the Limitation Act not by Art. 29 or 36, and limitation runs from the date on which the attaching creditor received the money from Court. (*White*, C.J., *Sankaran Nair and Oldfield*, JJ.) YELLAIMMAL *v.* AYYAPPA NAICK. **38 Mad. 972 = 26 M.L.J. 166 = 1 L.W. 162 = 22 I.C. 870 = (1914) M.W.N. 348.**

——**O. 21, R. 46**—*Mortgage debt—Attachment of.*

A debt secured on a hypothecation bond is not immoveable property for purposes of attachment and a Small Cause Court can attach it. 22 M.L.J 105, *Foll.* (*Abdur Rahim and Sundara Aiyar*, JJ.) SUBRAMNIA AIYAR *v.* SUBBA AIYAR. **16 I.C. 816.**

——**O. 21, Rr. 46 and 54**—(1882) *Ss.* 268 *and* 274—*Attachment—Mortgage debt.*

C. P. CODE (V of 1908), O. 21, R. 46.

A purchaser of mortgage debt attached in execution of a decree without compliance with the provisions of attaching immoveable property, can enforce his valid right over it despite the irregularity of its conforming to the provisions of S. 274. The question in such cases naturally arises whether the irregularity is enough to set aside sales under S. 274. (*Sundara Aiyar and Sadasiva Aiyar*, JJ.) NOORDIN KUTTI *v.* KUNHI BAVA. **(1912) M W.N. 879 = 16 I.C. 438 = 12 M.L.T. 300.**

——**O. 21, R. 46**—*Debt—Right of debtor to plead that one claimant and not another entitled to debt.*

If there are two competing claimants to the same debts, the debtor is entitled to say that one of them is the person really entitled to payment from him and not the other. The debtor is entitled to refuse to pay the amount to the person who is not really entitled to payment. Although a creditor has notice of an assignment, there is no duty at law on him, under the old C.P.C. to bring it to the notice of the attaching Court. (*Sundara Aiyar*, J.) SUBRAMANIA PILLAI *v.* DAKSHINAMURTHI MUDALIAR. **11 M.L T. 262 = 16 I.C. 193 = (1912) M.W.N 863.**

——**O 21. Rr. 46 and 54**—*Mortgage debt—If immoveable property.*

A debt secured by a hypothecation bond is moveable property within the meaning of O. 21, R. 46 and so the provisions of O. 21, R. 54 do not apply to it. 8 M.L.J. 1 ; 18 Mad. 437 ; 15 All. 134; 26 Bom. 305; 12 Cal. 546 ; 20 Cal. 805; 6 C. W. N. 5 ; 19 Bom. 121; Foll. 9 Mad. 5 ; 10 Mad. 169. Not foll. (*Abdul Rahim and Spencer*, JJ.) NATARAJA IYER *v.* SOUTH INDIA BANK **10 M.L.T. 503 = (1911) 2 M.W.N. 590 = 13 I.C. 91 = 22 M.L.J 103 = 37 Mad. 51.**

——**O. 21, R. 46** — *Share of business — Attachment of an undivided share of one of several members of a joint Hindu family.*

The share of an undivided brother in the ancestral family money-lending business cannot be attached in execution of a personal decree against him (*Mittra*. O. A. J. C.) UMRAOSINGH *v.* SUGANCHAND. **23 I.C. 156 = 10 N.L.R. 17.**

——**O 21, Rr. 46 and 54**—*Mortgage debt—Simple mortgage.*

A simple mortgage is not immoveable property within O. 21, R. 54, and attachment of a simple mortgage is to be made under O. 21, R. 46. 37 Bom. 51; 26 Bom. 305; 20 Cal. 805 ; 12 Cal. 546. Ref. (*Kanhaiya Lal and Daniels*, A. J. Cs.) SHAH MOHAMMAD YUSUF *v.* LACHHMI NARAIN. **6 O.L.J. 49 = 60 I.C. 157 = 21 O.C. 400.**

——**O. 21, R 46**—*Debt—Attachment—Suit for recovery.*

An order of attachment of a debt is no bar to a suit for the recovery of the debt unless the order so expresses it. (*Pandit Kanhaiya Lal*, A. J. C.) SHEO RAJA *v.* JAGAN. **49 I.C. 88 = 5 O.L.J. 766.**

C. P. CODE (V of 1908), O. 21. R. 46.

———**O. 21, R. 46**— *Judgment debtor's money in decree-holder's hand.*

Money in the hands of the decree-holder belonging to the judgment-debtor is moveable property not in possession of the judgment-debtor and not a debt,not secured by a negotiable instrument ; so it may be attached without notice to the judgment-debtor. (*Stuart*, J. C.) RAJAB ALI SHAH *v.* UPPER INDIA PAPER MILLS CO, LTD. **17 I.C. 420=15 O.C. 289.**

———**O, 21, Rr. 46, 52 and 53**—*Debt— Description of—Essential.*

An application for execution against property not in the possession of the judgment-debtor such as debts due to him or money to which he is entitled in the custody of the Court should definitely specify the particular debt or decree and such execution cannot issue merely on the strength of an application for attachment or sale of moveable property. (*Piggott*, A, J. C.) MAHOMED SADIK *v.* TIKARAM. **9 I.C. 240.**

———**O. 21, R. 46**—*Debt— Attachment— Liability denied—Procedure.*

When the garnishee or third party admits the debt, payment can be ordered to be made to the judgment-debtor and where he denies the debt, the decree-holder may have it sold, or he may have a Receiver appointed with power to him to sue the garnishee to recover the debt from him. 8 Bom. L.R. 91 and 11 Bom. 448 Foll. (*Maung Kin*, J.) M.R.R. M. FIRM *v.* ZAN. **33 I.C. 469=10 Bur. L.T. 6.**

———**O. 21, R. 46**—*Money payable to judgment debtor—Attachment.*

Where an order of attachment is served upon the officer holding the judgment-debtor's money, after he has endorsed a cheque in favour of judgment-debtor's assignee. the attachment is of no avail. (*Moore*, J.) ARUNACHELLAM CHETTY *v.* SOMASUNDARAM CHETTY. **12 I C, 869=4 Bur. L.T. 148.**

———**O. 21, Rr. 46, 2 (1)**—*Burma Chief Court Rules— Practice — Judgment-debtor— Admits claim but refuses to pay.*

A debtor who admits that he owes money to the plaintiff but refuses to pay should be proceeded against under O. 21, R. 46 (*a*) of Burma Chief Court Rules. (*Fox*, O.J. *and Parlett*, J.) P.L.M. FIRM *v.* DAISY M. STACEY. **33 I.C. 169=9 Bur. L.T. 122.**

———**O. 21, Rr. 48 and 52**—*Attachment— Security—Deposit of employee—Notice served on auditor—Notice disregarded—Liability of company—Lien on—Security deposit.*

Where the auditor of a Railway Company was prohibited by the order of a Court from paying to a Railway employee the amount of a security deposit and he disregarded the order on the plea that the amount was under the control of the Agent and hence, not being at the disposal of the employee was not liable to attachment ; *held*, that the deposit could be attached subject to the Company's lien, though it could not be realised until freed from that lien and the Company was liable for the default of the auditor. (*Parlett*, J.) BURMA RAILWAYS CO., LTD. *v.* HIRA LAL. **7 Bur. L.T. 288=24 I.C. 725=8 L.B.R. 62.**

C. P. CODE (V of 1908), O. 21, R. 50.

———**O. 21, R. 48 (3)**—*Government, a necessary party.*

No order under R. 48 (3) of the Code can be made against Government without bringing the Government on the record as a party. (*Reid*. C.J.) NIADAR MAL *v.* BIDDULPH. **93 P.R. 1912=255 P L.R. 1912= 14 I.C. 737=164 P.W.R. 1912.**

———**O. 21, R. 49**—*Decree against individual partner—Direction to take accounts.*

A decree against an individual partner can be made. Such a decree is contemplated in O. 21, R. 49. (*N. R. Chatterjee and Newbould*, JJ.) KRISHNADHAN BANERJEE *v.* SANYASI CHARAN MANDAL. **23 C.W.N. 800= 51 I.C. 597=29 C.L J. 280.**

———**O. 21, R. 50**—*Interpretation of section —Sub-rule (4) does not affect subr-ule (2).*

O. 21, R. 50, sub rule (4) is really intended to make clear the implication of sub-rule (1). It does not in any sense affect the provisions of sub rule (2) of that rule. The meaning of sub-rule (4) is that a decree against a firm as such will not affect a partner who has not been served with a summons to appear and answer so far as his other property is concerned. O. 21, R. 54 (2) is wide enough to cover the case of a deceased partner. (*Shah*, A.C.J. *and Crump*, J.) JIVRAJ LALOOBHAI PATEL *v.* BHAGVANDAS GORDHANDAS. **24 Bom. L.R. 1037=68 I.C. 627= 1923 Bom. 66.**

———**O. 21, R. 50**—*Partnership—Execution against.*

Per *Hayward*, A.J.C.—*Quaere.*—Whether execution can issue on an award against a firm in respect of which a person objects that he is not a member of the firm and not bound by the award against anything more than the property of the partnership under the rule. (*Crouch and Hayward*, A.J.Cs.) POKARDAS JASHOMAL *v.* FORBES CAMPBELL & CO., LTD. **19 I.C. 363=6 S.L.R. 127.**

———**O. 21, R. 50 (1) and (2)**—*Applicability.*

O. 21. R. 50 (2) applies only in the absence of the conditions in R. 50 (1). (*Mookerjee and Beachcroft*, JJ.) BAISNAB CHARAN SHAHA *v.* BANK OF BENGAL. **19 C.L.J. 581= 26 I.C. 866=19 C.W.N. 1008.**

———**O. 21, R. 50 (1)**— *Partnership— Liability of members in execution.*

Under English Law, in a judgment against a firm execution, may issue only against any property of the firm so far as partners not served and who have not appeared are concerned. (*Benson and Sadasiva Iyer*, JJ.) SAHIB THAMBI *v.* HAMID. **36 M. 414= 22 M.L.J. 109=12 I.C. 1006= 10. M.L.T. 515=(1911) 2 M.W.N. 534.**

C. P. CODE (V of 1908), O. 21, R. 50.

——O. 21, R. 50, Cl. (1) (c) and O. 30, R. 5—*Execution against partner.*

Where one of the partners refused to accept a summons which was therefore affixed to the outer door of the place of business and the partner did not appear in execution proceedings: *Held*, that he was served individually as a partner and as such execution could proceed against him under O. 21, R. 50 (1) (c). *Mookerjee and Beachcroft*, JJ.) BAISH NAB CHARAN SHAH *v.* BANK OF BENGAL.

19 C.L.J. 381=26 I.C. 866=19 C.W.N. 1008.

——O. 21, R. 50 (2)—*Transfer for execution—"Court which passed the decree" is Court of transfer.*

Where a decree is transferred by one Court to another Court for execution, the latter Court is, for the purposes of O. 21, R. 50 (2) of the Code the "Court which passed the decree" and is competent to decide all questions arising in execution thereof. (*Piggott and Walsh*, JJ.) SITAL PRASAD *v.* CLEMENTS ROBSON & CO. **43 All. 394=19 A.L.J. 187=61 I.C 401=3 U.P.L.R. (All.) 36.**

——O. 21, R. 50 (2)—*Applicability—Execution against persons not parties.*

The rule applies only to cases in which members of a partnership who have not been impleaded as such, are sought to be arrested in execution of a decree obtained against the firm. (*Spencer and Seshagiri Aiyar*, JJ.) BANK OF BENGAL *v.* RAMANADHAN CHETTY. **28 I.C. 260=(1915) M.W.N. 180.**

——O. 21, R. 52—*Attachment—Judgment-debtor not declared an insolvent — Money ordered to remain in Court.*

Where a judgment-debtor (who had put in a petition of insolvency) had not been declared an insolvent, the Court has no power to retain in its custody his money which has been attached by the decree-holder but should dispose of it according to law. (*Tudball*, J.) PARMER *v.* CAWASJEE. **33 I.C 723=14 A.L.J. 236.**

——O. 21, Rr. 52 and 63—*Fund in Court—Right to payment—Attachment.*

Where a decree-holder attaches money deposited in Court, in pursuance of an attachment before judgment taken out by another suitor, the former is entitled to be paid the entire amount of his decree out of the fund. (*Richards*, C J. *and Banerjee*, J.) BISHESHAR DAS *v.* AMBIKA PERSHAD **37 All 578=29 I C. 622=13 A L.J. 732.**

——O 21, R. 52—*Garnishee order—Revenue payable in future—Attachment of.*

The attachment of property yielding a revenue or producing interest or dividends is governed by the rule: Revenue in future of attached property is on the same footing as interest or dividend. On an application for execution of a decree, an agreement was entered into, that the deft.'s share of the revenues of

C. P. CODE (V of 1908), O. 21, R. 52.

village should be paid to plaintiff through the Court. The revenue continued to be paid to plaintiff under the terms of a prohibitory order of Court. *Held*, the payment was valid. (*Beaman and Hayward*, JJ.) UMA BAI SHANKAR GODBOLE *v.* AMRUTIA ANANT.

39 Bom. 80=28 I.C. 18=17 Bom. L.R. 133.

——O. 21, R. 52—*Attachment, anticipatry—Effect of.*

R. 52 applies only where the property to be attached is actually in the custody of a public officer *Per Sanderson*, C. J.—An attachment under O. 52 of a fund merely prevents alienation of the fund, subject to the further order of the Court and does not give title to the creditor who effects the attachment. (*Sanderson*, C.J. *and Mookerjee*, J.) THAKURDAS MOTI LAL *v.* JOSEP-ISKENDAR.

44 Cal 1072=26 C.L.J. 598=41 I.C. 516=21 C.W.N. 887.

——O. 21, R. 52—*Scope of—Attachment—Application for—Prior attachment—Effect on.*

The rule is applicable not only when the property sought to be attached is in the custody of a Court, other than that executing the decree, but also when the property is in the custody of the same Court. When the property to be attached is in the custody of any Court, the order should be made in terms of the rule, that such property may held subject to the further order of the Court. A prior subsisting attachment will not become unfructuous, if by way of precaution, respondent applied for a formal attachment in strict compliance with the terms of the rule. (*Chatterjee and Greaves*, JJ.) SURAJMAL AGARWALA *v.* RAMCHANDRA MISTRY. **28 I C 123=20 C.W.N. 412.**

——O. 21, R. 52—*Fund in Court—Attachment—Rival decree-holders—Priority—Receipt of assets—Date of.*

Where a fund in the Court is attached by another Court in execution of a decree it is the duty of the former Court to hold the fund subject to the directions of the executing Court and to transfer it to that Court. The fund, as soon as it is transferred to the execution Court becomes "assets held", by that Court within S 73 of the C P. Code. All decree-holders can claim rateable distribution where they have applied for execution to the executing Court before the receipts of such assets. If the executing and the custody Court are the same, the fund becomes the assets within S. 73 of the C. P. Code by an order of attachment coupled with a formal order of transfer of the fund to the credit of the suit in which the execution is sought. (*Wallis*, C.J., *Ayling, Sadasiva Aiyar Napier and Krishnan*, JJ.) VISV NATHAN CHETTY *v.* ARUNACHELLAM CHETTY **44 Mad 100=39 M L J. 608=12 L W. 744=28 M.L T. 412=60 I C. 302=(1921) M W N. 14.**

——O 21, R. 52—*Fund in Court—Attachment—Priority.*

C. P. CODE (V of 1908), O. 21, R. 52.

Where a fund in another Court to the credit of the judgment-debtor is attached by a decree-holder, he is entitled to be paid out in priority to the subsequent creditors attaching the fund later on. Immediately on the attachment, the money becomes payable. 38 Mad. 221, Not Foll; 26 M.L.J. 364, Foll. (*Oldfield and Seshagiri Aiyar*, JJ.) UMMA VENKATARATNAM AND CO. *v.* METHAWALA ADAMJI AND CO. **42 Mad. 692=50 I C. 925=(1919) M W.N. 623=26 M.L.T. 82.**

[But see 44 Mad. 100=39 M L J. 608=13 L.W. 744=28 M L.T. 412=(1921) M.W.N. 14 (F.B.)].

———O. 21, R. 52, Ss 42 and 47—*Appeal—Forum.*

Where the holder of a decree passed by a Munsif's Court attached in execution thereof, a sum of money realised in execution of a decree passed by the Sub-Court in favour of the judgment-debtor and obtained an order from the Sub-Court for payment of the money, an appeal against the order lay to the Dt. Court and not to the High Court. If filed in the wrong Court the proper course is to return the appeal petition for presentation to the proper Court and not to dismiss it altogether. (*Ayling and Seshagiri Aiyar*, JJ.) KRISHNA PATTAR *v.* KAVALAPPARA MOOPPIL NAIR. **38 I.C. 772=5 L.W. 264.**

———O. 21, R. 52—*Priority—Rival attaching decree-holders.*

An applicant for execution of his decree does not acquire any priority by virtue of his attachment and the fund in Court must be distributed rateably among the creditors who put in claims thereto. (*Bakewell*, J.) SUIKUNI KATUM *v.* MUHAMMAD ABDUL AZIZ. **29 I C. 239=38 Mad. 221.**

[But see 44 Mad. 100=(1921) M.W.N. 14=39 M.L.J. 608=12 L.W. 744=28 M.L.T. 412.]

———O 21, R. 52—*Attachment before money paid into Court—Whether valid.*

An attachment before the payment of the money into Court is invalid. (*Wallis*, J.) TIRUVENGADIAL *v.* THIRUVENGADIAH. **24 I.C. 617=26 M.L.J. 364.**

———O. 21, R. 52—*Money with Receiver.*

Money with the receiver, is supposed to be in Court's custody. The Court having such custody only, can decide questions relating to such money No other Court has jurisdiction to do it. (*Chamier* C.J. *and Sharfuddin*, J.) DEBENDRA *v.* CHANDRA SEKHAR. **38 I.C. 589=1 Pat. L.J. 449.**

———O. 21, R. 52—*Money in another Court—Attachment.*

It is illegal for a Court to attach money lying in the hands of another Court in another district. The proper procedure is to have the decree transferred to the other district for execution. (*Shaw*, J. C.) RAMCHANDRA *v.* LATCHMAN PILLAY. **26 I.C. 941=7 Bur. L.T. 277.**

C. P. CODE (V of 1908), O. 21, R. 53.

———O. 21, R. 52—*Attachment of property—Not in the custody of a Court—Irregular.*

An attachment of a property in the custody of another Court, the attachment not having been made by notice to that Court, is irregular. (*Ormond*, J.) MAUNG TAUNG BO. *v.* VYRAVAN CHETTY. **11 I.C. 859=4 Bur. L.T. 192.**

———O. 21, Rr. 53 and 57—*Attachment of decree—Payment by judgment-debtor to original decree-holder during subsistence of attachment—Volidity.*

Where a decree-holder attached a decree of the judgment-debtor and his applications for execution of the attached decree were struck off for default and the judgment-debtor in the attached decree paid a sum to his decree-holder, *Held*, that the payment was invalid inasmuch as the provisions of O. 21, R. 57 did not apply to the case and the attachment of the decree was subsisting at the time of the payment. 16 Bom. 522, Rel. (*Chamier and Rafique*, JJ.) PREM *v.* MUHAMMAD HABIBULLAH. **24 I.C. 795 (All.).**

———O. 21, Rr 53, 54 and 89—*Mortgage decree—Not immoveable.*

The term 'immoveable property' does not include a decree for sale in enforcing a mortgage. (*Chamier*, J.) SUBRANI *v.* PURAN SINGH. **12 I.C. 924=8 A.L.J. 1327.**

———O. 21, R. 53—*Attached decree—Court cannot sell.*

Where a decree in favour of the judgment-debtor is attached in execution of a decree against him, the Court must execute the attached decree and apply the net proceeds in satisfaction of the decree sought to be executed. It cannot sell the attached decree. Where, however an attached decree was sold and was purchased by the attaching decree-holder who executed it and realised a larger amount under it than he paid for it. *Held*, that he must give credit to the judgment-debtor for the full amount realised by him. (*Macleod*, C.J. *and Fawcett*, J.) VITHALDAS PRABHU *v* SUBRAYA MANJAPPA. **45 Bom. 348=59 I.C. 541=22 Bom. L.R. 1304.**

———O. 21, R. 53—*Attachment of decree—Payment into Court of money due under attached decree—Cessation of interest.*

Where, in execution of a decree, another decree is attached and the moneys payable under the attached decree are paid into court, interest on the amount of the attached decree as well as on the decree amount due to the attaching decree-holder, stops to run from the date of the payment into court. This fits in with the view that the holder of the decree sought to be executed by attachment of the other decree is in law, the representative of the holder of the attached decree. (*Mookerjee and Panton*, JJ.) MADAN MOHAN DEY *v.* BISHNUPADA DEY. **64 I.C. 780=38 C.L.J. 901.**

C. P. CODE (V of 1908), O. 21, R. 53.

———**O. 21, R. 53**—*Burden of proof—Defeated claimant.*

The onus of proving the validity of his transfer lies on the defeated claimant in a suit under O. 21, R. 53. (*Johnstone and Chevis, JJ.*) MEHNGI BAI *v.* FATEH CHAND.

246 P.L.R. 1913=20 I C. 385=197 P.W.R. 1913.

———**O. 21, Rr. 53 and 2**—*Notice to judgment-debtor—Adjustment—Validity of.*

The attachment of a decree is complete without notice to the judgment-debtor and the holder of it has no right to deal with it after attachment. Where a decree attached by a creditor of the decree-holder, is adjusted after the attachment, the adjustment does not bind the attaching creditor whether notice of the attachment has been issued to the judgment-debtor or not. (*Abdur Rahim and Oldfield, JJ.*) KUPPUSAMI AIYAR *v.* KUPPUSAMI AYYAR.

(1918) M.W.N. 874=48 I.C. 109=24 M L.T. 495=9 L.W. 32.

———**O. 21, R. 53**—*Attachment by assignee decree-holder—One of several judgment-debtors.*

Per *Sundara Aiyar*, J.—Whether a judgment-debtor taking an assignment of a decree against himself for immoveable property can execute it or not, the attachment of the decree by himself in execution of a decree against his decree-holder is not invalid. Per *Sadasiva Iyer*, J.—Such judgment-debtor has the right to apply for a set-off of the amount due to him as decree-holder in a suit againt his judgment-debtor as against what is due to such judgment-debtor from himself and other co-judgment-debtors. (*Sundara Iyer and Sadasiva Aiyar, JJ.*) ARUMUGA MUDALIAR *v.* YOGAMBA BAI AMMANI.

17 I.C. 323=13 M.L.T. 227.

———**O. 21, Rr. 53 and 16**—*Decree-holder—Assignee of—If can execute attached decree.*

The assignee of the holder of an attached decree, cannot execute the decree and the only persons under O. 21, R. 53 who can execute the decree, are the decree-holder of the attached decree or the attaching creditor. (*Benson and Abdur Rahim, JJ.*) THIRUVENGADAM PILLAI *v.* DORIDLA SUBBIAH. **11 M.L.T. 144=13 I.C. 659=(1912) M.W.N. 176.**

———**O. 21, R. 53**—*Execution of a decree under attachment—If in accordance with law—Limitation.*

An application for execution of a decree already under attachment is one in accordance with law and can save limitation even though it is dismissed. 21 M. L. J. 577, Dist. (*Benson and Abdur Rahim, JJ.*) MULLASERI GOPALA MENON *v.* KRISEKI KOVILAKNATH MANAVIKRAMAN. **10 M.L.T. 368=13 I.C. 179=22 M.L.J. 146.**

———**O. 21, R. 53**—*Attaching decree-holder—Rights and liabilities.*

It is only the attaching decree-holder who can execute the decree attached and he is liable in damages to his judgment-debtor (*i.e.,*) the holder of the decree attached, if through negligence or collusion he allows the attached decree to lapse. 13 M.L.J. 265; 21 Mad. 417, 24 Cal. 778, Dist.; 27 All. 19; 33 Cal. 867; 7 Bom. 459, Ref. (*Abdur Rahim and Ayling, JJ.*) THUCHAKOVIL UNNI KOYA *v.* ARAPAYIL PATHUTHI UMMA. **36 Mad. 622=(1911) 1 M.W.N. 187=9 M.L T. 312=9 I.C. 786=21 M.L.J. 577.**

[Reversing, 5 I.C. 56=7 M.L.T. 262.]

———**O. 21, Rr. 53 and 54**—*Decree relating to immoveable property—Attachment—Small Cause Court.*

A decree relating to immoveable property is not immoveable property. O 21, R. 53 deals, with the mode in which decrees are to be attached and dealt with in execution proceedings. They are a class by themselves whether the decree is one regarding moveable or immoveable property. There is nothing in the present Code to prevent a Small Cause Court from attaching and selling a decree for immoveable property. (*Mittra, A.J.C.*) KRISHNAJI *v.* BALIRAM. **44 I.C. 252=16 N.L.R. 72.**

———**O. 21, Rr. 53 and 54**—*Decree for costs and mesne profits—Decree for money—Attachment and sale of decree.*

A decree for mesne profits cannot be sold under S. 60 of the C P. Code. The only procedure that the decree-holder can legally take is to attach the decree and to execute it under the provisions of O. 21. R. 54 of the Code, 24 Mad. 341, Dist. (*Mullick and Thornhill, JJ.*) LACHMAN OJHA *v.* CHARITER OJHA.

4 Pat. L.J. 336=5 Pat. L.W. 191=48 I.C. 183=1918 Pat. 257.

———**O, 21, R. 53**—*Procedure.*

Rule 53 lays down the procedure to be followed in execution, when a money decree is attached and it has long been a settled law that a money decree cannot be sold in execution. (*Heald and Lentaigne, JJ.*) MAUNG LUN BYE *v.* MAUNG PO NYUN. **2 Bur. L.J. 151=76 I C. 679=1 R. 360=1924 Rang. 21.**

———**O. 21, R. 53, Cl. (1). (b)**—*Attachment—Court other than that which passed the decree.*

Per *Sundara Iyer*, J.—An order of attachment of a decree by the Court actually executing the decree in execution of which such decree is sought to be attached is valid as under S. 42 the Court which executes the decree has the same powers as the Court which passed the decree. Even if there is a defect, such defect is not a jurisdictional effect so as to make the order void but one which could be waived by the judgment-debtor. (17 M.L.J. 304). Ref. Per *Sadasiva Iyer*, J.—Such orders though affected by sending notices to other Courts are made in exercise of the powers in executing a decree and therefore the Court to which the decree is sent for execution can under S. 42, exercise the powers mentioned in O. 21, R. 53, Cl. (1) (*b*). (*Sundara Iyer and Sadasiva Iyer, JJ.*) ARUMUGHA MUDALIAR *v.* YOGAMBA BAI AMMANI. **17 I.C. 323=13 M.L.T. 227.**

C. P. CODE (V of 1908), O. 21, R. 53.

——— **O. 21, R. 53 (3)**—*Appeal—Attachment of decree—Execution against sureties.*

The holder of decree which is sought to be executed by the attachment of another decree has the same remedies against sureties of the judgment-debtor of the decree attached as the decree-holder himself has, as against the sureties and the order against the sureties is appealable. (*Le-Rossignol*, J.) MOHIBUDDIN *v* PARTAB MAL. **44 P.R. 1919 = 86 P.W.R. 1918 = 46 I C. 884 = 88 P.L.R. 1918.**

——— **O. 21, R. 53 (3)**—*Decree for maintenance charging immoveable property — Sale—Procedure.*

Where a decree-holder in execution of his decree attaches a decree for maintenance charging immoveable property, his proper course is to apply for execution of the maintenance decree, purchase the interest and bring a separate suit under O. 34, R. 14, C.P.C. for sale. Alternatively, he may as representative of the maintenance decree-holder under O. 21, R. 53 (3) attach and bring to sale the property of the defts. in the maintenance decree. (*Spencer and Bakewell*, JJ.) VENKATA RAMAMURTHI *v*. SUNDARA RAMIAH. **28 M L.T. 385 = 47 I.C. 680.**

——— **O. 21, R. 53 (3)**—*Applicability of.*

O. 21, R. 53 (3) refers to the stage at which execution of the attached decree is being sought and not to a case where the application for attachment of the decree has been disallowed. (*Lindsay*, A.J.C.) PIARE LAL *v*. MUHAMMAD MAHMUD. **27 I.C. 363 = 17 O.C. 374.**

——— **O. 21, R. 53, Cl. (6)**—*Applicability of—Attachment before judgment.*

O. 21, R. 53, Cl. (*b*) applies to attachment of decrees made either before or after judgment. (*Abdur Rahim and Sundara Aiyar*, JJ.) GORRIJALA VENKAYYA *v* PORTHIGUMTA LAXMIAH. **14 I.C. 285 = 22 M.L.J. 394.**

——— **O. 21, Rr. 54 and 90**—*Execution sale—Material irregularity in conducting sale—Beat of drum.*

Under O. 21, R. 54, C.P.C. a proclamation of sale by beat of drum is sufficient. A drum need not be beaten at the time of the sale, unless the judgment-debtor proves that the irregularity has resulted in material loss and the Court will not set aside the sale on this ground. (*Tudball and Sulaiman*, JJ.) BHAGWATI PRASAD *v*. MUKAND SARUP. **66 I.C. 823 = 2 U.P.L.R. (All.) 147.**

——— **O. 21, R. 54**—*Attachment, when complete.*

An attachment is not complete, until the procedure provided by O. 21, R. 54 has been followed, when only it takes effect. (*Beachcroft and Walmsley*, JJ.) KANAI LAL *v* AHMED BUX. **39 I.C. 862.**

——— **O. 21, Rr. 54, 67**—*Non compliance is material irregularity.*

C. P. CODE (V of 1908), O. 21, R. 54.

Under O. 21, Rr. 54 and 67, a copy of the proclamation order must be affixed on a conspicuous part of the property. Where *prima facie* from the serving officer's report, this was not done, *Held*, it is a material irregularity. (*Campbell*, J.) WISHWA NATH *v*. RAHMAT ULLAH. **1923 Lah. 671.**

——— **O. 21, R. 54**—*Proclamation is necessary.*

In order to constitute a valid attachment, the proclamation described in the second portion of R. 54 of O, XXI must be carried out. (*Broadway and Harrison*, JJ.) MULA RAM *v*. JIWINDA RAM. **4 Lah. 211 = 5 Lah. L.J. 200 = 72 I.C. 452 = 1923 Lah. 423.**

——— **O. 21, R. 54**—*Non affixture of attachment order, is a fatal defect.*

An omission to affix a copy of an attachment order in a conspicuous part of the Court house, office of the Collector or the land attached is a fatal defect invalidating the attachment. (*Scott-Smith*, J.) ATTAR SINGH v. GHULAM MAHOMED. **60 I.C. 527.**

——— **O. 21, R. 54**—*Revenue suit—Rent payable in shrotriem village.*

Rent payable in the case of shrotriem villages is revenue within the meaning of O. 21, R. 54, C.P. Code. (*Oldfield and Devadoss*, JJ.) PAMIDIMARRI GANAMMA *v*. KETIREDDI. **46 Mad. 736 = (1923) M.W.N. 463 = 75 I.C. 869 = 45 M L.J. 263 = 1924 Mad. 217.**

——— **O 21, R. 54**—*Share of member of joint family—Mode of attachment.*

It is the co-parcener's undivided share in the whole family property and not his share in each item comprising it, which can be attached. (*Oldfield and Bakewell*, JJ.) JANGANTHAR SUBBIAH *v*. KAMESETTI CHINNA VENKATA-SUBBIAH. **53 I.C. 836 = 10 L.W. 449.**

——— **O. 21, R. 54**—*Attachment—When complete.*

An attachment becomes complete only from the date on which the necessary proclamation is made, *i.e.*, a copy of the order is affixed as required by O. 21, R. 54. (*Abdur Rahim, Off.*, C.J. *Oldfield and Seshagiri Aiyar*, JJ.) SENNAPAN *v*. ARUNACHALAM PILLAI. **42 Mad. 844 = 37 M L J 375 = 26 M L T. 281 = 10 L.W 391 = 53 I C 207 = (1919) M W N 678 (F.B).**

——— **O 21, R. 54**—*Attachment — When effective.*

Attachment ordered before judgment but proclaimed after judgment, is not a nullity, for, the proclamation is merely a ministerial act and the delay on the part of the Court or its officers should not prejudice parties. (*Phillips and Kumaraswami Sastri*, JJ.) RUDRAVARAM VENKAT SUBBIAH *v*. RUDRAVARAM VENKATA SESHAIYA. **42 Mad 1 = 24 M.L T. 346 = (1918) M.W.N 606 = 8 L.W. 369 = 48 I.C. 232 = 35 M L J. 387.**

[But see 53 I.C. 207 = 42 Mad. 844 (F B.]

C. P. CODE (V of 1908), O. 21, R. 54.

———O. 21, R. 54—*Omission to post order of attachment in Collector's office is not fatal.*

The omission to post a copy of the order of attachment of immoveable property in the office of the Collector as required by O. 21, R. 54 (2) does not render the attachment invalid, if all the other formalities prescribed by O. 21, R. 54 have been observed. 41 M. 844, followed. (*Hallifax*, A.J.C.) JODHAN *v.* KAPILNATH.
69 I.C. 868=1923 Nag. 78.

———O. 21, R. 54, S. 64—*Mortgage after attachment.*

A mortgage made after an attachment cannot prevail over the rights acquired by the purchaser at the sale effected in pursuance of that attachment. All rights acquired subsequent to the attachment are void as against all claims under the attachment under S. 64 of the Civil Procedure Code. (*Stuart*, A.J.C. *and Kanhaiya-lal*, A.J.C.) BISHAMBHAR NATH *v.* GIRDHARI LAL. **7 O.L.J. 1=2 U P.L R. (J C.) 46=55 I.C. 481 (2)=23 O.C. 18.**

———O. 21, R. 54—*Attachment when effective—Alienation after an order of attachment before it is effected—Validity.*

A private alienation of property after an order of attachment which has not been effected is valid unless proof is given that all the requirements of O. 21, R. 54, C.P.C. have been complied with. The filing of process-fee for the issue of an order of attachments of immoveable property is not sufficient proof of such service. (*Kanhaiya Lal*, A. J. C.) LALJI *v.* GANGA PRASAD. **26 I.C. 204=1 O.L.J. 549.**

———O. 21, R. 54—*Irregularity.*

The annual income realised from a property was over Rs. 1,000 and the valuation stated in the sale proclamation was Rs. 2,500. The property was sold for Rs. 2,500 and consisted of a right of fishing in a river which was about 20 miles long and it was described merely by a tauzi number and a name though the right ran through as many as 138 villages. *Held*, that the sale proclamation was materially irregular both in the description of the property and the valuation put upon it and the sale was liable to be set aside. In the case of such a property any particular spot on the river is not a conspicuous part of the property. The principle of the Rule laid down in R. 54 of O. 21 of the C.P. Code must be applied in such circumstances and the copy of the order must be conspicuously displayed at various portions of the estate. The sale should have been advertised in the local newspapers or in the Gazette. (*Chapman and Jwala Prasad*, JJ.) CHATTARPATT SINGH *v.* SURENDRA NATH SINGH.
44 I.C. 412=1918 Pat. 33.

———O. 21, R. 54—*Attachment, when complete.*

An attachment of immoveable property is complete when the procedure mentioned in O. 21, R. 54 is complied with and a mere entry in the *Tausi* Register is no part of the procedure

C. P. CODE (V of 1908), O. 21, R. 57—Attachment before judgment.

contemplated in the said rule. A fresh attachment does not render an already subsisting attachment, void but it is a mere redundancy. (*Sharfuddin and Roe*, JJ.) RAMKHELAWAN SINGH *v.* SUNDER RAUT. **34 I.C. 34.**

———O. 21, R. 54 (1)—*Immoveable property—Equity of redemption is.*

The equity of redemption of a mortgagor is immoveable property within the prohibitory provision contained in R 54 (1). (*Mookerjee*, A.C.J. *and Fletcher*, J.) BIRENDRA NATH MITTER *v.* MARTIN & CO. **62 I.C. 167=38 C.L J. 7.**

———O. 21, R. 55—*Attachment—Part payment of decree—Attachment withdrawn.*

An attachment of property cannot be deemed to be withdrawn when satisfaction of the decree in part only is certified to the Court and especially when a part of the satisfaction is due to the payment of the money attached. (*Karamat Hussain*, J.) KHUB CHAND *v.* NIADAR MAL.
15 I.C. 677=10 A.L.J. 165.

———O. 21, R. 55 and S. 73—*Attachment of moveables—Money paid to avert—Rateable distribution.*

Money paid under O. 21, R. 58, to remove an attachment is not available for rateable distribution but can be paid only to the attaching creditor. (*Pratt*, J.) NATHMAL GHAMIRMAL *v.* MANIRAM RADHAKISSON.
63 I.C. 899=21 Bom. L.R. 975.

———O. 21, R. 55—*Attachment—Revival of.*

The result of the reversal in second appeal of a reversal in first appeal of the decree of the Court of first instance in first appeal, is to revive the attachment which under the provisions of O. 21, R. 55 is regarded as withdrawn in consequence of the decision in first appeal. (*Lindsay*, J.C.) PARAMESHWAR DIN *v.* DEBI PRASAD. **48 I.C. 886=8 O.L.J. 647.**

———O. 21, R. 57.

ATTACHMENT BEFORE JUDGMENT.
CONTINUANCE OF ATTACHMENT.
DEFAULT.
DISMISSAL OF EXECUTION.
MANDATORY.
NOT RETROSPECTIVE.
NOTICE TO PARTIES.
REVIVAL OF APPLICATION.
REVIVAL OF ATTACHMENT.
STRIKING OFF.

Attachment before Judgment.

———O. 21, R. 57 and O. 38, R. 5—*Attachment before judgment—First execution application dismissed—Second application.*

A decree-holder who has obtained an order for attachment before judgment may without applying for a fresh attachment under O. 21, R. 57 sell the property even if his first application for execution has been dismissed for default for the attachment referred to in O. 21,

C. P. CODE (V of 1908), O. 21, R. 57—Attachment before judgment.

R. 57 is one made under O. 21, and not under O. 38. C. P. C. (*Brett and Sharfuddin, JJ.*) GANESH CHANDRA ADAK *v.* BANWARI LAL ROY. **16 C. L.J. 86=14 I.C. 345=16 C.W.N. 1097.**

——— **O. 21, R. 57 and O. 38, R. 5**—*Attachment before judgment—Dismissal of execution application.*

O. 21, R. 57, C. P. Code is not applicable to attachment, before judgment under O. 38, R. 5, C. P. C. (*Phillips and Kumaraswami Sastri, JJ.*) RUDRAVARAM VENKATA SUBBIAH *v.* RUDRAVARAM VENKATA SESHAIYA. **42 Mad. 1=24 M.L.T. 346=(1918) M.W.N. 606=35 M.L.J. 387=48 I.C. 232=8 L.W. 369.**

———**O. 21, R. 57**—*Attachment before judgment—Application for arrest after decree—Dismissed for default—Attachment if dissolved.*

Where a plaintiff attaches property of the judgment-debtor before judgment and after obtaining the decree, applies for, his arrest, the application is dismissed for default, the attachment is not dissolved but remains in force. O. 21, R. 57 of the C. P. Code applies only to attachment in execution of a decree. (*Sadasiva Aiyar and Spencer, JJ.*) BAVUDDIN SAHIB *v.* ARUNACHALLA MUDALI. **22 I.C. 351=26 M.L.J. 215.**

Continuance of Attachment.

———**O. 21, R. 57**—*Continuance of attachment—Suspension of execution—Claim.*

Where an execution case is discontinued not by reason of default on the part of the decree-holder but at the instance of an unsuccessful claimant who has sued to contest the validity of the order in the claim case, the attachment effected at the instance of the decree-holder continues to be in force. (*Mookerjee and Beachcroft, JJ.*) NILKANTHA *v.* GHOSTA BEHARI. **46 Cal. 64=44 I.C. 249=27 C.L.J. 145.**

———**O. 21, R. 57**—*Continuance of attachment—Determination—Presumption.*

The subsistence of an order of attachment is a question of fact depending on the circumstances of each particular case; and unless such an order is withdrawn or is dealt with on the merits, the presumption is that it is in force. (*Seshagiri Aiyar and Kumaraswami Sastri, JJ.*) RAGHAVACHARIAR *v.* ANANTHA REDDI, **31 I.C. 911.**

———**O. 21, R. 57**—*Continuance of attachment—Order determining—Rule does not apply.*

Where there is an explicit order putting an end to the attachment the provisions of O. 21, R. 57, C.P.C. have no application nor is there anything in the rule which limits the power of the Court to pass such an order. (*Daniels, J.C. and Dalal, A. J. C.*) SHEIKH MAHOMED MUZAFFAR ALI KHAN *v.* BHAGWATI PRASAD SINGH. **8 O.L.J. 358=56 I.C. 642.**

C. P. CODE (V of 1908), O. 21, R. 57—Dismissal of Execution.

Default.

———**O. 21, R. 57**—*Default—Meaning of—Decree-holder's default — Determination of attachment.*

The word 'default' used in O. 21. R. 57 of the C.P. Code is not restricted to default of the appearances or matters of that description. It means a failure to do what the decree-holder was bound to do, that is, to go on with his application and have the property sold. *Held*, also that where the decree-holder admitted that certain property had been sold by mistake and agreed to make a fresh application for execution but did not do so, there was default on his part. 38 Cal. 482, Foll.; 34 I.C. 240 and 39 Cal. 300, Dist. (*Richards, C.J. and Tudball, J.*) DILDAR-USSAIN *v.* SHEO NARAIN. **41 All. 157=49 I.C. 113=17 A L.J. 52.**

———**O. 21, R. 57**—"*Default*"—*Meaning of.*

"Default" is used in a wide sense and means failure to do what one is legally bound to do. Omission of the decree-holder to make an application for issue of notice under O. 21, R. 66 on the judgment-debtor amounts to such default. (*Chitty and Coxe, JJ.*) NOMUNA BIBI *v.* ROSHUN MEAH. **38 Cal. 482=16 C.W.N. 428=9 I.C. 558=13 C.L.J. 621.**

———**O. 21, R. 57**—*Default.*

The word "default" in O. 21, R. 57 means a failure to do what the decree-holder was bound to do, that is, to go on with his application and have the property sold. (*Scott-Smith and Abdul Qadir, JJ.*) FATEH DIN *v.* QUTAB DIN. **3 Lah. 7=67 I.C. 543=1922 Lah. 108.**

Dismissal of Execution.

———**O. 21, R. 57**—*Dismissal of execution—Order maintaining attachment—Effect of.*

Though an order dismissing an execution case but maintaining the attachment is not a proper order for the Court to pass, once it is passed it is binding on the parties between whom it is passed. 38 Cal. 482, dis.; 41 A. 157, dist. (*Piggott and Walsh, JJ.*) MAHOMED MUBARAK HUSAIN *v.* SAHU BIMAL PRASAD. **44 A. 274=20 A.L.J. 113=L.R 3 A. 52=65 I.C. 91=1922 All. 62.**

———**O. 21, R. 57**—*Dismissal of execution—Dismissal for default—Effect on attachment.*

Property was attached in execution of a decree. An appeal was filed in the High Court, by the judgment-debtor and during the pendency of the appeal, the execution case was struck off on account of the decree-holder's default in paying certain requisite fees. The decree-holders after the disposal of the appeal, applied for the revival of the execution proceedings and for the sale of property already attached. *Held*, that the attachment was not withdrawn by reason of the dismissal of the application for execution and a transfer by the judgment-debtor during the pendency of the

C. P. CODE (V of 1908), O. 21, R. 57—Dismissal of Execution.

attachment was void. (*Richards*, C.J. *and Banerjee*. J.) DAUD ALI *v.* RAM PRASAD.
37 All. 542=80 I.C. 787=13 A.L.J. 750.

———**O. 21, R. 57**—*Dismissal of execution—Application on objection by judgment-debtor—Review application granted—Whether attachment continues.*

Where in execution of a decree, property was attached and on objection by the judgment-debtor, the execution application was dismissed but was revived on an application for review of the order of dismissal, *held*, O. 21, R. 57 did not apply and the attachment subsisted during the pendency of the application for review. 14 C. L.J. 476; 13 C.L.J. 243; 33 Cal. 666, Dist. (*Karamat Hussain and Tudball*. JJ.) AZIZ BUX *v.* KANIZ FATIMA. **34 All. 490=16 I.C. 49=10 A.L.J. 48.**

———**O. 21, Rr. 57 and 90**—*Dismissal of execution application—Effect of—Attachment does not ipso facto cease under the Old Code.*

Under the old C. P. Code of 1882 an attachment once made did not necessarily fall with the dismissal of the application for execution. (*Richardson and Huda*, JJ.) JAGADISH *v.* RAM SUNDARA. **23 C.W.N. 608=51 I.C. 972=29 C.L.J. 411.**

———**O. 21, R. 57**—*Dismissal of execution—Default—Attachment if subsists.*

Where an execution proceeding is dismissed for default, the attachment previously effected ceases. 9 W.R. 205; 21 W.R. 66, Rel. upon. (*Mookerjee and Beachcroft*, JJ.) KRISHNA SUBHUDHI *v.* JANKIRAM.
20 I.C. 149=19 C.L.J. 248.

———**O. 21, R. 57**—*Dismissal of execution—Effect of order.*

Where, in an execution petition, the Court fixed a date for the proclamation and on that date passed the order "proclamation not filed," *held*, that it amounted to a dismissal of the attachment under O. 21, R. 57, C.P.C. (*Stephen and Richardson*, JJ.) MANDHYAN SHEIKIYA *v.* BADRAM DALIN.
18 I.C. 441=17 C.W.N. 204.

———**O. 21, Rr. 57, 58 and 60**—*Dismissal of execution—Default—Effect on attachment—Revival of proceedings—Rights of third parties.*

On the dismissal of an application for execution for default under O. 21, R. 57, C.P.C. attachment of judgment-debtor's property ceases, and a revival of the execution proceedings does not operate to revive the attachment so as to prejudice rights in the property of third parties acquired in the meantime. 15 I.A. 12, Rel. on. (*Mookerjee and Carnduff*, JJ.) PATRINGA KOER *v.* MADHABANAND RAM. **14 C.L.J. 476=12 I.C. 66=16 C.W.N. 382.**

———**O. 21, R. 57**—*Dismissal of execution—Effect on attachment.*

C. P. CODE (V of 1908), O. 21, R. 57—Dismissal of Execution.

The question whether dismissal of an execution petition has or has not the effect of removing on attachment depends on the facts of each case. 31 I.C. 911, Ref. (*Abdur Rahim and Bakewell*. JJ.) CHIVI KULA VENKATASUBBIAH *v.* GOLLAPUDI VENKATESVARULU.
44 I.C. 866=(1917) M.W.N. 816.

———**O. 21, R. 56**—*Dismissal of execution—Effect of.*

Per *Abdur Rahim*, J., Whether the dismissal or striking off an execution proceeding has or has not the effect of putting an end to the attachment is one of intention to be determined upon the circumstances of such case. Per *Oldfield*, J. The mere fact that an order on an execution application worded "dismissal" is not decisive and the order will be treated as merely suspensory if the circumstances of the case justify the presumption that such was the Court's real intention. (*Abdur Rahim and Oldfield*, JJ.) NANDUR SUBBIAH *v.* RAJA VENKATRAMAYYA APPARAO.
(1918) M.W.N. 214=28 I.C. 155=7 L.W. 16.

———**O. 21, R. 56**—*Dismissal of execution—Default—Effect on attachment.*

The circumstances of each case, the intention of Court and the parties should determine whether an order dismissing an application under this rule amounts to such an adjudication as prevents an attachment from subsisting. In case where execution application is dismissed for some default of the decree-holder an attachment then subsisting is *ipso facto* released. (*Ayling and Seshagiri Aiyar*, JJ.) KARATUR SATYANARAYANA *v.* GOPISETTI NARAYANASWAMI. **21 M.L.T. 88=38 I.C. 300=5 L.W. 204.**

———**O. 21, R. 57**—*Dismissal of execution—Effect of—Stay of sale pending appeal.*

Under O. 21, R. 57, which has to be strictly construed, an attachment shall cease only if the application for execution has been dismissed for default of the decree-holder who has to put in a fresh application in such a case. In all other cases of dismissal, the Courts will have to decide on the facts of each case, whether the order dismissing the application amounted to an adjudication on it, so as to prevent attachment from subsisting, *e.g.*, a dismissal of an application on the sale being stayed, pending an appeal has not the effect of removing the attachment. 15 I.C. 49, Foll; 9 I.C. 558. Appr. (*Seshagiri Siyar and Napier*, JJ.) VALIAKATH PUTHIAH *v.* MANAKKAL PARMESWARAN. **35 I.C. 240=3 L.W. 601.**

———**O. 21, R. 57**—*Dismissal of execution—Formal orders not passed—Execution pending.*

Execution applications praying for specific reliefs, which were all granted several years before assets were realised and on which no further reliefs could be asked or granted are still to be treated as pending and undisposed of, till final orders have been passed taking them

C. P. CODE (V of 1908), O. 21, R. 57—Dismissal of Execution.

off the file of pending applications after notice to parties. (*Seshagiri Aiyar and Kumaraswami Sastri*, JJ.) VENKATAPERUMAL *v.* VENKATA-REDDI. 39 Mad. 570=29 M.L.J. 96=(1916) M.W.N. 334=29 I.C 231=17 M.L-T. 427.

———O. 21, R. 57—*Dismissal of execution—Attachment—Determination of.*

A previously existing attachment ceases to exist on the dismissal of an application for execution when the circumstances required by R. 57 are shown. The object of the rule is to prevent the continuance of attachment for an indefinite period by the practice of "striking off" applications for statistical purposes. (*Oldfield and Tyabji*, JJ.) KAMISETHI PEDDA VENKATASUBBAYYA *v.* TANGATUR SUBBAYYA. 28 I.C. 62=(1915) M.W.N. 159.

———O. 21, R. 57—*Dismissal of execution—Effect on attachment—Old Code.*

Under the C. P. Code of 1882 the dismissal of an execution petition for non-prosecution does not necessarily put an end to an attachment; whether the attachment ceased, is a question of intention in each case. 13 M.L J. 548; 30 Mad. 461, Dist. (*Benson and Abdur Rahim*, JJ.) SUBBA CHARIAR *v.* MUTHUVEERAM PILLAI. 36 Mad. 553=14. I.C. 264=24 M.L.J. 545.

———O 21, R. 57—*Dismissal of execution—Execution transferred to Collector.*

Where the execution proceedings have been transferred to a Collector, he has power to dismiss the application under O. 21, R. 57, C. P. Code and thereupon the attachment ceases. (*Hallifax*, A.J C.) SHANKER RAO *v.* MANIK RAO. 68 I.C. 643=1923 Nag. 18.

———O. 21, Rr. 57 and 58—*Dismissal of execution—Collector executing decree has power to dismiss.*

A Collector is invested with all the powers which the court might exercise in the execution of the decree. These include the power to dismiss under O. 21, R. 57, C.P.C., but do not include the powers to investigate claims made or objections preferred under O. 21, R. 58, because such an investigation would not be "in the execution of the decree." (*Hallifax.*, A. J. C.) HARLAL *v.* NARAYAN. 18 N.L.R. 152=4 N.L.J. 118=64 I.C. 420=1922 Nag. 267.

———O. 21, R. 57—*Dismissal of execution—Default—Prior execution case consigned to record room—Effect on attachment—Default of decree-holder.*

A decree-holder took out execution on his decree in the Court of a Munsif and attached a house of the judgment-debtor. Later on another decree-holder took out execution of his decree in the Court of the Subordinate Judge asking for attachment and transfer of his decree to the Court of Munsif and for rateable distribution which was done on his application. After some time an order passed as

C. P. CODE (V of 1908), O. 21, R. 57—Not Retrospective.

the execution proceedings in which the decree-holder was to get rateable distribution in the Court of Munsif, had been consigned to records, the present application also was consigned to records for want of execution. *Held*, that it was not an order of dismissal under R. 57 because there was no default on the part of the decree-holder and the order did not discharge the attachment made by the Subordinate Judge; only a dismissal for default, puts an end to the attachment. (*Lindsay*, J. C.). NARENDRA BAHADUR RAI *v* GANGA SAGAR. 28 O.C. 166=37 I.C. 309=7 O.L.J. 337.

———O. 21, R. 57—*Dismissal of execution application—Cessation of attachment—Agreement to give time to decree-holder—Effect of.*

A decree-holder in execution of a decree attached the properties of the judgment-debtor but subsequently accepted a payment made by him towards the satisfaction of the decree and agreed to give time for payment of balance of the decree amount. Thereupon the Court dismissed the application after recording the part-payment. *Held* that the effect of the dismissal of the execution application was to put an end to the attachment and that the dismissal was due to default of the decree-holder. No doubt the Court has no power to dismiss an application for execution unless there is default on the part of the decree-holder but, as has been held, default means a failure to do what one is legally bound to do. (*Das and Bucknill*, JJ.) JAIKRISINA v. BIBI SOGHRA. 4 P.L.T. 418=71 I.C. 881=1923 P. 456.

Mandatory.

———O. 21, R. 57—*Mandatory—Attachment to cease.*

The provision that attachment shall cease on dismissal of an application for execution, is mandatory and will take effect in spite of an erroneous order of the Court continuing the attachment. (*Chitty and Coxe*, JJ.) NAMUNA BIBI *v.* ROSHAN MEAH. 38 Cal. 482=15 C.W.N. 428=9 I.C. 358=13 C.L.J. 621.

Not Retrospective.

———O. 21, R. 57—*Not retrospective.*

O. 21, R. 57, C.P.C. has no retrospective operation as to cut away the right to subsistence of an attachment acquired under the Old Code. (*Seshagiri Aiyar and Kumaraswami Sastri*, JJ.) RAGHAVACHARIAR *v.* ANANTHA REDDI. 31 I.C. 911.

———O. 21, R. 57—*Not retrospective—Dismissal of application for attachments in execution—Effect—Lease executed during continuance of attachment—Rights of lessee against auction-purchaser.*

O. 21, R. 57, C.P.C. has no retrospective effect upon an order of dismissal made before the passing of the Code. The dismissal of an application puts an end only to an attachment made on that application. Where a lease was

C. P. CODE (V of 1908), O. 21, R. 57—Not Retrospective.

made by a judgment-debtor while an attachment under the Code was still subsisting, it is invalid as against the auction-purchaser. (*Sadasiva Aiyar and Hannay*, JJ.) KHANDE SUBBAYYA *v.* NARA SUBBA REDDY.
27 I.C. 792=2 L.W. 4.

——O 21, R. 57—*Not retrospective.*

O. 21, R. 57 which provides that on the dismissal of an execution application, the existing attachment on the attached property shall cease and can only apply to orders of dismissal passed after the Act came into force. (*Sadasiva Aiyar and Napier*, JJ.) VARDIPARTHI RAMAYYA *v.* KORUKONDA JAGANNADHAM.
27 I.C. 868.

Notice to Parties.

——O. 21, R. 57—*Notice to parties—Dismissal.*

An execution case cannot be struck off or dismissed without notice to the parties; an order so passed is liable to be set aside. (*Fletcher and Huda*, JJ.) KIRTI CHANDRA DAW *v.* BEPIN BEHARI PALL.
46 I.C. 721.

Revival of Application.

——O. 21, R. 57—*Revival of application—Attachment order—Setting aside — Delay in making application—Decree-holder not negligent—Continuation of forum proceedings.*

An attachment order passed after notice to the judgment-debtor by a Judge cannot be set aside by his successor in office. When the decree-holder is not remiss, and delay in making the application for execution is not due to any fault of his, the application otherwise time-barred may be treated as one for the revival and continuation of earlier proceedings in execution. (*Jenkins*, C.J. *and Chapman*, J.) RAMESWAR SINGH *v.* RATESHWAR SINGH.
18 I.C. 841=17 C.L.J. 125.

——O. 21, R. 57—*Revival of application—Application for order absolute — If one in execution.*

An application for an order absolute for sale in execution of a mortgage decree passed under the Old Code is a valid application in execution proceedings. Such an application dismissed for statistical purposes can be revived within three years of such dismissal. (*Sadasiva Aiyer and Napier*, JJ.) SINGARAVELU PILLAI *v.* SANTHANA KRISHNA MUDALIAR.
31 I.C. 9=(1915) M.W.N. 648.

Revival of Attachment.

——O. 21, R. 57—*Rivival of attachment.*

A decree-holder attached a property. On the judgment-debtor's objection, the execution application was dismissed. The decree-holder applied for review during the pendency of the review application. The judgment-debtor sold the property to a third person. Afterwards the review was granted and the dismissal of execution application set aside. *Held*, that O. 21, R. 57 did not apply and consequently the attachment continued during the pendency of the review application. (*Karamat Hussain and Tudball*, JJ.) AZIZ BUX *v.* KANIZ FATIMA BIBI.
34 All. 490=15 I C. 49=10 A.L.J. 48.

C. P. CODE (V of 1908), O. 21, R. 57—Striking off.

——O. 21, R. 57—*Revival of attachment—Dismissal of execution application—Restoration.*

Where an execution application dismissed for default is restored the attachment which came to an end on the dismissal of the execution application is revived and an execution sale without a fresh attachment is valid. (*Hallifax*, A.J.C.) HARLAL *v.* NARAYAN.
18 N L.R. 152=64 I.C. 420=1922 Nag. 267.

——O. 21, R. 57—*Revival of attachment—Sale set aside.*

Where a sale in execution of a decree is set aside on any ground other than the default of the decree-holder, the attachment of the property made prior to the setting aside of the sale revives on a fresh execution petition being put in Court. No further attachment need be made. Where the valuation of a property put in sale is hotly contested it is the duty of the Court to go into the question and determine it in a judicial manner. (*Chapman and Atkinson*, JJ.) MAHABARAT DUTTA *v.* SURJA KANTA.
46 I.C. 589=3 Pat. L.J. 310=1918 Pat. 343.

Striking off.

——O. 21, R. 57—*Striking off—Execution—Struck off—Effect on attachment.*

It is not an easy matter to decide whether property remains under attachment when the darkhast is struck off. Strictly speaking if the darkhast is struck off the attachment would go with it, it seems contrary to the ordinary meaning of words that when a darkhast, which is issued to attach property, is dismissed, still the attachment continues. Having regard to the conduct of the judgment-creditor it was held in this case that there was no subsisting attachment at the time of the transfer. (*Macleod*, C. J. *and Coyajee*, J.) GANPATI BHATTA *v.* DEVAPPA.
24 Bom. L R 442=76 I.C. 893=46 B. 942=1923 Bom. 30.

——O. 21, Rr. 57, 68, 63—*Striking off—Later order on objection petition is a nullity.*

Properties being attached in execution, objections were put in under O. 21, R. 58. Pending their disposal, as the decree-holders were able to realise part of the decree amount, the proceedings were struck off—subsequently, on the representation of the objectors that the decree had been adjusted between the parties, the objection petition was allowed *ex parte*. On a question arising as to the effect of this order, *Held*, the effect of the order striking off proceedings was to raise the attachment and with that order the court became *functus officio* and had no power to pass any further orders therein

C. P. CODE (V of 1908), O 21, R. 57—Striking off.

—The later order allowing the objection was therefore quite unnecessary and redundant and being a nullity in the eye of the law, there was no necessity for the decree-holders to bring a suit within one year under O. 21, R. 63. (*Scott-Smith and Abdul Uadir*, JJ.) FATEH DIN *v.* QUTAB DIN. **3 Lah. 7=67 I.C. 343=1922 Lah. 108.**

——O. 21, R. 57—*Striking off—Effect on attachment—Application for arrest.*

The Court is not justified in striking off an application for execution which should either have been dismissed or adjourned, as the Court was not legally competent to do anything else. The order of release of goods attached must be regarded as one involving and implying the dismissal of the execution application. The judgment-debtor was a party to the disappearance of the property attached and the decree-holder was entitled to execute the decree by the arrest of the judgment-debtor. (*Petman*, J.) DIWAN CHAND *v.* THE FIRM OF BEDHA RAM DEVI DIAL. **32 I.C. 295=154 P.R. 1919.**

——O. 21, R. 57—*Striking off—Effect of.*

The effect of an order "Striking off" an execution application is one to be determined according to the circumstances of the case, such an order is unknown to law. *Held*, in the circumstances of the case that the order amounted to an adjournment of the application *sine die*. (*Benson and Bakewell*, JJ.) SEETARAMA CHETTIAR *v* KRISHNA ROW. **15 I.C. 406=(1912) M.W.N. 407.**

——O. 21, R. 58.

ATTACHMENT BEFORE JUDGMENT.
DELAY.
EFFECT OF ORDER.
GARNISHEE CLAIM,
MORTGAGE DECREE.
OBJECTION.
PAYMENT OF MONEY.
PERMISSIVE REMEDY.
SMALL CAUSE COURT.
STAY OF SALE.

Attachment before Judgment.

——O. 21, R. 58—*Attachment before judgment—Objection to—After decree.*

Plff. applied for an attachment before judgment though the deft. did not object, still he is not precluded from raising the objection that the property is not liable after the decree to attachment after the decree is passed. (*Mookerjee and Teunon*, JJ.) BASIRAM MALO *v.* KATYANI DEBI. **38 Cal. 448=10 I.C. 305=16 C.W.N. 795.**

——O. 21, R. 58—*Attachment before judgment—Rule not applicable.*

O. 21, R. 58 of the C. P. Code, applies only to attachment in execution of a decree and not to attachments made before judgment. (*Leslie Jones*, J.) RATAN LAL *v.* BALA PRASAD. **28 P.W.R. 1918=58 P.R. 1918=44 I.C. 986=118 P.L.R. 1918.**

C. P. CODE (V of 1908), O. 21, R. 58—Effect of Order.

——O. 21, Rr. 58 and 63—*Attachment before judgment,*

O. 21, R. 63, C. P. C. applies to orders on claims preferred to property attached before judgment, 41 Mad. 23 overruled. The general policy of the law is that questions of title raised by claim against attachments before or after judgment should be promptly disposed of immediately. (*Wallis*, C. J. *Oldfield and Seshagiri Aiyar*, JJ.) MALLI KARJUNA PRASAD NAIDU *v.* MATIAPALLI VIRAYYA. **41 Mad. 849=35 M.L.J. 231=24 M.L.T. 134=(1918) M.W.N. 699=47 I.C. 1000=8 L.W. 197 (F.B.),**

[Overruling 39 I.C. 868=41 Mad. 23.]

——O. 21. Rr. 58 and 63—*Attachment before judgment—Claim.*

O. 21, R. 63 includes claims to property attached before judgment and a suit is maintainable by the defeated claimant. (*Spencer and Krishnan*, JJ.) MUTHU KUMARA CHETTIAR *v.* ALAGAPPA CHETIAR. **42 I.C. 554=6 L.W. 518.**

Delay.

——O. 21, R. 58—*Delay—Proviso to R. 58—Applicability.*

The proviso to R. 58 (1) applies even to those cases where the Court without jurisdiction becomes possessed of the property attached in execution by the usurpation of authority. (*Fletcher and Smither*, JJ.) SURENDRA NATH GOSWAMI *v.* RAJANIKANTA DAS. **41 I.C. 446.**

——O. 21, Rr. 58, 60 and 61—*Delay—Effect of—Investigation—Form of.*

Where a Judge considers that an application under O. 21, R. 58 (1) has been designedly and unnecessarily delayed, he may refuse an investigation, but if he makes an investigation he must pass orders under O. 21, R. 60 or R. 61. The dismissal of the application, for delay, after making investigation is illegal. (*McColl*, J.) NGA SAN BALU *v.* MI THAIK. **(1916) 2 U.B.R. 136=39 I.C. 345=11 Bur. L.T. 41.**

Effect of Order.

——O. 21, Rr. 58 and 63—*Effect of order—Refusal to investigate claim—Suit by defeated claimant—Limitation.*

Where objections preferred by a claimant to the attachment and sale of certain property in execution of a decree were rejected without an investigation of the merits of the case and the property was ordered to be sold, which is incumbent upon the claimant to institute a suit within the period of limitation prescribed by Art. 11 of the Limitation Act. 41 M. 985, followed. (*Ryves and Gokul Prasad*, JJ.) GOBERDHAN DAS *v.* MAKUNDI LAL. **45 A. 436=21 A.L.J. 342=L.R. 4 A. 185=75 I.C. 1024=1923 All. 435.**

C. P. CODE (V of 1908), O. 21, R. 58—Effect of Order.

———**O. 21, R. 58 and O. 9, R. 9**—*Effect of order—Claim disallowed—Suit dismissal for default—Execution application—Withdrawn—Subsequent application—Fresh suit by the claimant—Limitation Act—Sch. 1, Art. 11.*

Where, a claim preferred to an attachment having been disallowed, a regular suit instituted thereafter by the claimant, was dismissed for default, the execution petition being in the meanwhile withdrawn, a fresh suit for the same declaratory right brought on the decree-holder's fresh application, for execution, is barred under O. 9, R. 9 as there was no fresh cause of action and under Art. 11 of Sch. I, Limitation Act, as the fresh suit was not brought within one year of the rejection of the objection. (27 I.C. 944, Ref. to.) (*Rattigan and Le-Rossignol*, JJ.) GOPAL SINGH *v.* GANPATI RAI

66 P.R. 1916=117 P.W.R. 1916=38 I C. 321=180 P.L.R. 1916.

——— **O. 21, Rr. 58 and 63**—*Effect of order—Order on, notifying claim to intending bidders without investigating, it is improper—Limitation Act, Art. 11 does not apply.*

Plaintiff preferred a claim to property attached in execution of a decree obtained against another, stating that the judgment-debtor was entitled only to a share in the said property, and that he was entitled to the other moiety. The claim was disposed of by an order which, after reciting plaintiff's contention ran as follows: "Whatever right the defendant has will pass by the sale. The petition does not require any further investigation. The claim put forward by the petitioner will be noted in the sale proclamation." The sale was held and the decree-holder himself became the purchaser. In a suit brought by the plaintiff for the recovery of his half share of the property from the decree-holder purchaser *held* (1) that the order on the claim petition was an improper one; (2) that it was not, however, an order against the claimant (plaintiff) within the meaning of O. 21, R. 63, C.P.C., and the suit instituted more than a year from the date thereof was not barred under Art. 11 of the Limitation Act. (*Spencer and Venkatasubba Rao*, JJ.) KACHINAMTHODI PARAMBIL SAHARABI *v.* KACHINAMTHODI PUTHIA PURAYIL SREEMAMUTTI'S SON ALI.

44 M.L.J. 141=17 L.W. 182=72 I.C. 857=1923 Mad. 295.

———**O. 21, Rr. 58 and 63**—*Effect of order—Claim by mortgagee—Adverse order declining to adjudicate does not bar—Suit for enforcing mortgage—Limitation—Conversion of mortgaged property into money—Effect of.*

Property mortgaged to plaintiff was attached and brought to sale in execution by the defendant. On the day fixed for the sale, the plaintiff preferred a claim petition that the sale proceeds should be kept in court deposit to satisfy his mortgage and not be paid over to the defendant. The Court dismissed the application holding that as the sale had taken place it had no jurisdiction to hear the petition. In a suit by the plaintiff to enforce his mortgage and recover the mortgage money from the defendant the latter pleaded that the suit was barred by Arts. 11 and 62 of the Limitation Act. *Held*, by the Chief Justice (agreeing with Spencer, J.) (1) that there was no order negativing the claim of the plaintiff and his suit was not therefore barred by art. 11 of the Limitation Act and (2) that the suit was one to enforce a mortgage and was governed by art. 132 and not by art. 62 of the Limitation Act, though the mortgaged property had been converted into money as a result of the court sale. 41 M. 985 (F.B.), dist. 41 C. 654 (P.C.), Rel. (*Sir Walter Schwabe*, C.J.) on a difference of opinion between (*Spencer and Krishnan*, JJ.) ABDUL KADIR SAHAB *v.* SOMASUNDARAM CHETTIAR.

31 M.L.T. 441=16 L.W. 485=43 M.L.J. 467=43 M. 827=70 I.C. 648=1923 Mad. 76.

———**O. 21, R. 58**—*Effect of order—Sale of property in execution is no bar to suit.*

O. 21, R. 58 confers a statutory right of suit and his right is not affected by the sale of the property in execution of the decree before the suit. 35 C. 202, referred. (*Jwala Prasad*, J.) MT. MANIK *v.* RAMJAS AGARWALLA.

1 Pat. L R. 51=70 I.C 332=3 P.L T. 832=1923 P. 152.

———**O. 21, R. 58**—*Effect of order.*

Objection petition of judgment-debtor to attachment on the ground that the property is waqf is an objection under O. 21, R. 58 and an order allowing the objection is not appealable. (*Coutts and Das*, JJ.) NAZIR HUSSAIN *v.* MUHAMMAD EJOZ HUSSAIN. **1 P. 637=67 I.C. 438=3 P.L.T. 432=1922 P. 196.**

———**O. 21, R. 58**—*Effect of order—Attachment and sale of equity of redemption.*

On attachment and the sale of the judgment-debtor's share in the equity of redemption, the auction-purchaser would acquire the right, title and interest of the judgment-debtor and nothing more. If the judgment-debtor was one of the three mortgagors, the auction-purchaser would step into his shoes and have all the rights as one of the three mortgagors. But the mortgage was one and cannot be divided. (*Brown* A.J.C.) MAUNG SO *v.* DEVIGYAN. **70 I C. 830=44 U.B.R. 132=1923 Rang. 119 (2).**

Garnishee Claim.

———**O. 21, Rr. 58 and 63**—*Garnishee claim—Attachment of debt.*

An attachment of debt is within O. 21, R. 58, C. P. C. A Garnishee who in an execution matter has been unsuccessful cannot without bringing a suit within one year from the date of the adverse order, plead the same plea. (*Scott*, C. J. *and Batchelor*, J.) TAYABALI GHULAM HUSAIN *v.* ATMARAM SAKHARAM VANI. **38 Bom. 631=25 I.C. 376=16 Bom. L.R. 520.**

C. P. CODE (V of 1908), O 21, R. 58—Garnishee Claim.

C. P. CODE (V of 1908), O. 21, R. 58—Mortgage Decree.

Mortgage Decree.

———O. 21, R. 58—*Mortgage decree for sale—Claim, if lies—Revision.*

A claim cannot be entertained under O. 21, R. 58 of the Code to property, which has been ordered to be sold under a mortgage-decree, and where it is disallowed no revision lies to the High Court under S. 115 of the Code. (*Sanderson*, C.J. *and Richardson*, J.) MAHABIR PRASAD *v.* JOGENDRA.
68 I.C. 271=26 C.W.N. 50.

——O. 21, R. 58—*Mortgage decree—Claim—Not competent.*

A Court has no jurisdiction to entertain a claim petition in proceedings in execution of a mortgage decree as S. 278 of the old Code(1882) corresponding to O. 21, R. 58 of the new Code applies only to cases of money decrees where the properties are attached; and if it does so the High Court can interfere in revision. (*Brett and Richardson*, JJ.) HARI MOHAN DALAL *v.* LACHMI CHAND. **18 I.C. 218.**

———O. 21, R. 58—*Mortgage decree—Claim—Investigation.*

Where there is a mortgage decree for sale no attachment is necessary and O. 21, R. 58, C.P. Code does not apply and the executing Court has no jurisdiction to entertain objections. (*Chevis*, O. C. J.) TARA CHAND *v.* RAJ KISHORE. **2 U.P.L.R. (Lah) 90=55 I.C. 893=2 Lah. L.J. 348.**

———O. 21, R. 58—*Mortgage decree—Rule inapplicable.*

Where property is directed to be sold under a mortgage decree no objection under O. 21, R. 58 of the C. P. Code can be entertained for the property does not require to be attached under O. 21, R. 58 by way of execution. The mere fact that there has been an unnecessary attachment does not make any difference. (*Leslie Jones*, J.) RATAN LAL *v.* BALA PRASAD.
23 P.W.R. 1918=58 P.R. 1918=45 I.C. 986=113 P.L.R. 1918.

———O. 21, Rr. 58 and 63—*Mortgage decree—Decree for money with lien.*

The decree for a sum of money with a lien on mortgaged property is not one under the T.P. Act or under O. 34, C.P. Code and therefore the decree-holder can ask for attachment of the property and thereon objections may be filed. (*Chevis and Shadi Lal*, JJ.) MUSSAMMAT KHAN DEVI *v.* MUSSAMMAT NIHAL DEVI. **101 P.R. 1918=32 I.C. 43=191 P.W.R. 1918.**

———O. 21, R. 58—*Mortgage decree—Sale of mortgaged property.*

O. 21, R. 58, C.P.C. does not apply where mortgaged property is ordered to be sold to satisfy the mortgage decree by the terms of the decree itself. It applies only where mortgaged property is sought to be sold in execution of a money decree. (*Miller*, C.J. *and Mullick*, J.) RAGHO PAHAN *v.* LACHAN KOER.
50 I.C. 448=1919 Pat. 79.

C. P. CODE (V of 1908), O. 21, R. 58—Objection.

——O. 21, R. 58—*Mortgage decree—Execution—Claim—Investigation—Procedure.*

Proceedings by way of attachment are not applicable to mortgage decrees, but if the decree-holder applies for and obtains an order of attachment and property is attached, claims and objections to the attachment can be brought under O. 21, R. 58, C.P.C. Such claims and objections must be dealt with under that rule and the following rules prescribing the procedure for investigation of claims and objections. (2 L.B.R. 138; 4 L.B.R. 82, R. and Expl.) (*Fox*, C.J. *and Twomey*, J.) MG MRA TUN *v.* U KAING. **8 Bur. L.T. 214=29 I.C. 941=6 L.B.R. 215.**

Objection.

———O. 21, R. 58—*Objection by purchasers—Purchaser after attachment.*

Purchasers after attachment cannot bring on claim proceedings under O. 21, R. 58, C.P.C. (*Brett and Chitty*, JJ.) MAHADEV LAL *v.* DINKAR PRASAD. **9 I.C. 194=16 C.W.N. 542.**

——O. 21, R. 58—*Objection.*

Objection to attachment must be made first. The subsequent order after attachment is raised is unnecessary. (*Scott-Smith and Abdul Quadir*, JJ.) FATEH DIN *v* QUATAL DIN. **3 Lah. 7=67 I.C. 543=1922 Lah. 108.**

——O. 21, R. 58—*Objection by judgment-debtor—Possession of a widow in lieu of her dower—Mortgagee.*

A woman to whom a certain house was assigned in lieu of her claim for a certain sum as the deferred dower due to her from her deceased husband and who was given possession of the house by the heirs of her husband is a mortgagee of the house and is entitled to retain possession of the house until satisfaction of her dower claim. 7 All. 73; 32 All. 551; 32 All. 563; 7 All. 353; 36 All 358, Ref. Even where she is a party to the consent decree, against her passed against the assets of her deceased husband in her hands, her objection to the attachment of the house is one under O. 21, R. 58 and even if it was covered by S. 47, C. P. C., and the house could be sold subject to her mortgage lien. (*Rattigan and Jones*, JJ.) JHABBAN LAL *v.* SHAFDRI BEGAM. **187 P.L.R. 1915=126 P.W.R. 1915=31 I.C. 722=80 P.R. 1915.**

——O. 21, R. 58—*Objection by transferee—Attachment—Simple money decree.*

A transferee of property which has been attached in execution of a money decree can object under O. 21, R. 58, 8 P. R. 1897, Foll.; 27 All. 700; 14 Cal. 631; 18 Bom 98; 19 All. 480, Dist. (*Chevis*, J.) NIHAL CHAND *v.* ABDULLAH. **123 P.L.R. 1912=13 I.C. 563=247 P.W.R. 1912.**

C. P. CODE (V of 1908), O. 21, R. 58—Objection.

———**—O. 21, Rr. 58 to 63**—*Objection—Claim under S. 34 of the Pro. Ins. Act—Limitation Act, Arts. 11 and 13.*

The Official Receiver's claim to any property where the vesting was after the attachment of that property is a statutory claim and not a claim under O. 22, Rr. 58 to 63 and the Court dealing with such claims acts under S. 151 of the C. P. Code and not under O. 21. Articles 11 and 13 of the Limitation Act do not apply to such cases. (*Sadasiva Aiyar and Spencer*, JJ.) BALAKRISHNA MENON *v.* RANGAN PATTAR. **14 L.W. 333=41 M.L.J. 334=69 I.C. 326=(1921) M.W.N. 775.**

———**—O. 21, R. 58, S. 64**—*Objection to attached debt allowed—Suit by decree-holder decreed — Payments by debtor after claim allowed and before decree are void.*

Where a claim to an attached debt was allowed and thereafter the attaching decree-holder brought a suit to establish his right to attack and got a decree but the debtor had made two payments to the creditor-claimant after the claim was allowed but before the decree in the claim suit, *held*, that the attachment should be taken as revived on the passing of the decree and to have continued in force since the original attachment and that the two payments are void under S. 64 of the Code against the purchaser in execution of the decree in the claim suit. (*Krishnan and Odgers*, JJ.) ANTHAYA HEGADE *v* MANJAYYA SHETTY. **45 M. 84=14 L.W. 371=69 I.C. 642=41 M.L J. 393=(1921) M.W.N. 842=1922 Mad. 176.**

———**—O. 21, Rr. 58 and 63**—*Objection by exonerated defendant—Dismissal — Remedies of claimant.*

S. 47, C.P.C. does not prescribe the procedure to be followed in the case of a claim preferred by a party to the suit and regard must be had to the provisions of O. 21, Rr. 58 and 63. O. 21, R. 63 may possibly be construed as substituting a right of suit for a right of appeal, to the aggrieved party in the cases of claims or objections by parties to suits. The meaning of O. 21, R. 63 is that the parties to proceedings shall be concluded by the order and the purchaser at a Court sale shall take the property purchased by him free from any claims negatived by that order, subject to any right of appeal or of suit to which the claimant may be entitled. (*Bakewell and Odgers*, JJ. VENKATACHELLA REDDI *v.* MUTHIALU REDDI. **34 I.C. 536=37 M L J. 624.**

———**—O. 21, R. 58 and S. 47, O. 43, R. 1**—*Objection by legal representative.*

When a claim is preferred in execution proceedings by the legal representatives of the judgment-debtor and the claim is traceable to the same capacity in which he is brought as legal representative the executing Court should hear and determine the matter under S. 47. An appeal lies against such an order. (*Ayling and Seshagiri Aiyar*, JJ.) NADUVIL EDOM KELU ACHAN *v.* PARASU PATAR. **38 I.C. 360=5 L.W. 168.**

C. P. CODE (V of 1908), O. 21, R. 58—Objection.

———**—O. 21, R. 58, S. 47**—*Objection by judgment-debtor—Trust.*

A claim by a judgment-debtor to a property attached in execution of a decree on the ground that he held in trust must be preferred under O. 21, R. 58 and not under S. 47. (*Oldfield and Phillips*, JJ.) GULAM KAVUSHA *v.* BHUVARAHA AYYANGAR, **38 I.C. 152.**

———**O. 21, Rr. 58, 60 and 61**—*Objection by transferee—Contract to sell—Effect of.*

The rule that an attachment of property by a judgment creditor which is subject to a contract of sale, can only be subject to such obligation is not affected by the procedure laid down in the above rules. (*Abdur Rahim and Srinivasa Iyangar*, JJ.) REBALA VENKAT REDDI *v.* MANGADU YELLPPA CHETTY. **38 I.C 107=5 L.W. 284.**

———**O. 21, R. 58**—*Objection—Rejection of claim—No revision.*

In this case certain house property was attached in execution of a decree. The objector claimed that the property in question had been purchased by him from the judgment-debtor on the 3rd August, 1921, before the passing of the decree in execution of which it was sought to be sold. The court below found that the *bona fides*, of the sale-deed was doubtful and the judgment-debtor was really in possession of the said property in spite of the alleged sale. The Court rejected the claim. *Held*, there was no reason in these circumstances for interfering in revision. (*Kanhaiya Lal*, J C.) SHYAM LAL *v.* RADHE SHYAM. **10 O L J 139=74 I.C. 546=1923 Oudh 208.**

———**—O. 21, R. 58**—*Objection—No jurisdiction to try suit after sale is held.*

It is obvious that after a sale is held in execution the attachment is *ipso facto* determined and the Court had no longer any jurisdiction to try the claim case. (*Mullick and Bucknill*, JJ.) MT. PUHUPDEI KUAR *v.* RAMCHARITAR BARHI. **4 P.L.T. 544=74 I.C. 87=1924 P. 76.**

———**—O. 21, R. 58**—*Objection—Claim by legal representative of deceased judgment-debtor falls within S. 47, C. P. Code.* (*Coutts and Das*, JJ.) NOWRATNAN LAL *v.* MRS. MARGARET ANNE STEPHEN. **3 P.L.T. 613=68 I C. 369=1922 P. 572.**

———**O. 21, Rr. 58, 63 and 100**—*Objections—Usufructuary mortgagee cannot make—Dispossession by auction purchaser—Application under O. 21, R. 100—Maintainability.*

A usufructuary mortgagee in possession cannot object to an attachment under O. 21, R. 58. Where such a mortgagee is dispossessed by the purchaser at an execution sale, he is entitled to

C. P. CODE (V of 1908), O. 21, R. 58—Objection.

apply to court under O. 21, R. 100, and his application is not barred by O 21, R. 63. (*Das and Adami*, JJ.) BISWANATH PATRA *v.* LINGARAJ PATRA. **70 I.C. 306=1 P. 159=1922 P. 408 (1).**

——**O. 21, R. 58**—*Objection.*

In proceedings under R. 58, the Court cannot deal with the point whether the execution is time-barred. (*Das*, J.) JALALUDDIN *v.* MANI RAM. **60 I.C. 375=2 Pat. L.T. 275.**

——**O. 21, R. 58**—*Objection—Investigation.*

In claim investigations, the duties of the Court are confined to ascertaining who was in actual possession at the time of attachment. The court will not go into the question as to whether that possession was fraudulent or void. It must be determined by a regular suit. (*Young* J.) HO SYEW WAING *v.* P. R. P. L. CHETTY. **13 Bur. L.T. 214=64 I.C. 66=1922 L.B. 16.**

Payment of Money.

——**O. 21, R. 58**—*Payment of money—To avert attachment.*

Where a person pays money to avoid an attachment of his property (on the supposition that the judgment-debtor's property was his) he cannot recover the money under O. 21, R. 58, C.P.C. as no property had been attached. (*Pratt*, J.C.) JAN MAHOMED *v.* MANTHAR. **34 I.C. 492=9 S.L.R. 213.**

Permissive Remedy.

——**O. 21, Rr. 58 and 59**—*Permissive remedy—Wrongful attachment — Claim—Not compulsory.*

Omission to prefer a claim to a wrongful attachment is no bar to assertion of title subsequently. The provisions of O. 21, Rr. 58 and 59, etc., are permissible only. (*Lord Moulton.*) KANHAYA LAL *v.* NATIONAL BANK OF INDIA, LTD. **40 Cal. 598=40 I.A. 56=17 C.W.N. 541=17 C.L.J. 478=25 M.L.J. 104=13 M.L.T. 406=(1913) M.W.N. 406=15 Bom. L.R. 472=18 P.L.R. 1913=18 I.C. 949=11 A.L.J. 413 (P.C.)**
[On appeal from 9 I.C. 966=32 P.W.R. 1911.]

Small Causes Court.

——**O. 21, Rr. 58 and 63**—*Small Cause Court—Attachment before judgment of immoveable property—Claim petition—Power to adjudicate.*

Small Cause Court cannot order attachment before Judgment of immoveable property or to adjudicate on claim proceedings resulting from it. (*Rankin and B. B. Ghose*, JJ.) SADEK ALI *v.* SAMEED ALI. **28 C.W.N. 16=1924 Cal. 193.**

Stay of sale.

——**O. 21, R. 58**—*Stay of sale—Claim application—Order after sale.*

An order upon an application under O. 21, R. 58 must be made before the execution sale has taken place. (*Mookerjee and Carnduff* JJ.) GOPAL CHANDRA MOOKERJEE *v.* NOTOBAR KUNDU. **15 I.C. 53=16 C.W.N. 1029.**

C. P. CODE (V of 1908), O. 21, R. 59.

——**O. 21, R. 59**—*Scope of enquiry—Possession of judgment-debtor.*

O. 21, R. 59 does not mean that if the claimant establishes that he has some interest in the attached property, he can succeed irrespective of the question of possession; nor should his claim be disallowed if he fails to establish the interest set up, irrespective of the question of possession of judgment-debtor. The words "some interest" mean such an interest as would make the possession of the judgment-debtor, possession not on his own account but on account of or in trust for some other person. 1 C.W.N. 617; 24 Mad. 555, Rel. (*Mookerjee and Beachcroft*, JJ.) SATKARI MANDAL *v.* TERTHA NARAIN BHATTACHARJEE. **24 I.C. 62.**

——**O. 21, R. 59**—*Scope of inquiry—Evidence of possession—Court's powers.*

If in an inquiry under O. 21, R. 59, a claimant to an attached property does not adduce any evidence as to possession, the Court should deal with the question of title only. (*Abdur Rahim and Spencer*, JJ). SEVAUGAN CHETTY *v.* RANGAMMAL. **32 I.C. 34.**

——**O. 21, R. 59**—*Scope of inquiry—Possession.*

Where it was found that the properties attached were purchased in the names of the judgment-debtor and the claimant, that the entire purchase money was paid by the claimant only and that he had been in sole possession of the property for the past several years; *held*, that the claimant was entitled to get the properties released from attachment. (*Sankaran Nair*, J.) RANGAMMAL *v.* SEVAUGAN CHETTY. **29 I.C. 228=28 M.L.J. 327.**

——**O. 21, Rr. 59 to 63 and S. 115**—*Execution proceeding—failure to investigate title—Revision.*

Where investigation has been refused or an order is passed without investigation is not a proper order passed in avoidance with Order 31, Rules 59-63 the High Court should and can interfere if it is in the interests of justice under section 115. Where on the objection that the property attached was not in possession of the judgment-debtor on his own behalf but on behalf of the objector, the court failed to make investigation as to on whose behalf the property was held and inquired only into the actual possession *held*, it acted with material irregularity and revision lay. (*Duckworth*, J.) PHOMAN SINGH. v. A.J. WELLS. **76 I.C. 677=1 R. 276=2 Bur. L.J. 134=1923 Rang. 195.**

——**O. 21, R. 59**—*Scope of inquiry—If Court entitled to enquire into question of title or is it restricted merely to ascertain who is in possession.*

C. P. CODE (V of 1908), O 21, R. 59.

In an investigation of claim to attached property, Court will not ordinarily be justified in enquiring into the question of title but in extraordinary cases, a Court may go into the questions of title and is not necessarily restricted to an enquiry into possession. In this case it was held that enquiry into title was proper. (*Maung Kin*, J.) MAUNG PO HTUT *v.* SOMASUNDARAM CHETTY. **39 I.C. 275 = 10 Bur. L.T. 14.**

——**O. 21, R. 59**—*Scope of inquiry—Not limited to possession.*

A person who has an interest in the property attached may prefer his claim under R. 58, O. 21 even if he be not in possession of the property. Enquiry under O. 21, R. 58 to 62 is not restricted to the question of possession only. (*Shaw*, J.C.) NGA TAK *v.* SUBRAMANIAN CHETTY. **10 I.C. 994 = (1910) 1 U.B.R. 75.**

[But see 59 I.C. 947 = 43 Mad. 760 also 8 I.C. 117 = 33 Mad. 35.]

——**O. 21, R. 60**—*Objection to attachment—Capacity dual—Procedure.*

An objection to attachment in execution proceedings by a person, impleaded in the proceedings as heir of the deceased debtor, on the ground of his possession as trustee, must be decided under O. 21, R. 60 and such order is conclusive subject to a suit under O. 21, R. 63. The person in his capacity as trustee is not the judgment-debtor's representative, even though the author of the trust was himself, the judgment-debtor, except in cases in which the trust has been created after the suit or after the decree passed in it. (*Kanhaiya Lal*, J.) BHAGWAN DAS *v.* MT. MAHOMED BANO. **75 I.C. 1053 = L.R. 4 A. (Civ.) 447 = 1924 All. 183 (2).**

——**O. 21, Rr. 60 and 63 and S. 64**—*Effect of order under R. 60.*

An order under R. 60, which makes it obligatory on the Court, to release property under attachment, is only provisional and liable to be set aside by a regular suit; and therefore as transfer of such property, after the release order, is liable to be set aside if the order itself is set aside by a regular suit. (*Mookerjee*, A.J.C. *and Fletcher*, J.) PROTAP CHANDRA *v.* SARAT CHANDRA. **33 C.L.J. 201 = 62 I.C. 348 = 28 C.W.N. 544.**

——**O. 21, R. 60**—*Conditional order—Allowing claim.*

A Court has no jurisdiction to make an order allowing a claim preferred under O. 21, R. 58 of the C. P. Code to a property attached in execution of a decree, conditional on the claimant paying a certain sum to the decree-holder on the ground that in the conveyance by which the claimant purchased the property there was an undertaking in his part to pay that sum to the decree-holder as part of the consideration, if such claimant is in possession of the property on his own account under title of a conveyance executed in his favour by the judgment-debtor, his claim should be allowed unconditionally. (*Richardson and Walmsely*, JJ.) KAMALA KANTA SEN *v.* DURGA KUMAR SEN. **44 I.C. 1007.**

C. P. CODE (V of 1908), O. 21, R. 60.

——**O. 21, Rr. 60 and 61 and 115**—*Scope of inquiry—Possession of judgment-debtor—Refusal to enquire—Revision.*

In each of the cases mentioned in O. 21, Rr. 60 and 61, the Court must decide only the question of possession of judgment-debtor; it cannot base its decision on the question of the validity of the claim or the determination of title to the property attached. 14 Cal. 617; 18 Cal. 290; 29 Cal. 543, Rel. on. Where the Court below in a claim case refused to determine the one question which it could decide, *i.e.*, possession but investigated the question of title, the order of the Court under O. 21, R. 61 is open to revision. (*Mookerjee and Beachcroft*, JJ.) SATKARI MANDAL *v.* TIRTHA NARAIN BHATTACHARJEE. **24 I.C. 62.**

——**O. 21, R. 60**—*Scope of inquiry—Objection to attachment—Courts duty to decide on merits.*

An objection to an attachment should not be dismissed and the claimant forced to file a regular suit merely on the ground that the question of possession is doubtful and of title complicated, 8 P.R. 1897, Foll. (*Shadi Lal*, J.) AMIR CHAND *v.* RAM SARAN DAS. **248 P.L.R. 1914 = 27 I.C. 256 = 162 P.W.R. 1914.**

——**O. 21, Rr. 60 and 61**—*Claim petition—No decision as to the possession and interest of the claimant—Revision.*

Certain property was attached in execution. A, claimed interest in and possession of the property. The Court disallowed the claim but held, that he had some interest but not the entire interest. There was no finding what the nature of the interest was, nor a finding as to the person entitled to possession. *Held*, the order was illegal and liable to be set aside in revision by the High Court. (*Jwala Prasad*, J.) NAINU *v.* BHUPENDRA NATH RAKHAT. **60 I.C. 616.**

——**O. 21, Rr. 60 and 63**—*Release from attachment—Suit—Declaration of right to attach—effect.*

An order releasing property from attachment is only provisional and the effect of the decree in a subsequent suit brought under the provisions of O. 21, R. 3 declaring the right to attach the property is to maintain the attachment originally made. (*Heald*, J.) MAUNG SEIN *v.* MAUNG MAUNG. **76 I C. 617 = 2 Bur. L J. 118 = 1923 Rang. 237.**

——**O. 21, Rr. 60 and 61**—*Scope of inquiry—Question of title gone into.*

In an investigation of claims to property under attachment the Court should consider whether the judgment-debtor was or was not in possession of the property, and if in possession whether he was in possession on his own

C. P. CODE (V of 1908), O. 21, R. 60.

account, or in trust for some other person. If this involves a decision as to the *bona fides* of an alleged sale, or the legal effect of the deed of conveyance, and the circumstances attending its registration, the Court ought to go into such matters. (*Hartnoll*, O. C. J. *and Twomey*, J.) N. M. K. CHETTY *v.* CHARTERED BANK OF AUSTRALIA INDIA AND CHINA.

48 I.C. 182=11 Bur. L.T. 118.

———**O. 21, R. 60**—*Mortgagee in possession.*

A mortgagee in possession is in possession "on account of or in trust for" the mortgagor to the extent of the mortgagor's interest. And if the property is attached under a decree against the mortgagee, it must be realised from that attachment to the extent of the mortgagor's interest. (*Shaw*, J. C.) NGA TOK *v.* SUBRAMANIAM CHETTY.

(1910) 1 U.B.R. 78=10 I.C. 994.

———**O. 21, R. 61** — *Claim dismissed—Attachment withdrawn—Suit by claimant for possession not necessary.*

Where a claim by a third party is dismissed, in an attachment in execution but subsequently the attachment is raised, the claimant is not bound to bring a suit within one year of the order under Art. 13 of Limitation Act and a subsequent suit by him for possession is not barred. (*Macleod*, C.J., *and Fawcett*, J.) MANILAL GIRDHAR PATAL *v.* MAHASUKHRAM VYAS. **43 Bom 861=59 I C. 774=22 Bom. L.R. 1446.**

———**O. 21, R. 61**—*Possession in trust—Fraudulent transfer.*

It is not necessary to defeat a claim under O. 21, R. 58 that the trust must be one enforceable by law. So possession of a claimant claiming under a fraudulent and collusive sale must be deemed to be in trust for the judgment-debtor. (*Stephen and Chatterjee*, JJ.) MACKINTOSH *v.* BIDHU BHUSAN SEN.

17 I C. 12=16 C.W N. 959.

———**O. 21, R. 62**—*Sale subject to charge—Application by person in possession claiming a charge of maintenance on the property.*

Certain property of the judgment-debtor was attached in execution of a decree. His mother applied to raise the attachment on the ground that it was in her possession and that she was entitled to a life interest in it and that there was a charge therein for a certain sum to be paid by the brothers for her funeral ceremonies after her death. The property was eventually sold subject to her charge and purchased by the plff. After the mother's death the plff sued to recover the judgment debtor's share in the property; the judgment debtor and his brother contended that as there was no attachment of the property, the Court sale was void. The trial Court held that the sale was void even in the absence of attachment and allowed the plff. to recover his share by partition. One of the brothers alone appealed with the result that the sale was declared to be void in consequence of the absence of attachment. *Held*,

C. P. CODE (V of 1908), O. 21, R. 62.

that the property in dispute was sufficiently attached and that all the subsequent proceedings including the sale of the right, title and interest of the judgment-debtor were in order, that there was no real basis for the objection that the sale was void, and as the second brother did not appeal, the decree of the trial Court could not be properly reversed. (*Shah and Crump*, JJ.) VAIKUNT SHRIDHAR BHATTA *v.* MANJUNAND MADHAN BHANDARI.

44 Bom. 860=38 I.C. 217=22 Bom. L.R. 640.

———**O. 21, Rr. 62 and 63**—*Claim by mortgagee—Execution—Application of mortgagee.*

S. 282 applies when the Court is satisfied that the property is subject to a mortgage or lien in which case it enables the Court to continue or dissolve the attachment in its discretion, but if the attachment is to be continued it should be done subject to the mortgage or lien. S. 283 does not apply to an application of a mortgagee asking that the attachment should be subject to his mortgage. (*Batchelor*, A. C. J. *and Shah*, J.) GANESH KRISHNA KULKARNI *v.* DAMU NATHU SHIMPI.

41 Bom. 64=36 I.C. 627=18 Bom. L.R. 782.

———**O. 21, Rr. 62 and 63**—*Sale subject to mortgage—Rights of purchaser to contest mortgage.*

S. 283, C.P.C. (1882) contemplates a suit based upon facts known to the party against whom an order was passed under S. 282, within a year from the date of the order. Therefore if a person is not aware of the fraud within a year and became aware of it afterwards, he could under S. 44, Evidence Act, assert the fraudulent nature and the invalidity of the mortgage sought to be enforced by the party in whose favour an order was made under S. 282. (*Scott*, C.J. *and Beaman*, J.) CHINA SADASHIV *v.* RAMDAYAL PRAYAGDAS.

27 I.C. 238=16 Bom. L.R. 658.

———**O. 21, Rr. 62 and 66**—*Order of Court—Execution—Attachment—Application to raise attachment by third person—Court declaring lien in his favour.*

If an intervenor seeks to raise an attachment on the ground that the property belongs to him but does not say directly that he has a lien, the order of the Court that the property may be sold subject to his lien is not an order under R. 62 but one under R. 66. 15 Bom. 290 Foll. (*Chandavarkar and Heaton*, JJ.) NARAIN *v.* UMBAR ADAM. **38 Bom 275=10 I C. 913=13 Bom. L R. 307.**

———**O. 21, Rr. 62 and 66**—*Sale subject to mortgage—Purchaser in execution sale when stopped.*

If a person purchases an estate subject to a mortgage whether under a private sale or an execution sale or undertakes to discharge it, he cannot be heard to deny the validity of the mortgage subject to which he made his purchase. Where, however, the purchaser merely buys an estate which is under mortgage but does not take it, subject to the encumbrance or

C. P. CODE (V of 1908), O. 21, R. 62.

undertake to discharge it, he is not precluded from impeaching the validity of the mortgage. The question is whether the property has been sold subject to the mortgage or whether mere notice of the mortgage has been given in the proclamation of sale. The former contingency is provided for by R. 62 and the latter by R. 66. (*Mookerjee and Panton*, JJ.) KALI DAS *v.* PRASANNA KUMAR DAS. **47 Cal. 446 = 30 C.L.J. 496 = 85 I.C. 189 = 24 C.W.N. 269.**

———O. 21, R. 62—*Sale subject to mortgage—Rights of purchaser.*

Where a person purchases property in execution sale subject to the lien of the plaintiff, the purchaser is bound to satisfy the lien. (*Mookerji and Roe*, JJ.) KRISHNA KUMAR NANDY *v.* JOY KRISHNA NANDY. **29 I.C. 690 = 21 C.W.N. 401.**

———O. 21, R. 62—*Sale subject to mortgage — Liability of purchaser.*

A purchaser in execution purchasing the property subject to an incumbrance with possession, must pay it off, before he claims possession. (*Le Rossignol*, J.) MUSSAMMAT KARMAN *v.* CHOTHA RAM. **30 I.C. 909.**

———O. 21, R. 62—*Order for sale subject to mortgage—Decree-holder purchaser cannot challenge and mortgage.*

Where an objection is allowed and the attached property is directed to be sold subject to the mortgage of the objector, the decree holder, merely by becoming the auction-purchaser of the property, cannot challenge the mortgage in a subsequent foreclosure-suit by the mortgagee against the decree-holder auction purchaser. A decree-holder cannot circumvent the order in an objective case by himself becoming the auction-purchaser. (*Kotval*, A.J.C.) GOVIND *v.* DHEKLU. **19 N.L.R. 15 = 1923 Nag. 282.**

———O. 21, R. 62—*Sale subject to mortgage —Notification of—Auction-purchaser estopped from questioning their validity.*

Where a Court without enquiring as to the alleged incumbrance and without notice to the judgment-debtor acted on the statement of the decree-holder's pleader and ordered the incumbrances to be vaguely notified in the sale proclamation, *Held* that the Court did not direct the sale of the attached property subject to a mortgage but the mortgage is simply declared at the time of the sale, the auction-purchaser is not precluded from questioning the validity of the mortgage. 31 All. 583, Ref.; 7 A.L.J. 199; 30. I.C. 238, Dist.; 2 O.L.J. 140, Foll. (*Stuart and Kanhaiya Lal*, A.J.Cs.) BHAGWAN DAS *v.* AHMAD JAN. **26 I.C. 732 = 3 O.L.J. 422.**

———O. 21, R. 62—*Sale subject to mortgage —Purchaser acquires only right of redemption.*

When a property is sold subject to a mortgage, the purchaser acquires only a right of redemption, and he cannot question the validity of the mortgage. (*Stuart.*, A.J.C.) GURUCHARAN PRASAD *v.* BACHNI. **30 I.C. 238 = 2 O.L.J. 225.**

C. P. CODE (V of 1908), O. 21, R. 63—Appeal.

———O. 21, Rr. 62 and 66—*Sale subject to mortgage—Limitation—Mortgagee allowing his right to get barred by negligence.*

A purchaser of property subject to a mortgage, the mortgagee of which allows his right to be lost by lapse of time, is not debarred from raising a plea of limitation. (*Lindsay*, J.C.) DEPUTY COMMISSIONER OF LUCKNOW *v.* SUKHNANDAN. **28 I.C. 448 = 17 O.C. 88.**

———O. 21, R. 62—*Sale subject to mortgage —Rights of purchaser.*

The effect of an order under O. 21, R. 62 continuing an attachment subject to a mortgage is that the purchaser at the auction sale takes only the mortgagor's right of redemption. (*Rigg*, J.) PO SO *v.* BA ZAN. **51 I.C. 580 = 12 Bur. L.T. 43.**

———O. 21, R. 63.

APPEAL.
BURDEN OF PROOF.
CONSENT ORDER.
COSTS.
DECLARATORY SUIT.
DECREE.
DEFENCE.
EFFECT OF ORDER.
EVIDENCE.
PARTIES.
REVIVAL OF ATTACHMENT.
SUIT UNDER.
VALUATION OF SUIT.

Appeal.

———O. 21, R. 63—*Appeal—Dismissal of execution.*

If on the objection of a third party the application for execution is dismissed, the decree-holder can either bring a suit against objector or prefer an appeal. Revision petition does not lie. (*Banerjee*, J.) BHAI RON *v.* RAJANI. **38 I.C. 299.**

———O 21, R. 63—*Appeal—No right.*

The order of the execution Court overriding an objection that property cannot be attached, is not appealable being subject to the decision of the suit under O. 21, R. 63. (*Piggott and Lindsay*, JJ.) SANTILAL *v.* INDIAN EXCHANGE BANK, LAHORE. **38 All. 537 = 36 I.C. 6 = 14 A.L.J. 722.**

———O. 21, R. 63—*Appeal—Order under wrong section.*

An order passed on a claim under this rule is not appealable even when it purports wrongly to have been made under S. 47, C.P.C. (*Oldfield and Phillips*, JJ.) GULAM KAVUSHA *v.* BHUVARAHA AYYANGAR. **38 I.C. 152.**

———O. 21, R. 63 and S. 47—*Appeal—No right to.*

A claimant under O. 21, R. 58 has not a right of appeal or second appeal under S. 47. A Court auction purchaser of property sold in execution of a decree cannot take advantage of S. 47, C.P.C. and claim a right to prefer an appeal and second appeal against the decision

C. P. CODE (V of 1908), O. 21, R. 63—Burden of Proof.

in a claim petition put in by him on account of property purchased by him having been attached and sold in pursuance of another decree against the same judgment-debtor but in favour of a different judgment-creditor. (*Sadasiva Ayyar and Moore*, JJ.) THANGAVELU MUDALIAR *v.* MAHOMAD IBRAHIM.
34 I.C. 759=3 L.W. 377.

Burden of Proof.

——**O. 21, R. 63**—*Burden of proof—On whom lies.*

In a suit under O. 21, R. 63 the burden of proof is on the unsuccessful party in the claim petition. (*Mookerjee and Carnduff*, JJ.) NARAK LAL *v.* THAGOO LAL.
13 I.C. 455=22 C J. 380.

——**O. 21, R. 63**—*Burden of proof—Suit by unsuccessful claimant—Fraudulent transfer—Evidence.*

In a suit under O. 21, R. 63 by an unsuccessful claimant, where the objections as to the attached properties have been disallowed by the execution Court, the burden of proof to establish the owner-ship of the property would lie necessarily on the plaintiff. Where the circumstances disclosed by the evidence on the record, lead to the conclusion that the document must have been executed with the fraudulent object of defeating and delaying the creditors, the Court may presume that the alienation was fraudulent. (*Abdul Raoof*, J.) MUSAMMAT AI BAI *v.* BHAI KAHAN SINGH.
67 I.C. 876=3 Lah. L.J. 198.

——**O. 21, R. 63**—*Burden of proof—Decision against objector—Suit to contest correctness of the decision.*

Where the Executing Court decides a case against the objector and he brings a suit to contest the correctness of the order, the burden of proof lies on him but this rule does not apply where there is no decision against him. (*Chevis*, J.) KASTURI MAL *v.* LAJJA RAM.
60 I.C. 751.

——**O. 21, R. 63**—*Burden of proof—Claim suit.*

It is open to an unsuccessful objector to the attachment of property in execution to proceed by suit and he has to prove that he got the property without a fraudulent or collusive transfer. The onus is on him. 22 C.L.J. 27; Bom. 270; 18 All. 369 Foll. 1 C.W.N. 655; P.R. 1916; 9 I.C. 1018 not Foll. (*Martineau*, J.) LAIQ RAM *v.* THOLA SINGH.
30 I.C. 884=47 P.L.R. 1919.

——**O. 21, R. 63**—*Burden of proof.*

In a suit instituted after the summary rejection of the claim under S. 278 of the Civil Procedure Code, 1882 (Order 21, rule 58 of the new code, the onus of establishing that the transaction on which the suit is based was entered into, in good faith lies on the plaintiff. (*Baker*, J.C.) MULLA FAIZ ALI *v.* MT. HARKUAR. **77 I.C. 50=1923 Nag. 334.**

C. P. CODE (V of 1908), O. 21, R. 63—Burden of Proof.

——**O. 21, R. 63**—*Burden of proof—Plea of Fraudulent transfer—Defence.*

Although the investigation in proceedings under O. 21, R. 58, C. P. C. is summary, the order made is subject to the result of a suit under R. 63, final. In a suit under O. 21, R. 63, C. P. C. he who questions the adjudication, must show that it was wrong. 2 N.L.R. 87. Foll. A defendant may impeach a transaction voidable as against him, such as a fraudulent transfer when it is sought to be enforced whether by a declaration or otherwise, 41 Mad. 612 Diss. from. The mere existence of a part of the consideration for a transfer does not prevent the transfer being a fraudulent transfer voidable at the instance of the person defrauded. (*Mitra*, A.J.C.) HAJI ABOO *v.* SOBHAGCHAND. **55 I.C. 752.**

——**O. 21, R. 63**—*Burden of proof—Defeated claimant.*

In a suit by a defeated claimant under O. 21, R. 63, the ordinary method of establishing the *bona fides* of the transfer, is to prove that the consideration passed and that possession was actually transferred, and this being done, the onus would be shifted on to the contesting party to show that there was nevertheless an intention to defeat creditors. (*Drake Brockman*, J.C.) RAGHUNATH *v.* NATHU. **55 I.C. 72.**

——**O. 21, R. 63**—*Burden of proof—Good faith and consideration.*

When a claimant whose claim has been rejected as too late, sues to obtain a declaration that the property is his and is not liable to attachment, the onus of proving *mala fides* and want of consideration on the plff.'s part is on those who seek to resist the claim. (*Drake Brockman*, J.C.) AWADHUT *v.* PUNJAJI.
53 I.C. 205.

——**O. 21, R. 63**—*Burden of proof—Defeated claimant.*

Where a person intervenes unsuccessfully as an objector, in execution proceedings on the strength of a document of title, he must bring a suit to establish his title and must give *prima facie* evidence that the document represents a *bona fide* transaction in order to get rid of the order passed against him. 12 Bom. 270; 18 All. 369; 30 All. 321; 2 I.C. 258 Followed. (*Stuart*, A.J.C.) KALKA PRASAD *v.* SITTLA BAKSH. **38 I.C. 427=19 O.C. 64.**

——**O. 21, R. 63**—*Burden of proof—Defeated claimant*—Bona fides.

In a suit brought under O. 21, R. 63, the onus is upon the plaintiff, to prove not merely the execution of the document on which he relies and the passing of consideration, but also the further fact that document is a *bona fide* transaction, 22 C.L.J. 27 Foll. (*Miller*, C.J. *and Foster*, J.) BIBI SERIAH *v.* GOLAB KUAR.
63 I.C. 892=1919 Pat. 409.

C. P. CODE (V of 1908), O. 21, R. 63—Burden of Proof.

———O. 21, R. 63—*Burden of proof—Claim suit—Evidence Act, Ss.* 102 *and* 110.

The person who fails to get the attachment removed, bears the initial burden of proof in a regular suit under O. 21, R. 63, C.P.C. Proof of possession, shifts the burden to the person who is out of possession under S. 110 of Evidence Act, and the finding of failure to discharge the burden is not appealable. (*Parlett*, J.) MAUNG PO HNIN *v.* MA HNYEIN. **37 I.C. 767 = 10 Bur. L.T. 238.**

———O. 24, R. 63—*Burden of proof—Defeated claimant.*

In a suit under O. 21, R. 63, the burden lies on the plaintiff decree-holder to establish his right to attach property, but he is entitled to take advantage of statements made by the defendant to prove his right. (*Parlett*, J.) K. P. NAMBIAR *v.* SUNDARA BAI **14 I.C. 813 = 8 Bur. L.T. 47.**

Consent order.

———O, 21, R. 63—*Consent order—Effect of.*

In a suit under O. 21, R. 63, C.P. Code. no question of setting aside the consent order arises, if a party does not object to an order being passed against him. It cannot be assumed that the order passed is not against him. (*Ayling and Tyabji*, JJ.) VENKATA RAMA AIYAR *v.* NARAYANA AIYER. **28 I.C. 586 = (1915) M.W.N. 237.**

Costs.

———O. 21, R. 63—*Costs.*

The objector who impugns the decree-holder's title to the whole property has to pay on his objections being disallowed, the full costs of decree-holder though the objector claimed only half the property. (*Lindsay*, J.C. *and Stuart*, A.J.C.) SARFARZ HUSAIN *v.* AMAR CHAND PAL. **37 I.C. 78 = 3 O.L.J. 529.**

Declaratory Suit.

———O. 21, R. 63—*Declaratory suit—Declaration of partial interest.*

In a suit by a plaintiff decree-holder for a declaration that the property in dispute belonged to the judgment-debtor, it was found that the vendor, (judgment-debtor) did not part with his entire interest and had retained a right to continue in occupation. *Held*, that plaintiff was entitled to a declaration that he was entitled in execution of his decree to bring to sale, the right, title and interest of the judgment-debtor namely his right of occupation. (*Jenkins*, C.J. *and Mookerjee*, J.) JAGAT CHANDRA SARMA CHOWDHURI *v.* RADHINATH CHAKRAVARTHI. **28 I.C. 576 = 21 C.L.J. 302.**

———O. 21, R. 63—*Declaratory relief—General law.*

Plaintiffs were not because, of an order under O. 21, R. 63 of the Code, incompetent to institute a suit for a declaration under the provisions of S. 42 of the Specific Relief Act but the house in suit not having been sold, the plaintiff's suit was premature. 11 W.R. 10; 35 Cal. 202, Dist. (*Petman*, J.) WARYAM SINGH *v.* NARAIN DAS. **52 I.C. 157.**

C. P. CODE (V of 1908), O. 21, R. 63—Decree.

———O. 21, R. 63—*Declaratory suit—Suit dismissed—Fresh suit to enforce mortgage barred.*

Where a claim of a third person based on a mortgage is disallowed, and also his suit for declaration of his mortgage rights is dismissed, he cannot enforce, by a regular suit, his rights under the mortgage. (*Ayling and Odgers*, JJ.) SINGARIAH CHETTY *v.* CHINNABI. **44 Mad. 268 = 12 L.W. 726 = 28 M.L.T. 420 = 40 M.L.J. 7 = 60 I.C. 780 = (1921) M.W.N. 38.**

———O. 21, R. 63 and O. 38, R. 9—*Declaratory suit—Abatement of—Attachment raised.*

The statutory right under O. 21, R. 63 is merely to establish the right which the attaching plaintiff claims to attach the property as that of the defendant whenever it is his interest to do so. The fact that the attachment before judgment ceases to be operative on the dismissal of the suit by virtue of O. 38, R. 9 does not also cause the suit under O. 21, R. 63 to abate. (*Wallis and Seshagiri Aiyar*, JJ.) RAMASWAMY CHETTY *v.* ALAGIRI CHETTY. **27 I.C. 800.**

———O. 21, R. 63—*Declaratory relief—Specific Relief Act, S.* 42.

A declaratory suit under the order is not controlled by S. 42 of the Specific Relief Act which bars a suit in a case where the persons suing are admittedly out of possession. (*Maung Kin*, J.) K.Y.K.M. CHETTY FIRM *v.* S.N.V.R. CHETTY FIRM. **34 I.C. 125 = 9 Bur. L.T. 199.**

———O. 21, R. 63—*Declaratory relief—Attaching creditor.*

An attaching creditor withdrawing the attachment, cannot sue under O. 91, R. 63 but he can sue under S. 42 of the Specific Relief Act for a declaration that the property sought to be attached belongs to his judgment-debtor. 1 Bur. L.T. 34; 14 Bur. L.R. 135, Ref. (*Maung Kin*, J.) CHAND TAT TAHI *v.* MA LAT. **33 I.C. 124 = 9 Bur L.T. 89.**

Decree.

———O. 21, R. 63—*Decree—Effect on execution.*

Where an original execution is interrupted by a declaratory suit that the property could not be sold and it is decreed, the decision is as fatal to the former as to a subsequent execution. (*Coxe and Ray*, JJ.) KALI PROSANNA GHOSH *v.* GOLAM RAHMAN. **20 I.C. 790 = 18 C.W.N. 910.**

C.P. CODE (V of 1908), O. 21, R. 63—Defence.

Defence.

——O. 21, R. 63—*Defence—Avoidance of sale.*

In a suit under O. 21, R. 63, C.P.C. it is open to the defendant to plead any defence which might have served him as a ground for avoiding the transaction as plaintiff. A plea of fraudulent transfer is a valid defence to a suit by a transferee under O. 21, R. 63, C.P.C. (*Macleod*, C.J. *and Heaton*, J.) BHIMRAJ GANPAT *v.* LAXMAN RAMACHANDRA.
57 I.C. 430=22 Bom. L.R. 743.

——O. 21, R. 63—*Defence—No suit brought—Defence is barred.*

Adverse decision of a claim raised under O. 21, R. 58, prevents the unsuccessful party from asserting the rights thus claimed in any capacity whether as plaintiff or as defendant except in a suit under, O. 21, R. 63. (*Henderson and Panton*, JJ.) HARIPADA (BERMAN) *v.* SURENDRA NATH SAMANTHA. **1922 Cal. 164.**

——O. 21, R. 63—*Defence—Fraudulent transfer.*

An attaching decree-holder can plead in defence to a suit under O. 21, R. 63, that the alienation is a fraudulent one intended to defeat or delay the creditors. 41 Mad. 612, F.B.= 30 M.L.J. 565, overruled. (*Wallis*, C.J., *Oldfield Sadasiva Aiyar*, *Spencer and Seshagiri Aiyar*, JJ.) RAMASWAMI CHETTIAR *v.* MALLAPPAREDDIAR. **43 Mad. 760=36 M.L.J. 350= 28 M.L.T. 170=12 L.W. 475= 59 I.C. 947=(1920) M.W.N. 672 (F.B.) [Overruling 41 Mad. 612=43 I.C. 651 (F.B.) and 34 I.C. 778=30 M.L.J. 565.]**

——O. 21, R. 63— *Defence — Fraudulent transfer.*

Unless the attaching creditor has avoided the mortgage by a suit under S. 53 of the T. P. Act, he cannot set it up as a defence to a suit by the mortgagee under O. 21, R. 63, C.P.C. 41 Mad. 613 Foll. (*Abdur Rahim and Seshagiri Aiyar*, JJ.) CHERUTHAZATH ABDULLA HAJI *v.* CHERIYANDI IBRAYAN KUTTI,
50 I.C. 959.
[This is erroneous. See 59 I.C. 947= 43 Mad. 760.]

——O. 21, R. 63 — *Defence — Fraudulent transfer—Sale was in fraud of creditors—Not open to decree-holder.*

In a declaratory suit under O. 21, R. 63 by a vendee from the judgment-debtor, the decree-holder cannot set up in defence that the sale was in fraud of creditors and could not prevail over his decree. If the sale was before the attachment, the decree-holder must first set aside the sale by a separate suit. 27 Bom. 146, Foll.; 39 Bom. 507, Dist. (*Coutts Trotter and Seshagiri Aiyar*, JJ.) PALANIANDI CHETTIAR *v.* APPAVU CHETTIAR. **30 M.L.J. 565= 34 I.C. 778=19 M.L.T. 390.**
[Overruled by 59 I.C. 947=43 Mad. 760.]

C.P. CODE (V of 1908), O. 21, R. 63—Effect of Order.

——O. 21, R. 63—*Defence—Auction-purchaser of properties subject to mortage can plead that nothing is due under it.*

No order passed under S. 283, C.P.C. (1882) that is O. 21, R. 63 of the Code of 1908, precluded the purchaser at an auction sale from resisting a suit on a mortgage, upheld at the time of sale as nothing is due under it. (*Batten and Prideaux*, A.J.Cs.) GHANASYAMDAS *v.* BHAIRAOBAX. **4 N.L.J. 149.**

——O. 21, R. 63—*Defence—Fraudulent Transfer.*

Where a transferee from the judgment-debtor whose claim under O. 21. R. 58, C.P.C. was dismissed, sues under O. 21, 63 for a declaration of his right to the property, it is open to the attaching creditor to plead as a defence to the suit that the alienation is void under S. 53 of the T.P. Act, 41 Mad. 612, diss; 42 Mad. 143 151 and 16 C.W.N. 717, Appr. (*Drake Brockman*, J.C.) DHANUSUKHDAS *v.* ZANGOO.
34 I.C. 793=16 N.L.R. 3

Effect of Order.

——O. 21, R. 63—*Effect of order--Dismissal for default—Effect.*

An order dismissing a claim for default, is an order within the meaning of O. 21, R. 63 of the Code and, subject to the result of a regular suit, is conclusive. (*Chatterjee and Pearson*, JJ.) SATINDRA NATH *v.* SHIVA PRASAD. **26 C.W.N. 126= 64 I.C. 713=1922 Cal. 166.**

——O. 21, R. 63—*Effect of order—Parties and property affected.*

An order in a claim case is conclusive only as between the parties and only as regards the particular disputed property. 27 Cal. 714; 29 Mad. 225; 35 Mad. 35, Dist.; 13 All. 53; 14 Bom. 306, Foll. (*Chatterjee and Sheepshanks*, JJ.) ASNA BIBI *v.* JAIGUNNISSA BIBI.
44 Cal. 698=37 I.C. 887= 21 C.W.N. 322.

——O. 21, Rr. 63 and 99—*Effect of order--Dismissal for default—Right to obstruct delivery.*

A claimant who allows his claim to be dismissed for default of prosecution cannot afterwards obstruct delivery of possession of the property attached and sold in Court auction to the decree-holder, as the order of dismissal had become final under O. 21, R. 63 of the C.P. Code, unless set aside by a regular suit. (*Mookerjee and Beachcroft*, JJ.) JUGAL KISHORE MARWARI *v.* BEJOY KRISHNA MUKERJEE. **15 I.C. 688=16 C.W.N. 882.**

——O. 21, R. 63—*Effect of order—Limitation Act, Art.* 11.

Where executing court does not adjudicate on merits of the objection, the limitation for suit does not begin till the date on which fresh objections were allowed after second execution application by decree holder. (*Scott-Smith and Abdul Qadir*, JJ.)= FATEH DIN *v.* QUTAB DIN. **3 Lah. 7=67 I.C. 513=1922 Lah. 108.**

C.P. CODE (V of 1908), O. 21, R. 63—Effect of Order.

———**O. 21, R. 63**—*Effect of order—Attachment of debt—Dismissal of claim—Finality of order.*

Unless a suit is brought as provided by O.21, R. 63, the party against whom the order is made cannot assert, either as plaintiff or as defendant in any other suit or as a party to any other proceedings, the right denied to him by the order. The procedure laid down in Rr. 58 to 63 applies to a debt attached in execution of a decree, and an order made against the alleged debtor is binding upon him, if he does not institute a suit for a declaration that no debt was due from him, within a year from the date of the order passed against him. (*Shadi Lal*, C. J.) PIARA RAM *v.* GANGA RAM. **71 I.C. 46 (1)**

———**O. 21, R. 63**—*Effect of order—Auction-purchaser, if bound.*

An order passed under O. 21, R. 63, C.P. Code subject to the decision of a regular suit is conclusive and cannot be questioned by an auction-purchaser who simply purchases the right, title and interest of judgment-debtor. (*Scott-Smith*, J.) MUSSAMMAT JESWANI *v.* MUSSAMMAT MISRI. **51 I.C. 100= 45 P.L.R. 1919.**

———**O. 21, R. 63**—*Effect of order.*

An order passed summarily or on investigation on an objection by third person to attachment of property in execution of decree, is conclusive. (*Rattigan and Le-Rossignol*, JJ.) GOPAL SINGH *v.* GANPAT RAI. **66 P.R. 1916=117 P.W.R. 1916= 35 I.C. 321=180 P.L.R. 1916.**

———**O. 21, R. 63**—*Effect of order—Attachment of debts—Objection by garnishee—Confirmation of attachment—Effect of—Sale of debt—Rights of purchaser.*

In execution of a decree against a judgment-debtor, a debt alleged to be due to him by a third person was attached and the garnishee objected to the attachment stating that no debt was due to the judgment-debtor. The Court on enquiry confirmed the attachment and the garnishee did not take any steps to challenge the validity of the order. The decree-holder purchased the debt in Court-auction and brought a suit to recover the same. *Held*, that it was not open to the debtor to contend that there was no debt due by him to the judgment-debtor and that the order on the previous execution proceeding was final and conclusive. (*Schwabe*, C.J. *and Wallace*, J.) SUBBIER *v.* MOIDEEN PITCHAI. **44 M.L.J. 388=17 L.W. 582= (1923) M.W.N. 282=32 M.L.T. (H.C.) 304= 72 I.C. 358=1923 Mad. 562.**

———**O. 21, R. 63**—*Effect of order.*

An order notifying claim to intending bidders without investigating it, is not an order against the claimant. (*Spencer*, J.) KACHINAMTHODI PARAMBIL SAHABABI *v.* KACHINAMTHODI PUTHIA PURAYI. **44 M.L.J. 141= 17 L.W. 182=72 I.C. 857=1923 Mad. 295.**

C. P. CODE (V of 1908), O. 21, R. 63—Effect of Order.

———**O. 21, R. 63**—*Effect of order—Order for attachment but no attachment—Claim disallowed—Suit more than a year afterwards is barred.*

In pursuance of an order of attachment, but without actual attachment, the properties of a debtor were brought to sale in execution, and a mortgagee put in a claim petition which was disallowed. The latter brought a claim suit but withdrew with permission to sue again and more than one year afterwards brought a suit on the mortgage, *Held*, that plff. having submitted to the order on the claim petition though under a mistake could not later on urge that the order was without jurisdiction and that the suit was barred. (*Oldfield and Ramesam*, JJ.) MUTHIAH CHETTY *v.* PALANIAPPA CHETTY. **41 M.L.J. 594=(1921) M.W.N. 764= 15 L.W. 190=45 Mad. 90=70 I C. 432= 1922 Mad. 447.**

———**O. 21, R. 63**—*Effect of order—Dismissal of claim for want of jurisdiction is not one under the rule.*

An order on a claim petition, declining to investigate for want of jurisdiction is not one under O. 21, R. 63 of the Code and the claimant need not bring a suit within a year to set it aside. (*Spencer and Ramesam*, JJ.) LAKSHMI AMMAL *v.* KADIRESAN CHETTIAR. **41 M.L.J. 198=(1921) M.W.N. 495= 63 I.C. 431=14 L.W. 12.**

———**O. 21, R. 63**—*Effect of order—Refusal to recognise mortgage—Suit to contest order—Limitation.*

The order dismissing an application to have the encumbrance recognised on the property to be sold, is final unless a suit is brought within one year to contest it. (*Sadasiva Aiyar and Spencer*, JJ.) VELU PADAYACHI *v.* ARUMUGAM PILLAI. **38 M.L.J. 397= 11 L.W. 343=56 I.C. 481= 27 M.L.T. 312.**

———**O. 21, R. 63**—*Effect of order—Effect on judgment-debtor—Payment of decree amount—Effect of claim order confined to possession.*

The judgment-debtor was a party to a claim petition, put in a statement claiming the property attached, and actively contested the claimant's rights but the Court confined itself to the question of possession and only adjudicated upon that question. *Held*, that the title of the judgment-debtor was not adjudicated upon in the claim petition and he was not bound under Art. 11 of the Lim. Act to sue in a year to establish his title. Per *Seshagiri Iyer*, J.:—The scope of O. 21, Rr. 58 to 61 of the Code should be restricted to concluding the parties regarding the right to attach the property in execution and not to finally determine the rights of the parties to the property itself. An order under O. 21, R. 60 is binding on the judgment-debtor only if he is a party thereto, and only to the extent it deals with

C. P. CODE (V of 1908), O. 21, R. 63—Effect of Order.

questions of title. Payment of the amount of the decree even after a year from the date of an adverse claim order has the effect of making the order spend itself out and the party affected by it, need not seek to have it set aside. Per *Bakewell*, J.—The meaning of the words "conclusive" in O. 21, R. 63 is that the realisation of the attached property shall proceed or be stayed as directed by the order of the Court and that there shall be no appeal therefrom except as prescribed by the Rule. If the attached property be sold in pursuance of the order, then the purchaser will take free from or subject to the rights asserted by the claimant or objector as determined by the Court. (*Seshagiri Iyer and Bakewell*, JJ.) VEDALINGAM PILLAI *v.* VEERATHAL.

37 M.L.J. 547=26 M.L.T. 513=54 I.C. 580=(1920) M.W.N. 77.

———O. 21, R. 63—*Effect of order—Recording of objections to attachment—Dismissal.*

Where a person objects to the attachment of the property and files a petition asking that his objections be recorded, without asking for an investigation of his claim, and the Court records his objections, such recording of objections does not amount to an order against the objector to which O. 21, R. 63 of the C.P. Code would apply. (*Abdur Rahim and Spencer*, JJ.) AYYA PATTAR *v.* ATTUPURATH MANAKKAL.

52 I.C. 938=(1919) M.W.N. 805.

———O. 21, Rr. 63 and 66—*Effect of order—Simple mortgage—Dismissal of petition with or without investigation—Suit on simple mortgage after one year of order—Limitation Act, Art.* 11.

A petition by the simple mortgagee of properties belonging to the judgment-debtor and attached in execution by the decree-holder, praying that the properties should be described in the sale proclamation as being subject to the simple mortgage in his favour and sold subject thereto is a petition under O. 21, R. 58 of the C. P. Code. If such a petition is dismissed after investigation or otherwise, the mortgagee is barred under Art. 11 of the Limitation Act from suing on the mortgage against the execution purchaser or his representative. 31 M.L.J. 247, Foll.; 41 Mad. 985, Appl.; 41 Bom; 64, Dist. (*Ayling and Napier*, JJ.) LAKSHUMANAN CHETTIAR *v.* PARAMASIVAN PILLAI.

37 M.L.J. 169=52 I.C. 720=(1919) M.W.N. 668.

———O. 21, R. 63—*Effect of order—Order refusing to investigate a claim—Limitation Act, Art.* 11—*Order that claim be notified to bidders.*

Where a Court purports to make an order refusing to investigate a claim, such an order comes within O. 21, R. 63 and Art 11 (1) of the Limitation Act. 2 L.W. 206; 31 M.L.J. 241, Foll. Where the order passed on a claim petition is that the allegation of the claimant will be notified to the bidders, the order is one made against the claimants and amounts to a rejection of the claim petition. The practice of notifying claims to intending bidders is not warranted by anything in the Code. It often leads to the depreciation in value of the property to be sold and is not calculated to advance the right of the claimant in any way. (*Wallis*, C.J., *Oldfield and Seshagiri Iyer*, JJ.) MADHI RAJU VENKATARATNAM *v.* SRI RAJAH RANGANAYAKAMMA.

41 Mad. 985=35 M.L.J. 335=24 M.L.T. 197=(1918) M.W.N. 599=48 I.C. 270=8 L.W. 292 (F. B.).

———O. 21, Rr. 63 and 58—*Effect of order—Withdrawing of attachment.*

The subsequent withdrawal of attachment bars all operations including a suit under O. 21, R. 63. 26 M.L.J. 499; 3 C.L.J. 381, Foll.; 40 Mad. 733; 23 Cal. 829, Dist. On a fresh attachment and dismissal of objection, the claimant can sue within one year of the order on the second objection. If the attachment is removed within one year though at the instance of another person the defeated claimant need not sue under O. 21, R. 63 for the object of the suit is to get rid of the attachment. (*Abdur Rahim and Oldfield*, JJ.) GALANAPPA SUBAYYA *v.* SANKARA VENKATARAMAN.

(1917) M.W.N. 851=42 I.C. 683=22 M.L.T. 496.

———O. 21, R. 63—*Effect of Order—Defence barred.*

An order on a claim petition is conclusive as against a party unless it is set aside and he cannot challenge the correctness of the order even within a year as deft. (*Abdur Rahim and Napier*, JJ.) PEELA YARAKAYYA *v.* KANUMURI VENKATA KRISHNAMRAJU.

6 L.W. 281=22 M.L.T. 232=41 I.C. 684=(1917) M.W.N. 721.

———O. 21, R. 63—*Effect of order—No evidence—Effect of.*

An order passed on a claim petition on petitioner's failure to produce evidence on the day fixed for hearing, is an order passed on investigation and is final and conclusive if not set aside within a year. (*Sadasiva Aiyar and Hannay*, JJ.) KURUDA VENKATACHALLAPATHI RAO *v.* GUDIVADA PEDDHA VEERASWAMI.

17 M.L.T. 223=28 I.C. 244=(1915) M.W.N. 188.

———O. 21, R. 63—*Effect of order—No investigation—Finality of.*

O. 21, R. 63 is much wider in scope than S. 283, C.P.C. (1882) and covers cases in which there has been no investigation. Orders passed under this Rule become final unless set aside within one year. (*Oldfield and Tyabji*, JJ.) NARASIMHA CHETTY *v.* VIJIPALA NAINAR.

27 I.C. 944=2 L.W. 205.

———O. 21, R. 63—*Effect of order—Objector, when bound.*

Where three persons objected to an attachment on different grounds and the Court raised the attachment but held that the grounds of

C. P. CODE (V of 1908), O. 21, R. 63—Effect of Order.

the first objector were not well-founded, *Held*, that as the order raised the attachment, it was not against the first objector and could not be interpreted against him simply because the Court had held that his objections were not well-founded. (*Tyabji and Spencer*, JJ.) PONAKA BALARAMI REDDI *v.* HAZI MAHOMED ABDUL AZIZ. **26 I.C. 582 = 26 M.L.J. 499.**

———**O. 21, R. 63**—*Effect of order—Finality of order—Claim by trustee—Trust found to be for judgment-debtors—Disallowance of claim.*

Whether an order is one under O. 21, R. 63 or not and whether it is conclusive, depends upon the allegation of the parties in the claim petition. An order passed on the claim petition by trustees appointed for the benefit of creditors is one under O. 21, R 63, C.P.C. and is conclusive but non-appealable, though the Court may find that the trustees held the properties for the benefit of the judgment-debtors. Where the claim petition under O. 21, R. 58, C.P.C. by a trustee is construed to be for the judgment-debtor, he cannot evade S. 47, C.P.C. by bringing it within R. 58. But if it is under R. 58 then R. 63 applies to any order passed on the petition. (*Sadasiva Aiyar and Spencer*, JJ.) MUTHUKUMARA CHETTIAR *v.* ALAGAPPA CHETTIAR. **21 I.C. 748.**

———**O. 21. R. 63**—*Effect of order—Defence—Cancellation of attachment within three months—Suit by third parties for possession—Defence by claimant.*

An adverse order on a claim, put in by a person will not affect the claimant's right to put forth his title in defence to an action for recovery of possession by a third party even though the claimant did not institute a suit within one year after the disallowance of his claim when the attachment was raised within three months after the passing of the order on the claim petition. Plff. being no party to the claim proceedings, cannot claim the benefit of the order on the claim petition passed adversely to deft. (*Sundara Aiyar and Sadasiva Aiyar*, JJ.) THIAGARAYA MUDALIAR *v.* SABAPATHI MUDALIAR, **16 I.C. 529 = (1913) M.W.N. 54.**

———**O. 21, Rr. 63 and 58**—*Effect of order—Suit.*

Where in the course of summary proceedings, an order was made under R. 58 and there was evidence in favour of the claimant, the merits of the case can be agitated by a suit under O. 21. R. 63. C.P.C. (*White*, C.J. *and Sankaran Nair*, J.) VENKATASUBBIAH *v.* VENUGOPAL, **9 I.C. 260 = 9 M.L.T. 483.**

———**O. 21, R. 63**—*Effect of order—Dismissal of claim without investigation of the merits—Dismissal on the ground of delay—Suit to establish title—Limitation Act, Art. 11 applicable.*

C. P. CODE (V of 1908), O. 21, R. 63—Evidence.

The period of limitation prescribed by Art. 11 of schedule 1 to the Limitation Act is applicable to a suit to establish a right to property attached in execution of a decree brought after disallowance without investigation of an objection to such attachment. (*Mr. Prideaux*, A J. C.) NARASAYYA *v.* LAXMI NARAYAN **6 N.L.J. 66 = 19 N L R. 71 I.C. 404 = 1923 Nag.**

———**O. 21, R. 63**—*Effect of order—Dismissal without investigation.*

The period of Limitation for a suit to set aside an order under R. 63 of O. 21 is one year, even if that order was passed without investigation and not on merits. (*Hallifax*, A.J.C.) GANGADHARARAO *v.* ABDUL MAJID. **69 I.C. 822 = 1923 Nag. 69.**

———**O. 21, R. 63**—*Effect of order—Dismissal for default.*

Held, that an objection which is dismissed for default is as much final under O. 21, R. 63 subject to a regular suit being filed as if it had been dismissed after contest. (*Daniels*, J.C.) KEDAR NATH *v.* SUKH NATH SINGH. **64 I.C. 209 = 24 O.C. 213.**

———**O. 21, R. 63**—*Effect of order—Findings, nature of.*

The findings that no proper investigation was made under R. 58 and therefore no proper order could be passed under R. 63 are subject to question in second appeal being questions of mixed law and facts. (*Stuart*, J.C.) BALMUKUND *v.* MAQSUD ALI. **3 O.L.J. 519 = 37 I.C. 92 = 19 O.C. 357.**

———**O. 21, R. 63**—*Effect of order—Objection dismissed without inquiry.*

Where an objection to the attachment was rejected as the necessary process-fee was not paid, the order will be conclusive unless set aside within one year by a suit. (*Chamier*, J.C.) DHARMA *v.* MADAR SINGH. **12 I.C. 345.**

———**O. 21, R. 63**—*Effect of order—Conclusive means final.*

The word conclusive has the same meaning as final, *i. e.*, unappealable. (*Duckworth*, J.) PHOMAN SINGH *v.* A.J. WELLS. **1 R. 276 = 76 I.C. 677 = 2 Bur. L.J. 131 = 1923 Rang. 195.**

———**O. 21, R. 63**—*Effect of order*—Ex parte *order for removal of attachment is final.*

Where an attachment has been removed by an order of court, the order is conclusive unless set aside by suit. It does not make any difference that the order of removal was made *ex parte* or that the proceedings were irregular. (*Pratt*, J.) MA THEIN TIN *v.* MA HTOO. **2 Bur. L.J. 60 = 78 I.C. 322 = 1923 Rang. 156.**

Evidence.

———**O. 21, R. 63**—*Evidence—Evidence taken in summary proceedings—Admissibility of in regular suit.*

C. P. CODE (V of 1908), O. 21, R. 63—Parties.

It is irregular to admit in the regular suit the depositions of parties made in a summary proceeding without examining them. Although the evidence taken in the summary case, is admissible upon certain conditions and for certain purposes, the finding in the suit should be upon the evidence tendered and taken in the regular suit. (*Saunders*, A.J.C.) NGE SEIK *v.* NGA PU.

22 I.C. 676 = (1913) U.B.R. 181.

Parties.

———O. 21, R. 63— *Parties—Judgment-debtor, if and when a party to.*

The question whether a judgment-debtor is a party to an objection proceedings would depend upon facts of each case; where throughout an execution proceeding the contest was between the judgment-debtor and the objector, and the objection was allowed despite the protests of the judgment-debtor, the order of the executing Court is an order against the judgment-debtor and he is a party to the execution proceeding and as such entitled to bring a suit under O. 21, R. 63 of the C. P. Code. (*Johnstone and Beadon*, JJ.) ANANT RAM *v.* DAMODAR DAS.

102 P.L.R. 1914 = 59 P.W.R. 1914 = 22 I.C. 737 = 84 P.R. 1914.

———O. 21, R. 63— *Parties—Decree-holder is not a necessary party.*

Where a claim has been rejected and the properties have seen sold and purchased by a stranger purchaser, the decree-holder is not a necessary party to a suit by the claimant. 7 C. 608, Rel. (*Spencer and Ramesam*, JJ.) SUBBARAYA MUDALIAR *v.* KANDASWAMY MUDALY.

16 L.W. 330 = (1922) M.W.N. 674 = 70 I.C. 168 = 32 M.L.J. 124 = 1923 Mad. 58.

———O. 21, R. 63— *Parties—Judgment-debtor party—Right to sue.*

A judgment-debtor who was a party to claim proceedings can file a suit under O. 21, R. 63 for vacating the adverse order against him. 13 Mad. 366; 13 M.L.J. 367; 15 Cal. 521, P.C., Foll. (*Oldfield and Seshagiri Aiyar*, JJ.) SABELLA APPANNA *v.* MALLIDI APPANA.

(1914) M.W.N. 838 = 1 L.W. 772 = 26 I.C. 700 = 16 M.L.T. 300.

———O. 21, R. 63— *Parties—Claim petition—Order thereon—Judgment-debtor not a necessary party.*

A judgment-debtor is not necessarily a party to the proceedings under S. 246, of the Code of 1859. Under S. 246, the right of a claimant to some interest in property in the possession of the judgment-debtor could not be investigated nor could the Court raise an attachment where the judgment-debtor had a possessory interest in the property. (*Benson and Sundara Aiyar*, JJ.) KURRIYIL PARKUM *v.* VARANAKATH KHATH GANAPATHI.

35 Mad. 168 = 21 M.L.J. 550 = 9 M.L.T. 423 = 10 I.C. 424 = (1911) 2 M.W.N. 315.

C. P. CODE (V of 1908), O. 21, R. 63—Suit under.

———O. 21, R. 63— *Parties—Suit to set aside fraudulent alienation—Alienee a party.*

A decree-holder being in a sense a person deriving title from the judgment-debtor has a right to attach property which has been fraudulently or collusively conveyed by the judgment-debtor and also a right to set aside fraudulent transfers and collusive decrees even though they may be binding upon the jugment-debtor. (*Mittra*, A.J.C.) DHONDRAM MANGNIRAM *v.* RAMGOPAL KANIRAM. **43 I.C. 960.**

Revival of Attachment.

———O. 21, R. 63— *Revival of attachment—Order referring decree-holder to regular suit—Attachment not raised—Decree.*

An executing Court allowed a claim and referred the unsuccessful decree-holder to a regular suit but did not pass any order under O. 21, R. 63 raising the attachment. The decree-holder thereafter filed a declaratory suit and obtained a decree in his favour. *Held*, the decree passed in the declaratory suit revived the attachment which had been previously carried out, even if it be assumed that the legal effect of allowing the objection had been to raise the attachment. (*Lindsay*, J.C.) PARMESHAR DIN *v.* DEBI PRASAD.

48 I.C. 386 = 5 O.L.J. 647.

Suit under.

———O. 21, R. 63— *Suit under—Applicability—Suit for consideration.*

Where on a claim petition being dismissed, the objector whose title was negatived, brought a suit against his vendor for refund of money for failure of consideration, O. 21, R. 63 does not apply and hence the suit need not be brought within one year. (*Sulaiman*, J.) RATI RAM *v.* BURMAJIT.

21 A.L.J. 770 = L.R. 5 A. 28 = 77 I.C. 82 = 46 All. 45 = 1924 All. 302.

——O. 21, R. 63— *Suit under—Right of suit—Attachment of assets of deceased judgment-debtor—Claim—Rights of suit of decree-holder—C.P.C., S. 47.*

In execution of a decree, the decree-holder attached the assets of a judgment-debtor who had died. A reversioner who was not a party either to the decree or to the execution proceeding, preferred objections under O. 21, R. 58, C.P.C. and the objections were allowed. In a suit brought by the decree-holder for a declaration of the liability of the assets to attachment and sale in execution held that the suit was not barred by S. 47, C.P.C. (*Bannerji*, J.) BANSIDHAR *v.* SHAM LALL.

71 I.C. 1012 = 1923 All. 292.

———O. 21, R. 62— *Suit under—Valuation—Jurisdiction.*

The value for purposes of jurisdiction of a suit for declaration that the land attached in execution of a decree is not liable to sale, is the value of the decree sought to be set aside and

C. P. CODE (V of 1908), O. 21, R. 63—Suit under.

not the value of the property attached. (*Richards*, C.J. *and Banerji*, J.) ANANDI KUNWAR *v.* RAM NIRANJAN DAS.
40 All. 505=45 I.C. 494=16 A.L.J. 374.

———**O. 21, R. 63**—*Suit under—Nature of—Real title to be proved.*

The plff. in a suit under the Rule must prove his real title and not merely an ostensible one. Such a suit being to set aside a summary decision of a Court, is a method of obtaining review. (*Jenkins*, C.J., *Woodroffe and Mookerjee*, JJ.) JAMAHAR KUMARI BIBI *v.* ASKARAN BOID. **30 I.C. 858=22 C.L.J. 27.**

——**O. 21, R. 63**—*Suit under—Question as to validity of decree can be gone into.*

In a suit under O. 21, R. 63 of the C. P. C., a Court is not restricted to determine only the question of the attachability of the property but can go into the question, whether the decree has been fraudulently obtained. 10 Bom. 659, Dist. (*Fletcher and Richardson*, JJ.) BAMACHARAN BHATTACHARYA *v.* BEGALA CHARAN KUNDU. **23 I.C. 755.**

———**O. 21, R. 63**—*Suit under—Scope of.*

A suit under S. 283, C. P. Code, (1882) is essentially a suit for the review of a summary decision. 35 Cal. 202, Rel. If, in such a suit brought by a purchaser from the judgment-debtor, the Court finds that the plff. and not the judgment-debtor was and has been in possession after the purchase for a valuable consideration, the suit should be decreed unless there is anything in the pleadings outside the scope of S. 283, to restrain or restrict such a result. (*D. Chatterjee and N. Chatterjee*, JJ.) ABDUL KADER *v.* ALI MEAH.
16 C.W.N. 717=14 I.C. 715=
13 C.L.J. 649.

——**O. 21, R. 63**—*Suit under—Scope of—inquiry.*

What is decided by a suit under O. 21, R. 63 is the question of title arising in execution between the attaching decree-holder and the objector, 35 Mad. 35, Doubted, 35 Cal. 202, Expl. 15 Cal. 521, Foll. (*Wallis*, C.J. *Oldfield*, *Sadasiva Aiyar*, *Spencer and Seshagiri Aiyar*, JJ.) RAMASWAMI CHETTIAR *v.* MALLAPA REDDIAR. **43 Mad. 760=**
39 M.L.J. 380=28 M.L.T. 170=
12 L.W. 475=59 I.C. 947=
(1920) M.W.N. 872 (F.B.).

[Overruling 43 I.C. 681=41 Mad. 612. (F.B.) and 34 I.C. 778=30 M.L.J. 565.]

——**O. 21, R. 63**—*Suit under—Suit by attaching Decree-holder—Representative suit unnecessary.*

A suit by an attaching decree-holder to set aside a transfer by the judgment-debtor as fraudulent under S. 53, T. P. Act need not be brought as a representative suit on behalf of the entire body of creditors. *Obiter.* Even an ordinary creditor is not under an obligation to sue in a representative character. 34 Cal. 999

C. P. CODE (V of 1908), O. 21, R. 63—Suit under.

Diss.; 41 Mad. 612 Dist. (*Ayling and Krishnan*, JJ.) KOTTARATHIL SUTHAPURAYILPOKKER *v.* BALATIHIL PARKUM CHANDRANKANDI,
42 Mad. 143=25 M.L.T. 47=
(1919) M.W.N. 39=9 L.W. 138=
51 I.C. 714=36 M.L.J. 231.

[Also 59 I.C. 947=43 Mad. 760 (F.B.)].

——**O. 21, R. 63**—*Suit under—Onus of proof.*

In a suit under O. 21, R. 63, C. P. C. the burden lies on the plff. to establish his title. (*Seshagiri Aiyar and Bakewell*, JJ.) RAMA SHENOI *v.* HALEAGNA. **41 Mad. 205=**
45 I.C. 703=34 M.L.J. 295.

———**O. 21, R. 63**—*Suit under—Determination of rights of parties.*

A successful claim petitioner whose title had not ripened into ownership on the date of the attachment is not entitled to resist the suit under O. 21, R., 63, C.P.C. on the ground of his perfection of title subsequent to the attachment. The right restored to the parties, in a suit under O. 21, R. 63 is the right which they asked the Court to give a decision upon, as on the date of the attachment. (*Seshagiri Aiyar and Kumaraswami Sastri*, JJ.) PANDYAN PILLAI *v.* VELLAYAPPAN ROWTHER.
33 M.L.J. 316=42 I.C. 488=6 L.W. 588.

———**O. 21, R. 63**—*Suit under—Scope of—Meaning of "to establish the right"—Sale of property prior to order in claim proceedings.*

A suit under R. 63 is not merely in the nature of an appeal. The words 'to establish the right' in the Rule are wide enough to cover not only a mere suit but also one for consequential relief, *i.e.*, recovery of the value of the land if it has been sold prior to the order on the claim petition. (*Abdur Rahim*, O.C.J. *Seshagiri Aiyar and Phillips*, JJ.) KOVOWI BASSIVIREDDI *v.* NIDUMOORI RAMAYYA.
40 Mad. 733=31 M.L.J. 394=
(1916) 2 M.W.N. 207=4 L.W. 300=
36 I.C. 445=20 M.L.T. 353.

——**O. 21, R. 63**—*Suit under—Nature of—Lis pendens.*

Per *Sadasiva Aiyar*, *J.*—An order on a claim petition under O. 21, Rr. 60 and 61 is connected with rights in immoveable property attached and not merely an affair between the parties in their personal capacity. A transfer of property pending a suit under O. 21, R. 63, is *lis pendens*. (*Sadasiva Aiyar and Spencer*, JJ.) KRISHNAPPA CHETTY *v.* ABDUL KHADAR SAHEB. **38 Mad. 835=**
25 I.C. 11=26 M.L.J. 449.

———**O. 21, R. 63**—*Suit under—Suit by defeated creditor—Form of—Representative suit—Necessity for.*

A decree-holder has a statutory right to sue under O. 21, R. 63 in his personal capacity as a decree-holder respecting merely his own right to have the property attached under his decree. He is not obliged to take the general ground

C. P. CODE (V of 1908), O. 21, R. 63—Suit under.

that as against all other creditors and all other persons a mortgage or sale is to be void. 42 M. 143, followed. (*Pipon*, J.C.) LOK NATH *v.* THAKAR DAS. **71 I C. 20.**

———**O. 21, R. 63**—*Suit under—Dismissal of claim without investigation.*

An order passed without investigation of the claim, is an order made against the party in such a way as to render that order conclusive and thereby prohibit the institution of a suit to establish the same rights after the period of one year allowed by the Limitation Act has expired. Order 21, Rule 63 of the Code of Civil Procedure 1908 is much wider in its scope than the corresponding S. 283 of the Code of 1882, and unlike that latter section covers cases in which there has been no investigation. Orders made under Rule 63 of Order 21 become final if not set aside by suit within one year. (*Duckworth and Po Han*, JJ.) MAUNG PYA ON *v.* MA HLA KYU. **1 Rang. 481 = 2 Bur. L.J. 173 = 76 I.C. 851 = 1924 Rang. 42.**

Valuation of Suit.

———**O. 21, R. 63**—*Valuation of suit.*

In suits for declaration that property is not liable to attachment and sale, the proper valuation for purposes of jurisdiction is the decree amount and not the value of property when it is higher than the decree amount. 17 All. 69; 27 All. 440, Fol.; 35 Cal. 202 (P.C.); Rel. (*Banerji and Tudball*, JJ.) KHETRA PAL *v.* MUMTAZ BEGAM. **38 All. 72 = 31 I.C. 879 = 13 A.L.J. 1104.**

———**O. 21, R. 63**—*Valuation of suit.*

The plaint in a suit under O. 21, R. 63 is chargeable with a fixed Court-fee of Rs. 10 and not with an *ad valorem* fee. 35 C. 202 (P.C.) Foll. (*Walmsley and Greaves*, JJ.) GOL ASMATER KHATUN *v.* HABIBULLA. **64 I.C. 49.**

———**O. 21, Rr. 63**—*Valuation for jurisdiction.*

The jurisdictional value of a suit by a decree-holder under O. 21, R. 63 impleading the judgment-debtor merely as a *prima facie* deft. is the amount of the decree. (*Chevis and Shadi Lal*, JJ.) BHAGWAN DAS *v.* KANSHI RAM. **253 P.L.R. 1914 = 26 I.C. 180 = 145 P.W.R. 1914.**

———**O. 21, R. 63**—*Valuation of suit——Jurisdiction.*

In suits under S. 283, C. P.C., (1882) the question of jurisdiction must be determined entirely on the nature of the relief sought. Where the right to maintain the attachment as between the claimant and the decree-holder is all that is in dispute, the value of the suit is the decretal amount. But if the claimant's title against both the decree-holder and the judgment-debtor concerning the whole property is in question then the value of the suit is the value of the property. Whether the judgment-debtor confesses judgment or denies the claim and it is decided after contest is immaterial. This, however, does not cover a case where the judgment-debtor, though a *pro forma* party, has no interest in the decision; but a confession of judgment is not absence of interest. (*Robertson and Shah Din*, JJ.) SARDAR BEGUM *v.* MEHR CHAND. **82 P.R. 1913 = 38 P.W.R. 1913 = 18 I C. 820 = 89 P.L R. 1913.**

C. P. CODE (V of 1908), O. 21, R 63.

———**O. 21, R. 63**—*Valuation—Judgment-debtor a party—Suit valuation.*

In a declaratory suit under O. 21, R. 63 to which the judgment-debtor too is made a party, the jurisdiction value of the suit is the value of the property. 55 P.R. 1906; 142 P.R. 1906, Con.; 17 All. 69; 94 P. R. 1908, Foll. (*Robertson and Chevis*, JJ.) KALLU MAL *v.* SHAMSUDDIN. **269 P.W.R. 1912 = 14 P.L.R. 1913 = 17 I.C. 196 = 41 P.R. 1913.**

———**O. 21, R. 64**—*Property not attached—If Court can sell.*

A Court has no jurisdiction to sell a property in execution if it has not been duly attached. (*Fletcher and Newbould*, JJ.) PANCHAMAN DAS *v.* KUNJA BEHARI. **42 I.C. 259.**

———**O. 21, R. 64**—*Execution sale—Larger amount than was due.*

A sale at the instance of a decree-holder, who took out execution for a larger amount than what was due, is not necessarily fraudulent nor is it vitiated by that circumstance alone. (*Mookerjee and Carnduff*, JJ.) TRILOCHAN HAZRA *v.* BAKKSWARJA. **14 I.C. 839 = 15 C.L J. 423.**

———**O. 21, R. 64**—*Sale without attachment*

A Court cannot sell property which has not been attached. But when before sale, a person claiming to be interested, submits that the sale is without attchment, it has inherent power to investigate the matter. (*Mookerjee and Coxe*, JJ.) SASIRAMA KUMARI. *v.* MEHERHAN KHAN. **9 I C. 918 = 13 C.L.J. 243.**

———**O. 21, R. 64**—*Moveables—Attachment of—Property not in custody of Court.*

It is not necessary under the rule for the Court to have the moveable property before it, before ordering its sale. There is no legal order of dismissal of an application for sale when it is dismissed for non-payment of *batta* and the attachment previously existing continues effective. (*Oldfield and Tyabji*, JJ.) KAMISETTI PEDDA VENKATASUBBAIYA *v.* TANGATUR, SUBBAYYA. **28 I.C. 62 = (1915) M.W.N. 159.**

———**O. 21, Rr. 64 and 79**—*Sale of debt—Procedure regarding attachment and sale.*

Under O. 21 R. 64 a debt can be sold and delivery made in the manner prescribed in O. 21, R. 79. (*Maung Kin*, J.) M. R. R. M. FIRM *v.* ZAN. **33 I.C. 469 = 10 Bur L.T. 6.**

———**O. 21, R. 65**—*Auction sale—Bid—Withdrawal of.*

C. P. CODE (V of 1908), O. 21, R. 66—Appeal.

If a person bids at an auction-sale for a property with full knowledge of the conditions, offers bids for the property, and the property, is knocked down to him, the mere fact that the Court is subsequently directed to confirm or annul the *Nazir's* action does not leave it open to the bidder to withdraw his bid. (*Coxe and Richardson*, JJ). RAJENDRA PROSAD JHA *v* UPENDRANATH JHA.
21 C.L.J. 174=27 I.C. 805=19 C.W.N. 633.

——O. 21, R. 66.

APPEAL.
DUTY OF COURT.
ESTOPPEL.
FRESH PROCLAMATION.
NOTICE.
NOTIFICATION.
OBJECTION.
PROCEDURE.
REVISION.
RIGHTS OF PURCHASER.
SALE PROCLAMATION.
SEPARATE LOTS.
STEP IN-AID.
TIME OF SALE.
VALUATION AND UNDER VALUATION OF PROPERTY.

Appeal.

——O. 21, R. 66—*Appeal.*

An order directing issue of sale proclamation though the Court had previously ordered stay thereof at the request of the judgment-debtor till his objection was decided is not final and therefore not appealable. (*Sanderson*, C.J. *and Chotzner*, JJ.) JOGESH CHANDRA *v* HEMENDRA KUMAR. **64 I.C. 647=35 C.L.J. 170.**

——O. 21, R. 66—*Appeal—Sale proclamation—Order fixing terms.*

No appeal lies against an order settling the terms of a sale proclamation under O. 21, R. 66. (*Teunon and Newbould*, JJ.) GIRIDHARI LAL *v.* ALTAF ALI. **46 I.C. 864.**

——O. 21, R. 66 and S. 47—*Appeal—Execution of decree—Order accepting decree holder's valuation of mortgaged property.*

In execution proceedings, orders which conclusively determine the rights of the parties are appealable but an order merely accepting the valuation put upon a property by the decree-holder is not appealable. (*Fletcher and Chatterjee*, JJ.) MAHAMMAD EAHASAN HOSAIN *v.* TARA PRASANNA MUKERJEE. **22 I.C. 548.**

——O. 21, R. 66—*Appeal—Order determining value of immoveable property.*

An order determining the value of immoveable properties to be entered in the sale proclamation by the executing Court under O. 21, R. 66, C.P.C. is not appealable. (*Jenkins*, C.J. *and Chapman*, J.) PANCH DUAR THAKUR *v.* MANI RAUT, **17 I.C. 88=16 C.W.N. 970.**

C. P. CODE (V of 1908), O. 21, R. 66—Appeal.

——O. 21, R. 66 (2)—*Appeal—Sale proclamation—Inquiry as to value of property—Second appeal.*

Where in a sale proclamation both the values stated by the decree holder and by the judgment-debtor were entered and no enquiry was made as to whether either of these values was correct, or whether any other and intermediate value was correct. *Held*, that no second appeal lay to the High Court as the order did not determine any question judicially. (*Caspersz and Sharfuddin*, JJ.) SAKHI CHAND *v.* KALANAND SINGH. **11 I.C. 789. 14 C.L.J. 607.**

——O. 21, R. 66—*Appeal—Order setting terms of sale proclamation.*

O. 21, R. 66 of the C.P. Code requires a Court to draw up a proclamation of sale after notice to the decree-holder and the judgment-debtor. The action of a Court in settling the terms of a proclamation under O. 21, R. 67 is a judicial act and is appealable. 2 Pat. L.J. 130, foll. If the amount of the decree is wrongly stated in the proclamation it is defective and a new proclamation would issue after the amount has been corrected. (*Scott-Smith*, J.) KANHIA LAL *v.* THE BANK OF UPPER INDIA, LIMITED, **49 I.C. 539=36 P.W.R. 1919.**

——O. 21, R. 66—*Appeal—Order settling the order in which properties are to be sold—Nature.*

Order settling the order in which properties are to be sold is appealable. (*Oldfield and Devadoss*, JJ.) VEDAVYASA AIYAR *v.* THE MADURA HINDU LABHA NIDHI CO. LTD.
18 L.W. 311=45 M.L.J. 478=77 I.C. 148=(1923) M.W.N. 662=1924 M. 365.

——O. 21, R. 66—*Appeal—Order fixing the upset price is not open to.*

An order fixing the upset price in a sale proclamation is not appealable. 27 M. 250; 1917 M.W.N. 141 Relied on. (*Oldfield and Venkata Subba Rao*, JJ.) RAMANATHAN CHETTIAR *v.* VENKATACHELLAM CHETTIAR.
44 M.L.J. 699=(1923) M.W.N. 297=17 L.W. 336=32 M.L.T. (H C.) 401=72 I.C 836=1923 Mad. 619.

——O 21, R. 66 and O. 43, R. 1—*Appeal—Order under is not appealable.*

An order under O. 21, R. 66 is not appealable under O. 43, R. 1. An objection as to a defect in the signature of the verification in a petition under O. 21, R. 66 (3) must be made within the time fixed by a notice under rule 66. (*Jwala Prasad and Adami*, JJ.) BRAJA SUNDAR DEB *v.* SIVARANJAN DEI.
59 I. C. 282=1 Pat. L.T. 647.

——O. 21, R. 66—*Appeal.*

Order of a Court fixing a valuation under O. 21, R. 66 is not a 'decree' and therefore not appealable. (*Mullick and Atkinson*, JJ.) DEOKINANDAN SINGH *v.* DHAKESHWAR PRASAD-NARAIN SINGH. **38 I.C. 616=2 Pat. L.J. 12.**

C. P. CODE (V of 1908), O. 21, R. 66—Appeal

———O. 21, R. 66 (4) and S. 105—*Appeal.*

No appeal lies against an order under O. 21, R. 66 (4). (*Fox*, C. J. *and Parlett*, JJ.) N. C. CHATTERJEE *v.* R. M. K. KARUPPAN CHETTY. **8 L.B.R. 350=36 I.C. 402=10 Bur. L.T. 115.**

Duty of Court.

———O. 21, R. 66—*Duty of Court—Mistake due to carelessness of Court — Purchaser's remedy.*

A purchaser at a Court sale of immoveable property buys at his own risk and there is no warranty that the property will answer the description unless the sale is vitiated by fraud. (*Maung Kin*, J.) MASHIM ISPHANY *v.* N. A. P. K. CHETTY FIRM. **9 Bur. L.T. 169=33 I C. 1003=8 L.B.R. 427.**

Estoppel.

———O. 21, R. 66—*Estoppel—Sale proclamation—Mortgage not mentioned.*

Where, in an application for execution of a money decree, the decree-holder mentions that the property was subject to a mortgage, held, by him but the sale proclamation omits it, and such omission was not due to any fraud, collusion, misconduct or misrepresentation, *Held*, that he was not estopped from putting forward and enforcing his mortgage against the auction-purchaser. (*Mears*, C. J. *and Banerji*, J.) RAMSARUP *v.* BHARAT. **19 A.L.J. 744=64 I.C. 763=43 A. 703.**

———O. 21, R. 66—*Estoppel—Incumbrances—Omission to specify.*

A decree-holder is bound to notify before the execution sale all encumbrances on the property about to be sold and cannot subsequently set up an encumbrance in his own favour not set up in the execution proceedings. (*Mookerjee and Panton*, JJ.) KALIDAS *v.* PRASANNA KUMAR. **47 Cal. 446=30 C.L.J. 496=55 I.C. 189=24 C.W.N. 269.**

———O. 21, R. 66—*Estoppel—Objection not taken by judgment Debtor—Effect of.*

Where a judgment-debtor having notice of the proceedings does not raise any objection as to under valuation in the sale proclamation he cannot afterwards challenge the sale on the ground of inaccuracy or insufficiency of description. (*Mookerjee and Carnduff*, JJ.) PRAN SINGH *v.* JANARDHAN SINGH. **13 I.C. 337=14 C L.J. 541.**

———O. 21, R. 66—*Estoppel—Failure to attend at the settlement of proclamation — Effect—If estopped from raising plea of non-liability to attachment.*

Failure to attend at the settlement of proclaimation estops from raising plea of non-liability to attachment. (*Schwabe* C.J. *and Oldfield and Ramesam*, JJ.) CHIDAMBARAM CHETTY *v.* KANDASAMI GOUNDAN. **(1923) M.W.N. 571=46 Mad. 768=45 M.L J. 346=74 I.C. 155=18 L.W. 757=1924 Mad. 1.**

C. P. CODE (V of 1908), O. 21, R. 66—Fresh Proclamation.

———O. 21, R. 66—*Estoppel—Incorrect statement sale—Proclamation—Omission to object—Estoppel.*

The party who does not object to the sale proclamation fails in his duty to the Court and is hence estopped from complaining of any irregularity resulting from the incorrect statement in the proclamation except where there is lawful excuse for the judgment-debtor. (*Benson and Sundara Aiyar*, JJ.) RAJA OF KALAHASTI *v.* MAHARAJAH OF VENKATA GIRI. **38 Mad. 387=14 M.L T. 320=21 I.C. 389=25 M.L.J. 198.**

———O. 21, R. 66—*Estoppel—Proclamation—Error—Whether judgment-creditor estopped.*

An erroneous statement in a sale proclamation signed by the decree-holder as to decretal amount creates no estoppel against him unless the judgment-debtor is in any way prejudiced thereby. (*Abdur Rahim and Ayling*, JJ.) SRINIVASA RAO *v.* SAMA RAO. **12 I.C. 97=10 M.L T 94.**

———O. 21, R. 66—*Estoppel—Mortgage, if can be questioned by auction-purchaser.*

The auction-purchaser at a sale in execution of a decree on a subsequent mortgage cannot, as the representative of the mortgagor, question the validity of the prior mortgages on the property. (*Lindsay*, J.C.) KIFAYAT ULLAH *v.* MAHABIR PRASAD. **24 I.C. 2=1 O.L.J. 175.**

———O. 21, R. 66—*Estoppel—Notification of mortgage—Omission.*

Where a decree holder brings properties of the judgment-debtor to sale in execution of his decree without disclosing the existence of a prior mortgage in his own favour, he is estopped from setting up the mortgage thereafter as against the auction purchaser. The fact that the mortgagee is a minor makes no difference. 10 C. 609; 22 B. 686, Ref. (*Brown*, A. J. C.) MAUNG KYIN PEIN *v.* MA PWA ME. **64 I.C. 953=4 U.B.R. (1921) 62=1922 U.B. 1.**

Fresh Proclamation.

———O. 21, R. 66—*Fresh Proclamation—Decree-holder purchasing property—Sale set aside—Set off for occupation of decree-holder after sale.*

Where a decree-holder purchased property at an auction sale and the sale was set aside later, the judgment-debtor is entitled, at the time of consideration of the proclamation for the next sale, to set-off against the decretal amount the net income enjoyed by the decree-holder; this matter of what is due to the judgment-debtor should be gone into in execution proceedings. (*Harinoll*, O.C.J. *and Twomey*, J.) MAUNG MAUNG *a.* WIGHTMAN & CO. **24 I.C. 468=7 Bur. L.T. 64.**

C. P. CODE (V of 1908), O. 21, R. 66—Notice.

Notice.

———O. 21, R. 66—*Notice to judgment-debtor—Terms of proclamation settled ex-parte—Question of liability of property.*

A decree-holder applied on attachment of immoveable property of the judgment-debtor without any effect. Judgment-debtor did not get any notice. An application was then made for the sale of the property and the judgment-debtor got a notice for settling the terms of the sale proclamation. As the latter did not attend on the date fixed, the terms of the sale proclamation were settled *ex parte*. The judgment-debtor, applied for the release of property. The decree holder raised the question of *res judicata* as the question of the liability of the property had been decided on the hearing of the application for settling the terms of the sale proclamation ; *Held*, that, *notice* to judgment-debtor to be present at the settlement of the terms of the proclamation cannot be regarded as raising the question of the liability of the property to be attached and therefore it cannot be said, that the judgment-debtor was invited to object to that attachment. That being so, the order that followed cannot be implied as an implied adjudication that the property was correctly attached. (*Schwabe*, C.J., *Oldfield and Ramesam*, JJ.) CHIDAMBARAM CHETTY *v.* KANDASWAMI GOUNDAN.
46 M. 768=(1923) M.W.N. 571=45 M.L.J. 346=18 L.W. 757=74 I.C. 155=1924 Mad. 1.

———O. 21, R. 66—*Notice of proclamation.*

The provisions for notice under O. 21, R. 66 are directory and not mandatory. They have not been enacted for the benefit of the judgment-debtor but with a view to ascertain the exact rights that should be set forth in the proclamation of sale. (*Mittra*, A.J.C.) KRISHNAJI *v.* BALIRAM. **44 I.C. 252.**

———O. 21, R. 66—*Notice—Omission to issue, in fresh application for execution is not an irregularity.*

Where on an application for execution, notice had been issued under O. 21, R. 66 of the C.P. Code and the particulars to be entered in the proclamation of sale were settled, the omission to issue the notice under O. 21, R. 66 again on a succeeding application for execution does not constitute an irregularity. 12 A. 510; 18 C. 496, 21 Cal. 66 ; 53 I.C. 809, ref. (*Kanhaiya Lal*, J.C.) BASANT LAL *v.* SAIYAD HUSAIN.
65 I.C. 988=24 O.C. 391.

———O. 21, Rr. 66 and 90—*Notice—Omission to give.*

Omission to give notice to the judgment-debtor of the sale of his property renders the sale void. (*Ormond*, J.) RAMASWAMI *v.* MAUTHA.
38 I.C. 98=11 Bur. L.T. 40.

Notification.

———O. 21, R. 66—*Notification of incumbrances—Rights of purchaser—Estoppel.*

C. P. CODE (V of 1908), O. 21, R. 66—Notification.

Under O. 21, R. 66. C.P. Code, if a mortgage deed is merely notified, that notification is in no way conclusive as between the decree-holder or the purchaser on the one hand and the holder of the incumbrance on the other as to its validity and where a sale is not effected subject to a mortgage but the mortgage is simply notified at the time of the sale the auction-purchaser is not estopped from questioning the validity of the mortgage, 29 C. 154 ; 20 A. 421, dist. (*Stuart and Sulaiman*, JJ.) ROSHAN LAL *v.* LALLU.
44 All. 714=20 A.L.J. 722=L.R. 3 A. 800=68 I.C. 790=1922 All. 448.

———O. 21, R. 66—*Notification of mortgage—If conclusive—Right of auction-purchaser.*

A sale proclamation after proceedings under O. 21, R. 66 of Code is not conclusive between the parties or binding on the auction-purchaser, who can contest the validity of a mortgage notified in the proclamation. (*Gokul Prasad and Lindsay*, JJ.) SULTANKHAN *v.* MOHABAT KHAN. **48 All. 489=63 I.C. 895=19 A.L.J. 400.**

———O. 21, R. 66—*Notification of mortgage—Rights of purchaser.*

A person set up title as mortgagee of property attached in execution and the Court directed under O. 21, R. 66, C. P. C. that the mortgage be notified. *Held*, the purchaser at the execution sale could contest the validity of the mortgage in a suit by the mortgagee without suing to set aside the mortgage. (*Tudball and Rafique*, JJ.) KISHEN LAL *v.* RUPRAM.
55 I.C. 354=2 U.P.L.R (All.) 94.

———O. 21, R. 66—*Notification of mortgage—Mortgage invalid—Effect of.*

If a mortgage notified in the proclamation of sale turns out to be invalid, the benefit is taken by the purchaser and the judgment-debtor is not entitled to claim from him a refund of the amount alleged to have been due on the mortgage. The purchaser is free to contest the reality or validity of the mortgage in a suit by the mortgagee. 31 All. 583, foll. (*Mookerjee and Buckland*, JJ.) KRISHNA *v.* NAGENDRABALA. **25 C.W.N. 942=66 I.C. 894=34 C.L.J. 338.**

———O. 21, R. 66—*Notification of lien—Half of a legally enforceable lien—Whether auction-purchaser liable for whole.*

Where, in an execution sale, the Court ordered only half of a legally chargeable lien on the property to be notified, the auction-purchaser in a suit subsequently brought against him to enforce the whole lien, cannot avail of the court's notification as the Court in execution sale gives no warranty of title. (*Lindsay*, J.C. *and Kanhaiya Lal*, A.J.C.) RAHAS BEHARI LAL *v.* BACHCHU SINGH. **23 I.C. 871=1 O.L.J. 50.**

———O. 21, R. 66 (c)—*Notification of mortgage—Rights of purchaser.*

C. P. CODE (V of 1908), O. 21, R. 66—Notification.

A person purchasing property at Court-auction cannot deny the validity of the charge over it, but can contest the accuracy of its description in the proclamation. A mistake in the proclamation cannot confer any right on the charge holder. (*Stuart*, J.C.) MAHABIR PRASAD *v.* AUJUMANISA. **50 I.C. 145 = 6 O.L.J. 67.**

——— **O. 21, R. 66**—*Notification of mortgage—Duty of Court—Order of Court, if conclusive.*

O. 21, R. 66 enjoins the Court to state fairly accurately for the information of intending purchasers, the encumbrances on the property. An order passed by Court during enquiry under O. 21, R. 66 is not conclusive as between the decree-holder or purchaser on one side and the incumbrancer on the other. 28 All. 418; 10 O.C. 280; 15 O.C. 211, Ref. (*Stuart and Kanhaiya Lal*, A.J.Cs.) BHAGWAN DAS *v.* AHMAN JUN. **36 I.C. 732 = 3 O.L.J. 422.**

——— **O. 21, R. 66**—*Notification of mortgage—Rights of auction-purchaser—Notification of existence of mortgage.*

Notice of an alleged mortgage in a sale proclamation, does not mean that the property is sold subject to mortgage. A prior mortgagee is entitled to question the validity of a subsequent mortgage and an auction-purchaser in the execution of the sale has a right to contest the validity of the encumbrances with which the property is charged. 31 All. 583; Ref. (*Stuart*, A.J.C.) JAG DEI *v.* SOHAN LAL. **28 I.C. 360 = 2 O.L.J. 140.**

——— **O. 21, R. 66**—*Notification of mortgage—Purchaser, if can dispute mortgage.*

The auction-purchaser in execution is not liable to pay the incumbrance which was merely proclaimed at an auction-sale to be existing on the property, if it appears that the document does not really create a charge. (*Lindsay*, A.J.C.) GANESH PRASAD *v.* DISRAM SINGH. **18 I.C. 461.**

——— **O. 21, R. 66 (2) (c)**—*Notification of lien—Purchaser cannot dispute lien.*

Where on a mortgage suit the plff. prays for the sale of the property subject to the prior lien it is not open to the auction-purchaser in execution of the decree obtained in that suit to dispute the subsistence of the lien. (*Roe and Coutts*, JJ.) BASAWAN SINGH *v.* GANGAPHAL RAI. **47 I.C. 224.**

——— **O. 21, R. 66 (2) (c)**—*Notification of lien—Rights of purchaser.*

If a person having a lien on property attached and proclaimed for sale, informs intending purchasers of such lien and a purchaser bids in spite of the warning, the purchaser is subject to the lien. (*Parlett*, J.) MAUNG LON GYI *v.* RAHAMAN CHETTY. **12 I.C. 855 = 4 Bur. L.T. 142.**

C. P. CODE (V of 1908), O. 21, R. 66—Rights of Purchaser.

Objection.

——— **O. 21, R. 66**—*Objections—Issue of sale proclamation before objections are disposed of—Propriety of.*

A Court may issue a sale proclamation before objections filed by the judgment-debtor had been judicially disposed of, though the property cannot be sold until the objections put forth, are disposed of. (*Fletcher and Newbould*, JJ.) HARENDRA NATH BANERJEE *v.* HARI CHARAN DUTT. **43 I.C. 450.**

Procedure.

——— **O. 21, R. 66**—*Procedure — General rules of practice for civil Courts, Ch. IV, R. 5 (a).—Ancestral property.*

Property acquired by gift is not property *inherited* within R. 4, Chap. IV of the General Rules of Practice for the Civil Courts and such property is consequently not *ancestral* within R. 5 (a). (*Walsh and Sunder Lal*, JJ.) FAZAL AHMED *v.* WESAL-UD-DIN. **35 I.C. 742 = 38 All. 481 = 14 A.L.J. 669.**

——— **O. 21, R. 66**—*Procedure—Proclamation, issue of, date of—Objection.*

As regards procedure, a court is at liberty to use its own discretion for fixing a date in cases when the date has already expired. The court can also entertain an objection and do justice between the parties after giving sufficient reasons for postponement. The date of issue of a proclamation, is the day on which it is made known to the public in such a way as to enable the persons concerned to understand the subject matter contained in the proclamation by using reasonable prudence. (*Sanders and Greeves*, A. J. Cs.) SHEORATAN SINGH *v.* ROHAN SINGH. **39 I.C. 715 = 4 O.L.J. 115 (note).**

Revision.

——— **O. 21, R. 66 and S. 115**—*Revision—Sale proclamation.*

O. 21, R. 66 of the C.P.C. of 1908 differs from S. 287 of the old Code in that it requires a Court to cause a proclamation of the intended sale to be prepared after notice to decree-holder and judgment-debtor. Consequently it is a judicial act and is open to revision by the High Court. (*Chamier*, C.J. *Sharfuddin and Atkinson*, JJ.) RAGHUNATH SINGH *v.* HAZARI SAHU. **1 Pat. L.W. 111 = 2 P. L.J. 130 = 37 I.C. 872 = 1917 Pat. 105.**

Rights of Purchaser.

——— **O. 21, Rr. 66 and 92** — *Rights of purchaser.*

A purchaser at an execution sale need only look to the sale proclamation prepared by the decree-holder and if he allows it to be drawn up in a particular way, he cannot afterwards turn round and say that the purchaser whose money he has taken has brought something quite

C. P. CODE (V of 1908), O. 21, R. 66—Rights of Purchaser.

different from what was advertised. (*Coxe and Ray*, JJ.) KHIRODE CHANDRA *v.* JANKI DAS.
20 I C. 758.

——O. 21, R. 66—*Rights of purchaser—Mortgage prior to attachment.*

A mortgage made prior to attachment is binding on the auction-purchaser even though he had no notice of the mortgage and the mortgagee failed to have his lien notified at the time of sale. (*Ranhaiya Lal*, A.J.C.) BHAIRON PRASAD *v.* SHEO DARSHAN.
45 I C. 877=5 O.L.J. 114.

Sale Proclamation.

——O. 21, R. 66—*Sale proclamation—Statement as to revenue assessed—Omission of—Effect.*

Under O. 21, R. 66 of the C. P. Code, the sale proclamation should contain the statement as to the revenue assessed upon the estate, that it is a material matter which would enable the judgment-debtor to base an application for setting aside the sale, if he could comply with the other condition that the Code provides. (*Lord Buckmaster.*) BALIRAM SINGH *v.* RAI BAHADUR SETH NARSINGADAS.
45 M.L J. 403=18 L.W. 137=
L.R. 4 P.C. 197=
28 C.W.N. 593=33 M.L.T. 275 (P.C.)=
75 I.C. 546=(1923) M.W.N. 715=
1923 P.C. 93 (P.C.).

——O. 21, R. 66—*Sale proclamation—Value of the land not stated—Failure to serve sale proclamation.*

The approximate value of the land should be stated in sale proclamations but its omission is an irregularity which does not necessarily vitiate the sale unless it had a material effect upon the number of bidders and upon the price. Failure to serve the sale proclamation does not vitiate the sale when the judgment-debtor knows of it. 2 C. W. N. 848, distinguished. (*Greaves and Ghosh* JJ.) JASHINUDDIN *v.* MANMOHINI
1922 Cal 93.

——O. 21, R. 66—*Setting aside sale proclamation—If a purely ministerial act.*

Quaere.—Whether the decision of the Full Bench in 27 Mad. 259 which holds that setting aside a sale proclamation is a ministerial act, is still, good law? (*Schwabe*, C.J. *and Coleridge*, J.) KAVERIBAI AMMAL *v.* MEHTA & SONS.
18 L.W. 615=(1923) M.W.N. 894=
75 I.C. 901=46 M.L.J 71=1924 Mad. 234.

——O. 21, R. 66 (3)—*Sale proclamation—Enquiry as to mortgages on the property sold.*

A sale cannot be set aside on the ground that in the sale proclamation, the property was described as subject to two mortgages but the fact that the property was not to be redeemed, before redeeming other properties of the owner, was not described. It is not the business of the attaching creditor to see if there are clauses restraining redemption.

C. P. CODE (V of 1908), O. 21, R. 66—Valuation and under-valuation of Property.

He is to proceed as in O. 21, R. 66 (3) and then to file an affidavit as prescribed by the Civil Rules of Practice. (*Wallis*, C.J. *and Seshagiri Aiyar*, J.) PONNUSWAMI *v.* ABDUL HABIZ.
13 L.W. 444=62 I.C. 735=
(1921) M.W.N. 288.

——O. 21, R. 66—*Sale proclamation.*

Verification by a person acquainted with the facts; is enough. (*Jwala Prasad and Adami*, JJ.) BRAJA SUNDAR DEB *v.* SIVARANJAN DEI.
59 I.C. 282=1 P.L.T. 647.

Separate lots.

——O. 21, R. 66—*Separate lots—Property situated in different places.*

Where the property to be sold is situated in several villages, there need not be a separate proclamation in each village unless proper notice could not otherwise be given. (*Mookerjee and Teunon*, JJ.) BASANTA KUMARI *v.* RAM KANAI SEN.
9 I.C. 698=13 C.L J. 192.

Step-in-aid.

——O. 21, R. 66—*Step-in-aid—Oral application.*

An oral application by the decree-holder's pleader to have a date fixed for the settlement of the terms of the proclamation under O. 21, R. 66 is a step-in-aid of execution. 3 All. 139; 38 Mad. 695, Rel. on. (*Atkinson and Jwala Prasad*, JJ.) SURAJMAL *v.* SARJOOG PRASAD SINGH.
2 P.L J. 5=3 P.L.W. 208=
38 I.C. 540=1917 Pat. 54.

Time of sale.

——O. 21, Rr. 66 and 90—*Time of sale—Appendix E, Form* 29.

The omission to state the time of sale in a proclamation of sale of immoveable property is a material irregularity and the judgment-debtor is entitled to have the sale set aside provided he proves that loss has been caused to him by the said irregularity. (*Findlay*, A.J.C.) NARHAR *v.* G. M. BUTI.
51 I.C. 864=15 N.L.R. 125.

——O. 21, R. 66 (2) and 90—*Time of sale—Omission to specify—Irregularity—An omission under O.* 21 *substantial.*

An omission to specify the time of the sale under O. 21, R. 66 (2) will vitiate the sale if substantial injury has resulted thereby. (*Lindsay*, A.J.C.) MAHOMED ALI *v.* GOBIND PRASAD.
28 I.C. 184=18 O.C. 1.

Valuation and under-valuation of Property.

——O. 21, Rr. 66 and 90—*Under valuation—Sale proclamation—Effect of.*

An execution sale is liable to be set aside if the value of the properties is understated in the sale proclamation which has the effect of misleading bidders and preventing them from

C. P. CODE (V of 1908), O. 21, R. 66—Valuation and under-valuation of Poperty.

offering good prices. 20 All. 412, Rel. on. 12 C.W.N. 550, Not foll. (*Mookerjee and Carnduff*, J.) PRAN SINGH *v.* JANARDHAN SINGH. **13 I.C. 337=14 C.L.J. 541.**

——**O. 21, R.** 66—*Under valuation—Effect of.*

An understatement of value of the property calculated to mislead bidders and prevent them from offering adequate prices or from bidding at all, made in the sale proclamation if resulting in a sale for an inadequate price must be treated as a material irregularity. 20 All. 412, Foll. (*Mookerjee and Teunon*, JJ.) BASANTA KUMARI *v.* RAM KANAI SEN.
9 I.C. 698=13 C.L.J. 192.

——**O. 21, Rr. 66 and 90**—*Valuation of property—Omission to specify income—Execution sale—When invalid.*

A person contesting the sale in execution of a decree must satisfy the Court that there has been material irregularity in publishing or conducting the sale and that he has sustained substantial injury from such irregularity. The omission to mention the income of the property in the sale proclamation does not vitiate the sale, nor an omission to make an application for sale under O. 21, R. 66 (3). (*Shadi Lal*, J.) MANI RAM *v.* LACHMAN DAS.
39 I.C. 59=11 P.L.R. 1917.

——**O. 21, R. 66**—*Valuation—Notice for settling sale proclamation—Failure to appeal—Effect—Estoppel.*

Where the judgment-debtor had notice issued to him of the date for settling the sale proclamation and in spite of it did not attend or assist the court in fixing the valuation, he is afterwards estopped from objecting to the valuation. (*Mullick and Bucknil*, JJ.) MAHADEO SINGH *v.* DHOBI SINGH.
(1923) Pat. 283=4 P.L.T. 721=74 I.C. 838=2 P. 1916=1924 P. 111.

——**O. 21, R. 66**—*Valuation to be fixed by court.*

The insertion of any valuation in the sale proclamation other than valuation fixed by the court, is calculated to mislead intending bidders and is therefore wrong. A sale held under such circumstances can be set aside, (*Das and Macpherson*, JJ.) DAMRUPAT SINGH *v.* RAMESHWAR SINGH.
(1923) Pat. 208=73 I.C. 317=1923 P. 445.

——**O. 21, R. 66**—*Valuation—Fixing of*—A Court has no jurisdiction to fix the valuation on a sale proclamation before the day fixed for hearing the parties as to the proper valuation. (*Coutts and Ross*, JJ.) SUKHRAJ BAHADUR *v.* DEBI BUKSH. **3 Pat. L.T. 342=65 I.C. 360=1923 P. 102.**

——**O. 21, R. 66**—*Valuation of property in sale proclamation—Nature of.*

The value fixed by the Court for the preparation of sale proclamation need not be the free value of the property. It is a mere estimate,

C. P. CODE (V of 1908), O. 21, R. 69.

which should as far as possible be a fair estimate. (*Jwala Prasad and Ross*, JJ.) RAJBANS SAHAY *v.* ASKARAN BAID. **1 P. 214=1922 P. 550.**

——**O. 21, R.** 66—*Valuation of property—Legality of.*

The insertion of any valuation in a sale proclamation other than the valuation fixed by the Court, is calculated to mislead intending bidders and is, therefore, wrong. Neither the valuation assessed by the decree-holder nor by the judgment-debtors should be inserted. (*Chapman and Atkinson*, JJ.) BENI PRASAD *v.* EDAL SINGH. **49 I.C. 193=4 Pat. L.J. 37.**

——**O. 21, R.** 66—*Valuation of property.*

Where an executing Court directed that the property should be valued at twenty times the Government revenue, *Held* that it was only a colourable pretence of making the valuation required by law. (*Roe and Jwala Prasad*, JJ.) JAGGARNATH PRASAD *v.* CHITRAGUPTHA NARAIN SINGH. **48 I.C. 141=3 Pat. L.J. 580.**

——**O. 21, R. 66**—*Valuation of property—Settlement of terms of proclamation is judicial proceeding — Specification in proclamation of nature, and value of property.*

The settlement by the Court of the terms of the proclamation under O. 21. R.66 is a judicial act and the proclamation should specify, with all possible fairness and accuracy, the nature and value of the property. 20 All. 412 P.C. Foll. (*Chamier*, C.J. *Sharfuddin, and Atkinson*, JJ.) RAGHUNATH SINGH *v.* HAZARI SAHU.
1 Pat. L.W. 111=2 Pat. L.J. 130=37 I.C. 872=1917 Pat. 105.

——**O. 21, R. 66**—*Valuation of property—Whether "material".*

The value of the property to be sold is a material thing for the purchaser to know; so where a fair and accurate value is not given, the sale can be stayed, 20 All. 412. (P.C.); 2 C.W.N. 550. 25 I.A. 146, Rel. (*Hartnoll*, O.C.J. *and Twomey*, J.) MAUNG MAUNG *v.* WIGHTMAN. **24 I.C. 468=7 Bur. L.T. 64.**

——**O. 21, R. 69**—*Time of sale not mentioned—Effect of.*

On a sale being adjourned under O. 21, R. 69 the omission to mention the hour of sale is a material irregularity. 6 C.W.N. 48, Foll. (*Mookerjee and Carnduff*, JJ.) PRAN SINGH *v.* JANARDHAN SINGH. **13 I.C. 337=14 C.L.J. 541.**

——**O. 21, R. 69**—*Fresh proclamation—Execution of decree—Postponement of sale—Waiver.*

A waiver, on application for postponement of an execution sale, by the judgment-debtor, of a fresh proclamation does not amount to waiver of objections to the previous one. (*Mookerjee and Carnduff*, JJ.) RUDRANANDA THAKUR *v.* PRITHI CHAND. **14 C.L.J. 356=11 I.C. 428=16 C.W.N. 704.**

C. P. CODE (V of 1908), O. 21, R. 69.

———O. 21, R. 69—*Applicability of—Postponement of sale—Satisfaction of decree.*

Where an execution sale is postponed on the ground that the decree has been satisfied, O. 21, R. 69, C. P. Code has no application to such a case. (*Jwala Prasad*, J.) JAGDHARI RAI *v.* LANGAT GOPE. **4 Pat. L.T. 495 = 76 I.C. 676 = 1923 Pat 872.**

——O. 21, R. 69—*Execution—Sale postponed* sine die—*No fresh proclamation—Irregularity—Sale set aside.*

When a sale was adjourned *sine die* and no fresh proclamation fixing the date was issued, it is a material irregularity in publishing and conducting the sale. The sale will be liable to be set aside if substantial injury results from the material irregularity. (*Atkinson and Jwala Prasad*, JJ.) KIRPAL SINGH *v.* KEDAR NATH BOSE. **41 I.C. 68 = 3 Pat. L.W. 337.**

———O. 21, Rr. 69 and 90—*Adjournment—Sale without fresh proclamation ought not to be held.*

The court ordered stay of sale in execution of a mortgage decree "until further orders" and subsequently ordered the sale of the property without a fresh proclamation. *Held*, that the sale ought not to have been held without a fresh proclamation and that it should be set aside. (*Pratt*, J.) ABDUL HAKIM *v.* NGA NIGRI. **2 Bur. L.J. 54 = 75 I.C. 343 = 1923 Rang. 154**

———O. 21. R. 69(1) and (3)—*Sale of third lot, when money paid up.*

A sale in execution of a third lot of properties after the judgment-debtor had paid up the amount due, when two prior lots had been knocked down, is not vitiated by irregularity because the words "the debt and costs" in the section could not be interpreted to mean "the balance of debts and costs which would remain if the knocking down could be taken to be the completion of the sale." (*Sadasiva Aiyar and Napier*, JJ.) RAJA OF KALAHASTI *v.* VENKATA RAMIAH ROW BAHADUR GARU. **26 I.C. 273 = (1914) M.W.N. 873.**

——— O. 21, R. 69 (2)—*Non-compliance with—Effect of.*

Where an execution sale is held more than 7 days after the date originally advertised and without a fresh proclamation, it is a mere irregularity and the sale will not be set aside in the absence of substantial injury. (*Mr. Ameer Ali.*) RANG LAL SINGH *v.* RAVANESHWAR PERSHAD SINGH. **38 I.A. 200 = 39 Cal. 26 = (1911) 2 M.W.N. 108 = 10 M.L.T. 161 = 12 I.C. 174 = 13 Bom. L.R. 823 = 14 C.L.J. 334 = 8 A.L.J. 1173 = 16 C.W.N. 1 (P.C.)**

———O. 21, R. 69 (2)—*Adjournment of sale—Sale held without fresh proclamation.*

Where a sale is repeatedly postponed and is held on a subsequent date without a fresh proclamation, the procedure though irregular does not render the sale invalid. (*Piggott and Walsh*, JJ.) OFFICIAL LIQUIDATOR, KAYASTHA TRADING AND BANKING CORPORATION *v.* SANT NARAIN SINGH. **48 All. 433 = 60 I.C. 763 = 19 A.L.J. 262.**

C. P. CODE (V of 1908), O. 21, R. 71.

———O. 21, Rr. 69 (2) and 90—*Fresh proclamation—Omission of—Material irregularity.*

The omission to issue fresh proclamation under O. 21, R. 69 (2) is not a 'material irregularity' within R. 90. (*Lindsay*, A.J.C.) MOTI SINGH *v.* PRITHIPAL SINGH. **28 I.C. 17.**

———O. 21, Rr. 71, 84 and 85—*Non-payment of deposit—Fresh sale—Deficiency—Recovery of.*

Whether there is default in payment of the initial deposit of 25 per cent of the purchase price under O. 21, R. 84 or in the deposit of the balance under O. 21, R. 85, the property may be resold and the deficiency of price recovered from the defaulting purchaser. (*Piggott, Walsh and Lindsay*, JJ.) SITA RAM *v.* JANKI RAM. **44 A. 266 = 20 A.L.J. 108 = 65 I.C. 618 = L.R. 3 A. 117 = 1922 All. 200 (F.B.).**

———O. 21, R. 71—*Resale on purchaser's default—Suit to recover deficiency—Second appeal.*

No second appeal lies from an order passed on an application by the decree-holder under O. 21, R. 71 of the C. P. Code to recover deficiency of the price from a defaulting purchaser, when the decree for the money claimed is less than Rs. 500. (*Macleod*, C.J. *and Fawcett*, J.) RAJACHARYA *v.* CHEMANNA. **22 Bom.L.R. 1193 = 59 I.C. 192 = 45 Bom. 228.**

———O. 21, Rr. 71 and 84—*Auction-sale in execution—Failure of purchaser to deposit—Re-sale—Defaulting purchaser, when liable for loss.*

Where a purchaser at an auction sale fails to deposit the purchase-money, the property must be re-sold forthwith. Fresh bids should be invited soon afterwards and no fresh proclamation of sale is necessary. 16 Cal. 33; 12 Mad. 454, Foll. The requirements of O. 21, R. 84 are not complied with, where re-sale was held after six months, and the auction-purchaser could not be called upon to pay the deficiency in price. (*Shadi Lal*, J.) BELI RA *v.* SODEN SINGH. **32 I.C. 907 = 45 P.W.R. 1916.**

———O. 21, R. 71—*Execution sale—Default in payment of price — Re sale—Deficiency in price—Purchaser's liability—Rights of auction-purchaser after purchase and before confirmation of sale*—Caveat emptor.

To attract the provisions of O. 21, R. 71, it is not necessary that what is sold at the re-sale should, in all respects, be the identical property that was sold at the first sale. If there are material alterations, the Court is bound to mention them for the benefit of intending purchasers. If, therefore, owing to material or other causes attributable to the default of the

C. P. CODE (V of 1908), O. 21, R. 71.

purchaser in paying the purchase-money, any loss occurs on the subsequent sale, the defaulting purchaser will be liable. Per *Kumarasami Sastri*, J.—Though O. 21, R. 71, does not expressly provide for the issue of notice to the defaulting purchaser, it is the duty of the Court to give him notice and to hear and decide on his objections before it orders execution to issue against him. The objections which a defauling purchaser can urge under R. 71 are only those which can be urged in an application to set aside a sale under O. 21. The re-sale should be in a reasonable time after the first sale and the property re-sold should be substantially the same and that any difference will not matter if the difference in the condition of the property or title thereto, is one which would occur in the ordinary course of things, having regard either to the nature of the property or transactions in respect thereof having legal force at the date of sale or was brought about by the first purchaser's default. There is no warranty of title in the case of sales by Court. (*Wallis*, C.J., *Ayling and Kumaraswami Sastri*, JJ.) AYYA ANNA VAJHULLA VENKATACHELLA AYYA GARU v. RAMA GIRJEE NEELKANT GIRJEE.
41 Mad. 474=34 M.L.J. 186=23 M.L.T. 9=43 I.C. 685=7 L.W. 159=(1918) M.W.N. 121.

———O. 21, R. 71—*Loss on re-sale—Defaulting purchaser is liable.*

Where the Court acting under Prov. Insol. Act, sells the insolvent's property and it is resold owing to the failure of the auction-purchaser to make up the deposit, the Court can ask the auction-purchaser to make up the difference if the proceeds of the second sale fall short and can realize the amounts under R. 71. (*Kotwal*, A.J.C.) MANAKCHAND v. IBRAHIM. **62 I.C. 307=17 N.L.R. 49.**

———O. 21, Rr. 71 and 85—*Suit to set aside order.*

A defaulting purchaser, who has been ordered to make good a deficiency of price, resulting from a re-sale attached in execution of the decree, can bring a separate suit to set aside the order. (*Drake-Brockman*, J.C.) PARBAT v. BINDRAJ. **12 I.C. 360=7 N.L.R. 135.**

———O. 21, R. 71—*Remedy not exhaustive.*

A person damnified in the manner indicated in R. 71 may have recourse to other remedies than those provided in R. 71 to recover damages, unless he has got his relief under R. 71. A claim and certificate issued under R. 71, is not an interest bearing debt. (*Atkinson and Roe*, JJ.) KAMESWAR NARAIN SINGH v. HARBANS BABNI. **50 I.C. 59=1919 Pat. 210.**

———O. 21, Rr. 72 and 90—*Leave to bid refused—Purchase by decree-holder is voidable and not void.*

A purchase at an execution sale by the decree-holder who has not obtained leave to bid, is not void nor a nullity but is only to be avoided on

C. P. CODE (V of 1908), O. 21, R. 72.

the application of the judgment-debtor or some other person interested. Such a sale can only be set aside upon application and upon cause shown. The same would be the result, if the decree-holder had applied for leave to bid and had been refused such leave. (*Lord Phillimore*) RAI RADHA KRISHNA v. BISHESWAR SAHAY.
16 L.W. 190=3 Pat. L.T. 329=31 M.L.T. 209 P.C. 49 I.A. 312=(P.C.)=21 A.L.J. 23=27 C.W.N. 294=1 Pat. 733=44 M.L.J. 718=37 C.L.J. 480=25 Bom. L.R. 680=67 I.C. 914=9 O. & A.L.R. 194=(1922) 336 (P.C.)

———O. 21, R. 72—*Appeal.*

An order refusing leave to bid is not appealable. (*Lord Macnaghten*). KO THA HNYIN v. MA HNYINI. **38 Cal. 717=15 C.W.N. 862=(1911) 2 M.W.N. 449=13 Bom. L.R. 694=14 C.L.J. 241=8 A.L.J. 1117=6 L.B.R. 26=4 Bur. L.T. 257=11 I.C. 545=38 I.A. 126 (P.C.).**

———O. 21, R. 72—*Benamidar—Purchase without leave.*

Where a benamidar purchases property for mortgagee decree-holder at a Court sale under the latter's decree, and the latter has not asked for permission to bid for the property, the purchase is not void but only voidable at the instance of judgment-debtor. (*Shah and Hayward*, JJ.) RAMACHANDRA BHAT v. GAJANAN NARAYAN DESHMUKH.
44 Bom. 352=56 I.C. 349=22 Bom. L.R. 295.

———O. 21, R. 72—*Execution proceedings—Transfer to Collector—Leave to bid—Set off—Application to be made to Court—Bombay High Court Circulars.*

Where proceedings in execution of a decree have been transferred to the Collector, the decree-holder can apply to the Collector to grant him leave to bid at the sale. If the decree-holder desires a set off, he should apply to the Court under O. 21, R. 72, C.P.C. (*Macleod* C. J. *and Heaton*, J.) MARTAND TRIMBAK GADRE v. DAYA APAJI PHATAK.
44 Bom. L.R. 346=55 I.C. 527=22 Bom. L.R. 106.

———O. 21, R. 72—*Contravention of—Purchase by decree-holder without leave of Court—Illegality or mere irregularity.*

Failure to obtain leave to bid by decree-holder, is an irregularity only and does not nulify the Court-sale. It only makes the sale voidable on an application to set it aside within the period prescribed in Art. 166 of the Lim. Act. 23 M. 227, Ref. (*Scott*, C.J. *and Heaton*, J.) GANESH NARAIN KHARE v. GOPAL VISHNU APTE. **41 Bom. 357=39 I.C. 3=19 Bom. L.R. 75.**

———O. 21, R. 72—*Mortgage decree—Purchase in execution without permission of Court—Voidable and not void.*

A purchase of the mortgaged property in an execution sale by the mortgagee decree-holder

C. P. CODE (V of 1908), O 21, R. 72.

without the permission of the Court under O. 21, R. 72, C.P. Code is not void but merely voidable.

Per *Suhrawardy*, J.—The defendant in possession could plead the voidable character of the purchase by the mortgagee irrespective of the question of limitation. (*Walmsley and Suhrawardy*, JJ.) SARADINDU CHAKRAVARTI *v.* GOSTA BEHARI PRAMANIK.

27 C.W.N. 208=37 C.L.J. 403=75 I.C. 196=1923 Cal. 302.

———O. 21, R. 72—*Contravention of—Purchase by mortgagee—Leave to bid.*

When a mortgagee has purchased the equity of redemption in contravention of the provisions of S. 99 of T. P. Act, it should not be presumed under S. 114, Evidence Act, in the absence of evidence that the Court granted leave to bid. The purchase is voidable but not void. (*Sanderson*, C. J., *Woodroffe Mookerjee, Chatterjee and Newbould*, JJ.) UTTAM CHANDRA DAW *v.* RAI KRISHNA DALAL.

47 Cal. 377=24 C.W.N. 229=55 I.C. 157=31 C.L.J. 98 (F. B.).

———O. 21, R. 72—*Setting aside sale—Substantial loss by judgment-debtor not necessary.*

On a sale being set aside under R. 72 on account of the decree-holder's failure to obtain permission to bid at the sale, it is not necessary to see whether the judgment-debtor has sustained substantial loss by the sale. (*Spencer and Ramesam*, JJ.) KONDAPALLI TATIREDDI *v.* RAMACHANDRA RAO UPPALURU.

13 L.W. 616=62 I.C. 854=(1921) M.W.N. 585.

———O. 21, R. 72—*Rateable distribution—Permission to bid and order to set off decree debt, is subject to rights of other decree-holders.*

Where a Court permits a decree-holder to bid at an auction to set off the purchase-money against his decretal amount, the rights of the rival decree-holders under S. 73 are not disturbed and they have a right to the distribution. (*Seshagiri Aiyar*, J.) ARUNACHELLAM CHETTY *v.* SOMASUNDARAM CHETTY.

59 I.C. 86=12 L.W. 328.

———O. 21, R. 72—*Scope of.*

Per *Oldfield*, J.—O. 21, R. 71 has reference to the defaulting purchaser, and is concerned only with the legal relation created by a purchase assumed to be regularly made not with the consequence of its repudiation by the bidder. (*Oldfield and Seshagiri Aiyar*, JJ.) RAJAH OF BOBBILI *v.* AKELLA SURYANARAYANA.

42 Mad. 776=37 M.L.J. 274=51 I.C. 805=(1919) M.W.N. 784.

———O. 21, Rr. 72, 86 and 92—*Permission to bid given on conditions—Failure to fulfil conditions—Court can refuse confirmation of sale.*

An application for permission to bid at an execution sale was granted on terms, that a certain sum of money due to a prior charge holder should be paid in Court. The conditions were not fulfilled *in toto*, but the properties were nevertheless purchased in auction by the decree-holder: *Held*, apart altogether from O. 21, Rr. 72 and 92 the Court has power to refuse to confirm the sale under O. 21, R. 86 or under the inherent powers of Court. (*Miller*, C.J. *and Coutts*, J.) MT. JANAKBATI CHAUDHRAIN *v.* RAMESHWAR SINGH.

1 P. 285=69 I.C. 872=1 Pat. L.R. 179=1922 P. 511.

———O. 21, Rr. 72 and 84—*Delay in deposit.*

O. 21, R. 72 applies only to the holders of decree in execution of which the property is sold. Delay to make deposit is not a material irregularity and unless substantial injury is the result, the sale is not vitiated. (*Heald and Lentaigne*, JJ.) MAUNG CHIT HLAING *v.* N. A. R. M. CHETTY FIRM.

2 Bur. L.J. 166=1924 Rang. 81.

———O. 21, Rr. 72 (3) and 90—*Leave to bid—Conditions—Joinder of a stranger—Separation of interests purchased in one bid.*

A decree-holder associating with himself a stranger, cannot claim the sale to be valid, inasmuch as his interests cannot be separated, the bid being joint. The law authorizes a Court to impose any conditions it considers fit on the permission granted to a decree-holder to bid at a sale of the property of his judgment-debtor. An order imposing on the decree-holder a condition fixing the amount of the decree as the lowest bid, is valid and not illegal. 5 C.W.N. 265, Foll.; 28 All. 671; 16 Bom. 404, Dist. (*Lindsay*, J.C. *and Rafique*, A.J.C.) RAJ KUAR *v.* CHUNNOO LAL. 15 I.C. 888=16 O.C. 86.

———O. 21, R. 78—*Moveable—Execution sale—Setting aside.*

Semble There is no provision in the Code under which an auction sale of moveable property which has been duly confirmed by the execution Court can be set aside upon the application of the decree-holder or of the judgment-debtor. (*Shah Din*, J.) HUKAM CHAND *v.* GANGA RAM. 49 I.C. 140=12 P.R. 1919.

———O. 21, R. 78—*Sale of goods not answering description—Remedy of purchaser—Suit for recovery of price.*

Where goods offered for sale in execution of a decree are described as of a particular denomination, and every circumstance points to the buyer having contracted for the specific goods produced as described, and the goods tendered do not answer that description, the purchaser is entitled to reject them, and, if he has paid for them, to recover the price as money had and received for his use. (*Mitra*, A.J.C.) TUKARAM *v.* DEOJI. 54 I.C. 815.

———O. 21, R. 78—*Money—If moveable property.*

C. P. CODE (V of 1908), O. 21, R. 79.

Money is not a "movable property" within the meaning of O. 21, R. 78. (*Heald and Lentaigne*, JJ.) MAUNG LUN BYE *v.* MAUNG PO NYUN. **2 Bur. L.J. 151=1 Rang. 360=76 I.C. 679=1924 Rang. 21.**

———**O. 21, R. 79**—*Companies Act—Purchaser of shares at Court sale—Right of.*

Per *Shah*, J.:—It cannot be inferred from O. 21, R. 79 that the directors of a Company are compellable to accept the purchaser of shares at a Court sale, as the transferee. (*Batchelor*, A.C.J. *and Shah*, J.) MANI LAL BRIJ LAL *v.* GORDON SPINNING AND MANUFACTURING CO., LTD. **41 Bom. 76=37 I.C. 666=18 Bom. L.R. 982.**

———**O. 21, R. 80**—*Power of Court.*

The provisions of R. 80 of O. 21 empower a Court to cancel a previous endorsement to enable an auction-purchaser of a pro-note at a Court sale to realise his amount paid. (*Twomey*, J.) NETRAM *v.* P. N. MUDALIAR. **12 I.C. 913=4 Bur. L.T. 188.**

———**O. 21, R. 83**—*Mortgagee in possession—Transfer as part of ordinary management of the mortgaged property after decree on mortgage but before sale.*

By the sale the plffs. acquired the right of the prior mortgagees, to the extent of their mortgages. They also acquired such right as the mortgagors had left in them at the date of the sale. But at the date of the sale, the mortgagors had already made the partial alienations. The plffs. must be deemed to have purchased the property with notice. The plffs. are not entitled, to question the validity of the transfers made to the defts. (*Richards*, C.J. *and Banerji*, J.) ADANKI TELI *v.* MOTICHAND. **16 I.C. 102=9 A.L.J. 789.**

———**O. 21, R. 83**—*Alienation of property with sanction of Court—Minor's property—Procedure under Ss. 29 and 30 of the Guardians and Wards Act not followed—Effect of.*

S. 29 of the Guardians and Wards Act provides that a guardian of the minor's property cannot alienate any interest in it without a sanction of Court. S. 30 makes transfers by guardian without sanction voidable at the instance of any other person affected thereby. But such person must not ignore the transaction and he is bound to pay the consideration paid by the transferee. If this is not complied with, he is not entitled to have the transfer set aside. (*Mukerji and Cuming*, JJ.) VIJENDRA MOHAN SARMA *v.* MANORAMA DASI. **36 C L J. 326=49 Cal. 911=28 C.W.N. 57=1922 Cal. 150.**

———**O. 21, R. 83**—*Attachment under another decree, if sustainable.*

Where a purchaser buys property on the authority of the Court's certificate granted before an attachment by a rival decree-holder, he acquires an absolute title and so the attachment of it in execution of another decree is unsustainable. A formal application to obtain the Court's confirmation of a private transfer under O. 21, R. 83, C.P.C. is not necessary nor need a formal order declaring such confirmation be recorded. The effect of the Court's order to pay the purchase-money to the creditor taking at the same time no objection to the sale, is to confirm the sale. It is doubtful if a sale under O. 21, R. 83 comes under R. 92 and even if it should, there is nothing to prevent the confirmation of the sale within the 30 days from the date of sale. Payment to the judgment creditor's pleader under the order of the Court is a payment into Court, the pleader being made the agent of the Court to receive the money. (*Stephen and Mullick*, JJ.) MIAJAN ALI *v.* RUPCHANDRA SARMA. **21 I.C. 210.**

C. P. CODE (V of 1908), O. 21, R. 83.

———**O. 21, R. 83**—*Decree for sale in execution of mortgage decree—Provisions inapplicable.*

The provisions of O. 21, R. 83, C.P.C. do not apply to sale of property directed to be sold in execution of a decree for sale on enforcement of mortgage on such property. (*Shadi Lal*, J.) KORA LAL *v.* THE PUNJAB NATIONAL BANK, LTD., MULTAN. **2 U P.L.R. Lah. 91=118 P.L.R. 1920=55 I.C 816=5 L.L.J. 67.**

———**O. 21, R. 83**—*Co-judgment-debtors—Sale by manager of joint-family—Effect on other's share—Purchaser's rights.*

Where the equity of redemption in a certain property was held by the divided brothers in equal shares and the same was ordered to be sold in execution of a decree against both and the senior brother obtained leave to sell privately under O. 21, R. 83 and the Court allowed the sale to go on in spite of the objection of the junior brother. *Held*, that the senior brother had no power to sell his junior brother's interest after attachment, and, the latter is entitled to recover his half share from the purchaser on payment of half the price paid by the purchaser which had gone to discharge family debts. 26 Bom. 379, Foll. (*Wallis*, C.J. *and Ayling*, J.) RAMAYYA AIYAR *v.* KRISHNA CHARIAR. **11 L.W. 213=26 M L T. 151=(1919) M.W.N. 611=52 I.C. 966=10 L.W. 291.**

———**O. 21, R. 83 (3)**—*No power to extend time for redemption—Appeal.*

An application for extending the time for redemption to enable the mortgagor to raise the amount by mortgage or private sale is expressly prohibited by the Code, and an appeal does not lie from an order of Court refusing to do it. (*Schwabe*, C.J. *and Coleridge*, J.) KAVERIBAI AMMAL *v.* MEHTA & SONS. **46 M.L.J. 71=18 L.W. 615=(1923) M.W N. 894=75 I.C. 901=1924 Mad. 234.**

———**O. 21, Rr. 83 and 92, O. 43, R. 1 (j)**—*Appeal.*

An order setting aside an execution sale passed on default of the auction-purchaser to deposit his purchase, is not appealable. (*Banerjee*, J.) KATORI KUNJRA *v.* AJUDIA PRASAD. **56 I.C. 697=2 U.P.L.R. (All.) 81.**

C. P. CODE (V of 1908), O. 21, R. 84.

———O. 21, R. 84—*Execution sale—Deposit of purchase money — Decree-holder — When should withdraw—Interest when allowable.*

No decree-holder is permitted to withdraw the money deposited in Court as sale proceeds before the confirmation of the sale, and he is entitled to interest up to that time. 15 C.W.N. 783; 19 C.L.J 358, Foll. (*Mookerjee and Beachcroft*, JJ.) UPENDRA NATH CHOWDHURY *v.* BHUDEB CHANDRA ROY CHOWDHURY.
25 I.C. 859.

———O. 21, R. 84—*Failure to make deposit —Effect.*

If the deposit under O. 21, R. 84 of C.P.C. is not paid at all, the sale is null and void, 5 All. 316 and 30 All. 273, Foll. (*Caspersz and Chatterjee*, JJ.) MAHOMED ALI MIA *v.* KIBERIA KHATUN. **9 I.C. 66=15 C.W.N. 350.**

———O. 21, R. 84—*Omission by purchaser to deposit 25 per cent—Does not vitiate sale.*

In the absence of proof of substantial injury to the judgment-debtor an auction-purchaser's omission to deposit the 25 per cent in Court is a mere irregularity and does not vitiate the sale. 28 All. 238; 16 Cal. 33; 14 Mad. 227 Rel; 30 All. 273; 5 All. 316, dissented from. (*Abdul Raoof*, J.) INAIT ULLAH *v.* THE PUNJAB NATIONAL BANK, LTD. **67 I.C. 427.**

———O. 21, R. 84—*Execution sale—Bids—Effect—Death of bidder—Next lower bidder if can be declared to be the purchaser.*

A bid at a Court-sale in a Court-auction is merely an offer or a proposal; it is the highest bidder that is regarded as having made the final proposal which may or may not be accepted by the auctioneer. Every bid that is made does not remain in abeyance pending acceptance by the auctioneer. Where a higher bid is made, all preceding lower bids are impliedly refused. 147 P. R 925, Expl. Where the highest bidder dies, the proper course for the Court is to direct a fresh auction and not to treat the next higher bidder as the auction-purchaser and require him to deposit the money in the Court. Such an order is illegal and open to revision under S. 115, C.P.C. (*Oldfield and Seshagiri Iyer*, JJ.) RAJAH OF BOBBILI *v.* AKELA SURYANARAYANA RAO. **42 Mad. 776= 37 M.L J. 274=51 I.C. 805= (1919) M.W.N. 784.**

———O. 21, R. 84—*Extension of time.*

An officer conducting a Court-sale has no inherent power to extend the time for depositing the 25 per cent. of the purchase money, which is to be deposited immediately and a failure to deposit immediately annuls the sale. (*Stuart*, A.J.C.) ALI MUHAMMAD *v.* ALI KHUNAM. **30 I.C. 230=2 O.L.J. 216.**

———O. 21, R. 84—*Sale when complete—Acceptance of bid—Effect of deposit.*

The function of a Nazir or other officer appointed to conduct an auction sale is of a ministerial character. If he conducts it in the presence of the presiding officer and the latter forthwith declares under O. 21, R. 64, C.P. Code, who the purchaser is and signs the formal order the sale is complete. If it is not held in his presence, it can be completed only by his order closing the bidding or an order accepting the bid under O. 21, R. 84. Where in anticipation of sanction the Nazir accepts the deposit required from the highest bidder, that is only in law an offer, and it is open to the Court to resume the auction. (*Das and Macpherson*, JJ.) JAIBHADAR JHA *v.* MATUKDHARI JHA.
2 P. 548=76 I C. 113=4 P.L.T. 498= 1923 Pat. 190=1923 P. 525.

C. P. CODE (V of 1908), O. 21, R. 86.

———O. 21, R. 85—*Time for payment of the purchase-money—Extension of—No objection—Confirmation of sale.*

Though it is not open to the Court to extend the time for payment of the purchase price without the consent of the parties, still where an extension of time has been granted without objection on the part of the parties and the sale has been confirmed and the money drawn by the decree-holder, the sale cannot be set aside on account of the irregularity. (*Spencer and Ramesam*, JJ.) VARANAKKOT ILLATH SUBRAMANYAM NAMBUDIRI *v* VYKUNDA KAMMATHI. **43 M.L J. 477=16 L.W. 319= (1922) M.W.N. 707=69 I.C. 1001= 31 M.L.T, 363 (H C.)=1923 Mad. 48.**

———O. 21, R. 85—*Execution sale—Setting-aside—Withdrawal of purchase money—Confirmation on appeal—Repayment.*

Where, on an execution sale being confirmed in appeal, the auction-purchaser who had withdrawn his money on the sale being set aside by the lower Court, is ordered to repay it, the time limit of 15 days provided by O. 21, R, 85 will not apply as the repaying of the money is only the carrying out of an order of the Court. 29 Cal. 626, Dist. (*Abdur Rahim and Bakewell*, JJ.) SHENBAGAMUTHU PILLAI *v.* VADUGANATHAN CHETTY. **42 I.C. 552= (1917) M.W.N. 861.**

———O. 21, Rr. 85 and 86—*Decree-holder purchaser—Duty of, to pay balance of purchase money into Court—Default—Re-sale.*

The provisions of O. 21, Rr. 85 and 86 are mandatory and if the decree-holder purchaser fails to comply with the rules by neglecting to deposit the balance after deducting the decree amount, the property is liable to be re-sold. (*Atkinson and Jwala Prasad*, JJ.) RAMENDRA NATH *v.* MUSSAMAT HIKAIT KUER.
51 I.C. 316.

———O. 21, R. 86—*Deposit if may be refunded.*

A Court should, in its discretion under O. 21, R. 86 of the Code, refund the amount deposited by an auction-purchaser in a sale in execution, on good reason shown to the satisfaction of the Court as to why he failed, (*Hallifax*, A.J.C.) GANPAT RAO *v.* KESRICHAND.
59 I.C. 708=17 N.L.R. 15.

C. P. CODE (V of 1908), O. 21. R. 86.

———**O. 21, R. 86**—*Leave to bid on conditions—Failure to fulfil conditions—Court can refuse confirmation.*

Where a decree-holder is permitted to bid at an auction-sale, subject to certain conditions being fulfilled and those conditions turn out not to have been fulfilled, the Court can, apart altogether from R. 72 and R. 92 of O. 21 either under R. 86 of O. 21 or under its inherent powers, refuse to confirm the sale and have a resale. (*Miller*, C. J *and Coutts*, J.) JANAKVATI v. RAMESHWAR. 1 P. 235=69 I.C. 872= 1 P. L.R. 179=1922 P. 511.

———**O. 21, R. 88**--*Pre-emption—Co-sharer.*

The object of the rule is to enable a co-sharer in a mahal to keep out strangers. It provides that a co-sharer of the property of which a share is sold, is entitled to pre-empt that share when the highest bid is made by a person who is not a co-sharer. Hence a pre-emption suit will not be against a vendee, who is a co-sharer in a different *patti* but in the same mahal. (*Chamier*, J.) DAMBAR SINGH v. MURARI LAL. 26 I.C. 95=12 A.L.J. 1148.

———**O. 21, R. 88**—*Pre-emption—Auction-sale—Share of undivided moveable property sold—Bid for the same amount.*

Where, in an auction-sale of a share of undivided immoveable property, a co-sharer and the person proceeding him who is not a co-sharer bid the same amount and the co-sharer asserts his right of pre-emption, the requirements of O. 21, R. 88, are complied with. 3 All. 850; 3 All. 827, Ref. (*Kanhaiya Lal*, A.J. C.) IQAL HUSAIN v EJAZ HUSAIN. 35 I.C. 654=3 O L.J. 408.

———**O. 21, R. 89.**

APPEAL.
APPLICABILITY.
DEPOSIT.
DISMISSAL FOR DEFAULT.
FORM OF APPLICATION.
FORUM.
LIMITATION.
OBJECT OF.
RIGHT OF DECREE-HOLDER.
RIGHT TO APPLY.
SETTING ASIDE SALE.
STRICT CONSTRUCTION.

Appeal.

———**O. 21, R. 89 and O. 43, R. 1**—*Appeal—Second appeal.*

No second appeal lies from an order passed under O. 21, R. 89, Civil Procedure Code though the auction-purchaser is himself the decree-holder. (*Shah and Crump*, JJ.) KACHU RAVJI MINDHE VANJARI v. TRIMBAK KHEM CHAND GUJARATHI. 44 Bom. 472= 56 I.C. 597=22 Bom. L.R. 383.

———**O. 21, Rr. 89 and 92, S. 104 (2) and S. 43, R. 1, Cl. (J)**—*Appeal, execution sale—Order disallowing application under O. 21, R. 89, C. P. Code—Second appeal, if lies.*

No second appeal lies from an order passed in first appeal from an order under O. 21, R. 89 or R. 92, C.P.C., S. 104, sub section (2) of the Code takes away the right of second appeal where a second appeal could lie in cases under S. 310-A. read with S. 244 of the Code of 1882. (*Jenkins*, C.J. *and Coxe*, J.) ASIMUDDI SHEIKH v. SUNDARI BIBI. 38 Cal. 339= 15 C.W.N. 344=10 I.C. 345=14 C.L J. 224.

———**O. 21, R. 89**—*Appeal.*

An appeal lies against an order refusing to set aside a sale under O. 21, R. 89 though the purchaser is not the decree-holder. (*Sundara Aiyar and Phillips*, JJ.) LAKSHMINARASIMHA v. LAKSHMAMMA. 12 I.C. 169= 11 M.L,T. 380.

———**O. 21, Rr. 89, 90 and 91**—*Appeal—Second appeal.*

Order passed on appeal from an order allowing or rejecting an application for setting aside a sale in execution, is not subject to second appeal. (*Stanyon*, A.J.C.) WASUDEO v. HIRALAL. 17 I.C. 885=8 N.L.R. 177.

———**O. 21, R. 89**—*Appeal—Order under—Second appeal.*

A second appeal does not lie from an order under O. 21, R. 89. (*Mullick*, J.) RAZI-UD-DIN HUSSAIN v. BENDESHRI PRASAD SINGH. 36 I.C. 769.

Applicability.

———**O. 21, R. 89**—*Applicability of—Partition suit—Award of arbitrators directing sale of properties and payment out of proceeds—Sale can be set aside on deposit.*

In a partition suit instituted on the Original side of the High Court, the disputes between the parties were referred to arbitration under orders of the Court. The arbitrators made an award directing the sale of one of the properties which were the subject-matter of the suit and the payment of the common debts as well as of certain sums to the plaintiff. A decree was passed in terms of the award and the Registrar of the High Court sold the properties in terms of the award. The defendants applied with the plaintiff's consent for setting aside the sale under O. 21, R. 89, C.P.C. and it was contended that those provisions did not apply to the case. *Held*, that the sale was in enforcement of a decree on the award and the provisions of O. 21, R. 89, C.P.C. were applicable. (*Woodroffe and Suhrawardy*, JJ.) NIRODE NATH BANERJEE v. AMULHYA DHONE. 27 C.W.N. 466= 1923 Cal. 582.

———**O. 21, R. 89**—*Applicability—Mortgage decrees—Original Side of the Calcutta High Court.*

R. 89 applies to the sales held in execution of the mortgage decrees and to sales on the Original Side of the Calcutta High Court. (*Mukerji*, A.C.J. *and Fletcher*, J.) VIRJIBHUN DAS MOOLGI v. BISHESWAR DAS HARGOVIND. 48 Cal. 69=60 I.C. 406= 25 C.W.N. 1032.

C. P. CODE (V of 1908), O. 21, R. 89—Applicability.

———**O. 21, R. 89**—*Applicability—Sale by the original side of the High Court—Mortgage decree.*

O. 21, R. 89, C.P.C. may apply ordinarily to sales on mortgage decrees but it does not apply to a suit on the Original Side of the High Court where, without attachment, the sale has been held by the Registrar in conformity with the rules of the Court. The practice under the rules of the High Court and the C.P.C. are not workable together in this respect. (*Woodroffe*, J.) SURENDRA KRISTO ROY *v.* GURU PRASAD GHOSH. **59 I.C. 432=24 C.W.N. 536.**

[But See 24 C.W.N. 1032].

———**O. 21, R. 89**—*Applicability of—Sale under Public Demands Recovery Act.*

O. 21, R. 89, C.P. Code, is not applicable to a sale under Public Demands Recovery Act. S. 19 (2) of the Public Demands Recovery Act expressly bars its operation, but the judgment-debtor after tendering the amount contemplated by the section can proceed under S. 21 of the same Act. (*Mookerjee and Beachcroft*, JJ.) BEPIN BEHARI BERA *v.* SHASHI BHUSHAN DATTA. **18 C.L.J. 628=22 I.C. 95=18 C.W.N. 786.**

———**O. 21, R. 89**—*Applicability—Original Side Rules 75, 214—Sale in partnership suit.*

O. 21, R. 89 does not apply to a sale held in a partnership suit for the realization of partnership assets and R. 214 of the Original Side Rules only applies to cases to which O. 21, R. 89 is applicable. (*Wallis*, C.J. *and Krishnan*, J.) TULJARAM RAO *v.* RAMACHANDRA ROW. **14 L.W. 515=41 M.L.J. 465=68 I.C. 916=(1921) M.W.N. 736.**

———**O. 21, R. 89**—*Applicability—Deposit by one judgment-debtor.*

O. 21, R. 89 of the Code has to be strictly complied with and a judgment-debtor is not entitled to take advantage of any deposit made by his co-judgment-debtor, independently made. (*Krishnan*, J.) SUBBAYYAR *v.* MUTTAYYAR. **14 L.W. 631=66 I.C. 983=42 M.L.J. 71=30 M.L.T. 93.**

Deposit.

———**O. 21, R. 89**—*Deposit—Legality of—Improper refusal to set aside sale—Interference in revision.*

Two creditors A and B obtained a decree against a common debtor and A attached his properties. B applied for rateable distribution. A proclamation of sale was issued, ordering the sale of the judgment-debtor's property for the recovery of the decretal amount due to A. The judgment-debtor paid A's decree in full and the appellate Court stayed execution of the decree and sale. The Court below in disregard of the order of the appellate Court held the sale and the property was knocked down at a certain sum. The judgment-debtor tendered to the Court within 30 days the amount due on B's decree with the addition of 5 per cent. The amount deposited was more than that specified in the sale proclamation but short of a few rupees so far as B's decree was concerned. *Held* that the deposit was good under O. 21, R. 89 and the sale should have been set aside. Where the lower Court improperly refuses to set aside an execution sale under O 21, R. 89, C.P.C. the High Court can interfere in revision. (*Piggott and Walsh*, JJ.) ABUL NASAR RASHID-UD DIN AHMAD *v.* LALITA PRASAD. **L R. 4 A. 121=21 A.L.J. 162=71 I C. 1018=1923 All. 315.**

———**O. 21, R. 89**—*Deposit—Usufructuary mortgagee.*

A usufructuary mortgagee making payment to have an execution sale set aside is not a volunteer. (*Banerji*, J.) BENI MADHO *v.* SARWAR DAT. **20 A.L.J. 42=64 I C 918=1923 All. 127.**

———**O. 21, Rr. 89 and 92**—*Deposit—Made in treasury—Validity of.*

Deposits under O 21, R. 89 must be in the Civil Court and not in the Treasry. Whether or not O. 21, R. 89 is completely complied with is a question which the court has jurisdiction to decide and if in the exercise of such jurisdiction it comes to an erroneous conclusion the High Court cannot, in revision, interfere with the order. (*Richards*, C.J. *and Banerji*, J.) FAZAL RAB *v.* MANSUR AHMAD. **40 All. 426=45 I.C. 773=16 A.L.J. 483.**

———**O. 21, R. 89**—*Deposit—Stranger.*

Tender by a person who is not a general or special attorney or a vakil for the owner of the property, sold is not a valid tender within the meaning of the rule. (*Chamier*, J.) SARVOI BEGAM *v.* HAIDAR SHAH. **13 I.C. 405=9 A.L.J. 12.**

———**O. 21, R. 89**—*Deposit—Amount of—Application to set aside sale.*

The expression "any amount which may have been received by the decree-holder" in O. 21, R. 89(b) C.P. Code means money actually received by the decree-holder and does not include payment of sale proceeds into Court. 23 B. 723 foll. (*Macleod*, C.J. *and Crump*, J.) TOTA RAM *v.* CHHOTURAM, **28 Bom. L.R. 446=78 I.C. 454=1926 Bom. 299 (2).**

———**O. 21, R. 89**—*Deposit—Voluntary and unconditional.*

A payment to set aside an auction-sale, by a person claiming to be the owner of the property sold, cannot recover the amount from the decree-holder, after the sale is set aside on the ground that the judgment-debtor had no interest in the property. (*Macleod*, C.J. *and Shah*, J.) NARAYAN VASUDEVACHARYA *v.* ANGUNDA MALIGUNDA. **45 Bom. 1094=62 I.C. 104=23 Bom. L.R. 455.**

———**O. 21, R. 89 and S. 73**—*Deposit—Amount of—Decree-holder—Meaning of.*

The 'decree-holder' in R. 89 means the person for the satisfaction of whose decree, the sale has been ordered and does not include others

C. P. CODE (V of 1908), O. 21, R. 89—Deposit.

claiming rateable distribution out of the sale proceeds under S. 73. A deposit of the amount shown in the sale proclamation plus 5 per cent. is enough. (*Scott*, C J. *and Chandavarkar*, J.) GANESH BAL NAICK *v.* VITTAL VAMAN MALAYA. **37 Bom. 387=19 I.C. 475=15 Bom. L.R. 244.**

———**O. 21, R. 89—(1882, S. 310-A)**—*Deposit—Acceptance—Waiver.*

If a landlord accepts the deposit by a transferee of an occupancy holding under the section to set aside its sale in execution of a rent decree, against the old tenant without objecting the right to deposit, he cannot subsequently refuse to recognise him as tenant of holding. The acceptance means a recognition of the transferee as tenant. (*Woodroffe and Mookerjee*, JJ.) RAJANIKANTA SARKAR *v.* MIDNAPUR ZEMINDARI CO. **38 I.C. 701.**

———**O. 21, R. 89**—*Deposit—Shortage of deposit due to wrong information by officer of Court—Effect—Sale if can be set aside on balance being paid up.*

Where a judgment-debtor deposited in Court under O. 21, R. 89 within the prescribed time an amount which was represented by the Chief Officer of the Court to be due under the decree, but which was found to be insufficient, whereupon he applied for permission to pay the balance and the Court rejected the application as filed out of date and confirmed the sale. *Held*, that as the judgment-debtor was misled into committing a mistake, by an officer of the Court, who in the course of his duties is entitled to represent the amount due and the sale should be set aside on the judgment-debtor paying up the balance due. (*Fletcher and Chatterjee*, JJ.) GHULAM MAHOMED MUSTAFA *v.* MANINDRA NATH BHATTACHARYA. **22 I.C. 842.**

———**O. 21, R. 89**—*Deposit—Validity of—Deposit by purchaser under sale not confirmed—Deposit if can be taken advantage of—Persons applying to set aside sale.*

A deposit by an auction-purchaser in Court, cannot, when the sale is not confirmed, be taken advantage of by any person to support his application under O. 21, R. 89, 28 M.L.J. 262, Foll. (*Sadasiva Aiyar and Napier*, JJ.) MUHIUDDIN ROWTHER *v.* RANGACHARIAR. **31 I.C. 913.**

———**O. 21, R. 89**—*Deposit—Application by one judgment-debtor—Deposit by others.*

A Judgment-debtor who applies to have a sale set aside under O. 21, R. 89, cannot claim that the moneys deposited by the other judgment-debtors who have not joined in his application should be regarded as his. 23 B. 723; 1 C.W.N. 703. F.; 18 I.C. 579; 14 I.C. 326, Dist. (*Spencer and Seshagiri Aiyar*, JJ.) KARUNAKARA MENON *v.* KRISHNA MENON. **39 Mad. 429=2 L.W. 196=27 I.C. 952=28 M.L.J. 262.**

C.P. CODE (V of 1908), O. 21, R. 89—Deposit.

———**O. 21, R. 89**—*Deposit—Money paid by judgment-debtors other than those applying to set aside the sale—Decree-holder in position to receive amount—Effect.*

A judgment-debtor applying to set aside a sale can take advantage of the sums deposited by the other judgment-debtors provided the entire amount in the sale proclamation is fully made up and the decree-holder is in a position to draw the full amount from Court. (*Tyabji*, J.) MATTATHIL KRISHNA MENON *v.* COLLECTOR OF MALABAR. **22 I.C. 53.**

———**O. 21, R. 89**—*Deposit—Amount of—Extent of deposit.*

Besides 5 per cent. only the amount due to the decree-holder at whose instance the execution took place, is to be deposited and not the amount due to all decree-holders who have applied for rateable distribution under S. 73, C.P. CODE. (*Spencer*, J.) VEERARAGHAVAN PATHAR *v.* VALASSERI PARA MANNADISSIER. **17 I.C. 920=23 M.L.J. 585.**

———**O. 21, R. 89**—*Deposit—Agreement to set-off decretal amount—If amounts to payment.*

An agreement between the decree-holder and the judgment-debtor, by which the decretal amount is made a set-off on account of service rendered and balance paid, is sufficient payment of decretal amount and no cash payment necessary. (*Abdur Rahim and Sundara Aiyar*, JJ.) VEDALA LAKSHMINARSAMMAH *v.* PACHA LAKSHMAMAL. **14 I.C. 326=(1912) M.W.N. 736.**

———**O. 21, R. 89**—*Deposit—Effect of.*

Where the mortgagor makes a deposit under R. 89, his equity of redemption subsists and the deposit has the effect of redeeming the mortgaged property. (*Daniels and Wasir Hussain*, A J.Cs.) JAI KISHORI *v.* MUHAMAD ALI MOHAMAD KHAN. **60 I.C. 560=7 O.L.J. 620.**

———**O. 21, Rr. 89 and 92**—*Deposit—Limitation—Parties to application—Notice.*

Order 21, rule 92, C.P. C, nowhere speaks of the auction-purchaser being made a party. It provides that no sale can be confirmed or set aside unless notice of application has been given to all persons affected thereby, and the rule means that the Court is incompetent to make any order at all, till such notice has been given. The duty of moving the Court to issue notices lies of course upon the applicant and all that the Court has to do is to give him reasonable opportunity for doing so. On default, the Court may dismiss the application, and there is no obligation upon the Court to issue a notice of its own motion but without the assistance of the applicant. The law requires that the application to deposit should be made within 30 days of the sale. But it does not impose any period of limitation for the issue of notice. (*Mullick and Bucknill*, JJ.) MT. BIBI ZAINAB *v.* PARAS NATH. **4 P.L.T. 491=1 P.L.R. 361=2 P. 800=75 I.C. 430=1923 P. 37.**

C. P. CODE (V of 1908), O. 21, R. 89—Deposit.

———O. 21, R. 89—*Deposit—Validity of—B.T. Act, S. 174.*

In order that the deposit of the decretal amount should be valid and recognised by the Court, it must be made together with 5 per cent. of the purchase money, within 30 days of the sale. (*Atkinson and Jwala Prasad, JJ.*) SARJOO PRASAD *v.* NANOO RAI. **1 P.L.J. 469 = 35 I.C. 779 = 3 P.L.W. 48.**

Dismissal for Default.

———O. 21, R. 89—*Dismissal for default—Restoration—Review.*

A lower Court dismissed for default an application to set aside a sale under O. 21, R. 89 and on a subsequent application by the judgment-debtor reheard the application to set aside the sale. The Court was competent to treat the latter application as one for review. Whether the Court has jurisdiction to restore the application under S. 151 or O. 9, R. 9, (c) is doubtful. (*Sundara Aiyar and Ayling, JJ.*) SWAMINATHA NAICKER *v* R. D. PAUL. **22 M.L.J. 148 = 10 M.L.T. 569 = 12 I.C. 351 = (1912) M.W.N. 547.**

Form of Application.

———O. 21, R. 89—*Form of application—Oral application.*

An application to set aside a sale need not be in writing. Where after an execution sale the judgment-debtor deposits the decretal amount as well as the penalty of 5 per cent., the application must be deemed to be one also for having the sale set aside. (*Banerji, J.*) RAMRAJ SINGH *v.* RABI PROSAD. **63 I.C. 140.**

———O. 21, R. 89—*Form of application—If should be in writing—Requisites of.*

An application to set aside an auction-sale need not necessarily be in writing. It may be made orally but must be in time. A deposit of money alone is insufficient. (*Chamier, J.*) SARVOI BEGAM *v.* HAIDER SHAH. **13 I.C. 404 = 9 A.L.J. 12.**

———O. 21, R. 89—*Form of application—Mere deposit.*

Mere deposit of money under O. 21, R. 89 does not amount to an application to set aside the sale. (*Griffin, J.*) MATHURA PRASAD *v.* RAM LAL. **9 I.C. 33.**

———O 21, R. 89—*Form of application—Deposit.*

A mere deposit of the decree amount, etc., within thirty days unaccompanied by an application to set aside the sale is not a sufficient compliance with O. 21, R. 89 of the C. P. Code. (*Scott, C.J., and Hayward, J.*) RAOJI BABURAO *v.* BANSI LAL. **43 Bom. 735 = 53 I.C. 135 = 21 Bom. L.R. 835.**

———O. 21, R. 89—*Form of application—Auction-purchaser—If a necessary party.*

Where a petition was put in to set aside an auction-sale by depositing the decree amount in Court, but the auction-purchaser is not made a party to the same though his purchase is mentioned in the body of the petition, it is a sufficient compliance with the Code. Notice can issue to him as one of the parties affected by the sale, and it is not necessary he should be formally added as a party. (*Suhrawardy and Panton, JJ.*) RAJ CHANDRA DAS *v.* KALI KANTA DAS. **1923 Cal. 894.**

C. P. CODE (V of 1908), O. 21, R. 89—Form of application.

———O. 21, R. 89—*Form of application—Necessity of written application.*

A sale in execution cannot be set aside under O. 21, R. 89 without an oral or written application within 30 days. (*Sadasiva Aiyar and Moore, JJ.*) POPOONU VENKATA NARASIMHA *v.* JAYANTI LAKSHMI NARASIMHAM. **32 I.C. 783 = 3 L.W. 175.**

———O. 21, R. 89—*Form of application—Mere payment of money—Application to set aside sale, need not be in writing—Amendment when allowed—Revision.*

Mere payment of money under O. 21, R. 89, without an application to set aside the sale is not sufficient. 9 A.L.J. 12, Foll. Such application to set aside the sale need not be in writing. 14 M.L.T. 534; (1914) M.W.N. 62, Foll. If a petition states that the petitioner has paid the money into the treasury and that the object of the petitioner is to have the sale set aside but it contains no formal prayer to that effect, the Court can allow the petitioner to amend it by adding a formal prayer. 2 L.W. 665, Foll. But a High Court will not in revision allow an unstamped memorandum, filed under the Civil Rules of Practice to notify a payment, to be stamped as a petition and to be amended by containing a prayer to set aside the sale under O. 21, R. 89, C.P. Code, nearly 15 months after the application is barred. (*Kumaraswami Sastri, J.*) PARAT VEETHIL SEETHI *v.* AMBALATH VEETHIL KOLATHUR AHMAD, **32 I.C. 45.**

———O. 21, R. 89—*Form of application—Writing signed by applicant.*

An application under O. 21, R. 89 does not necessarily require writing or the applicant's signature. (*Tyabji, J.*) MARIAPPA ANNAM *v.* HARI HARA IYER. **14 M.L.T. 534 = 22 I.C. 291 = (1914) M.W.N. 62.**

———O. 21, R. 89—*Form of application—No prayer to set aside sale—Request to withhold payment.*

The judgment-debtor deposited the decree amount with the extra percentage under O. 21, R. 89, C.P.C., but in his application he prayed that it may not be paid to the decree-holder pending disposal of an appeal. Subsequently on the objection of the decree-holder he withdrew the prayer aforesaid. *Held*, that the object of the deposit was to set aside the sale, and though there was no specific prayer to that effect, the objection to the payment of the decree amount having been withdrawn, the court

C. P. CODE (V of 1908), O. 21, R. 89—Forum.

was bound to set aside the sale. 43 Bom. 735; 16 C.W.N. 904, Rel. (*Adami*, J.) RAM SIVENDRA NARAYAN OJHA *v.* AWADH BIHARY SARAN. **4 P.L.T. 295 = 68 I.C. 629 = 1923 P. 159.**

Forum.

——O. 21, R. 89—*Forum—Sale in execution by Revenue Officer—Application to set aside—Civil Court.*

An application under O. 21, R. 89, must be made to the Civil Court and not to the Revenue Officer. (*Macleod*, C. J. *and Heaton*, J.) TIPANGAVADA *v.* RAMANGAVD. **44 Bom. 50 = 54 I.C. 670 = 22 Bom. L.R. 35.**

Limitation.

——O. 21, R. 89—*Limitation.*

Where a judgment-debtor made an application to a sale officer on 20th April for setting aside a sale held on 20th March and he was directed to come on 30th April but paid the decretal amount on 1st May whereupon the court refused to consider the application on the ground that it was not made within 30 days of the sale. *Held*, the delay in the actual deposit of the money was not due to any act on the part of the judgment-debtor. (*Banerji*, J.) GAJADHAR DAS *v.* RAM SUMIRAN DUBE. **52 I.C. 161 = 17 A.L.J. 991.**

——O. 21, R. 89—*Limitation — Deposit—Time for.*

When a judgment-debtor has done all that he could do to deposit money, time in he is deemed to have deposited money in time though owing to the delay of the treasury, the money was not paid in time. (*Chamier and Piggott*, JJ.) MUNNALAL *v.* RADHAKRISHAN. **37 All. 591 = 30 I.C. 185 = 13 A.L.J. 793.**

——O. 21, Rr. 89 and 85—*Limitation—Application.*

For the conclusion of a sale, the sale officer must accept the final bid and declare the purchaser ordering him to pay over 25 per cent. of the purchase money. An application to set aside the sale by depositing the amount must be made within 30 days from such date. (*Tudball and Rafique*, JJ.) MUNSHI LAL *v.* RAM NARAIN. **35 All. 65 = 17 I.C. 783 = 10 A.L.J. 475.**

——O. 21, Rr. 89, 90 and S. 47—*Limitation—Extension of time—Agreement between judgment-debtor and decree-holder-auction-purchaser by Court—Appeal.*

In a petition to set aside a sale, the auction-purchaser granted an extension of time for payment and on failure to pay, judgment-debtor applied to Court for further time. *Held*, the Court had no power to further extend time. An appeal lies against an order passed under O. 21, R. 89 or R. 90. (*Fletcher and Newbould*, JJ.) SHASHI BHUSHAN BANERJEE *v.* CHARUSHIKA DEBI. **36 I.C. 809.**

C.P. CODE (V of 1908), O. 21, R. 89—Limitation.

——O. 21, R. 89—*Limitation—Deposit—Court's delay.*

An act of the Court ought not to prejudice any party. And, therefore, when the presiding officer of a court leaves the Court earlier than usual and hence money is deposited on the next day which is 31st day, the deposit must be held to be within time under O. 21, R. 89. (*Mookerjee and Casperse*, JJ.) DULHIN MOTHURA KOER *v.* BANSIDHER SINGH. **15 C.L.J. 83 = 10 I.C. 880 = 16 C.W.N. 904.**

——O. 21, Rr. 89 and 92—*Limitation—Delay in payment—Holiday.*

Payment by the judgment-debtor on the 31st day from the date of the auction-sale is within time, if he could not make that payment on the 30th day, the presiding officer of the Court having left the Court earlier than usual. (*Mookerjee and Teunon*, JJ.) MUHAMMAD AKBAR JAMAN *v.* SUKHDEO. **10 I.C. 51 = 13 C.L.J. 467.**

——O. 21, R. 89—*Limitation—Deposit—Time for.*

A deposit under O. 21, R. 89, is within time if made within 30 days of the deposit of the purchase money by the purchaser under O. 21, R. 84, C.P.C. (*Shadi Lal*, J.) MUSSAMMAT KHAIRAN *v.* THE ALLIANCE BANK OF SIMLA. **50 I.C. 915.**

——O. 21, Rr. 89 and 92 (2)—*Limitation—Deposit—Application to set aside sale made in time—Deposit after 30 days.*

The words in his depositing, in O. 21, R. 89, qualify the term apply and a deposit is a condition precedent to the making of an application for setting aside a sale. (*Sadasiva Aiyar and Moore*, JJ.) VENNISAMI THEVAR *v.* PERYASWAMI THEVAR. **19 M.L.T. 192 = (1916) 1 M.W.N. 179 = 33 I.C. 995 = 3 L.W. 271.**

——O. 21, Rr. 89 and 90 and S. 148—*Limitation—Power of Court to grant time.*

Under O. 21, R. 89, a judgment-debtor in order to obtain the reversal of a sale by deposit of money in Court, must make the deposit within 30 days of the sale and the Court cannot extend this period except with the consent of parties nor can it set aside a sale by allowing the judgment-debtor to deposit the decretal amount after the period is over. (*Chapman and Roe*, JJ.) RAMESHWAR MISSER *v.* SURESHWAR MISSER. **39 I.C. 665 = 2 P.L.J. 165.**

——O. 21, R. 89—*Limitation—Application to set aside sale—Deposit—Confirmation.*

An application to set aside an execution sale is within time if it is made within 30 days of the sale even though it be after confirmation of the sale. A deposit to be valid must be in cash and not by cheque. (*Ormond*, J.) ISMAIL ALI *v.* VISVANADAN CHETTY. **27 I.C. 656 = 8 Bur. L.T. 90.**

C.P. CODE (V of 1908), O. 21, R. 89—Object of.

Object of.

———O. 21, R. 89—*Object of.*

The purpose of R. 89 of O. 21 is mainly to prevent, as far as possible, sale of immoveable property at Court sale for inadequate prices. (*Batchelor and Shah*, JJ.) PANDURANG LAXMAN UPHADE *v.* GOVINDA DADA UPHADE.
40 Bom. 557=37 I.C. 211=
18 Bom. L.R. 571.

Right of Decree-holder.

———O. 21, R. 89—*Right of decree-holder—Sale set aside.*

When a sale is set aside under O. 21, R. 89, the decree-holder is only entitled to what was due to him under the decree on the date of payment into Court by the auction-purchaser. (*Hartnoll*, O.C.J. *and Ormond*, J.) L. T. ATTADIES *v.* R. M. K. CHETTY.
24 I.C. 479=7 Bur. L.T. 68.

Right to Apply.

———O 21, R. 89—*Right to apply—Judgment-debtor—Objections to the sale.*

Where a judgment-debtor who had preferred certain objections to the legality of an execution sale, was allowed to utilise the provisions of O. 21, R. 89, C.P.C., subject to protest. *Held* that the procedure was irregular and that the objections were not maintainable. (*Piggott and Walsh*, JJ.) RAJA DUTT PRASAD SINGH *v.* SRI NARAIN. 21 A.L.J. 340=
L.R. 4 A. 195=74 I.C. 357=
1923 All. 503.

———O. 21, R. 89—*Right to apply—Vendee from debtor after sale.*

An application by a purchaser from the judgment-debtor after execution sale cannot be entertained. 34 All. 186; 40 Bom. 357, Rel. (*Rafique and Walsh*, JJ.) MAHABIR PRASAD PANDE *v.* GANGA DEHAL RAI.
42 All. 7=52 I.C. 331=17 A.L.J. 878.

———O. 21, R. 89—*Right to apply—Person expecting to get title*—S. 310-A. (1882.)

A party having no title to property and not in possession but expecting to gain possession in a pending litigation is not entitled to set aside sale. (*Sharfuddin and Roe*, JJ.) NAND KISHORE JHA *v.* PARAOO MIAN.
39 All. 700=41 I.C. 889=
16 A.L.J. 671.

———O. 21, R. 89—*Right to apply—Attaching creditor.*

A decree-holder who attaches a property before the sale takes place is not entitled to get the sale set aside under R. 89. (*Chamier*, J.) FAKRAN *v.* RAJAB ALIKHAN.
26 I.C. 958=13 A.L.J. 401.

———O. 21, R. 89—*Right to apply—Mortgagee.*

C. P. CODE (V of 1908), O. 21, R. 89—Right to apply.

A prior mortgagee of a property sold in auction has an interest in the property and is entitled under O. 21, R. 89, to have the sale set aside. (*Knox*, J.) KASHMIRO BIBI *v.* HATIM ALI KHAN. 2 71.C. 831=
13 A.L.J. 273.

———O. 21, R. 89—*Right to apply—Transfer by judgment-debtor after auction sale—Rights of judgment-debtor and his transferee to apply.*

A judgment-debtor, or his transferee after an auction sale held in execution of a decree against the judgment-debtor cannot apply to have the auction sale set aside under O. 21, R. 89. (*Tudball and Chamier*, JJ.) ISHAR DAS *v.* ASAF ALI KHAN. 34 All. 186=
13 I.C. 134=9 A.L.J. 19.

———O. 21, R. 89—*Right to apply—Mortgagor—Interest in the property.*

A mortgagor of the property sold is a person who has an interest sufficient to enable him to make an application under R. 89, O. 21, C. P. C. But when the mortgagee causes the sale, he cannot apply under R. 89 of O. 21, as he causes the property to be sold either free from mortgage or subject to his mortgage. And in either case he has no interest in the property sold. (*Johnstone*, C.J. *and Banerjee*, J.) MUHAMMAD AHMADULLA KHAN *v.* AHMED SAID KHAN. 33 All. 481=10 I.C 863=
8 A.L.J. 356.

———O. 21, R. 89—*Right to apply—Judgment-debtor after transfer of his interest on Court sale.*

The right to have sale set aside under O. 21, R. 89 continues in the judgment debtor even after his transferring his interest in the property to another after Court sale, as he is regarded by law as the person who owns the property. 34 All. 186; 38 Mad 775, Foll. (*Batchelor and Shah*, JJ.) PANDURANG LAXMAN UPHADE *v.* GOVINDA DADA UPHADE. 40 Bom. 557=
37 I.C. 211=18 Bom. L.R. 571.

———O. 21, R. 89—*Right to apply—Sale in execution of decree—Judgment-debtor privately selling the property so sold to a third person before confirmation—Right of such purchaser to apply.*

Where a judgment-debtor, after the sale in execution of his immoveable property but before the confirmation of the sale, sold such property to a third person, and such subsequent purchaser applied to have the Court-sale set aside under O. 21, R. 89, C. P. C. *Held*, that he was not entitled to make the said application. The interest, if any, which he held in the property was not by virtue of a title acquired by him before the execution sale. His interest, if any, was by virtue of a title acquired after such sale and consequently he was precluded by the very terms of the rule from applying under O. 21, R. 89 of the Civil

C. P. CODE (V of 1908), O. 21, R. 89—Right to apply.

Procedure Code. 24 M. L. J. 205 ; 34 All. 186 ; 4 P. L. J. 340; 40 Bom. 557, Rel. (*Sanderson*, C.J. *and Chotzner*, J) SARADAKRIPA LAL *v.* HARENDRA LAL DAS. **26 C.W.N. 149 = 68 I.C. 289 = 49 C. 454 = 1922 Cal. 271.**

———**O. 21, R. 89**—*Right to apply—Under-tenure-holder.*

Where the provisions of the Eastern Bengal and Assam Tenancy Amendment Act apply, a permanent under-tenure-holder has a *locus standi* to apply under O. 21, R. 89 to set aside the sale of a taluk in execution of rent decree. 32 Cal. 107 and 11 C.W.N. 742, Rel. (*N.R. Chatterjee and Newbould*, JJ.) SARAT CHANDRA DAS *v.* MOTI LAL CHUKKERBUTTY. **52 I.C. 237 = 28 C.W.N. 597.**

———**O. 21, R. 89**—*Right to apply—Transferee of immoveable property under attachment.*

A transferee from the judgment-debtor of immoveable property attached in execution of a decree for money, is the owner of the property and can apply under R. 89 of O. 21, for cancellation of the sale in execution. S 64, C.P. Code does not invalidate, for all purposes, a transfer of property by the judgment-debtor after its attachment in execution of a decree against him. 14 M.I.A. 543; 29 Cal. 154, Ref. (*Mookerjee and Cuming*, JJ.) GOSTA BEHARI *v*, SANKAR NATH MUKERJEE. **26 C.L J. 127 = 36 I.C. 510.**

———**O. 21, R. 89**—*Right to apply—Mortgage of occupancy holding.*

The mortgagee of non-transferable occupancy holding which was brought to sale in execution of a rent-decree and purchased by the landlord decree-holder, sought to deposit in Court the decretal amount under O. 21, R. 89, C.P.C. *Held*, that the mortgagee had not interest under the rule in question and consequently his deposit could not be accepted by the Court. 13 I.C. 487, Foll. (*Stephen and Mullick*, JJ.) DENONATH DEY SARKAR *v.* KALI KUMAR ROY. **29 I.C. 916.**

———**O. 21, R. 89**—*Right to apply—Non-transferable occupancy holding—Sale of.*

A purchaser of an occupancy holding not transferable without the consent of the landlord, cannot seek to set aside a sale in execution of a decree for arrears of rent, where the purchaser under the rent decree is the landlord himself. A landlord can terminate the purchaser's interest at any time and his right to do so is independent of an execution sale when the Eastern Bengal and Assam Tenancy Act is applicable. (*Chatterjee and Greaves*, JJ.) ABDUL RAHMAN SARKAR *v.* PRAMOO BEHARI DUTT. **22 C.L.J. 108 = 28 I.C. 182 = 20 C.W.N. 40.**

———**O. 21, R. 89**—*Right to apply—Difference between old Code and new.*

A person owning the property or holding an interest therein, on the date of the application can only apply under R. 89. So a person

C. P. CODE (V of 1908), O. 21, R. 89—Right to apply.

divesting himself of the property after the sale but before its confirmation cannot apply now under the new Code though he could, under S. 310-A of C.P.C., (1882). (*Imam and Chapman*, JJ.) RAJANI BINOD CHAKRAVARTI *v.* ALL INDIA BANKING AND INSURANCE CO., LTD. **17 C.W.N. 1207 = 22 I.C. 192 = 16 Cr. L.J. 48 = 41 Cal. 305.**

———**O. 21, Rr. 89 and 90**—*Right to apply—Application to set aside sale under R. 90.*

No application for setting aside a sale under O. 21, R. 89, can be prosecuted until a prior application filed under O. 21, R. 90 has been withdrawn : but there is no provision in the Code for the converse case. (*Chitty and N. R. Chatterjee*, JJ.) BASIRUDDIN *v.* FAIMULLA. **11 I.C. 196 = 17 C.W.N. 476.**

———**O. 21, R. 89**—*Right to apply—Person not affected by sale.*

A person whose title cannot be affected by the sale sought to be set aside, cannot make a deposit under O. 21, R. 89. (*Mookerjee and Caspersz*, JJ.) DULHIN MOTHURA KOER *v.* BAWNIDHER SINGH. **15 C.L.J. 83 = 10 I.C. 880 = 16 C.W.N. 904.**

———**O. 21, R. 89**—*Right to apply—Purchaser after auction.*

A third party purchasing the property after the date of the auction sale is debarred by O. 21, R. 89 from making an application to have the auction sale set aside. (*Harrison*, J.) SHAM LAL OF DELHI *v.* HARI SHANKER. **1922 Lah. 302.**

———**O. 21, R. 89**—*Right to apply—Mortgagee.*

A mortgagee of immoveable property can pay the amount of decree and costs to get the property released from attachment even after it is sold to the highest bidder and even if the mortgage has been effected after attachment. (*Kensington*, J.) THAKUR SINGH *v.* GURDIT SINGH. **12 I.C. 783 = 178 P.W.R. 1911.**

———**O. 21, R. 89**—*Right to apply—Person in whose favour there is an agreement to sell.*

A person in whose favour there is merely an agreement to sell, the property sold in Court auction cannot apply to set aside the sale under O. 21, R. 89, C. P. C. Nor could a person who has purchased the property pending the attachment apply to set aside the sale. (*Odgers*, J.) ARUMALLA CHINA SUBBA REDDI *v.* VASIREDDI JAYARAMAYYA. **17 L.W. 680. 1923 Mad. 659.**

———**O. 21, R. 89**—*Right to apply—Prior application to pay decree amount—Dismissal—Effect of—Not* res judicata.

Where a person claiming as legatee under a will applied to pay the decree amount to prevent a sale but the application was dismissed, it does not bar an application under O. 21,

C. P. CODE (V of 1908), O. 21, R. 89—Right to apply.

R. 89, C. P. Code, to set aside the sale on depositing the decree amount. The effect of the previous dismissal was merely to decide that the applicant had no right to raise the attachment on payment of the decree amount. (*Spencer and Venkatasubba Rao*, JJ.) DHANAMMAL *v.* VEERARAGHAVALU NAIDU.
44 M.L.J. 325=(1923) M.W.N. 162=32 M.L.T. (H. C.) 176=18 L.W. 296=72 I.C. 385=1923 Mad. 487 (2).

———O. 21, R. 89—*Right to apply—Sale in execution—Subsequent transfer by judgment-debtor—Right to apply to set aside sale.*

Where the judgment-debtor's property has been sold in Court auction and he subsequently sells the property to another, the right to apply to have the sale set aside lies with him and not with his vendee. 38 M. 775, Over ruled. (*Wallis*, C. J., *Oldfield and Kumarasamy Sastry*, JJ.) SUNDARAM *v.* MAMSA MAVATHER. **44 Mad. 864=40 M.L.J. 497=13 L.W. 498=29 M.L.T. 269=63 I.C. 937=(1921) M.W.N. 272 (F.B.).**

———O. 21, R. 89—*Right to apply—Mortgagee after execution sale.*

A person who acquires a mortgage from the judgment-debtor of the properties sold in an execution sale subsequent to the Court-sale is not a person entitled to apply to set aside the sale under O. 21, R. 89. (*Wallis*, C. J., *Ayling and Coutts Trotter*, JJ.) GOPALA KRISHNA NAICKER *v.* VISVANATHA AIYAR.
39 M.L.J. 84=12 L.W. 166=58 I.C. 856=28 M.L.T. 162 (F.B.).

———O. 21, R. 89—*Right to apply—Private purchaser before confirmation—Right of purchasers and judgment-debtors.*

A purchaser, at a private sale from a judgment-debtor after Court's auction but before its confirmation, is entitled to apply to set aside the sale under O. 21, R. 89, C.P.C., but the judgment-debtor who has parted with his rights cannot apply. The words "owning the property" in O. 21, R. 89, C.P.C., mean owning on the date of the application and not owning on the date of the Court auction-sale. 9 A.L.J. 19, Not Foll.; 24 M.L.J 205; 38 Mad. 775, Foll. *Per Spencer, J.*—The right to apply depends upon whether the judgment-debtor has actually sold his interest unconditionally on the sale being set aside and has thus divested himself of all further interest in the property or has only agreed to sell it on that condition. (*Sadasiva Iyer and Spencer*, JJ.) GANTA SOLA JAGANATHAN *v.* THATAVARTHI RAMA BRAMAN. **54 I.C. 783.**

———O. 21, R. 89—*Right to apply—Mortgagee of property.*

Where immoveable property is sold in execution of a decree, the mortgagee of the property is entitled to apply under O. 21, R. 89 of the C.P.C. even though the property is sold subject to the mortgage. The provisions of O. 21, R. 89 should receive a liberal construction. (*Krishnan*, J.) KANDASWAMI ASARI *v.* SWARNAVELU STAPATHI.
10 L.W. 556=(1920) M.W.N. 151=53 I.C. 958=27 M.L.T. 130.

———O. 21, Rr. 89 and 90—*Right to apply—Purchaser of portion of properties before execution sale.*

A purchaser, at a private sale from a judgment-debtor, of a portion only of certain properties, subsequently sold in execution of a decree, is not entitled to apply to have the sale set aside on the ground that the amount of the decree has been fully paid by himself and other purchasers of the rest of the property. (*Seshagiri Ajyar*, J.) KOPPAKA CHANDRAYYA *v.* ROBERTSON. **52 I.C. 641.**

———O. 21, R. 89—*Right to apply—Judgment-debtor—Private sale of the properties—Sale-deed not registered—Right of judgment-debtors.*

A judgment-debtor whose property had been sold in Court auction, conveyed it by a private sale to a third person and then applied under O. 21, R. 89 of the C.P. Code to set aside the sale. On the date of the application the sale deed had not been registered though the time for its registration, had not expired. Subsequent to the application the judgment-debtor executed another conveyance of the property to the same third person and got it registered. *Held*, that notwithstanding the execution of the prior conveyance the judgment-debtor continued to be the owner of the properties so as to entitle him to apply under O. 21, R. 89 of C.P. Code. The execution of a subsequent registered conveyance would not deprive the judgment-debtor of a relief to which he was entitled on the date of the application. 38 Mad. 375 and 35 All 186 Dist. ; 29 Mad. 336 and 40 Mad. 1134, Rel. (*Seshagiri Aiyar and Phillips*, JJ.) SETHURAMASWAMI NAYANI VARU *v.* SYED MIR HUSSAIN SAHIN. **42 Mad. 803=26 M.L.T. 182=9 L.W. 347=49 I.C. 806=(1919) M.W.N. 407.**

———O. 21, R. 89—*Right to apply—Judgment-debtor divesting himself of his interest—Cannot apply under O. 21, R. 89.*

The natural meaning of the words in O. 21 R. 89 "any person either owning such property or holding an interest therein, etc.," is "any person owning such property or holding an interest on the date of making the application". Thus a judgment-debtor who has divested himself of the interest in the property sold by the Court, after such sale but before the confirmation of it has no right to apply to have the sale set aside. *Sadasiva Aiyar*, J.—A person who has purchased privately from the judgment-debtor has a right to make a separate

C. P. CODE (V of 1908), O. 21, R. 89—Right to apply.

application for setting aside the execution sale. (*Sadasiva Aiyar and Spencer, JJ.*) ADAPPA SUBBARAYADU *v.* TIPPATHILALAKSHMI NARASAMMA.

16 M.L.T. 98=(1914) M.W.N. 147=1 L.W. 39=22 I.C. 193=38 M. 775.

———**O. 21, R. 89**—*Right to apply—Purchaser from judgment-debtor after sale—Payment—Form of—Second Appeal—Revision.*

The expression 'by virtue of a title acquired before the sale' in O. 21, R. 89, does not qualify the phrase 'any person owning such property' in the same rule. A purchaser from the judgment-debtors after the auction sale can appiy under O. 21, R. 89, C.P.C. To maintain an application under the rule, payment to the decree-holder need not be in cash but it is enough if the decree is satisfied fully. (*Benson and Sundara Aiyar, JJ.*) ANANTA LAKSHMI AMMAL *v.* KUNVANCHAN KARATH SANKARAN NAIR.

13 M.L.T. 123=24 M.L.J. 205=18 I.C. 379=(1913) M.W.N. 101.

———**O. 21, R. 89**—*Right to apply—Usufructuary mortgagee.*

It is competent to a mortgagee with possession to apply to set aside the sale of the property under O. 21, R. 89, 21 O C. 400, Dist. 35 Bom. 288, Foll. (*Kanhaiya Lal, A.J.C.*) JAGMOHAN SINGH *v.* BACHCHA.

9 O.L.J. 50=25 O.C. 78=55 I.C. 929=1922 Oudh 156.

———**O. 21, Rr. 89 and 90**—*Right to apply—Applications under O. 21, R. 90—Dismissal.*

A judgment-debtor whose application under O. 21, R. 90 is dismissed for default, is not thereby disqualified from subsequently applying under O. 21, R. 89 (*Lindsay, J C.*) MURLI DHAR *v.* BALDEO SINGH.

48 I C. 360=20 O.C. 339.

———**O. 21, R. 89**—*Right to apply—Judgment-debtor.*

Neither judgment-debtor who has sold the property after the date of Court-sale nor his purchaser can apply to have it set aside. (*Evans, A J.C.*) DEBI PRASAD *v.* MUHAMMAD UNIS ARABI.

9 I.C. 745=14 O C. 38.

———**O. 21, R. 89**—*Right to apply—Mortgagee a part owner.*

A mortgagee who has purchased equity of redemption in one portion of the mortgaged property, can apply under R. 89, to set aside the sale held under his own decree (*Mullick and Macpherson, JJ.*) AULAD ALI *v.* ABDUL HAMID.

2 Pat. 715=74 I.C. 102=1923 P. 490.

———**O. 21, R. 89**—*Right to apply—Judgment-debtor—Parting with his interest—Duty of Court to set aside sale—C. P. Code, S. 115.*

The fact that a judgment-debtor has parted with his interest to a third party in the property

C. P. CODE (V of 1908), O. 21, R. 89—Setting aside sale.

attached and sold in execution of a decree is no bar to his making an application under O. 21, R. 89 of the C. P. Code to have the sale set aside. A purchaser by means of a private deed of the property of a judgment-debtor attached and sold in execution of a decree has no *locus standi* to make an application under O. 21, R. 89. When a Court does not accept the deposit from the judgment-debtor to set aside the sale its action amounts to refusal to exercise jurisdiction and the High Court can interfere under S. 115, C. P. Code. (*Mullick and Jwala Prasad, JJ.*) LACHMI NARAIN AGARWALA *v.* KALI PROSONNO BHATTACHARJI.

52 I.C. 344.

———**O. 21, R. 89**—*Right to apply—Judgment-debtor-Subsequent private sale.*

A judgment-debtor who, subsequent to the execution sale has sold his property privately, may apply to have the auction sale set aside under O. 21, R. 89, of the C.P. Code. 34 All. 186 and 38 Mad, 775, Not Foll.; 25 Bom. 631 and 40 Bom. 557, Foll. (*Mullick and Jwala Prasad JJ.*) MUSSAMAT DHANWATI KUER *v.* SHEO SANKAR LAL,

4 P. L.J. 340=51 I.C. 873=(1921) Pat. 364.

———**O. 21, R. 89**—*Right to apply—Second mortgagee—Failure of second mortgagee to payment to Court under O. 21, R. 89—Effect.*

A second mortgagee under a mortgage executed after the decree for sale on the first mortgage who fails to pay the amount of the decree under the first mortgage under O. 21, R. 89 and to save his security as representative of the mortgagor is precluded from having any remedy against the land. (*Pratt, J.C. and Crouch, A.J.C.*) KANAYARAM *v.* TIRITH SINGH.

31 I.C. 37=9 S.L.R. 86.

Setting aside sale.

———**O. 21, R. 89**—*Setting aside sale—Mortgage decree—Subsequent rent decree—Sale under—Application under O. 21, R. 89—Suit by mortgagee against mortgagor.*

The plff. had obtained a mortgage decree against deft. and the mortgaged tenure was sold subsequently for arrears of rent. The plff. applied under O. 21, R. 89 to have the sale set aside which was accordingly done. In a suit by plff. against deft. for recovery of money deposited, *held* that the plaintiff would be entitled to have the sale set aside. 29 Cal. 1, Rel. on (*Mookerjee and Carnduff, JJ.*) JAG NARAIN SINGH *v.* BADRI DAS.

18 I.C. 144=16 C.L.J. 156.

———**O. 21, R. 89**—*Setting aside sale—Deposit of money—Formal application—Necessity for.*

Where the money required to set aside an execution sale had been paid into Court within 30 days but no formal application to set aside the sale was presented within the time

C. P. CODE (V of 1908), O. 21, R. 89—Strict Construction.

prescribed the Court cannot set aside the sale. A mere judgment schedule which does not contain a prayer to set aside the sale cannot be treated as such an application. 14 M. L. T. 534; 19 M. L. J. 192. (*Krishnan*, J) RAYAPATHY VENKATASUBBA RAO *v.* NARAYANA RAO (1922) M.W.N. 171=15 L.W. 460=66 I.C. 44=1922 Mad. 83.

Strict Construction.

——O. 21, R. 89—*Strict construction.*

R. 89 ought to be strictly observed before the sale can be set aside. Whether it has been so done is to be decided by the Court and the High Court cannot revise the order even though it is erroneous. The word "Court" in O. 21, R. 89 means Civil Court. (*Richards*, C. J. *and Banerjee*, J.) FAZUL RAB *v.* MAUZAR AHMED, 40 All. 426=45 I.C. 773=16 A.L.J. 433.

——O. 21, R. 89—*Strict construction Payment or deposit in full must be made.*

R. 89 is a concession allowed to judgment-debtors and the judgment-debtor must strictly comply with it. An undertaking to pay a certain amount is not a payment. Hence a part payment coupled with an undertaking to pay the balance, cannot be considered as payment or deposit in full within R. 86. (*Macleod*, C.J. *and Shah*, J.) MANAJI KUVARJI *v.* AQAMITA 28 Bom. L.R. 847=46 Bom. 171=63 I.C. 39=1922 Bom 193.

——O. 21, R. 89—*Strict construction—Old Code.*

S. 310-A confers a special right on the judgment-debtor and he must comply strictly with its terms before he avails himself of the benefit of that section. (*Abdur Rahim and Ayling*, JJ.) KALINGA HEBBARA *v.* NARASIMA, (1911) 1 M.W.N. 143=9 M.L.T. 259=9 I.C. 937=21 M.L.J. 631.

——O. 21, R. 90.

APPEAL.
DEFECTIVE ATTACHMENT.
DESCRIPTION OF PROPERTY.
DISMISSAL FOR DEFAULT.
DUTY OF COURT.
EXECUTION SALE.
FORM OF APPLICATION.
FRAUD.
LIMITATION.
MATERIAL IRREGULARITY.
MINOR.
NOTICE.
NULLITY.
PARTIES.
PUBLICATION OF SALE,
RENT SALE.
RIGHT TO APPLY.
SCOPE OF.
SUBSTANTIAL INJURY.
UNDER-VALUATION.
WAIVER OF OBJECTIONS.

C. P. CODE (V of 1908), O. 21, R. 90—Appeal.

Appeal.

——O. 21, R. 90—*Appeal—Execution sale—Order refusing to set aside.*

An order of the High Court refusing to set aside an execution sale is a final order and is appealable to Privy Council. (*Lord Moulton.*) TEKAIT KRISHNA PRASAD SINGH *v.* MOTI CHAND. 40 Cal. 635=40 I.A. 140=17 C.W.N. 637=(1913) M.W.N. 487=11 A.L.J. 517=15 Bom. L.R. 515=17 C.L.J. 573=14 M.L.T. 37=19 I.C. 295=25 M.L.J. 140. (P.C.).

——O. 21, R. 90 and O. 43, R. 1 (j)—*Appeal—Second appeal—Application to set aside sale for fraud—Dismissal of.*

The New Code has altered the law in an important aspect inasmuch as an application based on fraud in publishing or conducting a sale comes within the purview of O. 21, R. 90, and not under S. 47. There is no second appeal from an order passed on an application to set aside the execution sale on the ground of fraud. (*Richards*, C. J. *and Banerjee*, J.) SHEO PRASAD SINGH *v.* MOSSAMAT PREMA KUAR. 40 All. 122=43 I.C. 523=15 A.L.J. 920.

——O. 21, R. 90, S. 2 and O. 43, R. 1 (c)—*Appeal—Dismissal for default—Refusal to set aside.*

An application to set aside a sale is a proceeding leading to an adjudication such as is referred to in S. 2 and so it is a suit within O. 43, R. 1 (c). There is an appeal from an order refusing to set aside a dismissal for default. (*Teunon and Newbould*, JJ.) BHUBAN BEHARI NAG *v.* DHIRENDRA NATH. 33 I.C. 581=20 C.W.N. 1203.

——O. 21, Rr. 90 and 92—*Appeal—Fraud—Old Code and New.*

The dismissal order in an application to set aside an execution sale on the ground of fraud or material irregularity, was a decree under the Old Code, and hence an appeal lay if passed while the Old Code was in force. Under the New Code it is a mere order under O. 21, Rr. 90 and 92. (*Mookerjee and Beachcroft*, JJ.) LAL BIHAR MITRA *v.* NAGENDRA NATH CHATTERJEE. 16 I.C. 690=22 C.L.J. 266.

——O. 21, R. 90—*Appeal—Second appeal—Order under.*

Old Code allowed sale to be impeached upon the ground of fraud under S. 244, and a second appeal lay, but under New Code it is done under O. 21, R. 90; and S. 104 read with O. 43, Cl. (j) makes it clear that no second appeal lies in this case. (*Carnduff and Chapman*, JJ.) BENODE BEHARI BHADRA *v.* RAM SARUP CHAMAR. 15 I.C. 679=16 C.W.N. 1015.

——O. 21, Rr. 90 and 92—*Appeal—Second appeal—Fraud—Application to set aside sale on ground of fraud.*

C. P. CODE (V of 1908), O. 21, R. 90—Appeal.

Unlike the Code of 1882 O. 21, R. 90 includes the case of fraud as well, and so S. 104 read with O. 43, Cl. (j) provides only for a first appeal and not a second appeal. Under the Old Code an application to set aside a sale on the ground of fraud did not come under S. 311 and so was attracted to S. 244 (corresponding to S. 47) and therefore a second appeal was allowed. (*Woodroffe and Carnduff*, JJ.) BISSONATH RAI *v.* KAMALESHWARI PRASAD SINGH.
9 I.C. 185.

——O. 21, R. 90—*Appeal—Order under.*

O. 43, R. 1 (1) expressly provides for an appeal against orders under O. 21, R. 90. (*Jwala Prasad and Foster*, JJ.) LACHMAN LAL *v.* PADARATH SINGH.
4 P.L.T. 735=74 I C. 695=1924 P. 846.

——O. 21, R. 90 — *Appeal — Failure to issue notice—Second appeal, if lies.*

Where an auction sale is sought to be set aside on the ground that no notice was served as required by O. 21, R. 22, but the Court finds no such notice was necessary, the order does not fall under S. 47 and hence there is no second appeal. (*Mullick and Bucknill*, JJ.) MAHADEO SINGH *v.* DHOBI SINGH.
2 Pat. 916=4 Pat. L T. 721=1923 Pat. 283=74 I.C. 838=1924 P. 111.

——O. 21, R. 90—*Appeal—Second appeal—Application to set aside the sale.*

A second appeal against an order passed on an application to set aside sale does not lie. (*Mullick and Thornhill*, JJ.) SHRIKRISHNA RAI *v.* RAMSARAN RAI.
36 I.C. 646=1 P.L.T. 267.

——O. 21, R. 90—*Appeal—Second appeal—Not competent.*

An order dismissing an application to set aside a sale under O. 21, R. 90 falls under S. 47 but is appealable as an order and is therefore not a decree and no second appeal lies against it. 19 I.A. 166; 26 C. 539, Expl. (*McColl*, J.C.) MAUNG SHWE MYAT *v.* MAUNG SHWE BAN.
(1916) 2 U.B.R. 139=39 I.C. 374=11 Bur. L.T. 26.

——O. 21, R. 90 and O. 43, R. 1—*Appeal—Forum—Proper Court of appeal.*

An order dismissing an application for setting aside a sale under O. 21, R. 90, C.P.C. not being a decree, an appeal against such an order of the District Court lies to the Divisional Court, even if the value of the subject-matter is above Rs. 10,000. (*McColl*, J.C.) MANDARI *v.* R, MISSER. **(1916) 2 U.B.R. 139=39 I.C. 372=11 Bur L.T. 8.**

Defective Attachment.

——O. 21, R. 90—*Defective attachment—Omission to attach.*

The mere fact that there has been no attachment or that there is a defect in the attachment does not render an execution sale a nullity. It is a mere irregularity. 64 I.C. 420; 18 M, 437; 30 M, 255, Ref. (*Hallifax*, A.J.C.) SHANKER RAO *v.* MAWK RAO.
68 I.C. 853=1923 Nag. 18.

——O. 21, R. 90—*Defective attachment—Material irregularity—Sale within 30 days of the proclamation—Effect of.*

The failure to attach the property before sale although an irregularity under the C.P. Code does not render the sale null and void. 18 C. 188; 34 C. 787; 21 A. 311, Ref. The object of the attachment is to bring the property under the control of the Court with a view to preventing the judgment-debtor from alienating it and the requirement that the order of attachment should be publicly proclaimed is merely one of the requirements of law for perfecting the attachment. The main object of the proclamation of the order is to give publicity to the fact that the sale of the particular property attached is in contemplation and to warn all persons against taking a transfer of it from the judgment-debtor to the prejudice of the rights of the decree holder. It is difficult to see why the absence of attachment which is primarily in the interests of the decree-holder can prejudice the rights of the judgment-debtor who has due notice of the sale. A Court has jurisdiction to sellproperty without attachment. Where property is sold within 30 days of the proclamation the irregularity does not render the sale void without proof of the substantial injury thereby to the judgment-debtor. 21 C. 66 foll. (*Miller*, C.J. *and Mullick*, J.) RAJA WAZIR NARAIN SINGH *v.* BHIKHARI RAM.
4 U.P.L.R.(P). 100: 68 I.C. 363=3 P.L.T. 765=(1922) Pat. 321=2 P. 207=1923 P. 45.

Description of Property.

——O. 21, Rr. 90 and 66—*Description of property—Misleading description—Incumbrances.*

The particulars of a sale, at a Court's auction, mentioning subsequent mortgages but not stating clearly that the property is to be sold subject to them are misleading and the sale must be set aside. Court must be scrupulous in the extreme in the conduct of contract sales and must not fall below the standard of honesty which it exacts from the parties. It should refuse to enforce against a purchaser misled by its duly accredited agents into an illusory or unconscionable bargain. (*Martin*, J.) CHINNA BAI *v.* DHULA KUPPA.
50 I.C 384=21 Bom. L R. 281.

——O. 21, R. 90—*Description of property—Material irregularity in publishing or conducting the sale—Judgment-debtor owning share in the house—Whole house sold.*

A sale in execution of a decree cannot be set aside unless material irregularity in publishing or conducting the sale is established. Where a judgment-debtor owned ½ the share in the house and the whole house was sold, it was held that it could not be assumed that the price realised was less than what could have been obtained if

C. P. CODE (V of 1908), O. 21, Rr. 90, 66 and 67—Description of Property.

the share was specified in the proclamation of the sale. (*Shah Din*, J.) NAI JAHAN BEGAM v. GIRDHARI LAL. 222 P L R. 1911 = 12 I C. 672 = 266 P.W.R. 1911.

——O. 21, Rr. 90, 66 and 67—*Description of property— Execution sale—Irregularity in proclamation.*

The mere fact that certain fields were in a proclamation of sale by mistake included in the lands mentioned in the first of the four lots advertised for sale whereas they should have been entered in the second, is not of itself such an irregularity as to afford good ground for setting aside the sale. (*Sadasiva Aiyar and Moore*, JJ.) SWAMINATHA IYER v. SIVAGURUNATHA CHETTIAR. 32 I.C. 990.

——O. 21, R. 90—*Description of property —Wrong khasra number.*

Khasra numbers are subordinate descriptions of a holding for purposes of identification. When an entire holding is sold in execution of a rent decree obtained in respect of the holding the giving of wrong numbers of the plot will not vitiate the sale. (*Sharfuddin and Roe*, JJ.) RAJENDRA PRASAD SAHA v. GANGAN KOER. 2 P.L.W. 81 = 41 I.C. 282 = 3 P.L.J. 623.

Dismissal for Default.

——O. 21, R. 90—*Dismissal for default— Fresh application, if maintainable.*

Where an application to have a sale set aside was dismissed for default and the application for restoration was rejected, it is doubtful whether the applicant can successfully prefer a second application for the same purpose. (*Jenkins*, C.J. *and Coxe*, J.) PARESH NATH MULLICK v HARI CHARAN DEY 38 Cal. 622 = 10 I.C. 361 = 15 C.W.N. 875 = 14 C L.J. 300.

——O. 21, R. 90 and O. 9, R. 9—*Dismissal for default.*

O. 9. R. 9, applies to an order dismissing for default an application under O. 21, R. 90. (*Lindsay*, A.J.C.) GOURI v. HINGA. 39 I.C. 875 = 28 O.C. 359.

Duty of Court.

——O. 21, R. 90—*Duty of Court.*

The duty of Court in connection with Court sales is to be scrupulous and just and to guard against misrepresentations likely to deceive innocent purchasers. (*Maung Kin*. J.) HASIM ISPHANY v. N.A.P.K, CHETTY FIRM. 9 Bur. L.T. 169 = 33 I C. 1008 = 8 L.B.R. 427.

Execution Sale.

——O. 21, R. 90—*Execution sale—Auction sale held at time and date other than those proclaimed—Sale is voidable.*

An auction sale held at a time or date other than those proclaimed is not a nullity but is voidable on proof of material injury. (*Johnstone*, C.J., *and Le Rossignol*, J.) SAFDAR ALI v. FAZAL. 156 P L R. 1915 = 30 I.C. 521 = 143 P.W.R 1915.

C. P. CODE (V of 1908), O. 21, R. 90—Execution Sale.

——O 21, R. 90—*Execution sale—Setting aside—Remedy by suit—Decree against member of joint Hindu family—Sale of his share of the property in execution.*

Where in execution of a decree obtained against some members of a joint Hindu family property of the family is sold it is open to any other member of the family having an interest in the property and not being bound by the decree, to institute a suit to set aside the sale and recover possession of the property without applying to set aside the sale under O. 21, R. 90 of the C. P. Code. (*Das and Kulwant Sahay*, JJ.) MEDNI PRASAD SINGH v. NAND KESHWAR PRASAD SINGH. 2 P. 386 = 1923 P. 481.

——O. 21, R. 90—*Execution sale—Application to set aside—Deposit of decree amount—Deposit subject to condition subsequently withdrawn—Effect.*

On the 22nd December 1920 a sale of a certain property took place in execution of a certain decree obtained by the opposite party as against the petitioners. On the 21st January 1921 the petitioners applied for setting aside the sale under the provisions of O. XXI, R. 90, Civil Procedure Code. On the 23rd January 1921 the parties entered into a compromise, the terms of the compromise being that if the judgment-debtor paid the sum of Rs. 2,695 to the decree-holders on or before the 23rd September 1921 the sale would be set aside, but that if the sum of Rs. 2,695 was not paid to the decree-holders within the time allowed, the application for setting aside the sale would stand dismissed and the sale would be confirmed. On the 19th September 1921 the petitioners deposited the sum of Rs. 2,695 in Court and invited the Court to set aside the sale. The petitioners also applied to the Court that the money should not be paid to the decree-holders until the decision of a regular suit which the judgment-debtors were about to institute against the decree-holders. It appears that such a suit was in fact instituted on the 24th September 1921. On the 23rd September 1921 the decree-holders filed a petition praying that the sale should not be set aside as the deposit made by the judgment-debtors was a conditional deposit which had in effect prevented them withdrawing the money from Court. *Held* the deposit was a conditional one. It is one thing to make that deposit subject to one condition; it is another to make the deposit and to apply to the Court that the party entitled to withdraw the money from Court should not withdraw it until a particular decision is reached in a particular case. The judgment debtors through their leaders intimated to the Court that they would not object to the money being withdrawn by the decree-holders, and, as a matter of fact, they took up that position before the decree-holders

C. P. CODE (V of 1908), O. 21. R. 90—Execution Sale.

made any application for withdrawal of the money from Court. Consequently the deposit was valid. (*Das and Macpherson, JJ.*) SHAM SUNDAR SINGH *v* MUSHAHEB LAL.
2 P. 534=72 I C. 907=1923 P. 418.

——O. 21, R. 90—*Execution sale—Absence of attachment—Sale not a nullity—Application to set aside.*

An execution sale held without attachment of the property or with a defective attachment does not render the sale void but materially irregular. An application to set aside the sale on that ground is governed by S. 47, C. P. Code and not under O. 21, R. 90. (*Lentaigne, J.*) MA PWA *v.* MAHOMED TAMBI.
1 R. 533=77 I.C. 368=1924 Rang. 124.

Form of Application.

——O. 21, R. 90—*Form of application—Separate applications for setting aside execution sale, whether can be consolidated.*

Separate applications by different judgment-debtors, for setting aside an execution sale, can be consolidated and tried together. Where separate applications are made by different judgment-debtors and some are barred, they may be treated as applications to be made parties to proceedings then before the Court; and the sale as a whole may be set aside. (*Mookerjee and Carnduff, JJ.*) RUDRANANDA THAKUR *v.* PRITHI CHAND.
14 C.L.J. 346=11 I.C 438=16 C.W.N. 704.

——O. 21, R. 90—*Form of application—Array of parties in preamble of application under.*

It is not absolutely necessary to set out in the preamble of the application under O. 21, R. 90 any formal array of parties and such an application should not be thrown out on that ground. (*Kendall, A. J. C.*) GHAZANFAR HUSAIN *v.* RAMRATAN. **25 I. C. 907=17 O.C. 306.**

Fraud.

——O. 21, R. 90—*Fraud—Suit to set aside sale—Fraud not specifically alleged—Suit, if maintainable.*

Where the plff. a purchaser in execution of a decree, sued to set aside the execution sale on the ground that he was misled by the sale proclamation which did not show any encumbrance on the property and that subsequent to the purchase it was discovered that the encumbrances on the property exceeded its value, *Held*, per (*Walsh and Lindsay, JJ. contra.*) that as there was no provision in the Code to bar the suit it was maintainable on the principles of justice, equity and good conscience although fraud was not specifically alleged in the plaint, an inference of fraud having been suggested by the allegations therein. (*Walsh and Lindsay, JJ.*) GAJADAR PRASAD *v.* MD. ABDUL MAJID.
63 I.C. 425=19 A.L.J. 530.

C. P. CODE (V of 1908), O. 21, R. 90—Fraud.

——O. 21, R. 90—*Fraud*—Bona fide *purchaser without notice—Plea of—When a bar to application.*

The Code does not exclude specifically an application to set aside the sale but the purchaser is a *bona fide* purchaser without notice of the irregularity or the fraud. A purchaser in execution is always an adventurer and must know his risk as it is possible that there may be fraud or irregularity which may render the sale a nullity (*Mookerjee and Rankin, JJ.*) BIRESWAR GHOSH *v.* PANCHCOURI GHOSH.
37 C.L.J. 145=27 C.W.N. 587=74 I C. 975=1923 Cal. 538.

——O. 21, R. 90—*Fraud—Execution after discharge of decree.*

The question of the decree-holder's fraud in not certifying the payment and holding a sale after satisfaction does not fall under O. 21, R. 90 but under S. 47, C. P. C. (*Coxe and Teunon, JJ.*) ALKESHI DASI *v.* BIRAJ MOHINI DASI. **10 I.C. 625.**

——O. 21, R. 90—*Fraud—Execution sale—Effect of* ex-parte *decree being set aside after the sale.*

The word "fraud" used in connection with execution-sales does not include any fraud in the loose sense but is restricted to those actions which are dishonest and morally wrong. The purchaser at an execution sale of an *ex-parte* acquires a good title and the subsequent setting aside of the *ex parte* decree on the ground of want of service, does not disturb his position. (*Jenkins, C.J. and Coxe, J.*) DASESH NATH MULLICK *v.* HARI CHARAN DEY.
38 Cal. 622=15 C.W.N. 875=10 I.C. 361=14 C.L.J. 300.

——O. 21, Rr. 90 and 92—*Fraud—Execution sale—Remedy by suit or by application.*

Objections to an execution sale on the ground of fraud can only be made under O. 21, R. 90 of the C. P. Code prior to the confirmation of the sale. Fraud should be specially set out with all the necessary details. Where a sale is confirmed, it could not be attacked except by a regular suit. (*Broadway, J.*) BASHI RAM *v.* HASSAN MAHOMED. **51 I.C. 447.**

——O. 21, Rr. 90 and 92—*Fraud or material irregularity—Suit to set aside sale.*

After an execution sale has been confirmed under R. 92, no suit lies to set it aside on the ground of fraud or material irregularity. 38 Mad. 1076, Cons. and Dist. (*Abdur Rahim and Odgers, JJ.*) KALINADHACHOTTA *v.* MARTA APPAYYA SASTRI. **44 Mad 351=40 M.L.J. 55=18 L.W. 16=(1921) M.W.N. 9=62 I.C. 208=29 M.L.T. 108.**

——O. 21, R. 90—*Fraud—Minor treated as major—Setting aside—Limitation.*

O. 21, R. 90, C. P. C., does not apply to the case of a minor seeking to declare sale void owing to the fact that owing to collusion between the decree-holder and the auction-purchaser and their fraud, the minor was

C. P. CODE (V of 1908), O. 21, R. 90—Fraud.

treated as a major without any guardian *ad litem* and his properties were sold for a gross under-value. A suit is maintainable by minor within 3 years of his majority. (*Wallis and Sadasiva Aiyar*, JJ.) PASUMARTI PAYIDANNA *v.* GANTI LAKSHMINARASAMMA.

38 Mad. 1076=29 I.C. 314=28 M.L.J. 925.

———**O. 21, R. 90**—*Fraud—Limitation Act, S. 18, Arts 12 and 166.*

O. 21, R. 90 unlike S. 311 of the C.P. Code includes applications to set aside sales on the ground of fraud. A suit to declare an auction-purchaser as not binding upon the estate fully represented by one of several administrators will not lie but the sale might be set aside within 30 days under Art. 166 of the Limitation Act. Case law Discussed. 10 All. 166 (P.C.); 29 All. 339 (P.C.); 25 Bom. 337 (P.C.); Ref. to. (*Sadasiva Aiyar and Napier*, JJ.) GRACE ROSAMAND RHODEO *v* PADMANABHA CHETTIAR. **1 L.W. 1033=26 I.C. 369=(1915) M.W.N. 921=17 M.L.T. 18.**

———**O. 21, R. 90**—*Fraud—Collusive bid.*

The conduct of a decree-holder who evades a condition imposed and colludes with strangers to bid with him in purchasing the property for much less than the decretal sum amounts clearly to fraud. 5 C.W.N. 265, Foll. The mere fact that the decree-holder agrees to bid for the property for the amount of the decree and purchases it for a sum much less than the amount, is sufficient to show that his fraud has led to substantial loss. Such a sale should be set aside. (*Lindsay*, J.C. *and Rafique*, A.J.C.) RAJ KUAR *v.* CHUNNOO LAL.

15 I.C. 888=16 O.C. 86.

———**O. 21, R. 90**—*Fraud—Execution sale—Setting aside—Auction-purchaser not party to fraud—Limitation—Extension of time.*

It is open to a Court to set aside an execution sale on the ground of fraud even though it is not proved that the auction-purchaser was a party to the fraud. 18 I.C. 715, Foll.; 24 W.R. 260, Dist. Where a judgment-debtor applying to set aside a sale proved fraud in the conduct of the sale and also the fact that he had been kept out of knowledge of the sale, *Held*, that S. 18 of the Limitation Act applied to his case and the onus was on the other side to show that the application was barred as having been filed more than 30 days after he had knowledge of the sale. The onus is on the party guilty of fraud to show that its effect had been removed. 17 B. 341, Rel 1 C.W.N. 67; 2 Pat. L.T. 401; 20 M. 10; 38 M. 1076, Ref. (*Ross*. J.,) MAHABIR RAM *v.* RAM BAHADUR DUBEY. **4 P.L.T. 306=72 I.C. 625=1923 P. 435.**

———**O. 21, R. 90**—*Fraud—Mis-statement by a decree-holder in the sale proclamation of the value of the property—May amount to proved—Onus of proof—Finding of fact.*

A wilful mis-statement by a decree-holder in the sale proclamation of the value of the property may be sufficient evidence in particular cases to justify an inference of fraud. Where certain facts are found and an inference of fraud is drawn based upon facts so found it is open to the Court in second appeal to consider whether as a matter of law such an inference is justified by the facts found. If however the first appellate Court, which is the ultimate judge of fact, refuses to draw and inference of fraud upon the facts found by it that decision cannot be questioned in second appeal unless the facts found necessarily amount to fraud. The mis-statement of value in a sale proclamation does not necessarily amount to fraud. (*Miller*, C.J. *and Mullick*, J.,) RAM DHARI CHAUDHURY *v.* DEONANDAN PRASAD SINGH.

8 Pat. L.T. 501=1 P.L.R. 18=4 U P.L.R. (Pat.) 71=(1922) P. 307=2 P. 65=1922 Pat. 269.

———**O. 21, R. 90**—*Fraud—Auction sale—Limitation to set aside.*

Where the sale and the irregularity affecting it has by the fraud of the decree-holder or other parties to the sale been kept concealed from the judgment-debtor, he is entitled to apply under R. 90 whether the sale has been confirmed or not, and the time for making the application is to be computed from the date when the fraud first became known to him. There is nothing in O. 21, R. 90 which limits the filing of an application to the period prior to confirmation of the sale. (*Adami*, J.) RAM PERSHAD LALL *v* CHAMARI SINGH.

70 I.C. 675=1922 Pat. 423.

———**O. 21, R. 90**—*Fraud in conducting sale—Petition to set aside—What to be proved.*

A person alleging fraud must state in detail the facts constituting fraud. A vague allegation of fraud cannot be accepted. A judgment-debtor applying to set aside an execution sale on the ground of fraud must clearly state in his petition as to how he was kept from the knowledge of the execution proceedings and the sale, and how his fraud was practised and how he came to know of the sale. Mere want of diligence is not fraud. (*Jwala Prasad and Adami*, JJ.) BABU DAS NARAYAN SINGH *v.* MUHAMMAD YUSUF *alias* BHEKHO.

3 U.P.L.R. (Pat) 33=2 P L T. 401=61 I.C. 823=6 P.L.J. 319=1921 Pat. 181.

———**O. 21, R. 90**—*Fraud—Publication of proclamation.*

O. 21, R. 90 covers a case of fraud committed after publication of the sale proclamation. Where the decree-holder agreed not to hold the sale if payment was made within a certain time and he then fraudulently proceeded to sell the property in contravention of this arrangement, this amounts to fraud in the matter of the conduct of a sale within O. 21. R. 90, C. P. C. (*Mullick and Thornhill*, JJ.) SHEIKH MAULA BUX *v* RAGHUBAR GANJHA.

48 I.C. 560=3 P.L.J. 645.

———**O. 21, R. 90**—*Fraud—Possession—Suit for—Decree-holder—Decree—Setting aside.*

C. P. CODE (V of 1908), O. 21, R. 90—Limitation.

In a suit for possession by the plaintiff decree-holder purchaser in execution of a mortgage decree, the defendant judgment-debtor is entitled to plead that the decree under which sale took place, was fraudulent and the Court is bound to go into that question. (*Mullick J.*) BANKEY BEHARI LAL *v.* BHAGWAN DAS MARWARI. 34 I.C. 697.

Limitation.

——— O. 21, R. 90—*Limitation—Real purchaser not known—Effect of adding him after limitation.*

Where the person who bid at an auction-sale did not disclose he was acting as an agent for another and as a result the judgment-debtor in applying to set aside the sale impleaded originally only the ostensible purchaser, but on knowing the facts impleaded the principle also but after the period of 30 days allowed by law, the application is not time barred. (*Stuart, J.*) MT. BHAGGO *v.* MATA PRASAD.
76 I.C. 807 = 1923 All. 462.

——— O. 21, R. 90—*Limitation—Setting aside on the ground of fraud—Starting point.*

The time for an application to set aside an execution sale on the ground of fraud, begins to run not from the date when the applicant becomes aware of the sale but from the date the applicant gets a definite knowledge as to fraud, and the burden of proving that the application is time barred is on the other side. (*Teunon and Asutosh Chaudhury, JJ.*) BHUSHANMAND DASI *v.* PRAFULLA KRISTA DEB. 60 I.C. 801 = 48 Cal. 119.

——— O. 21, R. 90—*Limitation.*

An application to set aside a sale made after 30 days from the date of sale on the ground of material irregularity and fraud cannot be admitted under O. 21, R. 90 of C. P. C. (*Fletcher and Walmsley, JJ.*) AHHA MUNSHI *v.* KAMA MOLLA. 48 I.C. 970.

——— O. 21, R. 90—*Limitation—Inherent powers.*

A Court cannot in the exercise of its inherent powers set aside a sale held in execution of a decree when the application under O. 21, R. 90 is barred by time. 14 Mad. 227; 21 Cal. 66 (P. C.), Foll. (*Oldfield and Tyabji, JJ.*) MUTHIAH CHETTIAR *v* BAWA SAHIB.
1 L.W. 969 = 26 I.C. 46 = 27 M L.J. 605.

——— O. 21, R. 90—*Limitation—Sale voidable and not void.*

A sale which is bad on the ground of irregularity or fraud and thus liable to be set aside is voidable only and an application to set it aside must be made within thirty days of the sale. (*Das, J.*) GHANASHAM *v.* BASDEB JHA. 60 I.C. 829 = 3 U.P.L.R. 27 (Pat.).

Material Irregularity.

——— O. 21, R. 90—*Material irregularity—Omission of Land Revenue in sale proclamation.*

C. P. CODE (V of 1908), O. 21, R. 90—Material Irregularity.

It is wrong to hold that the omission of the land revenue is immaterial for the purposes of R. 90 which entitles the person injured to apply on the ground of a material irregularity. (*Lord Buckmaster, J.*) BALIRAM SINGH *v.* RAI BAHADUR SETH NARSINGHDAS
40 M L J. 403 = L R 4 P C. 197 = 18 L W 137 = 28 C W N. 893 = 33 M L.T. (P.C.) 275 = (1923) M W N. 714 = 75 I.C. 546 = 10 O & A.L R. 358 = (1923 P C 93 (P.C.).

——— O. 21, R. 90—*Material irregularity—Minor — Not represented — Application to set aside by guardian, maintainable.*

An order for the sale of a zamindari directed that the sale proclamation should be served on each of the 109 *mouzahs* comprising it by beat of drum and that a copy of the same should be affixed to each *mouzah* but the proclamation was posted and read out without beat of drum, in only one *mouzah* The decree-holder had fixed the upset price at Rs. 2,000, which found to be a gross under-valuation, the zamindari being worth about 2 lakhs. At the sale no bidders appeared except the Collector who bid up to Rs. 2,000, the amount of arrears of taxes on the property and the decree-holder had the property knocked down to himself for Rs. 2,020. *Held* that the sale should be set aside as there was material irregularity in conducting it and substantial inquiry arising from. It was found that the deceased judgment-debtor's legal representative was a minor who was not represented by a guardian *ad litem* in the execution proceedings. The mother of the infant applied to set aside the sale on his behalf. *Held*, the mother as the natural guardian of the infant could apply on his behalf. (*Lord Moulton,*) TEKAIT KRISHNA PRASAD SINGH *v.* MOTI CHAND.
40 Cal 623 = 40 I.A. 140 = 17 C.W.N. 537 = (1913 M.W.N. 487 = 11 A.L.J 817 = 18 Bom. L R. 815 = 14 M L T. 37 = 19 I C. 293 = 23 M.L.J 140 P.C).

——— O. 21, R. 90—*Material irregularity—No attachment—Setting aside.*

In an application to set aside a sale under O. 21, R. 90, C.P.C., the following have been held not to be material irregularities:—An omission to state in the proclamation of sale the precise amount of claims of others, i.e., decree-holders entitled to rateable distribution (2) the absence from the sale proclamation of the valuation of the property ordered to be sold when it has not a deterrent effect on the minds of the intending or possible bidders; and (3) deposit by the purchaser of his ¼ share of the purchase money after the sales have all been concluded instead of at the conclusion of the bidding for each particular lot. Though the officer conducting the sale is guilty of irregularity until the judgment-debtor shows that such irregularity was so material as to cause him substantial loss, the sale will not be set aside. (*Piggott and Lindsay, JJ.*) MAHOMED ALI *v.* MAHABI PRASAD. 38 I.C. 411.

C. P. CODE (V of 1908), O. 21, R.90—Material Irregularity.

———O. 21, Rr. 90 and 92—*Material irregularity—No attachment.*

If property is sold in execution of a decree without being attached, it is a mere irregularity. (*Lyle, J.*) PENARA SHUKUL *v.* BALDEO SAHAI. **21 I.C. 46.**

———O. 21, R. 90—*Material irregularity—Minor—Legal representative not on record.*

If in execution proceedings, a minor son of a deceased judgment-debtor, is not brought on record, the proceedings are irregular and the sale should be set aside. (*Griffin and Chamier, JJ.*) RUKAMIN *v.* JODHA SINGH. **19 I.C. 120.**

———O. 21, R. 90—*Material irregularity—Execution of mortgage decree for amount of costs only—Sale of share of mortgaged properties.*

Where a mortgage suit by B against A and D was dismissed with costs against A and decreed against D and in execution of his decree for costs A attached the decree against A and having got himself substituted as attaching decree-holder executed his decree, and a share of the mortgaged properties was sold. *Held*, that the sale though irregular was not void but could be set aside by proper proceedings. (*Chatterjea and Panton, JJ.*) KAMINI KUMAR BHOUMIK *v.* PROTAP CHANDRA. **66 I.C. 608=25 C.W.N. 400.**

———O. 21, R. 90—*Material Irregularity—Execution sale held on a day other than that advertised is such.*

Where a sale in execution of a decree was held neither on the day originally advertised nor on the day to which it had been adjourned but on some third day, *held*, it was a material irregularity in the conduct of the sale. 6 C.W.N. 44 Foll. (*Mookerjee and Panton, JJ.*) HARI SADHAN ROY *v.* SHIB GOPAL MITRA. **66 I.C. 746=35 C.L.J. 140.**

———O. 21, R. 90—*Material irregularity—Mis-statement of value of property in proclamation.*

A mis-statement of the approximate value of the property in a sale proclamation constitutes material irregularity especially if it is knowingly made by the decree-holder. (*Walmsley and Huda, JJ.*) PARESH NATH GHOSE *v.* HARI CHARAN SHAH. **52 I.C. 23.**

———O. 21, R. 90—*Material irregularity—Legal representative—Sale without impleading.*

If a judgment-debtor died before the sale but after attachment, the sale is not necessarily invalid merely because the legal representative of the judgment-debtor had not been brought on the record. The omission laid the sale open to attack under the provisions of S. 311, of the Code. (*Richardson and Huda, JJ.*) JAGADISH *v.* BAMA SUNDARA. **28 C.W.N. 608=51 I.C. 972=29 C.L.J. 411.**

C. P. CODE (V of 1908), O. 21, R. 90—Material Irregularity.

———O. 21, R. 90—*Material irregularity—No attachment.*

Where an auction sale in execution of a mortgage decree was with the consent and at the request of the mortgagor, it is immaterial that there was no formal attachment of the lots. (*Chitty and Smither, JJ.*) SAMIRUDDIN *v.* ABDUL SYED. **44 I.C. 734.**

———O. 21, R 90—*Material irregularity—No attachment—Effect.*

The absence of an attachment in execution of a decree is an irregularity and does not absolutely invalidate the sale in execution. 5 All. 86 Diss; 36 Bom. 156. Dist; 13 Cal. 188; 21 All. 311, Foll; 21 Cal. 66, Ref. (*Chatterjee and Richardson, JJ.*) TARAK NATH ROY CHOUDHURY *v.* SYAMA CHARAN CHOWDHURY. **36 I.C. 292.**

———O. 21, R 90—*Material irregularity—Judgment-debtor deceased—Representatives not impleaded.*

Where a decree-holder initiated execution proceedings against a deceased judgment debtor and carried it on as if he were alive, not only not appraising the Court that the proceedings were taken against a dead man but untrue returns being repeatedly failed to show that the processes had been duly served. *Held*, that a sale under such circumstances is a grave abuse of the powers of Court and must be set aside. Judicial proceedings cannot be carried on in the name of a dead man. (*Mookerjee and Beachcroft, JJ.*) ARJUN DAS *v.* GUNENDRA NATH BASU MALLIK. **18 C.W.N. 1266=27 I.C. 294=20 C.L.J. 341.**

———O. 21, R 90—*Material irregularity—Legal representative—Not impleaded.*

Omission of the Court to bring on record the legal representatives of the judgment-debtors who has died after attachment but before sale is an irregularity and does not necessarily invalidate the sale. It is voidable and the persons affected can avoid it under O. 21, R. 90 or by suit within one year of the date of sale. Failure to proceed in either way within the time bars the right to impeach the sale. (*Mookerjee and Beachcroft, JJ.*) BEPIN BEHARI BERA *v.* SHASHI BHUSAN DATTA. **18 C.L.J. 628=22 I.C. 95=18 C.W.N. 766.**

———O. 21, R. 90—*Material irregularity—Substantial injury.*

Where the judgment-debtor applied to set aside an execution sale and it was found that there were a lot of irregularities coupled with a low price, the sale must be set aside though the property would be worthless than the decree amount and the decree-holder had since allowed the decree to be barred by limitation. (*Jenkins, C.J. and Chatterjee, J.*) SANT PERSHAD SINGH *v.* SHEO NARAYAN SINGH. **16 I.C. 728=16 C.W.N. 1022.**

C.P. CODE (V of 1908), O. 21, R. 90—Material Irregularity.

——— O. 21, R. 90—*Material irregularity—Omission to serve notice under O. 21, R. 22, C. P. C.*

Omission to serve notice under O 21, R. 22 is not by itself sufficient to render an execution sale void. Such omission constitutes a serious irregularity entitling the judgment-debtor to vacate the sale on proof of substantial injury. (*Brett and Chatterjee, JJ.*) RASARAJ KUNAI *v.* PROSANNA KUMAR ROY. **15 I.C. 506 = 40 Cal. 45.**

———— O. 21, R. 90—*Material irregularity—Mis-statement of value of property in sale proclamation—Effect.*

A deliberate and gross mis-statement of the value of property in sale proclamation to mislead intending purchaser is a good ground for setting aside the sale. (*Mookerjee and Carnduff, JJ.*) RUDRANDA THAKUR *v.* PRITHI CHAND. **14 C L J. 346 = 11 I.C. 438 = 16 C.W.N. 704.**

——— O. 21, R. 90—*Material irregularity—No attachment.*

A sale having once taken place, a subsequent impeachment of its validity on the ground that there had been no attachment would not vitiate the sale. But if objections are taken to the legality of the proceedings before the sale has taken place the position is different. (*Mookerjee and Coxe, JJ.*) SASIRAMA KUMARI *v.* MEHERBAN KHAN. **9 I.C. 918 = 13 C.L.J. 243 =**

——— O. 21, R. 90—*Material irregularity—Sale advertised subject to mortgage.*

A sale of property advertised for sale subject certain charges free of all charges and without a fresh sale proclamation is tainted with material irregularity. (*Mookerjee and Teunon, JJ.*) FAZLAR RAHMAN *v.* JAWAHIR SINGH. **9 I.C. 383.**

——— O. 21, R. 90—*Material irregularity—Delay in deposit.*

Delay in payment of deposit under O. 21, R. 84 amounts to an irregularity which can be inquired into only on an application under O. 21, R. 90. 28 All. 238; 16 Cal. 33, Con. (*Caspers and Chatterjee, JJ.*) MAHOMED ALI MIA *v.* KIBERIA KHATUN. **9 I.C. 66 = 15 C.W.N. 350.**

———— O. 21, R. 90—*Material Irregularity—Failure to issue notice for preparing sale proclamation.*

Failure to issue notice to the judgment debtor drawing up the proclamation of sale under O. 21, R. 66 is an irregularity in conducting or publishing a sale within the meaning of O. 21, R. 90. (*Shadi Lal and Le-Rossignal, JJ.*) JAGGAN NATH *v.* DAUD. **4 Lah. 243 = 78 I C. 103 = 1923 Lah. 592.**

———— O. 21, R. 90—*Material irregularity—Omission to state value in sale proclamation—Sale when liable to be set aside.*

C.P.CODE (V of 1908), O. 21, R. 90—Material Irregularity.

The mere omission to state the estimated price of the property to be sold is not a material irregularity when it is shown that the property was visible to all the purchasers who were thus in a position to frame their own estimates. Even if there had been a material irregularity in the publication or conduct of the sale that would not justify interference in the absence of proof that substantial injury to the petitioners had resulted therefrom. (*Le-Rossignol, J.*) MAHOMED NIZAM-UD-DIN *v.* AMIN-UD DIN. **4 Lah. L.J. 441 = 67 I.C. 885 (1) = 1922 Lah. 35.**

———— O. 21, R. 90—*Material irregularity—Omission of tom tom.*

Where the paucity of bidders at an execution sale was due to the omission of the decree-holder to announce it by beat of drum near the place where the property to be sold was situated, *Held*, that the sale must be set aside under O. 21, R. 90, C.P. Code. 24 C. 291, Rel. (*Broadway, J.*) NAND LAL *v.* TOLA RAM. **67 I.C. 752.**

———— O. 21, R. 90—*Material irregularity—Dissuading bids.*

The fact that the decree-holder dissuaded others from bidding and thereby caused the property to be sold at a low price is not "sufficient ground" for setting aside the sale. An application under O. 21, R. 90 is limited to the grounds enumerated in the sale. (*Shah Din, J.*) UTTAM CHAND *v.* DHANPAT RAI. **102 P.L.R. 1911 = 9 I.C. 816 = 203 P.W.R. 1911.**

———— O. 21, R. 90—*Material irregularity—Proclamation of sale not mentioning place of sale.*

Where in a sale by the Official Referee the sale proclamation did not mention the place of sale but it was found that the sale was well attended and no possible bidder kept away on account of the non-mention of the place of sale. *Held*, that the omission was only an irregularity and as the parties were not prejudiced thereby it is no ground for setting aside the sale. (*Wallis, C.J. and Krishnan, J.*) TULJARAM ROW *v.* RAMACHANDRA RAO. **14 L.W. 515 = 41 M.L J. 465 = 68 I.C. 916 = (1921) M.W.N. 736.**

———— O. 21, R. 90—*Material irregularity—Sale held at a place different from that advertised.*

Where in publishing a sale proclamation the process-server substituted for the selling officer and place of sale fixed by the Court in the sale proclamation a different selling officer and a place of sale and thus the sale proclamation as framed by the Court was never published in the village, the non-publication of the sale proclamation is an illegality which invalidates the proceedings and consequently the sale is a nullity. Per *Seshagiri Iyer, J.*—Where a substantial provision of law has been violated and that has the effect of not attracting persons

C. P.CODE (V of 1908), O. 21, R. 90—Material Irregularity.

who could be expected to be present for the purpose of bidding at the sale, the sale should be regarded as having been illegally conducted. 16 Cal. 794, Foll. (*Oldfield and Seshagiri Aiyar*, JJ.) JAYARAMA AIYAR *v.* VRIDHAGIRI IYER. **39 M.L.J. 188=12 L.W. 182=(1920) M.W.N. 490=59 I.C. 167=44 M. 35.**

——— **O. 21, R. 90**—*Material irregularity—Sale without notice to judgment-debtor—Validity*

An auction sale by Court without notice to judgment-debtor is bad and must be set aside. Want of notice to him will not however vitiate the sale when there is proof of his actual knowledge of the execution proceedings or of his wilfully keeping himself behind or of the existence of other valid defences for him. 25 Bom. 337; 42 Cal. 72, Foll. (*Sadasiva Aiyer and Napier*, JJ.) TANGUTUR JAGANNADHAM *v.* SESHAGIRI RAO. **37 I.C. 387=20 M.L.T. 479.**

——— **O. 21, R. 90**—*Material irregularity—Sale for larger amount than due.*

Where the sale proclamation mentioned that the execution sale was in satisfaction of the whole decree amount but as matter of fact part of the decree had been satisfied, it is a mere irregularity and does not make the sale a nullity. (*Sadasiva Aiyar and Napier*, JJ.) KASTHURI AIYANGAR *v.* ARUNACHELAM CHETTIAR. **34 I.C. 350=(1916) 1 M.W.N. 195.**

——— **O. 21, R. 90 and S. 47**—*Material irregularity—Contravention of terms of decree.*

A sale held in contravention of the terms of the decree is one held with material irregularity in the exercise of the jurisdiction of the Court and the executing Court can set it aside, on an application to it under S. 47 and not by a separate suit. (*Sadasiva Aiyar and Moore*, JJ.) PALANIYAPPA *v.* ARUMUGA. **33 I.C. 692=(1916) 1 M.W.N. 266.**

——— **O. 21, R. 90**—*Material irregularity—Legal representative—Not brought on record—Property purchased by decree-holder in execution—Sale, if valid.*

Where a decree-holder having notice of the death of the judgment-debtor but without bringing his legal representatives on record, purchased his property in execution, it was held that the omission is material and the sale as against them a nullity. 25 Bom. 337, Dist. (*Sankaran Nair and Ayling*, JJ.) SAMANDAN KARKAT EDATHIL RAYARAPPAN NAMBIER *v.* MALIKANDA AKETH MAYAH. **28 I.C. 251=26 M.L.J. 267.**

——— **O. 21, R. 90**—*Material irregularity—Incorrect proclamation.*

A materially incorrect statement of the Revenue or value of property in a sale proclamation would be an irregularity vitiating the sale, if the debtor or auction-purchaser sustains substantial injury thereby. (*Benson and Sundara Aiyar*, JJ.) RAJA OF KALAHASTI *v.* MAHARAJAH OF VENKATAGIRI. **38 Mad. 387=14 M.L.T. 320=21 I.C. 389=25 M.L.J. 198.**

C.P. CODE (V of 1908), O. 21, R. 90—Material Irregularity.

——— **O. 21, R. 90**—*Material irregularity—Minor—Representation.*

To sustain an application under C. P. C., S. 311 (Old Code) corresponding to O. 21, R. 90 material irregularity in publishing or conducting the sale as well as substantial loss as a consequence of the irregularity must be proved. An objection that a minor was not properly represented does not fall under the section. (*Krishnaswami Aiyar*, J.) KALLI NAGIAH *v.* GOPALA KRISHNIAH. **9 I.C. 252=9 M.L.T. 260.**

——— **O. 21, R. 90**—*Material irregularity.*

The omission to notify existing incumbrances on the property sold entitled the auction purchaser to set aside the sale under O 21, R. 90, C.P.C. (*Batten*, J.C.) SHIU PRASAD *v.* SANTOOJI. **18 N.L.R. 98=65 I.C. 878=5 N.L.J. 147=1922 Nag. 113.**

——— **O. 21, R. 90**—*Material irregularity—Non-transferability of property.*

An application to set aside a sale on the ground of non-transferability of property sold, not being a material irregularity in conducting a sale does not fall within the order. (*Coutts and Adami*, JJ.) SAKHI RAI *v.* RAM AUTAR RAI. **1 P.L.T. 742=2 U.P.L.R. (Pat) 187=57 I.C. 261=1920 Pat. 221.**

——— **O. 21, R. 90**—*Material irregularity—Valuation.*

Under O. 21, R. 90, C.P.C., the judgment-debtor must show that the inadequacy of the prices was caused in consequence of the irregularity alleged stating two valuations in the proclamation namely the decree-holder's and the judgment-debtor's. (*Chapman and Atkinson*, JJ.) NAND KISHWAR SAHAI *v.* KEDAR NATH. **40 I.C. 849.**

——— **O. 21, R. 90**—*Material irregularity—Execution-time barred.*

After confirmation of a sale in execution the only remedy of the judgment-debtor is to apply to have the sale set aside under the Rule, which application cannot succeed upon the only ground that the application for attachment and sale was time-barred. (*Chapman and Roe*, JJ.) LAKHU RAI *v.* KESHO PRASAD SINGH. **2 P.L.J. 167=38 I.C. 876=3 P.L.W. 403**

——— **O. 21, Rr. 90 and 69**—*Material irregularity—Adjournment by bailiff without Court's permission—Fresh proclamation.*

An adjournment of a Court sale by the bailiff himself without the leave of the Court is a mere irregularity and does not vitiate or nullify the sale held on the adjourned date in the absence of substantial injury caused thereby where the sale is adjourned only for 2 days, no fresh proclamation is necessary. 21 Cal. 66 P.C. Foll. (*Hartnoll and Young*, JJ.) VADU GANATHAM CHETTY *v.* E.G. FOY. **20 I.C. 192=6 Bur. L.T. 65.**

C. P. CODE (V of 1908), O 21, R. 90—Minor

Minor.

———O. 21, R. 90—*Minor—No guardian* ad litem *in execution proceedings—Irregularity.*

O. 21, R. 90 is applicable to applications for setting aside a sale on the ground that in the execution proceedings the minor had, no guardian *ad litem*. (*Sanderson*, C J *and Richardson*, J.) FANI BHUSAN *v.* SURENDRA NATH.
64 I C. 25=35 C.L.J. 9.

———O. 21, R. 90 and O. 32, R. 3—*Minor—Representation—Right to apply—Guardian ad litem.*

Where on the death of a judgment-debtor, the creditor applied to have the legatee a minor brought in record which prayer was granted but none was appointed as guardian of the minor even though the minor's father who was also added as a party continued the suit and the property was sold and purchased by the decree holder, *held*, in an application by the mother, as guardian and next friend to set aside the sale under S. 47 and O. 21, R. 90 alleging fraud and collusion, that in the circumstances of the case, the mother was entitled to make the application, that she should be appointed guardian *ad litem* and that the sale of the property without appointing such guardian was in itself an irregularity which would vitiate the sale. (*Sharfuddin and Coxe*, JJ.) KESHAWE SURENDRA SAHI *v.* DEVENDRA BALA DASI. 29 I.C. 211.

Notice.

———O. 21, R. 90—*Notice—Right to Second Appeal.*

A sale cannot be set aside without notice to auction-purchaser, who can appeal in case an order is passed adverse to his interests; but he has no right of Second Appeal from that order. Where a sale was set aside with the consent of judgment-debtor and decree-holder and the auction-purchaser appealed and the sale was confirmed in appeal, *held*, that no Second Appeal by the judgment-debtor was competent. (*Scott Smith*, J.) NUR MUSTAFA *v.* JAMADAR MAHOMMED. 62 I C. 986.

———O. 21, Rr. 90 and 92—*Notice of Sale—Insufficient notice—Loss.*

Where the property has been knocked down for any low price owing to insufficient notice of sale, the sale must be set aside as irregular. (*Kensington*, J.) MIRAJ DIN *v.* DILBAGH RAI.
144 P.L.R. 1914=28 I.C. 51=
48 P.W.R. 1914.

———O. 21, R. 90—*Notice of attachment and sale—Remedy.*

If the party objecting had no knowledge of the attachment and sale he must apply to set aside the sale. (*Sundra Iyer and Sadasiva Iyer*, JJ.) JAGADAMBAL AMMAL *v.* RAMASWAMY IYENGAR. 17 I.C. 126.

———O. 21, R. 90—*Notice—Absence of.*

An order setting aside an execution sale under R. 90, without giving proper notice to the parties as required by R. 92, is without jurisdiction and is of no effect. (*Jwala Prasad*, JJ.) BHIKHAN GIR GOSSAIN *v.* JALPADAT JHA. 2 Pat. L.T. 270=62 I.C. 113.

C. P. CODE (V of 1908), O. 21, R. 90—Publication of Sale.

Nullity.

———O. 21, R. 90—*Nullity—Sale in execution of a decree—Suit for possession.*

It is unnecessary to set aside the sale in a suit for possession of property sold in execution of a decree if the sale was a nullity, *e.g.*, where the decree was obtained against a deceased mortgagor. 11 C.W.N. 1078, Dist; 12 I.C. 155, Foll. (*Mullick and Kingsford*, JJ.) JAHNAVI PRASAD SINGH *v.* CHARBARAN DUBEY.
35 I.C. 405.

Parties.

———O. 21, R. 90—*Parties—Auction-purchaser.*

The Court has no jurisdiction to hear an application to which an auction-purchaser is not made a party within time. (*Fletcher and Walmsley*, JJ.) AJIUDDIN AHMED *v.* KHODA BUX. 30 I.C. 5.

———O. 21, R. 90—*Parties—Auction-purchaser, if necessary party.*

An auction-purchaser is not a necessary party to an application made under O 21, R. 90 (S. 311 of the Old Code) to set aside an execution sale. (*Brett and Carnduff*, JJ.) SURENDRA MOHINI DEBI *v.* LOHARAM CHATTOPADHYA. 39 Cal. 687=15 I.C. 67=
16 C.W.N. 570.

———O. 21, R. 90—*Parties—Purchase without leave of Court.*

An objection to a purchase without the leave of the Court can only be raised by parties to the suit and not by strangers. (*Sundara Iyer and Sadasiva Iyer*, JJ.) JAGADAMBAL AMMAL *v.* RAMASWAMY IYENGAR.
17 I C. 126.

———O. 21, R. 90—*Parties—Auction purchaser is a necessary party.*

An application to set aside an execution sale will not be entertained if the auction-purchaser who is a necessary party to the application, is not made a party within the time allowed by law for making the application. (*Ross*, J.) SUMITRA KUER *v.* DAMRI LAL.
62 I C. 61=2 Pat. L.T. 336.

Publication of Sale.

———O. 21, R. 90—*Publication of sale—Omission in sale proclamation—When a sufficient ground.*

To render a sale liable to set aside on the ground of an omission in the sale proclamation it must be shown that the omission was a material one. It is not for every omission that a sale is liable to be set aside. (*Fletcher and Cuming*, JJ.) PROMATHA NATH *v.* BEJOY MADHAB. 53 I.C. 168.

C. P. CODE (V of 1908), O 21, R. 90—Publication of sale.

———O. 21, Rr. 90, 66 (2) and 54 (2)—*Publication of sale—Irregularity in—Fraud—Auction purchaser no party to fraud—Sale set aside.*

The irregular preparation of the actual sale proclamation, the omission to issue the notice required by O. 21, R. 66 (2) and the failure to comply with the provisions of O. 21, R. 54 (2), as regards the promulgation of the order, are irregularities in publishing a sale under O. 21, R. 90 of the Code. A sale in execution may be annulled for fraud even if the auction-purchaser is no party to it. (*Carnduff and Beachcroft*, JJ.) BEPIN BIHARI BEJALI *v.* KANTI CHANDRA MANDAL. **18 I.C. 715.**

———O. 21, Rr. 90 and 67 (2)—*Publication of sale—Omission to advertise in Gazettes—Effect of—Substantial injury—Proof of—Objections not taken not to be urged.*

The failure to give a direction for advertisements of the sale in the *Gazette* does not amount to material irregularity in the conduct of the sale within O. 21, R. 90. The judgment-debtor must show that the irregularity has resulted in substantial injury to him. An execution Court should not consider objections other than those expressly stated in the application under O 21, R. 90, C. P. C. A *fortiori* objections not so taken cannot be considered by an Appellate Court when hearing an appeal from the order of the Court rejecting an application to set aside a sale. (*Rattigan*, C J.) GOPI CHAND *v.* BENARSI DAS. **38 I.C. 794.**

———O. 21, R. 90—*Publication of sale—Defects in—Application to set aside sale.*

Where the objections of a judgment-debtor to a sale held in execution are such as had been or might have been taken in the proceedings for framing the proclamation of sale of which the judgment-debtor had notice, the Court will not set aside the sale on these grounds. Under O. 21, R. 67 read with O 21, R. 54, C.P. Code, it is necessary that an execution sale of an enfranchised srotriem village should be published at the Collector's Office. The judgment-debtor applied to set aside an execution sale on the ground that the sale was not proclaimed in the village or published at the Collector's Office. The Court dismissed the application holding that the same objections had been inquired into and decided against the petitioner at an earlier stage of the execution proceedings before the sale was concluded. *Held* that there was no provision of law authorising the investigation of the objections in question before the conclusion of the sale and that the previous decision was not *res judicata*. The application was remanded for an enquiry on the merits. (*Oldfield and Devadoss*, JJ.) PAMIDIMARRI GANAMMA *v.* KETTIREDDI KRISHNA REDDI. **46 Mad. 736=(1923) M W N. 463=45 M L J. 263=75 I.C. 369=1924 Mad. 217.**

———O. 21, Rr. 90 and 92—*Publication of sale—Fresh proclamation—Material irregularity—Joint family property—Release of a portion.*

Just before the sale of certain items of property in execution of a decree on mortgage of the properties belonging to a Hindu joint family, one of the defts. paid a sum of money and got half the interest in those terms released from sale. The remaining half was put up for auction without a fresh proclamation. *Held*, where there was irregularity but there was no substantial loss following it, the sale need not be set aside under such circumstances. 3 Cal. 514, Not foll. (*Seshagiri Aiyar and Moore*, JJ.) SETHAI GOUNDEN *v.* SUBRAMANIA CHETTIAR. **11 L W. 477.**

C. P. CODE (V of 1908), O. 21, R. 90—Right to apply.

———O. 21, Rr. 90, 87 and 54 (2)—*Publication of sale—Non-compliance with O. 21, Rr. 54 (2) and 68.*

An omission to affix a copy of the sale proclamation in a conspicuous place and to hold the sale after the expiry of 30 days from the date of affixture is a material irregularity resulting in a substantial injury within O. 21, R. 90, C.P.C. (*Kotwal*, A. J. C.) LAXMI NARAYAN *v.* PURNABAI. **48 I. C. 611.**

———O. 21, R. 90—*Publication of sale—Proclamation not published—No substantial injury—Effect of.*

A Court is barred under O. 21, R. 90 from setting aside an execution sale on the ground of absence of publication of the sale, if no substantial injury is sustained thereby. (*Chapman and Roe*, JJ.) SRISH CHANDRA GHOSE *v.* SADHU CHARAN RAUTRA. **6 Pat. L.W. 15=46 I C. 81=1918 Pat. 285.**

Rent Sale.

———O. 21, Rr. 90 and S. 47—*Rent sale—Setting aside—Bengal Tenancy Act, S 173.*

One of the grounds on which the sale of a tenure in execution of a rent decree was set aside by a Munsiff was that the judgment debtor purchased the property through a *benamidar*. The case is not within S 173 (3) as there were other grounds for setting aside the sale *i. e.*, irregularity and fraud which are governed by S. 47 and O. 21, R. 90, C.P. Code. In such a case the Court must not adop the summary procedure laid down in S. 173 of the Bengal Tenancy Act, but try the case under the C.P. Code. Its decision is open to appeal and second appeal. (*Holmwood and Imam*, JJ.) SREENATHA HALDAR *v.* BEPIN BEHARI MAL. **38 I.C. 874.**

Right to Apply.

———O. 21, R. 90—*Right to apply—Person whose interests are not affected by sale—Declaratory suit by person alleging exclusive ownership.*

A person who has filed a declaratory suit regarding property ordered to be sold in execution of a Court decree, cannot during the pendency of his suit, take advantage of O. 21,

C. P CODE (V of 1908), O 21, R. 90—Right to apply.

R. 90 and have the sale set aside. (*Piggott and Walsh*, JJ.) HARDWARI LAL *v*, MUHAMMAD SALAMALULLA KHAN. **38 All. 368= 34 I.C. 272=14 A.L.J. 409.**

——**O 21, R. 90** —*Right to apply—Person not party to decree, if can object.*

A person, not a party to a mortgage decree cannot object under O. 21, R. 90, though it would be open to him to assert his title in a regular suit. (*Tudball and Rafique*, JJ.) RAM NARAIN *v.* RAM CHANDER SARUP. **20 I C 16.**

——**O. 21, R. 90** —*Right to apply—Co-sharer landlords.*

When some co-sharer landlords bring the defaulting tenure to sale under a decree for rent —the remaining landlords had a *locus standi*, and they can apply under O. 21, R. 90, C.P.C. (*Teunon and Cuming*, JJ.) NARENDRA BHUSAN ROY *v* KHAGENDRA BHUSAN ROY. **50 I.C. 329=23 C.W N. 619.**

——**O. 21, R. 90**—*Right to apply—Whose interests are affected by the sale.*

A mortgagee of an entire non-transferable holding, who purchased it in execution of the mortgage decree is a person whose interests are affected by the sale in execution of a rent decree obtained subsequently within R. 90. 22 C.L.J. 108, Dist. (*Richardson and Roe*, JJ.) SILABALA DEBI *v.* NRITYA GOPAL SEN PODDAR. **31 I.C. 859=22 C.W.N. 143.**

——**O. 21, R. 90**—*Right to apply—Occupancy holding—Non-transferable — Transferee of a portion—Whether can apply for setting aside sale in execution.*

A transferee of a portion of a non-transferable occupancy holding can apply under O. 21, R. 90 to set aside a sale in execution of a decree for rent obtained by the entire body of landlords. 3 I.C. 461; 11 C.W.N. 312 and 13 I.C. 487. Dist. (*Mookerjee and Beachcroft*, JJ.) ABDUL AZIZ *v.* TAFAJADDIN. **23 I.C. 839= 19 C.W.N. 326**

——**O. 21, R. 90 and O. 38, R. 5**—*Right to apply—Person attaching property before judgment.*

Attachment before judgment does not create any interest in the attached property, hence the person attaching cannot apply under O. 21, R. 90 to set aside a sale in execution at the instance of a decree-holder against the deft, in suit. (*Mookerji and Beachcroft*, JJ.) JOGENDRA NATH CHATTERJI *v.* MANMATHA NATH GHOSH. **16 C L J. 566=15 I.C 668= 17 C.W N. 80.**

——**O. 21, R. 90**—*Right to apply—Purchaser at execution sale.*

A purchaser at an auction in execution of a decree is a person whose interests are affected by the sale under O. 21, R. 90, C.P.C. The term "interests" in R. 90 of O. 21 is not confined to interests that existed prior to the

C. P. CODE (V of 1908), O. 21, R. 90—Right to apply.

auction-sale but include interests created by the sale itself. 19 Cal. 683, Ref. (*Spencer and Bakewell*, JJ.) BHAVIRISETTI GOPALA KRISHNAYYA *v.* BANJEEVA REDDI. **28 M L.J. 228=11 L.W. 184= 55 I.C. 333=(1920) M.W. N 152.**

——**O. 21, R. 90**—*Right to apply—Interest affected by sale.*

The word "interests" in R. 90 of O. 21, must be limited to the properties which are the subject of the application. A money decree-holder relying merely upon an attachment before judgment of properties other than those sold is not a person who can be said to have a present interest in the properties sold and so cannot maintain an application under this section. 17 C.W.N. 80, Foll. (*Sadasiva Iyer and Napier*, JJ.) KATHIRESAN CHETTIAR *v.* RAMASWAMI CHETTIAR. **27 M.L.J. 302= 26 I.C. 93=(1914) M.W.N. 871.**

——**O. 21, R. 90** — *Right to apply—Auction-purchaser.*

An auction-purchaser is a person "whose interests are affected by the sale" within the meaning of O. 21, R. 90, C.P. Code and he can apply to set aside the execution sale under that rule. 20 C. 8 (P.C.), dist.; 3 Pat L.J. 516, not foll.; 38 M.L.J. 228, foll. (*Batten*, J.C.) SHIU PRASAD *v.* SANTOJI. **5 N L.J. 157= 18 N.L.R. 98=65 I.C. 875=1922 Nag. 113.**

——**O. 21, R. 90**—*Right to apply—Auction-purchaser.*

An auction-purchaser cannot apply to set aside an execution sale under O. 21, R. 90, C.P. Code 20 C. 8; 19 C.W.N. 1291 Rel. (*Prideaux*, A.J.C.) BALWANT *v.* RATAN LAL. **68 I.C. 429.**

——**O 21, R. 90**—*Right to apply—Auction-purchaser cannot apply.*

An auction purchaser cannot apply to have the sale set aside under O. 21, R. 90, as it does not cover the case of a person whose interest was affected by the very sale sought to be set aside. (*Mullick and Bucknill*, JJ.) KARTIK CHANDRA CHATTERJEE *v.* NAGENERA NATH ROY. **5 Pat. L.T. 41=74 I C. 760 (2)= 1924 P. 319. (1).**

——**O. 21, Rr. 90 and 89**—*Right to apply—Hindu reversioner—Maintainability.*

A reversioner to a Hindu widow's estate is entitled to apply under O. 21, Rr. 89 and 90 of the C. P. Code to set aside a sale of immoveable property on account of fraud or irregularity in publishing or conducting the sale. *Quære*—Whether persons entitled to specific performance or licensees are also entitled to apply under that rule. 19 C. L. J. 72. Foll. (*Mullick and Jwala Prasad*, JJ.) BRIJ KRISHORE LAL *v.* PRATAP NARAIN. **4 Pat. L. J. 360= 51 I.C. 859=1919 Pat. 308.**

C. P. CODE (V of 1908), O. 21, R. 90—Right to apply.

——— **O. 21, R. 90**—*Right to apply—Paramount title-holder cannot apply.*

A person claiming property that had been sold, by title paramount to that of the judgment-debtor could not apply to have the sale set aside. 15 Cal 488 ; 23 Bom. 450, foll (*Brown, A.J.C.*). MAUNG KUN *v.* MA NAN.
4 U.B.R. 97=1 Bur L. T. 234=70 I C. 900=1922 U. B. 22.

——— **O. 21, R. 90**—*Right to apply—Interest—What is—Rateable distribution, nature of.*

The word "interest" in the expression "person whose interests are affected by the sale" in R. 90 means interests in the property sold. Creditors who have nothing more than a bare chance of getting a higher dividend out of the debtor's general assets if the sale is set aside are not such persons as can be said to have an interest contemplated by the Rule. The expression "rateable distribution" in R. 90 refers to rateable distribution under S. 73 of the Code and does not include the distribution of dividends under the Provincial Insolvency Act. (*Crouch and Hayward*, A. J. Cs.) SULEMANJI IBRAHIMJI *v.* PRAGJI KALA.
39 I.C. 932=10 S.L.R. 189.

——— **O. 21, R. 90**—*Right to apply—Insolvent.*

An adjudged insolvent judgment-debtor having no interest in the property vested in the Receiver cannot apply to set aside a sale under O. 21, R. 90. An allegation that the auction-purchaser and bidders conspired to lower the price is no ground to set aside the sale. Words "entitled to share in rateable distribution of assets" refer to decree-holders entitled under S. 73. The words "whose interests are affected by the sale refer to interests existing in the property sold and to claims by the alleged creditors. (*Pratt*, J.C.) PRAGJI KALA *v.* ASSA JALAL. **35 I.C. 530=10 S.L.R. 58.**

Scope of.

——— **O. 21, Rr. 90, 91 and 93**—*Scope of Order setting aside sale—Interest, if can be awarded.*

Where a sale is set aside under O. 21, R. 90 or R. 91, the Court has power to order interest on the purchase-money also being paid to the purchaser under R. 93. (*Viscount Cave.*) MAHARAJ BAHADUR SINGH *v.* FORBES.
48 I.A. 24=(1921) M W N. 26=13 L W. 217=40 M.L J. 141=19 A.L J. 101=33 C.L.J. 176=25 C.W.N. 366=2 P.L T. 116=6 P.L.J 129=59 I.C. 782=23 Bom L.R. 727 (P.C.).

——— **O. 21, R. 90**—*Scope of—Fraud in conducting execution sale.*

O. 21, R, 90, C.P. Code not only covers a case of material irregularity but also a case of fraud in publishing or conducting the sale. (*Chatterjee and Panton*, JJ.) ABDUL SAMAD MONDAL *v.* BASIRUDDIN CHAUDHURY.
66 I.C. 220.

C. P. CODE (V of 1908), O. 21, R. 90—Substantial Injury.

——— **O. 21, R. 90**—*Scope of—Decree for possession of immoveable property—Attachment and sale of—Setting aside sale.*

Where a decree for possession of immoveable property is sold in execution of another decree an application does not lie for setting aside a sale under O. 21, R. 90, C.P.C. (*N. R. Chatterjee and Suhrawardy*, JJ.) BIRENDRA NATH MITRA *v.* UMA CHARAN BANERJEE.
64 I C. 388.

——— **O. 21, R. 90**—*Scope of—Alteration in new Code.*

The effect of adding the words "or fraud" to O. 21, R. 90 is to take the applications setting up fraud in publishing or conducting a sale, out of the scope of S. 47 and bring them under the rule. (*Shadi Lal and Le Rossignol*, JJ.) JAGANNATH *v.* DAUD.
4 Lah. 243=75 I.C. 103=1929 Lah. 592.

——— **O. 21, R. 90**—*Scope of—Proceedings under, come within the scope of S. 47.*

Proceeding to set aside a sale on the ground of material irregularity or fraud in publishing or conducting a sale, involve questions relating to execution, discharge or satisfaction of a decree and come both under O. 21, R. 90 and S. 47, C.P.C. (*Sadasiva Aiyar and Moore*, JJ.) ANANTHARAMA IYER *v.* VETTATH KUTTIMALU KOVILAMMAL.
19 M.L T. 357=3 L.W. 504=34 I.C. 829=30 M.L J. 611.

——— **O. 21, R. 90**—*Scope of—Proceedings under are not execution proceedings.*

A proceeding to set aside a sale under R. 90 is not a proceeding in execution as execution proceedings ordinarily end with the sale resulting from the full or part satisfaction of the decree. (*Das and Ross*, JJ.) JAGDISH MISSIR *v.* SURESWAR MISSIR.
2 Pat. L.T. 273=62 I.C. 608=6 Pat. L J. 253.

Substantial Injury.

——— **O. 21, Rr. 90 and 69 (2)**—*Substantial injury—Execution sale—Irregularity—No proof of injury—Sale not to be set aside—C. P. Code*, (1882), *Ss.* 287 *and* 291.

An execution sale is not in contravention of Ss. 287 and 291 (O. 21, R. 69) merely because having been proclaimed to be held at the monthly sale commencing on July 13th it was not held till 20th July and then without a fresh proclamation. Assuming there was an irregularity in the sale, there was no proof of substantial injury to the judgment debtor and the sale could not be set aside. (*Mr. Ameer Ali.*) RANG LAL SINGH *v.* RAVANESHWAR PRASAD SINGH. **39 Cal. 26=38 I.A. 200=(1911) 2 M W.N. 108=10 M.L.T. 161=13 Bom. L R. 823=14 C.L J. 384=8 A.L.J. 1173=12 I.C. 174=16 C.W.N. 1. (P.C.).**

C. P. CODE (V of 1908), O. 21, R. 90—Substantial injury.

——O. 21, R. 90—*Substantial injury—Proof.*

To come under O. 21, R. 90 a party must prove that there was such an irregularity as resulted in substantial injury to him. (*Piggott and Rafique, JJ.*) MOHAMAD MABALUL RAHMAN *v.* SAIYED ALI KHAN. 25 I.C. 18.

——O. 21, R. 90 *Substantial injury—Essential.*

Material irregularity which would justify the setting aside of a sale must have caused a substantial injury to the judgment-debtor. (*Newbould and Panton, JJ.*) HALADHAR MITTRA *v.* PRAFULLA NATH. 57 I C. 892.

——O. 21, R. 90—*Substantial injury—Loss due from irregularity.*

An execution sale cannot be set aside under O. 21, R. 90 if there is nothing to warrant the necessary or at least reasonable inference that the inadequacy of the price was due to the irregularity complained of. (*Teunon and Newbould, JJ.*) TAIMUDDI BEPARI *v.* SHEIKH LAKPAT BEPARI. 45 I.C 212.

——O 21, Rr. 90, 66 and 67—*Substantial injury—Setting aside sale.*

Where the alleged irregularity in the conduct of the sale did not directly produce any serious loss, there is no ground for setting aside the sale. 32 I.C. 990; 33 I.C. 692; 67 I C. 885; 57 I.C. 892, foll. (*Broadway, J.*) NOOR MAHOMED KHAN *v* MALIK NOOR MAHOMED KHAN. 5 L.L.J. 30=71 I.C. 730=1923 Lah 213.

——O. 21, R. 90—*Substantial injury—Proof essential.*

When an appeal against an order for sale without attachment is preferred and during the appeal the sale takes place and is confirmed, it is only loss resulting to party from such sale that will justify the Appellate Court in setting aside the sale. 38 Cal. 432, Diss. 10 All 166. Dist. (*Oldfield and Krishnan, JJ.*) SIVAKOLANDU PILLAI *v* GANAPATHY IYER. 37 I.C. 964=(1917) M.W.N. 89.

——O. 21, R. 90—*Substantial injury—Proof of.*

Some connection between irregularity and inadequacy must be shown. (*Sadasiva Iyer and Moore, JJ.*) PALANIAPPA *v.* ARUMUGA PANDARAM. 33 I C. 692=(1916) 1 M.W.N. 286.

——O. 21, R. 90—*Substantial injury—Evidence of.*

Direct evidence to connect the irregularity with the loss by a person who seeks to set aside a Court auction sale on the ground of an irregularity in the conduct of the sale and of consequent loss to himself. 21 Cal. 66 at 70, Foll. (*Sadasiva Iyer and Moore, JJ.*) SWAMINATHA IYER *v.* SIVAGURUNATHA CHETTIAR. 32 I.C. 990.

C. P. CODE (V of 1908), O. 21, R. 90—Under-valuation.

——O. 21, R. 90—*Substantial injury.*

There must be substantial injury by reason of irregularity or fraud. (*Brown. A.J.C.*) MAUNG KUN *v.* MA NAN. 4 U B R 97=70 I C. 900=1 Bur. L J. 234=1922 U.B. 22.

Under-Valuation.

——O. 21, R. 90—*Under-valuation—Substantial injury.*

No substantial injury can be said to be caused where the valuation of the property in the sale proclamation was inadequate but the price fetched at the auction sale was adequate. (*Newbould and Panton, JJ.*) HALADHAR MITRA *v.* PRAFULLA NATH. 57 I.C. 892.

——O. 21, R. 90—*Under-valuation—Misstatement of value of property in proclamation.*

A mis-statement of the approximate value of the property in a sale proclamation constitutes material irregularity especially if it is knowingly made by the decree-holder. (*Walmsley and Huda, JJ.*) PARESH NATH GHOSE *v.* HARI CHARAN SHAHA. 52 I C. 23.

——O. 21, R. 90—*Under-valuation.*

Omission to state the amount due under a mortgage, and under statement in the sale-proclamation of the value of the property to be sold in execution of a decree are irregularities under rule 90, Order 21, C.P. Code and any party affected by sale can ask for its cancellation. (*Teunon and Chaudhari, JJ.*) MOHENDRA NATH JANA *v.* BEPIN BEHARY GHOSE. 33 I.C. 946.

——O. 21, R. 90—*Under-valuation—Dismissal of application by one judgment-debtor—Effect of.*

An application to annul sale by a judgment debtor may succeed even if a similar application by a co-judgment-debtor may have proved infructuous. An intentional under statement of the value of the property in the application for execution and in the sale proclamation, is a material irregularity and if the judgment-debtor sustains substantial injury therefrom the sale should be set aside. (*Mookerjee and Carnduff, JJ.*) JADOO NATH CHATTERJEE *v.* ASWANI KUMAR BANERJEE. 16 I C. 974=16 C.L.J. 98.

——O. 21, R. 90—*Under-valuation—Time of sale omitted.*

Mere under-valuation in sale proclamation or an omission of hour of sale, though an irregularity but without causing any substantial injury to the applicant is not sufficient irregularity to set aside an execution sale. (*Sharfuddin and Coxe, JJ.*) GOUR KISHORE BASAK *v.* CHANDRA MOHAN BANDOPADHYA. 16 I.C. 394.

——O. 21, R. 90—*Under-valuation—Omission to state area and profits—Whether amounts to fraud.*

Mere under-statement of value of properties

C. P. CODE (V of 1908), O. 21, R. 90—Under-valuation.

advertised for sale is not by itself sufficient to justify an inference of fraud unless from other circumstances a deliberate attempt to get the property for a low price can be made out: when the property is described without sufficient precision, omission to give the area and profits is no indication of fraud. (*Coxe and Teunon, JJ.*) KISHORI DASI *v.* MUKUND LAL. 11 I C 295 = 15 C.W.N. 955.

——O. 21, R. 90—*Under-valuation of property.*

More under-valuation in a sale proclamation is a material irregularity in publishing the sale within the meaning of S. 311 of the C. P. C., (1882) and if the properties have been sold below their proper value the sale should be reversed (*Mookerjee and Carnduff, JJ.*) SIVADURGA DEBI *v* RAJMOHAN PODDAR. 10 I.C. 478 = 15 C.W N. 577.

——O. 21, R. 90—*Under-valuation—Upset price—Sale set aside.*

Where the upset price fixed in a proclamation of sale of the lease hold interest held by the judgment-debtor as lessee for over 20 years had reference only to the annual net income and not an inadequate price, there was material irregularity and the sale should in consequence be set aside. 20 A 412 (P.C.), Ref. (*Sadasiva Aiyar and Spencer, JJ*) CHOKKALINGA SERVAI *v.* R. SRINIVASA AIYAR. 21 I.C. 592.

——O 21, R. 90—*Under valuation—Price below that in sale proclamation—Effect.*

Where the value shown in the sale proclamation was fixed by consent, the fact that the price fetched at the sale was considerably less is not enough to set aside the sale. (*Jwala Prasad and Ross, JJ.*) RAJBANS SAHAY *v.* ASKARAN BAID. 1 P. 214 = 1922 P. 550.

——O. 21, R. 90—*Under valuation—Sale in execution, whether can be set aside for.*

Where the sale in execution of a decree is effected for inadequate price resulting from under-valuation in the proclamation, the sale should be set aside. (*Coutts and Sultan Ahmed JJ*) MUHAMMAD JAHUR BEG *v.* GOPAL SARAN NARAYAN SINGH. 1 P L T 441 = 3 U.P.L R 12 = 57 I.C. 610 = (1921) Pat 75.

——O. 21 R. 90—*Under-valuation—Insufficient description—C.P Code*, O. 21, R. 54,

The annual income realised from a property was over Rs. 1,000 and the valuation stated in the sale proclamation was Rs. 2,500. The property was sold for Rs. 2,500 and consisted of a right of fishing in a river which was about 20 miles long and it was described merely by a tauzi number and a name though the right ran through as many as 138 villages. *Held* that the sale proclamation was materially irregular both in the description of the property and the valuation put upon it, and the sale was liable to be set aside. In the case of such a property any particular spot on the river is not a conspicuous part of the property. The

C. P. CODE (V of 1908), O. 21, R. 90—Waiver of objections.

principle of the Rule laid down in R. 54 of O 21 of the C P. Code must be applied in such circumstances and the copy of the order must be conspicuously displayed at various portion of the estate. The sale should have been advertised in the local newspapers or in Gazette (*Chapman and Jwala Prasad, JJ.*) CHATTARAPATT SINGH *v.* SURENDARNATH SINGH. 44 I C. 412 = 1918 Pat. 33.

——O. 21, R 90—*Under-valuation—Inadequate price realised—Effect.*

It is not safe to infer that the inadequacy of the price realised at an auction is due to under-valuation in the sale proclamation for bidders have their own means of finding out the value of the property. Where property is sold to a decree-holder in the absence of other holders an under-valuation causes a serious prejudice to the judgment-debtor and if it is clearly proved that the decree-holder has secured the property at a very low price in consequence of the fraudulent under-valuation, the sale should be set aside. (*Chamier, C.J. and Roe, J.*) SAKHI CHAND *v.* KALANAND SINGH. 4 P.L.W. 88 = 42 I C. 394 = 1917 Pat. 353.

Waiver of Objections.

——O. 21, R. 90—*Waiver of objections—Knowledge.*

Where the purchaser in execution of a mortgage decree is the mortgagee himself, he is deemed to have notice of the charges to which the property is subject and he cannot complain that it is fixed rate raiyati holding created by kabuliyat providing monthly instalments for payment of rent and heavy interest on arrears. (*Teunon and Chaudhuri, JJ.*) BHUTH NATH CHATTERJEE *v.* MATHURA MOHAN NASKAR. 37 I C. 1004 = 48 Cal. 93.

——O. 21, Rr. 90 and 66—*Waiver of objections—Postponement of sale with consent of judgment-debtor.*

A judgment-debtor got an order postponing an execution sale on undertaking that he would not raise any objection on the ground of illegality or irregularity. After the sale took place on the postponed date he applied to set it aside on the ground of an illegality or irregularity of which he was cognizant at the time he gave his undertaking. *Held*, that it could not be allowed to impeach the sale. (*Fletcher and Huda, JJ.*) LAKSHMI PRASANNA MOJUMDAR *v.* RAJINDAR PODDAR. 47 I.C. 831.

——O. 21, R. 90—*Waiver of objections—Agreement to waive all objections.*

An agreement to waive all objections to an execution sale is valid and operative only when the Court sanctions it. Where the Court withholds the assent the matter is set free and the parties cannot be regarded as bound by the agreement. 36 Cal. 422, Rel. A sale cannot be impeached on grounds expressly waived by the judgment-debtors. 3 A. 280; 2 C.L.J. 584, Foll.

C. P. CODE (V of 1908), O 21 R. 90—Waiver of objection.

An application by judgment-debtor alleged to constitute a waiver should narrowly be scrutinised and such rights only taken to have been waived as were within his knowledge at the time and were expressly abandoned. (*Mookerjee and Teunon*, JJ.) BASANTA KUMARI v. RAM KANAI SEN. 9 I.C. 698 = 13 C.L.J. 193.

——O. 21, R. 90 = *Waiver of objections—Standing by.*

A judgment-debtor who stands by, when an irregularity is committed within his knowledge and in his presence should not be allowed afterwards to take advantage of that irregularity in support of his application to set aside a Court auction-sale. 12 Mad. 19. (P. C.), Foll. (*Sadasiva Aiyar and Moore*, JJ.) SWAMINATHA AIYAR v. SIVAGURUNATHA CHETTIAR. 32 I.C. 990.

——O. 21, R. 90—*Waiver of objections—Non-appearance of judgment-debtors.*

Where on the date fixed for the settlement of the terms of a sale proclamation the judgment-debtors did not appear and object to the terms though they had notice and the properties are sold they cannot subsequently raise objections to the same on the ground of misdescription of the properties after the sale has been concluded and confirmed. Where it is found that no substantial injury was caused to the judgment-debtors, the sale should not be set a side on the ground of misdescription of property in the sale proclamation. (*Sadasiva Aiyar and Spencer* JJ.) SUBBARAYA ROWTHER MINDA NAINAR v. MUTHAMMAL. 22 I.C. 780.

——O. 21. R. 90—*Waiver of objection—Non-transferable holding.*

A tenant though entitled to get the sale of his holding set aside on the ground that it is non-transferable must take the objection at the earliest possible moment. Such objection cannot be taken in second appeal after the sale has taken place. (*Mullick and Thornhill*, JJ.) SHRIKRISHNA RAI v. RAMSARAN RAI. 36 I.C. 666 = 1 Pat. L.T. 267.

——O. 21. R. 90—*Waiver of objection—Rights of purchaser.*

An auction-purchaser is not bound to inquire into the correctness of an order for execution. (*Parlett*, J.) MAUNG PO THET v. ANNAMALAY CHETTY. 9 I.C. 472 = 4 Bur. L.T. 28.

——O. 21, Rr. 91, 92 and 93—*Properties sold twice over—Suit by second purchaser to recover purchase money.*

Where property has been sold in execution, the judgment-debtor has no interest thereafter in the property. If the Court purports to sell the property again, the purchaser acquires no interest by his purchase and can sue for refund of the purchase-money from all the creditors ofthe judgment-debtors to whom it had been paid. (*Piggott and Walsh*, JJ.) GIRDHARDAS v. SIDDHESWARI PRASAD NARAIN SINGH. 40 All. 411 = 44 I.C. 697 = 16 A.L.J. 236.

C. P. CODE (V of 1908), O. 21, R. 91.

——O. 21, Rr. 91, 92—*Suit for refund of purchase-money—Does not lie on ground of no saleable interest.*

An auction-purchaser cannot maintain a suit for refund of purchase-money on the ground of absence of saleable interest in the judgment-debtor. (*Rankin and B. B, Ghose*, JJ.) BANKA BEHARI DAS v. GURU DAS DHAR. 28 C.W.N. 20 = 1924 Cal. 172.

——O. 21, R. 91—*Purchaser at a Court sale—Rights and liabilities.*

Apart from R. 91 and fraud, a purchaser at a Court-auction must suffer the results good or bad of the sale. The Court selling the property does not guarantee the title to the property. (*Richardson and Cuming*, JJ.) ABINASH CHANDRA KAR v. BHUBAN CHANDRA MAITY. 68 I.C. 126 = 26 C.W.N. 756.

——O 21, R. 91—*Purchase by executor—Application to set aside.*

When an auction purchase is made by an executor of the deceased judgment-debtor in his personal capacity he should not be debarred from applying under S. 313 in this capacity. (*Chatterjee and Walmsley*, JJ.) MAHARAJ BAHADUR SINGH v. SURENDRA NARAYAN SINGH. 28 I.C. 893 = 19 C.W.N. 152.

——O. 21, R. 91—*No saleable interest—Execution sale.*

A total failure of consideration and the judgment-debtor having no saleable interest in the property are necessary to avoid a sale in execution but not where the judgment-debtor had saleable interest however small. 8 C.L.R. 468; 9 C. 506; 10 Cal. 368; 9 All. 167, Rel. (*Chatterjea and Walmsley*, JJ.) SHEO GOBIND SINGH v. DHANUKDHARI SINGH. 21 I.C. 774 = 19 C.W.N. 1291.

——O. 21, Rr. 91, 93—*Not exhaustive—Remedy of auction purchaser dispossessed by successful claimant—Suit if lies.*

The provisions of O. 21, Rr. 91 to 93 are not exhaustive of the remedies open to an auction-purchaser who after payment of full price is dispossessed by a claimant who succeeds in a suit brought under O. 21, R. 63 in establishing that the judgment-debtor has no saleable interest in the property. The remedy is that the auction-purchaser should recover his money by bringing a suit for the same. (*Harrison and Zafar Ali*, JJ.) ASADULLAH KHAN v. KARAM CHAND. 4 Lah. 354 = 76 I.C. 603 = 6 L L J. 67 = 1924 Lah. 115.

——O. 21, Rr. 91 and 92—*Setting aside—Execution sale—Proceedings to set aside—Real owner—If a necessary party.*

In proceedings to set aside an auction-sale, the real owner is not a necessary party the

C. P. CODE (V of 1908). O. 21, R. 91.

proper course is to proceed against him by suit. (*Oldfield*, J.) KOIL KANDADAI AMMAN *v.* THE CONJEEVARAM HOGSENPET DANARAKSHAKA NIDHI, LTD.

24 I.C. 44=1 L.W. 412.

———**O. 1, R. 91**—*Sale in lots—Effect of.*

The Court is precluded from severing one of several parcels of land sold in one lot in an execution, on the ground that the judgment-debtor has a saleable interest in one lot only. The decree-holder must disprove, the fact of saleable interest in one of such plots if admitted. (*Benson and Sundera Aiyar*, JJ.) KRISHNAMA NAICKEN *v.* KANDASAMI GOUNDEN. **12 M.L.T. 164=(1912) M.W.N. 824=18 I.C. 109=23 M.L.J. 108.**

———**O. 21. R. 91**—*Execution sale—Setting aside—Suit at the instance of a third party—Revival of execution proceedings.*

Two lots of property were sold in execution of a money decree. Out of which No. 1, the decree-holder bought. Afterwards a third person sued the decree-holder. He was the auction-purchaser of lot No. 1. He also sued the judgment-debtor for a declaration of title to lot No. 1 and possession. He obtained a decree. Its result was that the sale became invalid regarding lot No 1. The sale of lot No. 2 was also set aside at the desire of the judgment-debtor under the provisions of O. 21, R 90, C.P.C. After this the decree-holder executed his decree for the entire decretal amount. The judgment-debtor raised objections that the execution petition was barred by time. The only remedy to get back the price of lot No. 1 was to submit an application under O. 21, R. 91, C.P.C. to have the sale annulled. Otherwise that price cannot be recovered. *Held*: Both the judgment-debtor and the decree holder were parties to the suit and hence the order binds them. The execution Court need not abrogate the order. (*Mullick and Bucknill*, JJ.) RADHA KISHEN LAL *v.* KASHI LAL. **2 Pat. 829=1 Pat. L.R. 368=1923 Pat. 352=76 I.C. 927=5 Pat L.T. 345=1924 P. 278.**

———**O. 21, R. 91**—*Execution sale—Setting aside—Concealment of encumbrances—Effect of.*

If a purchaser at an execution sale has bought a property the title to which is defective or in he has been misled on account of fraud or omission on the part of the decree-holder it is open to him to seek his remedy as the law allows. But there is no reason why a Court should interfere on behalf of the auction-purchaser and set aside the sale simply because an auction-purchaser has bought a bad title. Every man buys at an auction sale with his eyes open and the general principle that an auction-purchaser cannot attack his own purchase except on the ground that the judgment-debtor has no saleable interest in the property must apply. (*Das and Bucknill*, JJ.) KEDAR NATH GOENKA *v.* MAHANTH JAGAN NATH DAS. **1 P.L.R. 73=74 I.C. 134=1924 P. 355.**

C. P. CODE (V of 1908). O. 21, R. 92.

———**O. 21, R 91**—*Saleable interest—Want of—Auction-purchaser—If can get sale set aside.*

An auction-purchaser cannot attack the purchase except on the ground that the judgment-debtor had no saleable interest in the property. (*Mullick and Thornhill*, JJ.) KHETRO MOHAN DUTT *v.* DILWAR.

5 P.L.W. 151=46 I.C 614=3 P.L.J. 516.

———**O. 21, R. 91**—*Warranty of title—Judgment-debtor having no interest in the property sold—Purchaser's rights.*

There is no warranty in a Court-sale that the judgment-debtor has any saleable interest in the property. If the judgment-debtor has no saleable interest in the property, the auction-purchaser must apply within 30 days to set aside the sale under O. 21, R 91. He has no remedy by a regular suit against the judgment-debtor to recover his purchase-money. If he fails so to do and the amount of the sale-proceeds is credited towards the decree; he cannot ask the Court to treat the sale as a nullity and to allow him to execute his decree in respect of the sum represented by the sale-proceeds. The decree must therefore be deemed to have been satisfied to the extent of the amount of the sale-proceeds. (*Maung Kin*, J.) U. PAW *v.* N. R. M. A. CHETTY.

61 I.C. 808=13 Bur. L.T. 152.

———**O. 21, R. 91**—*Setting aside sale—Fraud of judgment-debtor or decree-holder—Purchaser not misled thereby—Whether allowed.*

An auction-purchaser cannot seek to set aside a sale under O. 21, R. 91, C.P.C., on the ground that, knowing that the judgment-debtor had no saleable interest in the property, the decree-holder had sold the property fraudulently to him, when he was not misled by such fraud. (*Parlett*, J.) MAUNG THA DUN *v.* CHOKALINGAM CHETTY. **23 I.C. 383=7 Bur. L.T. 18.**

———**O. 21, R. 92**—*Execution sale—What passes under.*

What passes under an execution sale is the property that has been attached. If by mistake a wrong property has been attached and sold, a confirmation in respect of some other property not attached is invalid. (*Lord Moulton.*) RAJA THAKUR BARMHA *v.* JIBAN RAM.

41 Cal. 590=21 I.C. 936=41 I.A. 38=18 C.W.N. 318=15 M.L.T. 137=12 A.L.J. 156=19 C.L.J. 161=26 M.L.J. 89=(1914) M.W.N. 118=16 Bom. L.R. 186. (P.C.)

———**O. 21, R. 92**—*Execution before Collector—Right of pre-emptor—Failure to appear before Collector—Order against is final.*

At an execution sale before the Collector, the same bid was made by two persons, but one of them in addition claimed to have a preferential pre-emption right. The Collector before confirming the sale directed the pre-emptor to appear before him, but as he failed to do so confirmed the sale in favour of the other bidder. In a suit by the pre-emptor for possession, *held*, under the rule corresponding to O. 21, R. 92

framed by the Govt. under Ss. 68 and 70, C.P. Code to deal with execution sales by Collectors, the order of confirmation was an order against the pre-emptor and hence final. (*Mears*, C J. *Banerjee and Rafique*, JJ.) BADRI SINGH *v* TULSHI RAM. 45 A 203 = 21 A L J. 53 = 4 L.R.A. (Civ.) 43 = 1923 All. 183. (F B)

——O 21, R 92—*Sale-held—Injunction—Want of notice.*

Where an injunction was granted in favour of third parties who claim the property as their own, against the decree-holder restraining him from executing his decree by sale but no notice of it was given to either the decree-holder or the officer conducting the sale and in consequence the sale took place. *Held* the validity of the sale cannot be questioned and the injunction is ineffective. (*Stuart*, J.) RAMJI DAS *v.* LALA CHHAGAL LAL. 69 I.C 745 = 1922 All. 282

——O. 21, R. 92—*Appeal—Purchaser's right.*

An order setting aside a sale is appealable by the purchaser as he is affected thereby. (*Richards* C. J. *and Banerji*, J.) FAZAL RAB *v.* MANZUR AHMED. 40 All 423 = 45 I C. 773 = 16 A L J. 433

——O. 21, R. 92—*Title to property—Right to rent—Auction-purchaser—Relation back of title.*

The title of the auction-purchaser dates only from the confirmation of the sale and does not relate back to the date of sale. He is therefore, not entitled to rent for the intervening period. 24 All. 475; 7 I. C. 65 Foll. (*Griffin*, J.) JUGGILAL *v.* HUKUM CHAND 9 I.C. 25 = 8 A L J. 32.

——O 21, R. 92, S. 47—*Execution sale—Setting aside—Application to set aside—Collector—Duty to forward to Civil Court.*

In execution proceedings held before a Collector, when once an application is made, within the time limited by law to the Collector to set aside the sale, the Collector is bound to refer the application to the Civil Court. If the Collector, notwithstanding the reference of the application to the Civil Court, proceeds to confirm the sale, the judgment-debtor can sue to have the sale declared void when the auction purchaser is not the decree-holder. (*Macleod*, C J. *and Heaton*, J.) BALGAUDA *v.* MALLAPPA. 44 Bom. 551 = 37 I C 440 = 22 Bom. L R, 759.

——O. 21, R. 92—*Notice—Limitation.*

Notice under R. 92 need not be given within 30 days from the date of sale. (*Scott*, C.J. *and Chandavarkar*, J.) GANESH BUR NAIK *v.* VITHAL VAMAN MAHALYA. 37 Bom 381 = 19 I.C. 475 = 15 Bom. L R, 244.

——O. 21, R 92—*Notice—Service on all persons not compulsory.*

O. 21, R. 92, C. P. Code, does not make it obligatory on the applicant to pay the processfee or to serve notice according to the mode of service prescribed in the C. P. Code in every

case, on all persons affected by the sale. (*Suhrawardy and Ghose*, JJ.) SANTOSH BALA DEBI *v.* RAM CHANDRA GHATI. 67 I C. 286.

——O 21, R 92—*Appeal—Second appeal.*

Under the Code, no second appeal lies from an appellate order reversing the order of the first Court setting aside an execution sale under R 92. (*Fletcher and Newbould*, JJ.) RAKHAL CHANDRA *v.* MANARANJAN DAS 41 I.C. 753

——O. 21, R. 92—*Execution sale — What passes under.*

The legal effect of an execution sale depends upon the status of the decree-holder at the time proceedings for sale are taken and not at the time of actual sale. (*Mookerjee and Beachcroft* JJ.) SYEDUNNESSA KHATTUM *v* AMIRUDDIN. 45 Cal 291 = 41 I.C. 353 = 21 C.W N. 817 = 25 C.L J 629.

——O 21, R 92—*Execution sale—Private satisfaction of decree—No confirmation.*

Where after a sale in execution of a decree, the decree-holder is paid the amount of his decree and there is a concurrent wish of the parties that the sale should be set aside, the Court may treat the sale as being of no effect and decline to confirm it. (*Jenkins*, C.J. *and N R. Chatterjee*, J.) RAM PRASAD *v* RAM CHARAN SINGH. 27 I C. 601.

——O. 21, R. 92—*Setting aside sale—Sale of several properties at one auction.*

An execution sale can be set aside as regards some of the properties put up at an auction. 9 Cal. 656 at 661 Rel. (*Woodroffe and Carnduff*, JJ.) RAJANI NATH *v* KUSUM KUMINI. 21 I C 64 = 18 C W.N. 957.

——O 21. R 92—*Execution sale—Disputes between rival bidders at sale—Monies in Court—Decree-holder, if entitled to interest up to date of confirmation of sale.*

Where monies were realised by the sale in execution of the judgment-debtor's properties, and the decree-holder was not allowed to draw out his amount owing to the delay in the confirmation of sale resulting from disputes between bidders at the execution sale, the decree holder is entitled to interest on his decree amount up to the date of confirmation of the sale. (*Teunon and Beachcroft*, JJ.) NAFAR CHANDRA PAL *v.* GOPAL CHANDRA. 22 I C 916 = 19 C L J. 358.

——O 21, R. 92—*Notice to auction-purchaser.*

Notice to auction-purchaser is necessary before setting aside sale. (*Mookerjee and Chevers*, JJ.) BIBI SHAROFAN *v.* MAHOMAD HABIBUDDIN. 13 C.L J 585 = 10 I C. 118 = 15 C.W.N 685.

——O 21, R 92—*Appeal against appellate order does not lie.*

An order confirming or setting aside a sale is appealable under O. 43, r. 1 (j) and hence under

C. P. CODE (V of 1908), O. 21, R. 92.

S. 104, C.P.C., no second appeal lies in such a case. (*Shadi Lal*, C.J. *and Le-Rossignol*, J.) JAGANNATH *v.* DAUD. **4 Lah. 243 = 76 I.C 103 = 1923 Lah. 592.**

———**O. 21, R. 92**—*Order under—No second appeal.*

An order on an application seeking to set aside an auction-sale on the ground of material irregularity and fraud is not open to second appeal. (*Abdul Raoof*, J.) JAGAN NATH SETHI *v.* PIR MOHAMAD. **72 I.C. 788 = 1923 Lah. 287.**

———**O. 21, R. 92**—*Insolvency—Attachment and sale of property as belonging to insolvent—Defeated claimant—Right of suit is not barred.*

Where a person whose claim to certain property sought to be sold as the property of the insolvent has been defeated, brings a suit to establish his right, such a suit is not barred by O. 21, R. 92, C. P. C. (*Harrison*, J.) HARNAM *v.* GANPAT. **5 Lah. L.J. 9 = 73 I.C. 367 = 1923 Lah. 224.**

———**O. 21, Rr. 92 and 94**—*Confirmation of sale.*

Under O. 21, R. 92 an auction sale becomes absolute on confirmation by certificate of sale in the absence of which it may be inferred from the conduct of the executing Court after receipt of report of sale. (*Johnstone*, C.J.) SAWAN MAL *v.* SHIB DAYAL. **81 P.R. 1915 = 31 I.C. 254 = 178 P.W.R. 1915.**

———**O. 21, R. 92**—*Does not oust inherent power to cancel sale.*

Per *Wallace*, J.—Order 21, R. 92 of the Code of Civil Procedure does not oust the inherent power of a Court to interfere to cancel the sale even though no party has applied for cancellation when the Court discovers in the course of the proceedings, that the decree-holder auction-purchaser deliberately misled it and profited thereby to the disadvantage of the judgment-debtor or the judgment-debtor's creditors. (*Schwabe*, C.J. *and Wallace*, J.) RAGHAVACHARIAR *v.* MURUGESA MUDALI.
46 Mad. 583 = 44 M.L.J. 680 = (1923) M.W.N. 323 = 32 M.L.T. (H.C.) 285 = 17 L.W. 750 = 72 I.C. 545 = 1923 Mad. 636.

———**O. 21, Rr. 92 and 93**—*Persons affected by application to set aside sale—Right to rateable distribution.*

Persons who had obtained orders in their favour for rateable distribution of the proceeds of an execution sale are persons affected by an application to set aside the sale within the meaning of proviso to O. 21, R. 92 (2) and an order behind their backs cannot bind them for the purposes of S. 93. (*Abdur Rahim*, J.) KOMANDUR KRISHNAMACHARLU *v.* DANOJI.
8 L.W. 592 = 35 M.L.J. 604 = 24 M.L.T. 482 = 48 I.C. 38 = (1918) M.W.N 716.

———**O. 21, R. 92**—*Setting aside sale—Jurisdiction—Notice.*

C. P. CODE (V of 1908), O. 21, R. 92.

An order setting aside a sale is one without jurisdiction when passed without notice to the auction-purchaser. (*Cleg*, F. M.) SUNDARARAJA AIYANGAR *v.* ASIRI NAIDU. **32 I C. 891.**

———**O. 21, Rr. 92 and 91**—*Setting aside sale—Proceedings under O. 21, R. 92 (2)—Whether final.*

Proceedings under R. 92 (2) are not final and a third party is not concluded by it. 8 Mad. 99; 11 Mad. 269, Foll. (*Oldfield*, J.) KOIL KANDADAI AMMAN *v.* THE CONJEEVARAM HOGSENPET DANARAKSHKA NIDHI, LTD.
24 I.C. 44 = 1 L.W. 412.

———**O. 21, R. 92**—*Confirmation—Right of auction-purchaser.*

If there is any irregularity in publishing or conducting the sale, the auction-purchaser has no absolute right to have the sale confirmed though the irregularity be not his. (*Benson and Sundara Aiyar*, JJ.) RAJA OF KALAHASTI *v.* MAHARAJAH OF VENKATAGIRI.
38 Mad. 387 = 14 M.L.T. 320 = 21 I.C. 389 = 25 M.L.J 198.

———**O. 21, R. 92**—*Setting aside sale—Confirmation — Setting aside — Attachment before judgment — Property outside Court's jurisdiction—Sale and confirmation without objection—Effect.*

An execution sale is not valid merely because there was no attachment before sale or that it was made before judgment by a Court within whose jurisdiction, the property was not situate. Where such a sale takes place without objection of the judgment-debtor and the sale had been confirmed, it is not open to him to object to the sale. Persons getting sham conveyances from the judgment-debtor are in the same position as the latter and cannot object to the sale. (*Sankaran Nair and Sadasiva Aiyar*, JJ.) VELAYUTHA MUPPAN *v.* SUBRAMANIAM CHETTI. **13 M.L.T. 207 = 24 M.L.J. 70 = 18 I.C. 498 = (1913) M.W.N. 186.**

———**O. 21, R. 92**—*Sale when becomes absolute.*

A sale becomes absolute when it is confirmed and not when a petition under O. 21, R. 90, is dismissed. (*Benson*, O.C.J. *and Napier*, J.) ARUNAGIRI MUDALIAR *v.* UTHANDO MUDALI. **12 M.L.T. 311 = 17 I.C. 242 = (1912) M.W.N. 1136.**

———**O. 21, R. 92**—*Execution sale—Satisfaction reported—Sale cannot be confirmed.*

Where a sale in execution is held prior to the admission of satisfaction of the decree by the decree-holder, the sale cannot be confirmed after satisfaction is notified to the Court. (*Kotval*, A.J.C.) NILKANTH *v.* YESHWANT.
18 N.L.R. 134 = 65 I.C. 331 = 1922 Nag. 248.

———**O. 21, R. 92**—*Several judgment-debtors—Sale set aside as against one—Confirmation in entirety—Cannot be made.*

A sale in execution of a decree which has been set aside as against one of the several defendants, cannot be confirmed in its entirety

C. P. CODE (V of 1908), O. 21, R. 92.

but only against the shares of the other defendants. (*Kotwal and Macnair*, A.J.Cs.) HARI RAM *v.* GOPI KISAN. **61 I.C. 571.**

——**O. 21, R. 92**—*Order setting aside sale is not open to second appeal.*

There is no second appeal from an order setting aside a sale under O. 21, R. 92 of the C.P. Code. 38 Cal. 339, ref. (*Kanhaiya Lal*, A.J.C.) JAGMOHAN SINGH *v.* BACHCHA.
25 O.C. 78=9 O.L.J. 50=66 I.C. 929=1922 Oudh 146.

——**O. 21, R. 92**—*Execution sale—Application to set aside—Addition of parties after the time prescribed—Limitation.*

An application to have an execution sale set aside was made within the time allowed by law. In that application the number of the execution case was given and certain of the decree-holders auction-purchasers were mentioned. The names of four of the decree-holders were not mentioned but notice was subsequently served on them of the application. *Held*, that it was not necessary that notice of the application should be served on all persons affected by the sale within 30 days of the sale. O. 21, R. 92, C.P.C., merely provides that no sale shall be set aside until notice has been issued to all persons affected by it. But there is no limitation provided for giving such notice. 37 B. 387, 390, foll. (*Lyle and Ashworth*, A.J.CS.) ABDUR RAMAN *v.* BABU HAR NARAYAN DAS.
9 O.L.J. 211=4 U.P.L.R. (O.C.) 72=68 I.C. 238=1922 Oudh 129.

——**O. 21, R. 92**—*Provisions of, applies to suit to set aside sale under S. 174 of Bengal Tenancy Act.*

The provisions of O 21, R. 92, C.P.C. requiring notice to be served does not apply to a suit brought by a judgment-debtor to set aside a sale under S. 174 of the Bengal Tenancy Act. (*Miller*, C.J. *and Ross*, J.) PAHLAD SINGH *v.* SAJIVAN RAI. **6 P.L.J. 16=61 I.C. 126=2 P.L.T. 66.**

——**O. 21, R. 92 (2)**—*Setting aside sale—Nature of order.*

The order setting aside or refusing to set aside a sale in execution of a rent decree is one deciding a question of title to the land in dispute between the parties. (*Mookerjee and Carnduff*, JJ.) BENI MADHAB ROY *v.* BISWESWAR BHARATI. **16 C.L.J. 542=15 I.C. 436=17 C.W.N. 84.**

——**O. 21, R. 92 (2)** — *Limitation* — Terminus a quo—*Sale—When complete.*

The thirty days under O. 21, R. 92 (2) are to be counted from date of deposit made under O. 21, R. 84. 35 All. 65, Foll; 1 P.W.R. 1909, Dies. (*Shadi Lal*, J.) MUSSAMMAT KHAIBAN *v.* THE ALLIANCE BANK OF SIMLA.
50 I.C. 914.

——**O. 21, R. 92 (3)**—*Fresh suit—Execution of decree—Application to set aside sale by third party—Admission by pleader ignored.*

C. P. CODE (V of 1908), O. 21, R. 93—Execution Sale.

S. 47 or Cl. (3) of R. 92, O. 21 of the C.P. Code does not bar a person whose objection under R. 89 has been disallowed from suing when he was neither a party to the suit in which the decree was passed, nor to the execution proceedings after the decree. A Court is not bound by the admission made by the pleader of a party where the evidence on record clearly shows that the admission was wrong. (*Shah Din*, J.) BHAN SINGH *v.* PRITHAMI CHAND. **104 P.L.R. 1916=36 I C. 212=179 P.W.R. 1916.**

——**O. 21, R. 92 (2)**—*Mandatory provision.*

The Court has no power to entertain an application for setting aside a sale unless the deposit is made within 30 days from the date of the sale, because the requirements O. 21, R. 92 are mandatory and not directory. (*Sadasiva Aiyar and Moore*, JJ.) VENNISAMI THEVAR *v.* PERIAYASWAMI.
19 M.L.T. 192=(1916) 1 M.W.N. 179=33 I.C. 996=3 L.W. 271.

——**O. 21, R. 92 (2) and R. 93**—*Appeal—Setting aside sale—Refund of money.*

An order under O. 21, R. 92 (2) and R. 93 setting aside a Court-sale at the instance of the decree-holder and ordering repayment of purchase-money to the third party purchaser is not appealable under S. 47. (*Sadasiva Aiyar and Moore*, JJ.) LINGAM KRISHNA BHUPATI DEVU GARU *v.* JOGANI VENKATASWAMY.
(1916) 1 M.W.N. 109=33 I.C. 235=3 L.W. 105.

——**O. 21, R. 93,**

EFFECT OF SETTING ASIDE SALE.
EXECUTION SALE.
MISTAKE IN PROCLAMATION OF SALE.
REFUND OF MONEY.
REMEDY BY SUIT.
SALEABLE INTEREST.
WARRANTY OF TITLE.

Effect of setting aside Sale.

——**O. 21, R. 93**—*Effect of setting the sale aside—Poundage.*

When a third party purchaser at a Court-auction has had to pay poundage fees and the sale is afterwards set aside, it is doubtful as to from whom the poundage fee is recoverable, *viz.*, judgment-debtor or decree-holder. (*Sadasiva Aiyar and Moore*, JJ.) LINGHAM KRISHNA BHUPATI DEVU GARU *v* JOGANI VENKATASWAMY.
(1916) 1 M W N. 109=33 I.C. 235=3 L.W. 105.

Execution Sale.

——**O. 21, R. 93**—*Execution sale—Failure of title—Remedy of auction-purchaser.*

Where it is subsequently found that the judgment-debtor is only entitled to a share of the property sold, the purchaser cannot sue to recover a proportionate part of the purchase-money, especially when the sale had never been

C. P. CODE (V of 1908) O. 21, R. 93—Mistake in Proclamation of Sale.

set aside. 39 All. 144, Diss.; 114 P.R. 1909, Foll. (*Scott-Smith and Martineau*, JJ.) BHAGWAN DAS *v.* ALLAH BAKSH.
51 I.C. 595=62 P.R. 1919.

Mistake in Proclamation of Sale.

———O. 21, Rr. 93 and 92—*Mistake in proclamation of sale—Smaller area sold than advertised—Duty of Court with regard to proclamations—Remedy of purchaser misled by mistake due to carelessness of Court.*

Where a Court sale in execution of a decree is not vitiated by fraud on the part of the judgment-debtor or the decree-holder, the purchaser buys at his own risk and there is no warranty of title or guarantee that the property will answer to the description. In sales under the direction of the Court, Courts must be scrupulous in the extreme to see that no taint or touch of fraud or deceit or misrepresentation is found in the conduct of its ministers. When owing to a mistake in the proclamation of sale a larger area was advertised for sale than was actually sold, the auction-purchaser can sue either for a refund of a proportionate part of the purchase-money or for a cancellation of the sale. He can sue for either of the two reliefs, and would be entitled to the first if he can prove that the price paid by him is in excess of the fair value of the property and that he was induced to pay that price by the misdescription in the sale proclamation. (*Maung Kin*, J.) ISPAHANY *v.* N. A. P. K. CHETTY,
9 Bur. L.T. 169=33 I.C. 1003=
8 L.B.R. 427.

Refund of Money.

———O. 21, R. 93—*Refund of purchase-money.*

The purchase-money is returnable to the purchaser only on the execution sale being set aside. (*Richards*, J. C. *and Rafique*, J.) NANNU LAL *v.* BHAGWAN DAS. 39 All. 114
37 I.C. 9=14 A.L.J. 1216.

———O. 21, R. 93—*Refund of purchase-money—Setting aside sale—Necessity for.*

Where a purchaser at a court-auction seeks to get back his purchase-money, he must as a condition precedent, have the sale set aside under O. 21, R. 91, C.P.C. He can, however, sue the judgment-debtor on the ground of fraud or misrepresentation. 39 M. 803; 39 All. 114, foll; 35 B. 29, Ref. (*Macleod*, C.J. *and Coyajee*, J.) BALVANT RANGANATH *v.* BALU MALU.
46 Bom. 833=67 I.C. 360=
24 Bom. L.R. 308=1922 Bom. 205.

——O. 21, Rr. 93 and 90—*Refund of purchase-money—Purchaser from decree-hoder—Sale subsequently set aside—Effect of.*

The purchaser of a property privately from a decree-holder which was purchased by the latter in sale in execution of his decree, is as much affected as the decree-holder, by subsequent proceedings in which the sale set aside, after notice to decree-holder but without notice

C. P. CODE (V of 1908). O. 21, R. 93—Remedy by suit.

to purchaser. The purchaser is entitled to a refund of the price paid with interest from his vendor. (*Woodroffe and Mookerjee*, JJ.) SATI NATH *v.* RATNAMANI NASKAR. 41 I.C. 200.

———O. 21, R. 93—*Refund of money—Executable as a decree.*

A purchaser at a Court-sale which had been subsequently set aside, obtaining an order for refund of the purchase money, can execute the order as if it were a decree. (*Spencer and Bakewell*, JJ.) VENKATARAMANAMURTHI *v.* SUNDARA RAMIAH. 47 I.C. 630=
23 M.L.T. 366.

——O. 21, R. 93—*Refund of purchase-money—Interest.*

Six per cent. interest and no more should be allowed on the purchase money repayable to the auction-purchaser. (*Oldfield and Phillips*, JJ.) TIRUMALAISAMI NAIDU *v.* SUBRAMANIAM CHETTIAR. 46 I.C. 109=40 Mad. 1009.

———O. 21, Rr. 93 and 91—*Refund of money—Right to.*

The right to obtain a refund of purchase-money when the judgment-debtor is found to be without a saleable interest, must be regarded as entirely the creature of Rr. 91 and 93 of O. 21, with the result that without getting the sale set aside through the Court and by the methods prescribed by the Code, there lies no remedy for any purchaser. The general principle of *caveat emptor* would affect the purchaser unless he chooses to adopt the remedy given to him by the statute. Where, however, the fraud or carelessness of a party has led to the invalidity of the sale, the matter stands on a different footing. (*Drake-Brockman*, A.J.C.) LAKSHMICHAND *v.* CHATURBHUJ, 66 I.C. 230=4 M.L.J. 274.

Remedy by Suit.

———O. 21, R. 93—*Remedy by suit—Judgment-debtor having no saleable interest—Suit for refund of purchase-money—Right to sue.*

The present Code of Civil Procedure does not recognize any substantive right of the auction-purchaser to maintain a suit for the refund of the purchase-money, where it is found that the judgment-debtor had no saleable interest in the property sold. His right is limited to an application under R. 93 for an order for re-payment of the purchase-money, in case the sale has been set aside by the Court. (*Sulaiman and Gokul Prasad*, JJ.) RAM SAROOP *v.* DALPAT RAI. 43 All. 60=
18 A.L.J. 905=58 I.C. 105=
2 U.P.L.R. (A) 318.

———O. 21, R. 93—*Remedy by suit—Execution—Sale—Purchaser deprived of possession—Suit for refund of purchase money.*

A Court-auction-purchaser cannot maintain a suit against the decree-holder for refund of purchase-money, when he is deprived of possession

C. P. CODE (V of 1908), O. 21, R. 93—Remedy by suit.

by a third party. (*Tudball and Abdul Raoof*, JJ.) MAN MOHAN LAL *v.* GOPI NATH.
46 I.C. 103=16 A.L.J. 511.

——**O. 21, Rr. 93 and 91**—*Remedy by suit.*

A suit is maintainable by the auction-purchaser for recovery of purchase money on the ground that the judgment-debtor had no saleable interest on the date of sale on the properties sold. 5 All. 577, Foll. (*Richards*, C.J. *and Tudball*, J.) MUHAMMAD NAJIBULLAH *v.* JAI NARAIN. **36 All. 529=26 I.C. 59=12 A.L.J. 908.**

——**O. 21, R. 93**—*Remedy by suit—Recovery of purchase-money.*

In a suit by an auction-purchaser to recover the purchase-money under S. 315 on the ground that the judgment-debtor had no saleable interest in the property sold the proper article to be applied is Art. 120 of Limitation Act. (*Richards*, C.J. *and Lyle*, J.) SIDESHWARI PRASAD NARAIN SINGH *v.* MAYANAND GIR.
35 All. 419=19 I.C. 986=11 A.L.J. 606.

——**O. 21, Rr. 93 and 91**—*Remedy by suit—Not retrospective—Difference between the old Code and new.*

Under S. 315 of the C. P. Code of 1882 the purchaser at a sale in execution of a decree was competent to maintain a suit against the decree-holder for recovery of his purchase-money when the judgment-debtor was found to have had no saleable interest in the property sold. The purchaser was not restricted to the special procedure in the execution department mentioned in S. 315. 40 A. 411; 322 B. 753; 37 C. 67=40 M. 1009, Ref. A suit to recover the purchase-money would be governed by Art. 120 of the Lim. Act. *Semble*: The law is changed under O. 21, R. 93, C.P.C., and the remedy by suit is no longer available. 39 A. 114; 39 M. 803; 40 M. 1009; 43 A. 60, R. But the alteration in the law being of a substantial character is not retrospective and an auction-purchaser whose right to obtain the purchase money was acquired before the coming into force of the new Code is not affected and his right is not extinguished. 35 A. 419; 23 M.L.J. 487; 39 M. 803; 12 L. W. 639, Rel. (*Mookerjee and Chotzner*, JJ.) MAKAR ALI *v.* SARFADDIN. **36 C.L.J. 132=27 C.W.N. 183=70 I.C. 609=50 C. 116=1923 Cal. 85.**

——**O. 21, R. 93**—*Remedy by suit—Absence of saleable interest.*

No suit lies for recovery of the purchase money when it is found that the judgment-debtor had no saleable interest in the property sold in execution. The remedy of the purchaser is by an application under O. 21, R. 93, C.P. Code. 41 I.C. 924; 22 C.W.N. 760; 39 A. 114, Rel. (*Newbould and Panton*, JJ.) BIPIN BEHARI GHOSH *v.* HARI CHARAN GHOSH.
64 I.C. 628.

——**O. 21, R. 93**—*Remedy by suit—Auction-purchaser—If can recover purchase-money.*

C. P. CODE (V of 1908), O. 21, R. 93—Remedy by suit.

A Court-auction-purchaser cannot sue to recover the purchase money on the ground that the judgment-debtor had no saleable interest in the property sold. (*Chatterjee and Richardson*, JJ.) JURARU MAHOMED *v.* JATHI MAHOMED. **46 I.C. 783=22 C.W.N. 760.**

——**O. 21, R. 93**—*Remedy by suit—Absence of—Saleable interest—Suit for refund of purchase-money.*

A separate suit by a purchaser in execution of a decree to obtain a refund of the purchase-money paid by him on the ground that judgment-debtor had no saleable interest in the property sold, does lie even though the plff. does not ask to set aside the sale. 35 Bom. 29; 36 All. 529, Ref. (*Fletcher and Smither*, JJ.) PRASANNA KUMAR BHATTACHARJEE *v.* IBRAHIM MIRZA. **41 I.C. 924.**

——**O. 21, R. 93**—*Remedy by suit—Sale under the Old Code—Discovery of want of title.*

Where an execution sale is held under the Code of 1882 but subsequent to the passing of the New Code it is found that the judgment-debtor had no title to the property sold, a suit by the purchaser for refund of the purchase money is maintainable. (*Ayling and Odgers*, JJ.) ALANJI ISOECK SAHIB *v.* VENGA CHETTY. **(1920) M.W.N. 736=60 I.C. 66=12 L.W. 639.**

——**O. 21, R. 93**—*Remedy by suit—Provisions compared regarding setting aside of sale and purchaser's claim thereon.*

O. 21, R. 93 of the New Code repeals the last clause of S. 315 of the old Code which deals with the right to recover the purchase-money on cancellation of the sale. The Rule in the New Code makes provision for the purchase money being refunded on a sale being set aside in execution proceedings. However, even in the case of a sale under the Old Code, the purchaser must have recourse to a separate suit for enforcing his claim, in the event of the sale being set aside by a separate suit after the new Act is passed. 23 M.L.J. 487, Dist. (*Srinivasa Aiyangar*, J.) INTI TARINI *v.* KOMOLA BISOYI. **37 I.C. 768.**

——**O. 21, R. 93**—*Remedy by suit—Execution sale—Stranger-purchaser—Right to sue for purchase money—Interest—Costs of Sale—Poundage—Civil Rules of Practice, Rr. 154 and 157.*

A stranger-purchaser at an execution sale which is subsequently set aside owing to irregularities in the conduct of the sale for which the decree-holder is responsible, is entitled to sue and recover from the decree-holder the purchase-money paid by him into Court, the interest thereon, and also the poundage and other expenses of the Court sale. Poundage is the fee which is levied in England by the Sheriff as remuneration for his service. In India as the officers of the Court conducting the sales are paid a fixed salary, a certain percentage of the purchase-money, is taken for

C.P. CODE (V of 1908), O. 21, R. 93—Remedy by suit.

purchasing stamps. In effect the fee is a charge paid by the decree-holder for the services he obtains from Court. 17 Mad. 228; 23 M.L.J. 487, Ref. (*Spencer and Seshagiri Aiyar*, JJ). PARVATHI AMMAL *v.* GOVINDASWAMI PILLAI. **39 Mad. 803=29 M.L.J. 467=2 L.W. 861=30 I.C. 827=(1916) M.W.N. 797.**

———O. 21, R. 93—*Remedy by suit—Rights of auction-purchaser to recover money.*

(Per *Ayling*, J.) *Quaere.*—Whether the auction-purchaser has a right of suit under the new Code for the purpose of recovery of the purchase money on the discovery of absence of interest in the judgment-debtor. But the Code does not take away the right of suit which has accrued before it came into force. (Per *Napier*, J.)—Under the present Code the right is no longer a substantive right, but a right to get an order in execution proceedings for re-payment if he discovers the absence of interest before the confirmation of the sale. (*Ayling and Napier*, JJ.) MAHADEEN IBRAHIM *v.* MAHAMED MEERA LEVVAI. **12 M.L.T. 431=23 M.L.J. 487=17 I.C. 437=(1912) M.W.N. 1130.**

———O. 21, R. 93—*Remedy by suit—Purchaser subsequently evicted—Suit for return of purchase money.*

No action lies against the decree-holder for return of the purchase money when the purchaser is evicted by a third party who successfully establishes his title in a regular suit. There is no implied warranty of title in Court sales unlike private sales. (*Mittra*, A.J.C.) DEWAJI *v.* AMRITA. **52 I.C. 818=15 N.L.R. 140.**

———O. 21, R. 93—*Remedy by suit—Auction-purchaser—If can recover purchase-money as the ground of judgment-debtor having no saleable interest.*

An auction-purchaser cannot maintain a suit to recover purchase-money on the ground that the judgment-debtor had no saleable interest in the property. There is no implied warranty in an auction-sale in execution of either a money decree or a mortgage decree except so far as it is recognized by the C.P.C. 42 I.C. 440, Foll. (*Mittra*, A.J.C.) GOVIND *v.* SHANKAR. **42 I.C. 463.**

———O. 21, R. 93—*Remedy by suit—Purchaser deprived of property by paramount title—Suit to recover purchase money.*

A purchaser at a Court-sale who is afterwards deprived of the property purchased by him by a person claiming paramount title, has no right to sue for recovery of the purchase-money from the person to whom it has been paid. His only remedy is by application under R. 93. (*Daniel*, A.J.C.) RAM DAYAL *v.* RAMPAL SINGH. **22 O.C. 42=31 I.C. 95=6 O.L.J. 160.**

C. P. CODE (V of 1908), O. 21, R. 93—Warranty of Title.

Saleable Interest.

———O. 21, R. 93—*Saleable interest—Absence of—Right to recover purchase-money.*

An auction-purchaser is entitled under O. 21, R. 93, C.P.C. to recover his money or some part of it even when the judgment-debtor had some saleable interest in the property sold. (*Kensington*, J.) FAZAL ILAHI *v.* MUHAMMAD JAN. **79 P.L.R. 1913=18. I.C. 795=76 P.W.R. 1913.**

———O. 21, Rr. 93 and 91—*Saleable interest—Judgment-debtor having none—Right to refund of purchase-money.*

Where after an execution sale it is found that the judgment-debtor has no saleable interest in the property the remedy of the auction-purchaser is to apply under O. 21, R. 91, C.P.C., to set aside the sale and then apply for a refund of the purchase money under O. 21, R. 93, C.P.C. The purchaser cannot bring a suit for setting aside the sale or for recovery of the purchase money. 39 M. 803; 3 C. 806; 25 B. 337: 39 A 114; 36 A 529; 37 C. 67; 35 B. 29; 40 M. 1009, Ref. (*Drake-Brockman*, J.C.) LAKSHMI CHAND *v.* CHATURBHUJ. **65 I.C. 230.**

Warranty of Title.

———O 21, R. 93—*Warranty-of title—None.*

Under the general law, apart from statute there is no warranty of title at a Court sale. 3 Cal. 806. (P.C.) Foll. (*Chatterjee and Richardson*, JJ.) JURAMU MAHOMED *v.* JATHI MAHOMED. **46 I.C. 783=22 C.W.N. 760.**

———O. 21, Rr. 93 and 92—*Warranty of title—None—Confirmation — Paramount title Right of auction-purchaser to refund.*

There is no warranty of title in a Court-sale. An auction-purchaser cannot sue for recovery of the purchase money if after the confirmation of the sale a stranger successfully asserts his title to the properties sold. His only remedy is to apply under O. 21, R. 93, C.P.C., for refund before confirmation of the sale. 23 M.L.J. 487; 39 All. 114, Foll; 39 Mad. 803; 36 All. 526, Dist. (*Oldfield and Sadasiva Iyer*, JJ.) SUBBU REDDI *v.* PONNAMBALA REDDI. **49 I.C. 359=(1918) M.W.N. 655.**

———O. 21, R. 93—*Warranty of title—Court-auction-sale—Title.*

A purchaser of property in Court sale takes it not only with all benefits but also subject to all liabilities. Therefore a purchaser of property in a Court-auction-sale, not aware of the existence of a prior mortgage on the properties at time of sale, who is compelled to pay the mortgage debt subsequently, cannot compel his vendor to pay the amount thereof as compensation, 36 I.A. 203, Foll; 7 N.W.P.H.C.R. 362, Not foll. *Seshagiri Aiyar and Napier*, JJ.) MUTHUSWAMI PILLAY *v.* MUTHUVEERAM PILLAY. **29 I.C. 892=2 L.W. 517.**

———O. 21, R. 93—*Warranty of title—Auction-purchaser.*

C. P. CODE (V of 1908), O. 21, R. 93—Warranty of Title.

There is no implied warranty of title in Court-sale. 23 M.L.J. 487; 33 All. 419, Ref. (*Mitra*, A. J. C.) KRISHNAJI *v.* LADHARAM MARWADI. **42 I.C. 440.**

———**O. 21, R. 93**—*Warranty of title—Auction-purchaser right.*

An auction-purchaser purchases with his eyes open and if the title to the purchased property does not turn out to be as perfect as he expected, the fault is his own. (*Mullick and Jwala Prasad, JJ.*) SUKHDEO DASS *v.* RITO SINGH. **1 P.L.W. 551 = 39 I.C. 763 = 2 P.L.J. 361.**

———**O. 21, Rr. 93 and 92**—*Warranty of title—Remedies.*

At a Court-auction there is no warranty, express or implied, that the judgment-debtor has a saleable interest. If it is found that the judgment-debtor has no saleable interest in the property sold in execution of the decrees against him, the auction-purchaser has, when there is no fraud or misrepresentation, no right of action either under the C. P. Code or apart from it, cannot recover the purchase money paid by him. 39 All. 114; (1918) M.W.N. 655, Foll; 40 All. 11; 35 All. 419; 35 Bom 29, Not foll. (*Duckworth*, J.) SOOLAYMAN CASSIM INGH *v.* S.S.A.O. CHETTY FIRM. **32 I.C. 174 = 12 Bur. L.T. 211.**

———**O. 21, R. 94.**

EXECUTION SALE.
RIGHTS OF PURCHASER.
SALE CERTIFICATE.
TITLE OF PURCHASER.

Execution Sale.

———**O. 21, Rr. 94 and 92**—*Execution sale—What passes under—Certificate of sale in respect of property not attached—Setting aside.*

What is sold at a judicial sale of immoveable property in execution of a money decree can be nothing but the property attached and that property is conclusively described in and by the schedule to the order of attachment. Where an existing property is accurately described in the schedule, a certificate of sale cannot be issued in respect of a different property, treating the case as one of misdescription when it is really one of identity. The fact that the property was described in the Calcutta Gazette in a different way from the attachment order, only vitiates the sale. If by mistake the wrong property was attached and an order made to sell it, the only course open to the decree-holder, on discovery of the mistake, is to commence the execution proceedings over again. (*Lord Moulton.*) RAJA THAKUR BARMHA *v.* JIBAN RAM. **41 Cal. 590 = 41 I.A. 38 = 18 C.W.N. 313 = 15 M.L.T. 137 = 12 A.L.J. 156 = 19 C.L.J. 161 = 26 M.L.J. 89 = (1914) M.W.N. 118 = 21 I.C. 986 = 16 Bom. L.R. 166 (P.C.).**

C. P. CODE (V of 1908), O. 21, R. 94—Right of Purchaser.

———**O. 21, R. 94**—*Execution sale—Purchaser of share in specific items of joint family property—Rights of—Partition—Other items allotted.*

Where a person purchases the share of a co-parcener in certain items of joint family property and subsequently at a family partition other items are allotted to the share of that co-parcener, it is not open to the auction-purchaser to compel that co-parcener to give properties in substitution of those which had been sold at the Court sale. 1 I.A. 106 (P.C.), Dist; 38 Mad. 684; 25 Mad. 690; 40 Mad. 365. Rel. (*Seshagiri Aiyar and Moore*, JJ.) SABAPATHI PILLAI *v.* THANDAVARAYA ODAYAR. **37 M.L.J. 620 = 54 I.C. 515 = 11 L.W. 108.**

———**O. 21, R. 94**—*Execution sale—Rights of purchaser.*

An execution sale creates a right of some sort in the person in whose favour the property is knocked down, (*i.e.*,) a right to have the sale confirmed if not set aside within the period allowed by law. (*Chapman and Atkinson*, JJ.) GANPAT MAHTO *v.* CHOTA RAM. **42 I.C. 387 = 2 P.L.W. 149.**

———**O. 21, R. 94**—*Execution sale—What passes.*

A, a legatee, under a will agreed to sell the bequeathed property to B, and received full consideration before obtaining Letters of Administration for which the execution of the deed was postponed. Meanwhile the property was attached, sold and purchased by C, who sued for possession. *Held*, C, obtained the right, title and interest of A who was bound to hand over the property to B owing to the receipt of consideration before attachment and therefore C could not oust B. (*Hartnol*, J.) FAKIR MAHOMED *v.* AGA MAHOMED ALI. **12 I.C. 831 = 4 Bur. L.T. 135.**

Rights of Purchaser.

———**O. 21, R. 94**—*Rights of purchaser—Possession—Title.*

An auction-purchaser, under a defective execution sale who obtains possession would have a good title until the defect is discovered and if not challenged within the time allowed to set aside the sale, his title would become absolute; but if he does not get possession, his title would be open to any objection that may be taken by the person in possession. (*Macleod*, C.J. *and Shaw*, J.) SHANKAR DAJI NAIK *v.* DATTATREYA. **46 Bom. 1186 = 63 I.C. 248 = 23 Bom. L.R. 514.**

———**O. 21, R. 94**—*Rights of purchaser—Stranger possession of land under a contract of sale—Sale in execution—Position of judgment-debtor.*

The plaintiff who is in possession of land on payment of consideration under a contract of sale has an interest in the property, which

C. P. CODE (V of 1908), O. 21, R. 94—Rights of Purchaser.

would be purchased in the auction sale and plaintiff cannot recover the property from the auction-purchaser on getting a registered conveyance from its former owner after the defendant's purchase. (*Chatterjea and Newbould*, JJ.) JNAN CHANDAR DAS *v.* RAJANI KANTA PAL. 41 I.C. 850=22 C.W.N. 522.

———O. 21, R. 94—*Rights of purchaser.*

When property is sold in execution of a decree ordinarily, all right, title and interest therein which the judgment-debtor had in possession, reversion, reminder, or in expectancy would pass to the purchaser, unless the Court limits the operation of the conveyance. (*Fletcher and Newbould*, JJ.) KUMUND KRISHNA MANDAL *v.* JOGENDRA NATH. 21 C.W.N. 854=41 I.C. 511= 26 C.L.J. 250.

———O. 21, R. 94—*Rights of purchaser.*

Where an auction-purchaser is claiming possession from the persons who could claim only through one or more of the mortgagors and whose claim has been declared to be unfounded, a mistake or oversight in omitting to include in the lands sold, a certain holding, cannot affect the real substance or subject of the litigation between the mortgagors and the mortgagee. (*Fox*, C.J. *and Parlett*, J.) MAUNG MAUNG *v.* MAUNG SAN NYEIN. 29 I.C. 17.

Sale Certificate.

———O. 21, R. 94—*Sale certificate—Sale of equity of redemption—Effect on rights of third parties.*

When a sale certificate recites that the whole property sold is subject to a mortgage and that the defendant's right of redemption is sold, the right to redeem of any other co-parcener of the defendant is also barred. (*Scott*, C. J. *and Heaton*, J.) GANESH NARAIN KHADE *v.* GOPAL VISHNU APTO. 41 Bom. 357= 39 I.C. 3=19 Bom. L.R. 75.

———O. 21, R. 94—*Sale certificate—Value of.*

A sale certificate does not create title. It is merely evidence of title. (*Mookerjee*, C.J., *Fletcher and Richardson*, JJ.) PROMOTHA NATH *v.* SOURAV DASI. 24 C.W.N. 1011= 31 C.L.J. 463=58 I.C. 327=47 C. 1108.

———O. 21, R. 94—*Sale certificate—Agreement for sale by purchaser at Court sale—Certificate of sale to whom to be granted.*

The person who is declared to be the purchaser after the bids are concluded is the person in whose name the certificate is to be granted under O. 20, R. 94, C. P. C., and not his proposed vendee. (*Chatterjee and Newbould*, JJ.) BABURAM MANDAL *v.* DAKSINA SUNDARI NAMASUDRANI. 54 I.C. 725=24 C.W.N. 27.

———O. 21, R. 94—*Sale certificate—Cancellation of sale—Decree for rent obtained by such purchaser, validity of—After cancellation.*

C. P. CODE (V of 1908), O. 21, R. 94—Sale Certificate.

The effect of the reversal of a certificate of sale of tenure is that as between the tenure-holder and the purchaser or his representative in interest, the latter becomes liable to make restitution to the former but a decree for rent obtained by the latter and a sale held on the basis thereof are not affected by the subsequent cancellation, of the certificate of sale. (*Mookerjee and Beachcroft*, JJ.) NAGENDRA NATH BASU *v.* PARBATI CHARAN NOYAL. 35 I.C. 339=20 C.W.N. 819.

———O. 21, R. 94—*Sale certificate—Power of Court to amend.*

A Court has inherent jurisdiction to amend a sale certificate incorrectly describing the property actually sold. (*Mookerjee and Beachcroft*, JJ.) NASIRUDDIN *v.* SAYADUR RAHMAN. 28 I.C. 811=19 C.L.J. 209.

———O. 21, R. 94—*Sale certificate—Evidence to contradict terms, if admissible.*

No evidence can be given to contradict the terms of a sale certificate; but evidence may be adduced to interpret its terms when they are ambiguous and stand in need of explanation. (*Mookerjee and Beachcroft*, JJ.) BARHAMDEO SINGH *v.* RAM NARAIN SINGH. 22 I.C 280=19 C.L.J. 182.

———O. 21, R. 94—*Sale certificate—Boundaries prevail over areas.*

The boundaries of the property sold as given in a sale certificate prevail over the areas mentioned therein and a purchaser takes the plots as defined by the boundaries. (*Jenkins*, C.J. *and Mookerjee*, J.) GOSSAIN DAS KUNDU *v.* MRITTUNJOY AGNAN SARDAR. 22 I.C. 26=18 C.L.J. 541.

———O. 21, R. 94—*Sale certificate—Entries in—Not binding on strangers.*

Where in a rent suit the holding is sold in execution of a decree, an entry in the sale certificate though it would not estop the landlords who were not parties to the rent suit would be strong evidence against them under S. 13 of the Evidence Act. (*Coxe and Ray*, JJ.) KHIRODE CHANDRA GHOSH *v.* JANKI DASS. 20 I.C. 753.

———O. 21, R. 94—*Sale certificate—Amendment—Jurisdiction of Court to amend.*

Where a wrong *towji* number is given in sale proclamation and the sale certificate, the Court, on the application of the auction-purchaser, may amend the sale certificate by substituting the correct *towji* number. 18 I.C. 725, Dist. (*Chatterjee and Walmsley*, JJ.) MACKENZIE *v.* RAM PEARY KOER. 20 I.C. 588.

———O. 21, R. 94—*Sale certificate—Amendment of.*

A Court has no jurisdiction for amendment of a certificate of sale so as to show the purchase of a larger share of the property than what was stated in the sale proclamation. (*Harrington and Carnduff*, JJ.) NAZIR AHSHAN *v.* DALIP MAHTON. 18 I.C. 725.

C. P. CODE (V of 1908), O. 21, R. 95—Sale Certificate.

———O. 21, R. 95—*Sale certificate—Amendment—Notice to judgment-Debtor necessary.*

A sale certificate should not be amended without notice to judgment-debtor. An amendment without notice is a material irregularity and the order is revisable if prejudice is caused to the judgment-debtor. (*Devadoss*, J.) YAGNASAMI IYER *v.* K. CHIDAMBARANATH.
(1922) M.W.N. 180=16 L.W. 760=65 I.C. 732=1922 Mad. 63.

——O. 21, R. 95—*Sale certificate—Construction of—Boundaries and area.*

When a sale certificate contains only a general description of the boundaries of the whole area sold, without any specification of the boundaries of plots sold, the *paimash* and survey number of the plots must be taken as a far more correct specification of what was sold than the boundaries. (*Abdur Rahim and Spencer*, JJ.) KUPPUSWAMI IYENGAR *v.* SUBBARAYA MINDA. 11 M.L.T. 16=(1912) M.W.N. 1=13 I.C. 324=22 M.L.J. 161.

———O. 21, R. 95—*Sale certificate—Description of property—Evidence.*

An auction-purchaser of land is not bound by a statement in the sale certificate as to the situation of the land purchased by him. (*Das*, J.) PURGAN PANDE *v.* DHANPAT TEWARI.
52 I.C. 739.

——O. 21, R. 95—*Sale certificate—Duty of Court to issue certificate.*

The Rule is mandatory and a Court cannot withhold a sale certificate from an auction-purchaser who is otherwise entitled to it merely to compel him to meet the claim of a third party. (*Atkinson and Jwala Prasad*, JJ.) BAIKUNTI MISSER *v.* NARINDA SUNDARI DEBI.
1 P.L.J. 446=38 I.C. 576=3 P.L.W. 76.

———O. 21, R. 95—*Sale certificate—Judgment-debtor contesting validity of, on ground of fraud must prove it.*

Plaintiff, the assignee of a decree, brought the judgment-debtor's property to sale in execution and purchased it himself. The plaintiff got out a sale certificate and instituted the present suit for possession against the judgment-debtor. The defendant pleaded that the decree was without his knowledge and without service of summons and that the sale at which the plaintiff had purchased was brought about without service of the usual notices, *Held*, that the plaintiff having obtained a sale certificate from Court, the onus was clearly upon the defendant to prove that the decree had been obtained by fraud. (*Mullick*, J.) JIWACH RAUT *v.* SAMRAN MANWAR. 34 I.C. 911.

Title of Purchaser.

———O. 21, R. 95—*Title of purchaser—Misdescription of property—Effect on purchaser's title.*

A mere misdescription of property, where it can be easily identified would not invalidate a sale and the title of the purchaser is not affected. (*Chatterjee and Richardson*, JJ.) SRI NATH ROY *v.* SATYA KINKAR SEN.
11 I.C. 395=13 C.L.J. 660.

C. P. CODE (V of 1908), O. 21, R. 95.

———O. 21, R. 95—*Title of purchaser.*

The title of the purchaser at a sale in execution of a mortgage decree, relates back to the date of the mortgage where the mortgagee is the purchaser, (*Coxe*, J.) NABA KRISHNA PAL *v.* MOHIT KALI DEBI. 9 I.C. 840.

———O. 21, R. 95—*Title of purchaser—When complete.*

An auction-purchaser's title even as regards strangers arises on and becomes complete from the date of confirmation of sale and a suit by a female for maintenance subsequent to the sale but prior to the grant of the sale-certificate does not make the sale void by the doctrine of *lis pendens* and the purchaser takes the properties free from any charge of maintenance. 15 Cal. 546; 2 C.W.N. 589; 17 Bom. 375; 24 All. 475; (1902) A.W.N. 145; 33 All. 63, Dist.; 6 Bom. 139; 10 Bom. 453; 11 Bom. 588; 21 W.R. 351; 17 Bom. 375, Foll. (*Oldfield and Tyabji*, JJ.) LANKA GOPALAM *v.* LANKA RATNAMMA. (1915) M.W.N. 15=26 I.C. 363=28 M.L.J. 666.

——O. 21, R. 95—*Title of auction-purchaser.*

A sale in execution is an act of the Court and the auction-purchaser therefore derives his title from the Court's Act. Where an act of Court is induced by mistake it may be set aside. (*Benson and Sundara Aiyar*, JJ.) RAJA OF KALAHASTI *v.* MAHARAJAH OF VENKATAGIRI. 38 Mad. 387=14 M.L.T. 320=21 I.C. 389=25 M.L.J. 198.

———O. 21, R. 95—*Title of purchaser—Passing of.*

The purchaser at a sale has no title to the property sold before he obtains the certificate of sale. (*Drake Brockman*, J.C.,) PARBAT *v.* BINDRAJ. 12 I.C. 360=7 N.L.R. 136.

———O. 21, R. 95—*Title of auction-purchaser—Parties to sale—Not to question its validity.*

Persons who were parties to a sale in execution of a decree cannot question the title of auction-purchaser. (*Kanhaiya Lal and Daniels*, A. J. Cs.) SHAH MOHAMMAD YUSUF *v.* LACHMI NARAIN 6 O.L.J. 49=30 I.C. 187=21 O.C. 400.

———O. 21, Rr. 95, 96—*Delivery of possession—Time for suit by auction-purchaser.*

Where possession has been delivered to an auction-purchaser under R. 95 or R. 96, he gets a fresh start for the computation of limitation but a mere formal delivery of possession does not give such a start. (*Banerji Ryves and Lindsay*, JJ.) JANG BAHADUR SINGH *v.* HANWAT SINGH. 43 All. 320=68 I.C. 212=19 A.L.J. 159.

C. P. CODE (V of 1908), O. 21, R. 95.

———O. 21, R. 95—*Appeal—Order delivering possession.*

No appeal lies from an order delivering possession under O. 21, R. 95; to entertain such an appeal is to act without jurisdiction. (*Banerjee and Tudball, JJ.*) BUDDHU MISSIR *v.* BHAGIRATH KUAR. **40 All. 216 = 42 I.C. 936 = 16 A.L.J. 180.**

———O. 21, Rr. 95 and 96—*Scope of—Limitation.*

O. 21, R. 96 provides for the formal delivery of possession where the nature of the property does not permit of actual possession being given, but the legal effect of formal possession must be the same as actual possession under O. 21, R. 95. This is the same as granting possession under S. 319 of the Code of 1882. The auction-purchaser obtains a fresh start for the computation of limitation from the date of delivery of formal possession to him. (*Richards, C.J. and Banerji, J.*) LAL RAJENDRA KISHORE SINGH *v.* BHAGWAN SINGH. **39 All. 460 = 39 I.C. 745 = 16 A.L.J. 361.**

——O. 21, R. 95—*Adverse possession—Symbolical possession—Effect of delivery of, as between parties to a suit.*

The plaintiff sued to recover possession of land from the defendant who was in adverse possession of it from 1898, and obtained a decree in 1914. In execution of the decree, he secured symbolical possession in 1915. In 1918, the plaintiff having sued again to recover possession was met by the defendant with a plea of his adverse possession for upwards of twelve years. *Held*, that the plaintiff was entitled to succeed, since the decree of 1914 put a stop to defendant's adverse possession prior to the date of the decree, especially as the defendant was a party to the execution proceedings of 1915. 14 Bom. L.R. 115, F.B., doubted, in view of 20 Bom. L.R. 502. (*Macleod, C.J. and Shah, J.*) MAHADEVAPPA DUNDAPPA *v.* BHIMA DODAPPA MALED. **24 Bom. L.R. 232 = (1922) Bom. 28 = 66 I.C. 320 = 46 Bom. 710.**

———O. 21, R. 95—*Symbolical possession—Property in the occupancy of judgment-debtor—Symbolical possession.*

Where the property in the possession of the judgment-debtor is sold in execution of a decree and purchased by the plaintiff who merely obtains paper delivery of possession, the adverse possession of the judgment-debtor is not interrupted thereby. (*Scott, C. J. and Shah, J.*) SHRIDAR *v.* GANAPATI, **43 Bom. 559 = 61 I.C. 72 = 21 Bom. L.R. 357.**

[This is no longer law *See* 43 I.C. 268 = 35 M.L.J. 97 (P.C.).]

———O. 21, R. 95—*Symbolical possession—Delivery of, gives fresh start of limitation against judgment-debtor.*

Delivery of symbolical possession instead of actual possession is effective against the judgment-debtor and gives rise to a fresh start of limitation against him. This principle avails

C. P. CODE (V of 1908), O. 21. R. 95.

also persons claiming under the certified purchaser. 5 C. 584; 16 C. 530; 4 C. 870: 24 C. 175, foll.; 36 B. 373; 24 W. R. 418, not foll. (*Chatterjee and Pearson, JJ.*) BHULU BEG *v.* JATINDRA NATHSEN. **27 C.W N 24 = 1923 C. 138.**

——O. 21, R. 95—*Co-sharer—Purchaser of his share.*

A purchaser of the right, title and interest of a co-sharer who was in exclusive possession of a plot, is entitled to be placed in actual possession of that plot. Therefore a transferee from such purchaser is entitled to possession as against the judgment-debtor and to compensation for use and occupation. (*Chatterjee and Newbould, JJ.*) SUDARSHAN DAS *v.* BIRAJA SUNDARI DASI. **38 I.C. 338.**

———O. 21, R. 95—*Symbolical possession—Effect against judgment-debtor.*

A delivery of symbolical possession is effective as against a judgment-debtor but not against a stranger to the suit. (*Mookerjee and Beachcroft, JJ.*) NASIRUDDIN *v.* SAYADUR RAHMAN. **23 I.C. 811 = 19 C.L.J. 209.**

———O. 21, R. 95—*Delivery of possession.*

In execution delivery of possession must be according to either O. 21, R. 95 or 96. (*Abdul Raoof, J.*) SALAMAT ALI *v.* ALI AKBAR. **55 I.C. 946.**

——O. 21, R. 95—*Order for delivery of possession—Effect of.*

Per *Oldfield, J.*—An order for delivery made on an application under O. 21, R. 95 cannot be treated as a mere general order to be worked in subsequent execution proceedings or as one including both such general order and an order executing it. (*Abdur Rahim and Oldfield, JJ.*) NANDUR SUBBAYYA *v.* RAJA VENKATARAMAYYA APPARAO. **1918 M.W.N. 214 = 43 I.C. 155 = 7 L W. 16.**

——O. 21, Rr. 95, 96 and 103—*Order in execution referring party to a suit—Symbolical possession granted—Effect.*

Per *Spencer, J.*—Where an executing Court grants symbolical possession and refers the party concerned to a suit, such order must be taken to be unfavourable to him. 9 M.L.J. 175, Foll. Per *Sadasiva Aiyar, J.*—Its order cannot be treated as a refusal to pass an order. 9 M.L.J. 175, Dist. (*Sadasiva Aiyar and Spencer, JJ.*) AYYAKUTTI MANKONDAN *v.* PERIASAWMI GOUNDAN. **1 L.W. 31 = 24 I.C. 771 = 15 M.L.T. 163.**

———O. 21, Rr. 95 and 97—*Limitation—Successive applications.*

The failure of the decree-holder to complain of obstruction under O. 21, R. 97 within 30 days as prescribed by Art. 167, is no bar to a fresh application for delivery of possession under O. 21, R. 95. 13 Mad. 504. Foll. (*Wallis and Ayling, JJ.*) ABDUL KARIM SAHIB *v.* TIMMARAYA CHETTY. **24 I.C. 512.**

C. P. CODE (V of 1908), O. 21, R. 95.

———O. 21, Rr. 95 and 97—*Successive applications.*

A decree-holder or auction-purchaser cannot be prevented from making a fresh application under O. 21, R. 95 after an application made by him under R. 97 is dismissed by Court. 13 Mad. 504, Foll. (*Benson*, O C.J. *and Napier*, J.) MUTHUSAWMI GOUNDAN *v.* ETHIRAJULU NAIDU. **16 I.C. 432=(1913) M.W.N. 179.**

———O. 21, R. 95—*Nankar rights—Auction-purchaser—Title.*

An auction-purchaser of Nankar rights gets full title to them from the date of his purchase and need not apply for possession under O. 21, R. 95. (*Lindsay*, J. C.) PARTAB DAS *v.* KANHAI LAL. **36 I.C. 768=3 O.L J. 436.**

———O. 21, R. 95—*Effect of possession under—Judgment-debtor a trespasser.*

After possession has been given to the decree-holder under O. 21, R. 95, the judgment-debtor's possession is only that of a trespasser. (*Jwala Prasad and Coutts*, JJ.) RAM KRISHNA SINGH *v.* EMPEROR. **3 Pat. L.T. 335=66 I C. 817=23 Cr. L.J. 321=1922 P. 197.**

———O. 21, R. 95—*Appeal—Order giving possession.*

An appeal does not lie against an order under O. 21, R. 95 delivering possession to the decree-holder, under an auction-purchaser. (*Chamier*, C J. *Sharfuddin and Atkinson*, JJ.) ABDUL GANI *v.* RAJA RAM. **20 C.W.N. 829=1 Pat L.J. 232=35 I.C. 468=3 Pat. L.W. 62 (F.B).**

———O. 21, R. 96—*Symbolical possession—Limitation.*

An application by the auction-purchaser more than three years after the sale is confirmed, is not barred by limitation as such an order can be made by the Court of its own motion and no period is fixed for such an order, (*Chitty and Beachcroft*, JJ.). HARISH CHANDRA ROY *v.* SARAT CHANDRA BENDOPADHYA. **40 I.C. 605.**

———O. 21, R. 96—*Obstruction—Suit for partition.*

Where a person purchases in execution sale an undivided share in certain properties, and is obstructed by the person entitled to the possession of the whole, his remedy is to sue for partition. (*Spencer and Krishnan*, JJ.) MANDAVILLA RAMARAO *v.* SIVIABARAYANA. **25 M.L.T. 163=49 I.C. 629=9 L.W. 81.**

——O. 21, R. 96—*Effect of order—Judicial order.*

An order directing delivery of possession to a purchaser under O. 21, R. 96, C.P.C., is a judicial order. (*Abdur Rahim and Napier*, JJ.) KATHIRAYASAWMI NAICKER *v.* RAMA BHADRA NAIDU. **45 I.C. 608.**

——O. 21, R. 96—*Symbolical possession—Paper delivery—Distinction.*

C. P. CODE (V of 1908), O. 21, R. 97.

Symbolical possession is given only where the party in actual possession is entitled to remain in such possession as in cases of delivery under O. 21, R. 96 and should not be confounded with cases where a party is entitled to actual possession but obtains only what is called a paper delivery, *i.e.*, where he gets no possession at all. (*Spencer, Krishnan and Srinivasa Aiyangar*, JJ.) GOVINDASWAMY PILLAI *v.* PETHAPERUMAL CHETTY. **44 I.C. 839.**

——O. 21, R. 96—*Scope of—Auction-purchaser of share of judgment-debtor—Suit for partition.*

An auction-purchaser of the share of a judgment-debtor can sue for partition of his share without obtaining formal delivery of possession under O. 21, R. 96, C.P.C. (*Wallis*, C.J. *and Seshagiri Aiyar*, J.) HASAN AMMAL BIBI *v.* ISMAIL MOIDEEN. **(1918) M.W.N. 414=29 I.C. 976=26 M.L.J. 642.**

——O. 21, R. 96—*Symbolical possession—Effect of, as against stranger.*

Formal possession under O. 21, R. 96 is no possession at all against a stranger. His rights are not affected by it and he is entitled to recover possession. (*Lindsay*, J. C.) TASAD HUSSAIN *v.* ASGHAR HUSSAIN. **45 I.C. 606=21 O.C. 70.**

——O. 21, R. 96—*Symbolical possession—Effect of.*

A symbolical delivery of possession to an auction-purchaser does not of itself effect any transfer of possession by any person not a party to the decree. (*Chapman and Jwala Prasad*, JJ.) JHARI SINGH *v* GOPI PAS BAN. **42 I.C. 449=3 P.L.W. 138.**

———O. 21, R. 96—*Property in the hands of Receiver—Leave of Court is necessary.*

O. 21, R. 96 will not apply to property in the hands of a Receiver and he can be sued only with leave of Court. (*Fawcett*, J.C. *and Raymond* A.J.C.) RAMDAS *v.* AJUDHIADAS. **63 I C. 685=14 S.L.R. 137.**

——O. 21, R. 97—*Sub-tenant—Cannot resist.*

A sub-tenant cannot resist the execution and the decree for possession by the original landlord. The words "on his own account" refer to the person who claims to be in possession under his own title. A sub-tenant is not in possession on his own account. (*Macleod*, C.J.) JAIRAM *v.* NOWROJI. **23 Bom. L.R. 1316=66 I.C. 212=1922 Bom 449 (2).**

———O. 21, R. 97—*Sub-lessee of sub-tenant of judgment-debtor cannot obstruct.*

The sub-lessee of the sub-tenant is not entitled to obstruct the original landlord who has got a decree against the lessor of the sub-tenant as there is no privity of contract between the landlord and the sub-tenant though the

C. P. CODE (V of 1908), O. 21, R. 97.

sub-tenant may be entitled to protection against the immediate lessor. (*Macleod*, C.J.) JATFERJI *v.* MIYADIN. **23 Bom. L.R. 1251 = 64 I.C. 692 = 46 Bom. 526 = 1922 Bom. 273.**

———**O. 21, Rr. 97 and 99**—*Covenant against sub-lease—Breach—Decree against lessee—Resistance by sub-lessee in execution—Remedy is by suit.*

The lessee granted a sub-lease of the premises against a covenant in the lease not to sub-let. The lessor sued the lessee for possession and got a decree, in execution of which he was resisted by the sub-lessee. The lessor then applied under R. 97. *Held*, that the lessor's remedy was to proceed by suit for possession against the sub-lessee. (*Rankin*, J.) EZRA *v.* GUBBAY. **60 I.C. 969 = 47 Cal. 907.**

———**O. 21, R. 97**—*Delivery of possession complete—Second application for, is not maintainable.*

The return on a warrant for delivery of immoveable property issued on an application made as against the judgment-debtor for the execution of a decree for the possession of such property was that the delivery was complete, and this statement on the return was accepted by the decree-holder. The judgment-debtor had, during the pendency of the suit, granted a lease of a portion of the property. Alleging that he was not aware of the said lease when he accepted the delivery as complete, and that the lessee under the said lease prevented him from peacefully enjoying the property delivered to him, the decree-holder applied again as against the lessee, for removal of the obstruction and for the issue, if necessary, of a warrant of delivery. *Held* that the execution having been definitely closed by the delivery on the first application accepted by the decree-holder as complete, a second application by him for execution was in the absence of any allegation of fraud in the proceedings on the first application, incompetent. (*Oldfield and Venkatasubba Row*, JJ.) IBRAHIM SAHIB *v.* KONAMMAL. **43 M.L.J. 179 = 31 M.L.T. 366 (H.C.) = 70 I.C. 765 = 1923 Mad. 25.**

———**O. 21, Rr. 97 and 99**—*Obstruction to delivery—Members of undivided family not parties to suit—Remedy.*

Where an auction-purchaser is resisted in obtaining possession of the purchased property by some members of the family to which the property belonged but who were not made parties to the suit, the case falls under O. 21, R 99, C.P.C. The remedy of the purchaser is by a regular suit to obtain physical possession of the share of those judgment-debtors. (*Sankaran Nair*, J.) RANGASWAMI AIYANGAR *v.* RANGASAMI AIYANGAR. **14 I.C. 282.**

———**O. 21, R. 97**—*Auction-purchaser—Right to sue.*

A suit by an auction-purchaser for possession is maintainable even if the express words are

C. P. CODE (V of 1908), O. 21, R. 98.

absent in the decree. (*Prideaux and Mitra*, A.J.Cs.) BALLAHADAS *v.* GULAB SINGH. **57 I.C. 177.**

———**O. 21, Rr. 97, 99 and 103**—*Appeal—Suit—Application by purchaser for possession—Dismissal of—Remedy.*

During the pendency of execution proceedings for the sale of mortgaged property, the mortgagor leased it out. The mortgagee purchased the property and applied under O. 21, R. 97 for possession of the same. The application was dismissed. *Held*, that the order of the lower Court declining to interfere with the possession of the lessee was one dismissing the application of the decree-holder under O. 21, R. 99 and that the auction-purchaser had no right of appeal but that his remedy was to institute a suit against the occupiers for their ejectment. (*Stuart*, J.C.) MUSSAMMAT BIBI SAIDUNNISSA *v.* FAIYAZ HASAN. **53 I.C. 923.**

———**O. 21, Rr. 97 to 103**—*Delivery of possession—Resistance to—Whether fresh writ may be issued.*

Where the application of an auction-purchaser not being the decree-holder for delivery of possession is rendered infructuous by reason of obstruction, the applicant is entitled to apply for a fresh writ of possession within the period of limitation prescribed by Art. 167 of the Lim. Act without making an application under O. 21, R. 97, 21 W.R. 147; 5 Mad. 113; 18 All. 239, 13 C.W.N. 724 and 26 All. 365, Ref. (*Atkinson, Coutts and Manuk*, JJ.) RAGHUNANDAN PRASAD MISRA *v.* RAMCHARAN MANDAL. **4 P.L.J. 94 = 49 I.C. 150 = 1919 Pat. 81 (F.B.).**

———**O. 21, R. 98**—*Applicability of—Presidency Small Cause Court—Order of ejectment—Obstruction—Power to remove.*

Presidency Small Cause Court can pass an order of ejectment where the obstruction is offered by the judgment-debtor and it has power to remove. (*Krishnan*, J.) DAROGA MAHOMED GHOUSE SAHIB *v.* SHEIK MOHIDEEN SAHIB. **45 M.L.J. 66 = 18 L.W. 135 = 73 I.C. 985 = (1923) M.W.N. 882 = 1924 M. 74.**

———**O. 21, Rr. 98 and 102**—*Order to remove obstruction is appealable—Acquiescence in obstruction—Effect.*

An order under O. 21, R. 98 for removal of obstruction is appealable under S. 47, C. P. C. Acquiescence in the obstruction to a previous attempt to obtain delivery of possession does not prevent the decree-holder from applying again in execution for possession and to obtain it by the removal of the second obstruction. (*Oldfield and Ramesam*, JJ.) MEYYAPPA CHETTY *v.* MEYYAPPAN. **66 I.C. 722 = (1921) M.W.N. 698.**

———**O. 21, R. 98 and S. 146**—*Auction purchaser—Is a representative of judgment-debtor.*

A purchaser under a simple money decree is a representative of the judgment-debtor for the purpose of O. 21, R. 98, and proceedings can be

C. P. CODE (V of 1908), O. 21, R. 98 and 99.

taken against him under S. 146 of the Code. (*Abdur Rahim and Napier, JJ.*) MANICKA GRAMANY *v.* PARASURAM MUDALI.
12 L.W. 350=59 I.C 894=(1920) M.W.N. 787.

——**O. 21, Rr. 98 and 99**—*Scope of.*

The jurisdiction conferred by O. 21, R. 98 on Court to direct possession is confined to cases of obstruction due to judgment-debtor or to some other person at his instigation. (*Sadasiva Aiyar, J.*) SECRETARY OF STATE *v.* CHERUKARA NARAYANANUMI PISHARODI.
31 I C. 799.

——**O. 21, Rr. 99, 100. 101 and 103**—*Limitation—Execution by auction-purchasers—Dismissal for default—Limitation Act, Art.* 11.

Plffs. auction-purchasers applied for delivery of possession making deft. a person who preferred some claim to the property. This was dismissed for default on 11th August 1913. Subsequently plffs. again applied and got possession. Thereupon deft. preferred an objection which was allowed on 12th December 1914. Two days afterwards plffs. brought a suit for declaration of their title as auction-purchasers. *Held*, that the suit was within time, as the order of 11th August was merely one dismissing an application for default and the plffs. had no opportunity of establishing their right and no adjudication of title could have been made in their absence and therefore limitation began to run from 12th Dec. 1914, when the defts. objection was allowed. (*Richards, C.J. and Banerji, J.*) ALI MOHAMMAD SHAH *v.* RAM NARAIN. **39 I.C. 797=15 A.L.J. 420.**

——**O. 21, Rr. 99 and 103**—*Limitation—Decision as to possession—Finality of—Limitation Act, Art.* 11.

The decision in favour of a party not being a judgment-debtor under O. 21, R. 99 is conclusive so far as the question of possession is concerned; unless and until a suit is brought, by the party against whom the order is made under R. 103 within one year. 26 Bom. 730, Foll.; 34 Cal. 491 and 42 P. R. 1909, Dist. (*Scott-Smith and Broadway, JJ.*) CHAIL BEHARI LAL *v.* KIDAR NATH.
51 I.C. 787=51 P.W.R. 1919.

——**O. 21, R. 99**—Bona fide *claimant—Right to residence.*

Under Hindu Law, unmarried sisters have a right to residence in the family dwelling-house until they are married and if the house be sold in execution of a decree for debts incurred by the last male holder or his legal representatives, they can resist the auction-purchaser from ousting them out of their portions in their actual occupations till suitable arrangement is made for them. (*Wallis, C.J. and Sadasiva Aiyar, J.*) SURIYA NARAYANA RAO NAIDU *v.* BALASUBRAMANIA MUDALI.
43 Mad. 635=56 I.C. 525=38 M.L.J. 433=(1920) M.W.N. 267=11 L.W. 409.

C. P. CODE (V of 1908), O. 21, R. 100.

——**O. 21, R. 100 and S. 47**—*Excessive execution—Property outside decree—Remedy by application—No suit.*

The proper remedy for a judgment-debtor in case of dispossession of land outside the decree, is to put an application for restoration under S. 47, C. P. C. and not by separate suit. (*Piggott and Walsh, JJ.*) ABDUL KARIM *v.* ISLAMUNISSA BIBI. **38 All. 339=34 I C. 231=14 A.L.J. 401.**

——**O. 21, R. 100**—*Execution by Collector.*

The Rule does not apply where the execution of the decree has been transferred to the Collector. If a person is wrongly ousted or dispossessed under the Collector's order he should apply to the Collector and not to the Court. (*Heaton and Rao, JJ.*) RAGHO CHANDRA RAO KADAM *v.* HAIRMATI CHANDRA RAO KADAM.
37 Bom. 488=19 I C. 903=16 Bom. L R. 389.

——**O. 21, R. 100**—*Locus standi to apply.*

Application under O. 21, R. 100 cannot be maintained by person who is a representative of judgment-debtor under S. 47. (*Suhrawardy and Cuming, JJ.*) GIRIBALA DASI *v.* PRIANATH PAL. **65 I.C. 476.**

——**O. 21, R. 100**—Caveat emptor—*Mortgagee purchaser.*

Where at a sale under a mortgage decree, the mortgagee decree-holder purchased the property and got possession but was subsequently dispossessed of a portion, owing to a decision upon a claim under R. 100, when he applied for compensation, *held*, that there was no warranty of title in Court sales and there was no provision in the C. P. Code for compensation. That the purchaser was mortgagee makes no difference. (*Richardson and Cuming, JJ.*) ABINASH CHANDRA KAR *v.* BHUBAN CHANDRA MAITY. **63 I.C. 126=25 C.W.N. 756.**

——**O. 21, Rr. 100 and 101**—*Joint possession with judgment-debtor in respect of his interest.*

A person in joint possession with the judgment-debtor of a certain land as a member of a joint family or otherwise, can claim to be in possession of the land in good faith on his own account within O. 21, R. 100, C. P. C. and the effect of an order in his favour will be to place him in joint possession with the execution purchaser. 3 Mad. 81, Foll.; 5 I.C. 298, Appr.; 17 Bom. 718, Not foll. (*Mookerjee and Beachcroft, JJ.*) RADHA GOBINDA MISSER *v.* RAGHUNATH MISSER. **18 C.L J. 138=20 I.C. 253=18 C.W.N. 695.**

——**O. 21, Rr. 100, 101 and 103**—*Appeal.*

Under R. 103, no appeal lies from an order passed under R. 101. (*Shah Din, J.*) GULABI BIBI *v.* ASLAM KHAN. **101 P.L.R. 1917=41 I.C. 891=57 P.R. 1917=91 P.W.R. 1917.**

C. P. CODE (V of 1908), O. 21, R. 100.

———**O. 21, R. 100**— *Order under — is Appealable.*

***An appeal lies against an order under O. 21, R. 100 of the Code, where the question is between parties to the suit or their representatives. (*Sadasiva Aiyar and Coutts-Trotter*, JJ.) RUKMANI AMMAL *v.* NARASIMHA AIYAR. 41 M.L.J. 54=63 I.C. 780=15 L.W. 83=(1921) M.W.N. 487.**

———**O. 21, Rr. 100 and 101**—*Inquiry into title.*

A claim of an exonerated party that he was dispossessed by decree-holder or purchaser in execution of the decree therein must be restricted to question of possession or dispossession only. The Court cannot determine the title of the exonerated party. (*Ayling and Kumaraswamy Sastri* JJ.) KRISHNAPPA MUDALY *v.* PERIASWAMY MUDALY. 40 Mad. 964=38 I.C. 297=21 M L.T. 121=5 L.W. 369=32 M.L.J. 532.

———**O. 21, R. 100**—*Right to apply—Joint possession—Person claiming—Locus standi.*

Held **following 18 C. W. N. 695 and 3 M. 81 that claimant who has an interest in the land of which possession has been delivered in execution of a decree either as a member of a joint family or otherwise and who is affected by the delivery of possession can claim to be in possession of the property on his own account within the meaning of S. 331 of the C. P. Code of 1882 corresponding to O. 21, R. 100, C. P. Code. (1908) 17 B. 718, Not foll. (*Kotval*, A.J.C.) A. K. SINGH *v.* RAM PRASAD. 68 I.C. 394=1923 Nag. 52.**

———**O. 21, R. 100**—*Usufructuary mortgagee—Possession disturbed by purchaser at Court auction—Application under, lies.*

A usufructuary mortgagee of certain property applied under O. 21, R 58 of the C.P.C. objecting that the property is not liable to attachment and that, on being disturbed in possession by purchaser at Court auction he was entitled to bring the present application which is not barred by O. 21, R. 63 of the C.P.C. (*Das and Adami*, JJ.) BISWANATH PATRA *v.* LINGARAJ PATRA. 1922 P. 408=70 I.C. 306=1 P. 159.

———**O. 21, R. 100**—*Scope of.*

In an action for rent the landlord obtained a decree against the tenant (purchaser from the original tenant) of a holding and purchased it. The opposite party applied under R. 100 praying that he should be restored to possession of his portion of the holding which he had purchased from the original tenant. The opposite party was therefore restored to possession. The landlord again sued the tenant for the rent of the portion in possession of the opposite party got an *ex parte* decree and got it purchased by his servant who was given possession. The opposite party again objected under R. 100. The landlord having obtained a money decree, though the holding had not been split up, the opposite party was restored to possession. *Held* the petitioner was not a *bona fide* purchaser for

C. P. CODE (V of 1908), O. 21, R. 101.

value and the landlord was acting fraudulently in giving up possession to the opposite party. (*Adami*, J.) KHUB LAL DAS *v.* PATHO JHA. 1922 P. 308.

———**O. 21, R. 100**—*Right to apply—Purchaser of a holding not transferable by custom.*

Where a sixteen annas landlord purchases a holding in execution of a rent decree against the recorded tenant, a purchaser who has purchased without the landlord's consent has no right in the absence of a custom of transferability of holding without the landlord's consent to make a claim under Or 21, R. 100. (*Ros and Jwala Prasad*, JJ.) PANCHARATNAN KOERI *v.* RAM SAHAY. 3 P.L.J. 579=43 I.C. 969=4 P.L.W. 129.

———**O. 21, Rr. 100 and 101**—*Judgment-debtor—If includes representative.*

"Judgment-debtor" includes his representative and all persons bound by the decree against the judgment-debtor are bound by the sale in execution of that decree. (*Chapman and Jwala Prasad*, JJ.) BHIKHIA JHA *v.* BRIJ BEHARI. 1 P.L.W. 685=42 I.C. 526=2 P.L.J. 478.

———**O. 21, R. 101**—*Transfer of decree to Collector.*

When a decree is transferred to a Collector for execution, the Court which passed the decree is *functus officio*, for the time being for all purposes of execution but when the Collector has exhausted his powers conferred upon him; then any matters requiring to be done, and usually regarded as done in execution must be done by the Court which made the decree. (*Beman and Hayward*, JJ.) AJUN RAGHU NAROLE *v.* KRISHNAJI VENIMADHAV VALIMBE. 38 Bom. 673=26 I.C. 266=16 Bom. L.R. 637.

———**O. 21, R. 101**—*Inquiry into title.*

No question of title can be investigated under O. 21, R. 101. A mortgagee of an occupancy holding is in possession of it on his own account and not on account of the mortgagor within R. 101; consequently the purchaser of an occupancy holding in execution, cannot oust the mortgagee in possession summarily but must first annul the incumbrance. (*Mookerjee and Beachcroft*, JJ.) KEDARA NATH BAG *v.* SADAY CHANDRA NAIDU. 22 I.C. 707=19 C.L.J. 13.

———**O. 21, R. 101**—*Revision.*

A party against whom an order under O. 21, Rr. 98, 99 or 101 is made, can proceed under O. 21, R. 103 and therefore he cannot be allowed to have the order rectified in revision. (*Rattigan*, J.) NATHU MAL *v.* AMBHO. 129 P.L.R. 1911=10 I.C. 183=240 P.W.R. 1911.

———**O. 21, Rr. 101 and 103**—*Dismissal of claim petition—Must be challenged within one year.*

C. P. CODE (V of 1908), O. 21, R. 101.

Where a claim petition was dismissed without investigation on the ground of delay, but there was a rider added that the petitioner's right would not be affected by the sale, the order is one against the claimant, and must be challenged by suit within one year. On the rejection of such a claim the claimant will be estopped from pleading adverse possession. (*Odgers and Hughes*, JJ.) AISAMMA *v.* MOIDIN KUNHI BEHARI. **46 M.L J. 690 = (1923) M.W.N. 633 = 18 L.W. 520 = 33 M.L.T. 1 = 47 Mad. 160 = 77 I.C. 264 = 1925 Mad. 111.**

——**O. 21, Rr. 101 and 103**—*Transferee pendete lite.*

O. 21. R. 101 which directs that a *bona fide* claimant who has been dispossessed in execution shall be restored to possession does not apply to a transferee *pendente lite*. (*Abdur Rahim and Kumaraswami Sastri*, JJ.) KANAKASABAI MUDALIAR *v.* RAJAGOPAL. **42 I.C. 523 = 6 L.W. 568.**

——**O. 21, R. 101**—*Order under—Effect of—Symbolical possession.*

An order passed under S. 335, C.P.C. (1882) is conclusive as between the parties and if it is not set aside by suit within one year, it cannot be questioned in any subsequent suit as between the same parties, whether the possession given to auction-purchaser is symbolical or not. 30 Cal. 710; 36 Bom. 373, Dist. (*Oldfield and Tyabji*, JJ.) RANGASWAMI AIYAR *v* SUBBARAYA AIYAR. **27 I C. 90 = (1914) M.W.N. 897.**

——**O. 21, Rr. 101 and 103**—*Right of puisne mortgagee to redeem.*

A right to possession upon redemption is not a right to the present possession of the property. An order under O. 21, R. 101, C.P.C., becomes conclusive under R. 103 as to the right to present possession of the property is concerned. It does not affect a party's right to possession upon redemption. (*Mittra*, A.J.C.) BALIRAM *v.* NARAYAN. **34 I.C. 276 = 17 .N.L.R. 33.**

——**O. 21, R. 103**—*Effect of order—Defence barred.*

A second mortgagee, in execution of his mortgage decree to which the defendant, the prior mortgagee was not a party, purchased the mortgagad property. The purchaser was resisted by defendant on the ground that he was in possession by virtue of a sale in execution of the mortgage deed. But the objection was overruled. Plaintiff sued defendant for possession. As the deft. had not brought a suit within the period of limitation, he could not resist the suit and plff. should recover possession on redemption of deft's. prior mortgage. The order under S. 335 of Code of 1882 is conclusive even when the party against whom it is made is not the plff. but a deft. (*Chatterjee and Newbould*, JJ.) BISAN RAM PATRI *v.* SATICHANDRA SARMA. **38 I.C. 216.**

C. P. CODE (V of 1908), O. 21, R. 103.

——**O. 21, R. 103**—*Suit under—Proof of title by plaintiff.*

Plff. a purchaser at Court-auction, having title to and possession of certain property brought a suit for possession alleging that an order under S. 335, C.P. Code of 1882, deprived him of possession. *Held*, that the suit was not liable to be dismissed on the finding that the order had not that effect, as the mode in which or the point of time at which the ouster took place was not material. (*Mookerjee and Beachcroft*, JJ.) NABADIPENDRA MOOKERJEE *v.* MADHU SUDAN MONDAL. **16 I C. 741 = 18 C.W.N. 473.**

——**O. 21, R. 103**—*Applies only where order under Rr.* 98, 99 *or* 101 *has been passed.*

O, 21, R. 103 applies only where an order under one of the rules 98, 99 or 101 has been passed. Where the order of the lower Court is not one passed under any of the said rules there is no disability arising under Rule 103. (*Martineau*, J.) HARGOLAL *v.* CHANDU LAL. **69 I.C. 557 = 1923 Lah. 145.**

——**O. 21, R. 103**—*Limitation—Objection rejected—Limitation for suit.*

Limitation for a suit for possession by a person whose objection has been dismissed is one year from the date of order of dismissal. (*Le-Rossignol*, J.) RAM SINGH *v.* KUNDAN SINGH. **103 P.L.R. 1916 = 36 I C. 211 = 96 P.W.R. 1916.**

——**O. 21, R. 103 (S. 331)**—*Order without investigation is not* res judicata.

Where the claim put forward by an obstructor was not treated as a suit and no issues were framed nor evidence taken, but the matter was treated as an interlocutory proceeding, the decision could not be *res judicata* in any subsequent proceeding. 9 B.L.R. 936, followed. (*Schwabe*, C.J. *and Wallace*, J.) KOONAM VELLI UNNARA *v.* K.P. KUNHI RAMAN. **44 M.L.J. 443 = 17 L.W. 322 = 32 M.L.T. (H.C.) 146 = 72 I C. 882 = 1923 Mad. 814.**

——**O. 21, R. 103**—*Decree-holder selling own property by mistake—Remedy if by suit.*

Where a decree-holder sells his own property by mistake, his only remedy is by suit. An application under S. 47 is incompetent. (*Ayling*, C.J. *and Odgers*, J.) RAMASAMIKONAN *v.* KULANDAI VELU PILLAI. **15 L.W. 272 = 70 I.C. 869 = 1922 M.W.N. 121 = 1922 Mad. 63.**

——**O. 21, R. 103 and S. 47**—*Difference.*

O. 21, R. 103 of the Code only applies to cases where strangers to the decree are involved, while S. 47 governs cases where the persons concerned are parties to the suit or their representatives. (*Sadasiva Aiyar and Coutts-Trotter*, JJ.) RUKMANI AMMAL *v.* NARASIMHA AIYAR. **41 M.L J. 54 = 14 L.W. 85 = 63 I.C. 730 = (1921) M.W.N. 487.**

C. P. CODE (V of 1908), O. 21, R. 103.

———O. 21, R. 103—*Suit to establish right to the present possession of the property—Scope of.*

A suit under O. 21, R. 103 is not only concerned with the question of possession at the date of the summary order under R. 98, or R. 99 but also with the right to possession. An unsuccessful claimant suing under R. 103 will be entitled ordinarily to succeed on his showing the fact of possession on the date of order if the decree-holder fails to prove a subsisting title in him. A decree-holder may establish his right to the present possession by showing his subsisting title to the property without proving actual possession at the date of the summary order. The scope of the suit is the same whether the summary order was passed under Rr. 98 and 99 or 101. (*Wallis*, C.J. *and Seshagiri Aiyar*, J.) THENUTTI KALLINGAL UNNI MOHIDIN *v.* THENNUTTIL KALLINGAL UNNI MOHIDIN'S SON POOKER.
44 Mad. 227=39 M.L.J. 626=28 M.L.T. 342=12 L.W. 598=60 I.C. 109=(1920) M.W.N. 698.

———O. 21, R. 103—*Parties—Meaning of.*

The words "any party" in O. 21, R. 103 refer to any party to the petition and not to the decree under execution. (*Oldfield and Seshagiri Iyer*, JJ.) VEYINDRA MUTHU PILLAI *v.* MAYA NADAN. 43 Mad. 696=39 M.L J. 456=28 M.L.T. 312=58 I.C. 501=(1920) M.W N. 299.

———O. 21, R. 103—*Resistance by third party—No enquiry—Delivery—Limitation.*

An order under S. 335, C.P.C. (1882) is final as against a party if no suit to set it aside is instituted in one year from the date of that order. But if an order for delivery of possession were left unenforced within the time allowed by law and if the auction-purchaser institutes a suit for possession then it is quite open to the party against whom the order was passed under S. 335 to plead in defence that the plaintiff has no title to recover. The C.P. Code of 1908 does not provide for the investigation of the claim of the objector who does not derive title under the judgment-debtor. 7 W.R. 87, Foll.; 9 M.L.J. 131; 10 Mad. 357, Dist. (*Seshagiri Aiyar and Napier*, JJ.) YAMAJALA SANJEVUDU *v.* NAKKA VENKADU. 43 I.C. 24=23 M.L.T. 233.

———O. 21, R. 103—*Undivided share purchased in auction—Effect of symbolical delivery—Suit for partition—Separate possession.*

Art. 11 of the Limitation Act and O. 21, R. 103, C.P.C. do not bar the setting up of a plea of division when only symbolical possession was delivered by the Court since such order does not amount to a dispossession as against third-parties. 1 C.W.N. 343; 30 Cal. 710; 33 Cal. 487; 7 W.R. 87; 27 Mad. 67; 27 Mad. 262, considered. (*Sadasiva Iyer and Spencer*, JJ.) AYYAKUTTI MANKONDAN *v.* PERIASWAMI KOUNDAN. 1 L.W. 31=24 I.C. 771=15 M.L.T. 163.

C. P. CODE (V of 1908), O. 22, R. 1.

———O. 21, Rr. 103 and 101—*Dismissal for default—Suit—Limitation.*

An order under O. 21, R. 101 must be made upon the merits of the case. Mere dismissal for default or for non-production of evidence is not an order under R. 101 and does not bar a suit more than a year after the order. (*Mitra*, A.J.C.) BHIMA PATEL *v.* MARTAND.
43 I.C. 102=14 N.L.R. 66.

———O. 22, R. 1—*Hindu law—Joint family.*

If one of the many representatives appointed by a joint Hindu family dies, the surviving representatives continue to represent the family. When a bond is executed in favour of three members of a joint Hindu family and one of them dies, the survivors can sue on the bond as they sufficiently represent the family. (*Richards*, C. J. *and Rafique*, J.) RAM KISHORE *v.* PARMESHRI. 33 I.C. 123=14 A.L J. 265.

———O. 21, R. 1, Sch. 2, Cls. (2) and (11)—*Hindu law — Limited owner — Suit by —* Mitakshara—*Unmarried daughter as plaintiff — Whether right to sue survives to her married sisters.*

On the death of the widow in possession, B, her unmarried daughter brought a suit for her father's estate on the ground that being a maiden she had preference over her married sisters, who were made defendants to the suit. During the pendency of suit B died and the married sisters were transferred from defts. to plffs. The lower Court declared the suit to have abated—*Held*, that the new plffs. having been brought on record and a formal decree of abatement having been made, an appeal lay and that a Hindu woman in possession of an estate as such represented the estate and the persons who were entitled to succeed one after another were entitled on succession to continue the litigation commenced by their predecessor. (*Richards*, C. J. *and Rafique*, J.) JADUBANSI KUAR *v.* MAHAPAL SINGH.
38 All. 111=32 I.C. 104=14 A.L.J. 8.

———O. 22, R. 1—*Breach of contract of marriage—Death of Plaintiff.*

An action to recover damages arising out of the breach of a marital contract abates on the death of the plff. (*Macleod*, C. J. *and Heaton*, J.) BALUBHAI HIRALAL *v.* NANALAL BHAGUBHAI. 44 Bom. 946=55 I.C. 624=22 Bom. L.R. 143.

———O. 22, R. 1 and O. 33, R. 2—*Personal right—Right to sue in* forma pauperis *is a personal right and does not survive to the heirs of the pauper.* (*Chatterjee and Suhrawardy*, JJ.) JITENDRA NATH *v.* SAURINDRA NATH.
64 I.C. 63.

———O. 22, R. 1—*Personal action—Application for Letters of administraion—Death of applicant.*

The right of a residuary legatee to obtain a grant of administration is a personal right and this right does not devolve on his heir if he

C. P. CODE (V of 1908), O. 22, R. 1.

dies during the pendency of the application. (*Greaves*, J.) HARI BHUSAN DUTTA *v.* MANMATHA NATH DUTTA.

51 I.C. 76=45 Cal. 862.

——**O. 22, R. 1**—*Personal action—Suit for declaration that defendant is not the lawful wife of plaintiff—Personal action.*

Deft. having obtained a maintenance order against plaintiff, the latter sued for a declaration that deft. was not his lawful wife. During the pendency of that appeal both parties died. *Held*, that as the action was a purely personal one and both plaintiff and defendant had died, the right of appeal did not survive. (*Rattigan*, C. J. *and Martineau*, J.) ANAND BAHADUR *v.* HARDIL AZIZ. **52 I C. 545=87 P.R. 1919.**

——**O. 22, R. 1**—*Guardianship—Right to be appointed guardian of reversioner—If survives to next reversioner.*

Where a reversioner of a deceased Hindu applied to be appointed as guardian of the minor children of the deceased and the application was dismissed, whereupon he preferred an appeal and died pending the appeal. *Held*, that his right as a reversioner survived to his son who could continue the appeal. The Court is bound to make an inquiry into the application for appointment of a guardian. (*Scott-Smith*, J) ARJAN SINGH *v.* GUJRI.

116 P.L.R. 1917=42 I.C. 410=160 P.W.R. 1917.

——**O. 22, R. 1**—*Tort—Damages—Death of appellant pending second appeal—Costs.*

The general law is that rights of action for merely personal injuries do not survive the injured party, though his personal representative can maintain an action for any damage done to the personal estate in his lifetime. Plaintiff sued for damages on the allegation that deft. had injured his reputation by making false statements and insinuations to the police. He got a decree for Rs. 4,000 which was reduced to Rs. 50 by the Appellate Court. He died after filing the second appeal. *Held*, that the application of his sons to be impleaded as legal representatives could not be granted and that the appeal had abated and cannot be allowed merely because the Lower Appellate Court had directed plaintiff to pay defendant's costs. (*Johnstone and Shah Din*, JJ.) MUZAFFAR KHAN *v.* GHULAM MUHAMMAD KHAN.

83 P.L.R. 1915=62 P.R. 1915=28 I.C. 455=137 P.W.R. 1915.

——**O. 22, R. 1**—*Hindu Law—Limited owner—Abatement— Declaratory suit—Widow—Alienation.*

Where A sued for a declaration that an alienation by B., the widow, would be void after her death and the suit was dismissed, and pending an appeal by A, against the order of dismissal, B died ; *held*, that the claim must be deemed to have abated, as after B's death A had no right to sue for a decree. (*Reid and Rattigan*, JJ.) SAT BHARAI *v.* BHARAI.

24 P.W.R. 1918=18 I.C. 329=46 P.L.R. 1913=65 P.R. 1913.

C. P. CODE (V of 1908), O. 22, R. 1.

——**O. 22, R. 1**—*Judgment-debtor dead—Legal representatives when to be brought on record.*

A decree-holder is bound to implead the representatives of his deceased judgment-debtor only when it necessitates execution. (*Oldfield and Ramesam*, JJ.) ANDAL AMMAL *v.* VIJIA NAIDU. **14 L.W. 632.**

——**O. 22, R. 1**—*Suit for malicious prosecution—Appeal—Abatement.*

An appeal by a person to whom damages are awarded in a suit for malicious prosecution, on the ground that the damages are insufficient, abates on the death of such person. (*Wallis*, C.J. *and Napier*, J.) MURUGAPPA CHETTIAR *v.* PONNUSWAMI PILLAI.

44 Mad. 828=41 M.L.J. 304=13 L.W. 703=62 I.C. 757=(1921) M.W.N. 438.

——**O. 22, R. 1**—*Suit for malicious prosecution—Death of defendant.*

Where the deft. in a suit for malicious prosecution, dies more than a year after the prosecution and before judgment, the right to sue does not survive so as to prevent the abatement of suit. (*Ayling, Coutts-Trotter and Kumaraswami Sastri*, JJ.) RUSTOMJI DORABJI *v.* NURSE. **44 Mad. 357=40 M L J. 178=(1921) M.W.N. 121=62 I.C. 260=29 M.L.T. 121=14 L.W. 200 (F.B.).**

——**O. 22, Rr. 1, 2, 3 and 11**—*Tort—Malicious search.*

A suit for damages for malicious search was dismissed by the trial Court. Plff. died during pendency of appeal. *Held*, the suit abated. (*Abdur Rahim*, O.C.J. *and Krishnan*, J.) GADIGI MAREPPA *v.* FIRM OF MARWADI VAMAJEE VAJANJEE. **20 M.L.T. 303=(1916) 2 M.W.N. 280=38 I.C. 823=31 M.L.J. 772.**

——**O. 22, Rr. 1 and 11**—"*Right to sue*" *Appeals.*

"Right to sue" in R. 1 when used for appeals under R. 11 must be construed as the right to prosecute by law or to obtain relief by means of legal procedure. (*Tyabji and Spencer*, JJ.) PRASANNA VENKATACHELLA *v.* COLLECTOR OF TRICHINOPOLY.

33 I.C. 45=38 Mad. 1064.

——**O. 22, R. 1**—*Malicious prosecution—Cause of action—Survival of.*

The cause of action in a suit for malicious prosecution of the manager of a joint Hindu family does not survive to the surviving members thereof, as they are not representatives of the deceased member. (*Sadasiva Aiyar and Napier*, JJ.) SUBRAMANIA IYER *v.* VENKATARAMIER. **31 I.C. 4.**

——**O. 22, R. 1**—*Personal action—Suit by minor repudiating will—Will by father—Death of minor—Legal representative, right of, to continue suit.*

A minor sued for possession of certain property as his, by survivorship and challenged the

C. P. CODE (V of 1908), O. 22, R. 1.

validity of his father's will which vested the property in trust for the minor in case he should attain majority, otherwise in trust for a temple. The minor died and his legal representative was placed on record as plaintiff. *Held*, that the legal representative was entitled to prosecute the suit, and that the cause of action would not be personal to the minor. (*Oldfield and Tyabji*, JJ.) NARAYANA REDDI *v.* KAMAKSHI AMMAL. **27 I.C. 396=27 M.L.J. 674.**

——O. 22, R. 1—*Hindu law—Suit by Hindu reversioner—Death of plaintiff.*

A suit by a Hindu reversioner for a declaration of the invalidity of an alienation by a Hindu widow abates on his death, the cause of action not surviving to the next reversioner. 22 M.L.J. 375; 15 I C. 641, Rel. on. (*Sundara Iyer and Sadasiva Iyer*, JJ.) RAMCHANDRA NAIDU *v.* SUBRAYA PILLAI.

16 I.C 865 (1)=12 M.L.T. 664.

[This is no longer law. See 29 I.C. 298=38 Mad. 406 (P.C.).

[Also 46 I.C. 202=41 Mad. 669 (F.B.)]

——O. 22, R. 1—*Hindu Law—Suit by reversioner.*

A suit by a Hindu widow to declare that an adoption by her son's widow is invalid, abates no the plff.'s death as the right of suit does not survive, to the next reversioners. For this question no distinction should be drawn between suits of setting aside an adoption or an alienation. *Obiter.*—Even if it is held that the cause of action survives, the reversioners of the last male owner are not the plff.'s legal representatives. (*White*, C. J. *and Benson*, J.) ARUNACHELLAM PILLAI *v.* YELLAYA PILLAY.

12 M.L.T. 199=(1912) 1 M.W.N. 897=15 I.C. 461=23 M.L.J. 719.

[This is no longer law; See 29 I.C. 298=38 Mad. 406 (P.C.).]

[Also 46 I.C. 202=41 Mad. 669 (F.B.).]

——O. 22, R. 1—*Hindu Law—Suit by Reversioner.*

If a plaintiff, bringing a declaratory suit to declare that a deed of relinquishment is invalid as against reversioner dies, the suit abates on his death and no cause of action survives to the next reversioners. (*Benson and Sundara Aiyar*, JJ.) KOMMENENI CHINNA *v.* KOMMENENI.

37 Mad. 406=11 M.L.T. 184=22 M.L.J. 375=15 I.C. 218=(1912) 1 M.W.N. 442.

[This is no longer law. 29 I.C. 298=38 Mad. 406 (P.C.)]

[Also 46 I.C. 202=41 Mad. 669 (F.B.)

——O. 22, R. 1—*Hindu Law—Suit by reversioner—Survival of right to sue—Test.*

Whether the right to sue survives, must be decided with reference to the nature of the suit, and not on the qualifications of the representative of the deceased plff. 'Legal representative' in O. 22, R. 1 has a very wide signification and is not synonymous with the limited class governed by S. 11, C.P.C. or with 'heir' 8 C.W.N. 843; 34 Cal. 642, Foll. It, therefore, includes

C. P. CODE (V of 1908), O. 22, R. 2.

the next reversioner in a reversionary suit on the death of the presumptive reversioner who has instituted the suit. In a reversionary suit to set aside an alienation by a widow the right to sue survives on the death of the presumptive reversioner who has instituted the suit to the actual reversioner. (*Stanyon and Hallifax*, A.J.C.) RAM DIN *v.* RAJ RAM. **17 I.C. 101=8 N.L.R. 113.**

——O. 22, R. 1—*Malicious prosecution—Cause of action—Survival.*

A cause of action for malicious prosecution does not survive to the legal representatives of the deceased plff. (*Coutts and Dass*, JJ.) PUNJAB SINGH *v.* RAMATAR SINGH.

4 P.L.J. 676=52 I.C. 348=1920 Pat. 52.

——O. 22, Rr. 1 and 3—*Personal right does not abate after decree.*

A suit cannot abate by the death of the plaintiff after the decree, even in cases of personal right, as a decree is property capable of inheritance. (*Jwala Prasad*, J.) MULCHAND *v.* GOBIND SINGH. **39 I.C. 939.**

——O. 22, R. 1—*Malicious prosecution—Suit for damages—Death of defendant.*

A suit for damages for malicious prosecution and obstruction of a right of way abates on the death of the defendant in the absence of any allegation that the estate of the wrong-doer was benefited thereby. 13 B. 677; 34 I.C. 249; 9 Bur. L.T. 38 (*Saunders*, J.C.) MA SHWE THIT *v.* MAUNG PO AUNG.

(1921) 4 U.B.R. 73=65 I.C. 66=1922 U.B. 7.

——O. 22, Rr. 1 and 11—*Tort—Action for slander—Second appeal—Death of party.*

Where a plaintiff who was awarded damages in the Court of first instance, got his decree reversed in appeal, his second appeal does not abate on account of the death of the defendant during the pendency of the second appeal. The expression 'right to sue' means the right to seek relief. (*McColl*, A.J.C.) NGA KYET SEIN *v.* MI KYIN MYA. **(1910) 12 U.B R. 105=9 Bur. L.T. 38=34 I.C. 249=10 Bur. L.T. 8.**

——O. 22, Rr. 2 and 3—*Suit against dead man—Addition of legal representatives is a nullity.*

A suit against a dead man is a nullity, the consequence of which is that any order made in the suit to allow amendment of the plaint by substituting the legal representative of the deceased as defendant and allowing the suit to proceed against him is a nullity. It is immaterial that the suit was brought *bona fide* and in ignorance of the death of such person. 31 M. 86, Ref. (*Mulla*, J.) RAMPRATAB BRIJ MOHANDAS *v.* GAURISHANKER.

25 Bom. L.R. 7=1924 Bom. 109.

——O. 22, Rr. 2 and 9—*Partition decree—Death of one defendant—Abatement of suit—Application to set aside abatement—Limitation.*

Where after a partition decree passed in 1892, one of the defts. died, the suit as against him

C. P. CODE (V of 1908), O. 22, R. 2.

abates, on the date on which the New Code of Civil Procedure comes into force ; an application to set aside the abatement by adding the legal representative of the deceased deft. as a party, must under Art. 171 of the Lim. Act, be made within 60 days. (*Scott*, C.J. *and Batchelor*, J.) LAKHMICHAND *v.* KACHUBAI.
35 Bom. 393=11 I.C. 559=13 Bom. L R. 317.

———**O. 22, Rr. 2 and 11**—*Appeal—Severa respondents—Abatement in respect of one—Effect.*

If an appeal against one of several respondents abates, it abates against all, if their several interests cannot be discriminated. (*Walmsley and Greaves*, JJ.) GOL ASMATER KHATUN *v.* HABIBULLA. **64 I.C. 49.**

———**O. 22, Rr. 2 and 3**—*Co-sharers—Suit for rent — Claim for abatement—Appeal by tenants—Death of one—Bengal Tenancy Act*, S. 52.

Some of the co-sharer landlords instituted a suit for arrears of rent against the tenants who claimed abatement of rent. The Lower Appellate Court held that defts. were not entitled to an abatement of rent as all the landlords were not parties to the suit. The defts. preferred a second appeal and one of the appellants died. No substitution was made and the appeal as regards him abated. *Held*, that the whole appeal failed by reason of the abatement of the appeal with respect to one of the appellants. The remaining tenants were not entitled to claim abatement of rent. 27 Cal. 417 and 25 C.L.J. 469, Foll. (*N. R. Chatterjee and Duval*, JJ.) NARENDRA NATH KUTI *v.* SATYADHAN GHOSHAL. **54 I.C. 396=30 C.L J. 203.**

———**O. 22, Rr. 2 and 3**—*Joint decree—Appeal—Omission to implead representatives of one party—Abatement.*

A joint decree was passed in favour of several plffs. as *co-shebaits* of a temple. Defts. appealed but did not take proper steps for representation of a minor plff -respondent and the appeal was dismissed as against him. *Held*, that the appeal as against the other respondents also could not proceed. (*Mookerjee and Beachcroft*, JJ.) SRIRAM CHANDRA NAIK *v.* HRIDOY NATH GUPTA. **51 I C. 409=29 C L J. 461.**

———**O. 22, Rr. 2 and 3**—*Suit against dead person—Legal representatives.*

If a deft. is dead at the time of the institution of the suit, the plff. cannot continue the suit by applying for the substitution of the heirs of the deceased deft. (*Fletcher*, J.) KRISTA DAS LAL *v.* KUMAR KIRADA-KHANTA ROY. **51 I.C. 160.**

———**O. 22, R. 2**—*Co-sharer landlords—Joint decree—One of the heirs of the landlord not on record.*

Two landlords, applied under S. 105 of the Bengal Tenancy Act for settlement of fair rent and for enhancement of rent. One of them

C. P. CODE (V of 1908), O. 22, R. 2.

died after the decision of the lower appellate Court, leaving a major and a minor son surviving him as heirs. The tenants-appellants allowed the appeal against one of the heirs of the deceased to be dismissed for non-prosecution : *Held*, that the appeal by the tenants was incompetent for want of necessary parties. 6 C.W.N. 192 ; 10 C.W.N. 981 ; 19 C.W.N. 90, Foll. (*Walmsley and Panton*, JJ.) AZIMMUDDIN MANDAL *v.* TARA SANKAR GHOSE.
47 I.C. 638=28 C.L J. 201.

———**O. 22, Rr. 2 and 3**—*Legal representative—Right of, to continue suit or appeal—Abatement.*

When a party to a suit dies a legal representative is appointed merely in order that the suit might proceed and a decision be arrived at. It is the original party's rights and disabilities that have to be considered and the mere fact that the legal representative could not in his individual capacity have brought a suit for the relief claimed does not render the pending suit liable to dismissal as having abated. (*Broadway and Zafar Ali*, JJ.) GULLI *v.* SAWAN.
4 Lah. 72=74 I C. 146=5 Lah L J. 482=1924 Lah 48.

———**O. 22, R. 2**—*Second appeal—Legal representative not brought on record—Mistake—Effect of.*

Pending an appeal in the lower appellate Court two of the defts. died. Their legal representatives were brought on the record by that Court but by a mistake the legal representatives were not made respondents in the second appeal. The error was due to a mistake in the judgment on the part of the copying department which did not show the names of the legal representatives although they had long been brought on the record. *Held*, that there was no abatement of the appeal and even if there were the mistake being *bona fide* the delay could be excused. (*Wilberforce*, J.) KARTAR SINGH *v.* RALLA.
67 I.C. 306=2 Lah. L J. 45.

———**O. 22, R. 2**—*Appeal—Death of respondent—Legal representative already party to appeal—No abatement.*

Where the heirs of a respondent who died pending appeal, are already parties to the appeal, the appeal will not abate notwithstanding that no fresh application is made to bring them on record as the legal representatives of the deceased. (*Abdul Raoof*, J.) KARTAR SINGH *v.* LAL SINGH, **11 P L.R. 1921=59 I.C, 238=9 P.W.R. 1921.**

———**O. 22, Rr. 2 and 11**—*Appeal—Several appellants—Some Appellants being dead at time of appeal.*

Where an appeal was filed on behalf of several defts. and it appeared that some of the appellants had died before the institution of the appeal. *Held*, that the appeal could proceed as even, if those appellants had not appealed, the remaining appellants could have appealed

C. P. CODE (V of 1908), O. 22, R. 2.

nevertheless on a ground common to all the defts. (*Shadi Lal and Jones*, JJ.) NAWAB *v.* MUHAMMAD HAYAT. **33 I.C. 1006 = 29 P.W.R. 1916.**

———**O. 22, R. 2**—*Joint tort-feasors—Death of one—Survival of claims against others.*

The liability of joint tort-feasors is joint and several and the cause of action would on the death of one of them, survive as against the others. (*Rattigan and Leslie Jones*, JJ.) BISHEN DAS *v.* RAM LABHAYA.
106 P.R. 1913 = 32 I.C. 18 = 187 P.W.R. 1915.

———**O. 22, R. 2**—*Hindu Law—Joint family—Death of manager.*

Where on the death of the managing member of the joint Hindu family and the other members who are parties are substituted, there is no abatement. (*Ried and Robertson*, JJ.) KHUDA BAKHSH *v.* NARAIN DAS.
51 P.L.R. 1913 = 18 I.C. 44 = 81 P.W.R. 1913.

———**O. 22, Rr. 2 and 3**—*Death of appellant—Legal representative brought on record—Respondent can object at the hearing.*

On the death of an appellant in a pending appeal, a person alleging himself to be the legal representative of the deceased applied to continue the appeal and was brought on record as such without notice to the respondent. At the hearing the respondent objected that the alleged legal representative was not the proper legal representative and that the appeal had abated. *Held*, that the respondent was entitled to raise the objection at the hearing of the appeal. (*Krishnan and Ramesam*, JJ). PALCHUR MAHALAKSHAMMA *v.* VEMI REDDI.
44 M.L.J. 60 = 69 I.C. 529 = 32 M.L.T. (H.C.) 44 = 17 L.W. 8 = 1923 Mad. 367.

———**O. 22, Rr. 2 and 3**—*Scope of.*

O. 22 of the Code is not limited to cases where the party applying to be brought on record is either not on the record at all or is on the record by the side as co-plff. or co-deft. of the party who has died and as whose representative the applicant claims to be made a party. (*Benson and Sundara Aiyar*, JJ.) KHATIJA BI *v.* BALU SAHIB. **14 I.C. 844 = 11 M.L.T. 409.**

———**O. 22, R. 2**—*Damages—Hindu heir—Loss by misrepresentation—Cause of action—Survival of.*

In a suit by a Hindu for recovery of the loss sustained by him by his acting on certain misrepresentations made by the deft. The cause of action survives to the executor or administrator and that such representative is entitled to come in and continue a suit of this nature pending at the time of plff.'s death. (*Wallis*, J.) KISHEN BAHADUR *v.* RAMSWAMY MUDALIAR. **14 I.C. 491 = 11 M.L.T. 240.**

C. P. CODE (V of 1908), O. 22, R. 2.

———**O. 22, Rr. 2 and 3 (1)**—*Application made on that behalf—Applicant added as representative.*

Where a person applies to be made a party as legal representative and the application states that another person is not the legal representative, that other person cannot, to counteract his own failure to apply in time, ask to be made an applicant. The application must be made in time by the person ultimately found to be legal representative. (*Batten*, A.J.C.) AMELAKSAO *v.* GOVIND RAO. **49 I.C. 34 = 15 N.L.R. 21.**

———**O. 22, Rr. 2 and 4**—*Legal representatives already on record—No application necessary.*

If the legal representatives of a deceased respondent are already on the record as parties, it is not necessary to make an application for substitution and it is enough to make an entry on the record to that effect. O. 22, R. 4 is not applicable to the case. 32 A. 551; 32 A, 563. Foll. (*Daniels and Dalal*, A.J.Cs.) HAFIZ-UN-NISA *v.* JAWAHIR SINGH. **66 I.C. 24 = 24 O.C. 374.**

———**O. 22, R. 2**—*Delay in bringing on record legal representative when to be excused.*

Where the respondent a purdanashin lady died and the appellant came to know of it only when the process server reported her death, it was a fit case for excusing the delay in bringing on record the legal representative. (*Das and Macpherson*, JJ.) NATHSAHAI *v.* IMAM REZA.
74 I.C. 912 = 1924 P. 319.

———**O. 22, Rr. 2 and 4**—*Defendants jointly and severally liable—Death of one—Legal representatives not on record—Suit does not abate.*

A suit does not abate merely because one of the defendants, who are jointly and severally liable to the plaintiff, dies, and his legal representatives are not brought on record. (*Jwala Prasad*, J.) JWALA PRASAD *v.* KOPEYA MUNDA. **59 I.C. 890.**

———**O. 22, R. 2**—*Suit against several defendants—Liability of each ascertained—Death of some of the defendants—Abatement.*

Where the plaintiffs sued the defendants 210 in number, to recover a war-loan bond for Rs. 75,000 or in the alternative for Rs. 75,000 with interest thereon, and plaintiffs' case was that the ticket, which won the second prize in the Burma War Loan Sweepstake, a War Loan Bond for Rs 75,000, which had issued in the name of the first plaintiff, had been wrongly made over by the Executive Committee of the Sweepstake to the defendants on their false representations that they were purchasers of the ticket in question; and that the defendants were liable jointly and severally to return the bond to the plaintiffs or to pay the money equivalent with interest to date and that defendants Nos. 1 to 209 had transferred the bond to defendant No. 210. The trial Court dismissed the suit and pending an appeal by the plaintiffs some of the defendants died. Their legal representatives were not brought on

record. On a question arising as to whether the appeal had abated. *Held* that the plaintiffs had a cause of action for the sum sued for against each of the defendants out of the proceeds of the bond which had been distributed and that the death of some of the defendants did not cause the suit to abate. (*Pratt and Macgregor*, JJ.) MAUNG MÙ *v* MAUNG KAN GYI. **1 R. 618=77 I.C. 393=1924 Rang. 127.**

———O. 22, R. 3—*Suit—C. P. Code, S. 92—Death of original plaintiffs.*

A suit under this section (S. 92) is prosecuted by individuals not for their own interest but as representing general public, and so it does not abate on the death of the original plffs. (*Lord Dunedin.*) RAJA ANAND RAO *v.* RAMDAS DADURAM. **48 Cal. 493=13 L.W. 318=(1921) M.W.N 24=17 N L R. 37=25 C.W N 794=30 M.L.T 194=62 I C. 737=48 I.A. 12 (P.C.).**

———O. 22, R. 3—*Decree passed in appeal after death of one of joint plaintiffs—Decree is nullity—No legal representative on record.*

Where one of several plaintiffs prefers an appeal in which the others are also interested and a decree is passed in ignorance of the death of one of the joint plaintiffs, the judgment is a nullity. (*Rafique and Piggott*, JJ.) AMBIKA PRASAD *v.* JHINAK SINGH. **45 A. 286=21 A.L J. 91=71 I.C 321=L.R. 4 A. 92=1923 All. 211.**

———O. 22, R 3—*Suit by two partners—One partner dead at the date of decree—Whole suit does not abate.*

Where in a suit by two partners, a decree is passed, the decree does not become incapable of execution by the mere fact that one partner was dead at the date of decree. The suit in such a case abates so far as the deceased partner is concerned. (*Tudball*, J.) SARJU PRASAD *v.* RAM SARUP. **3 U.P.L.R. (All.) 40=60 I.C. 765=19 A.L.J. 266.**

———O. 22, Rr. 3 and 4—*Death of pro forma plaintiff—Legal representative of such plaintiff if should be impleaded.*

On the death of a *pro forma* plaintiff, such as, a person who was made co-plaintiff merely on the ground of his holding a succession certificate to the estate of one of the plaintiffs, it is not necessary to bring his legal representatives on record. (*Richards*, C.J. *and Banerji*, J.) GULSHER KHAN *v.* MASHU ALI KHAN. **22 I.C. 929.**

———O. 22, R. 3—*Legal representatives—All to be brought on record.*

The Court must cause all the legal representatives of a deceased appellant to be made parties before hearing the appeal. If one of them refuses to join as appellant he may be added as respondent 16 All. 211, Foll. (*Knox*, J.) FAZAL MUHAMMAD KHAN *v.* HABIBULLAH KHAN. **20 I.C. 366=11 A.L.J. 719.**

———O. 22, R. 3—*Legal representative—Pleas open to.*

An estoppel affecting a party deceased affects his legal representative also. (*Banerji*, J.) ISMAIL JOLAHA *v.* JAGANNATH. **19 I.C. 258.**

———O. 22, Rr. 3 and 11—*Joint decree—Joint appeal—Death of one of the appellants during pendency of the appeal—Effect.*

Where several defts. jointly appealed against a joint decree, to which S. 544, C.P.C. 1882, applies, and one of them died before the hearing and no legal representative of the deceased appellant was brought on record within limitation, the appeal abates so far as the deceased appellant is concerned and not as a whole. 25 All. 27, Foll.; 22 All. 222, Overruled. (*Stanley*, C.J. *and Banerji*, J.) RAM LAL *v.* DEBI SINGH. **10 I.C. 27.**

———O. 22, Rr. 3 and 4—*Sole appellant dying—No legal representatives brought on record.*

Omission to bring the legal representatives on record on the death of a sole appellant pending appeal, is not a mere irregularity which could be cured under S. 99. (*Richards*, J.) BADAL KHAN *v.* MURTAZA. **9 I.C. 977.**

———O. 22, Rr. 3 and 9—*Abatement of suit—Order setting aside, propriety of.*

Where more than three months after the death of a defendant in a suit, the Court brought his legal representatives on record on an application for that purpose, on the ground that the parties were ignorant of the reduction of the time allowed by recent legislation, *Held* that the delay was properly excused. The omission to set aside the abatement was a formal defect not affecting the merits of the order. (*Shah*, A.C.J. *and Crump*, J.) LASHMIBAI JAGANNATH JOSHI *v.* YESWANT VITHAL. **24 Bom. L.R. 909=75 I.C. 283=47 B. 92=1922 Bom. 449 (1).**

———O. 22, R. 3—*Legality of compromise—Power of Court to inquire whether award is proper.*

The addition of the words "where it is proved to the satisfaction of the Court" in the rule gives the Court power to inquire into a disputed compromise and to record it if satisfied that it was properly arrived at. (*Davar*, J.) HARAKHIBHAI *v.* JAMMABAI. **37 Bom. 639=19 I.C. 786=15 Bom. L.R. 340.**

———O. 22, R. 3—*Partnership—Suit for accounts—Death of partner—Suit cannot proceed.*

A suit to take the accounts and wind up the affairs of a partnership cannot proceed in the absence of one of the partners, or in the event of his death *pendente lite*, in the absence of his legal representatives. 31 Cal. 487, Ref. Where an appeal abated in part in respect of the heirs of a deceased appellant, the result of such abatement may be to make the appeal

C. P. CODE (V of 1908), O. 22, R. 3.

imperfectly constituted appeal which the Court cannot hear. 24 C.W.N. 44, Ref. (*Mookerjee and Panton*, JJ.) PULIM BEHARI ROY *v.* MAHENDRA CHANDRA GHOSAL.
67 I.C. 10=34 C.L.J. 405.

——O. 22, R. 3—*Appeal—Death of a defendant—Decree should direct abatement in respect of his interest.*

Where during the pendency of an appeal, one of several defendants having separate interests, dies, and his legal representatives are not brought on record, the decree ought to direct the abatement of the appeal in respect of the interest held by the deceased. (*Walmsley and Buckland*, JJ.) BHAIRAB CHANDRA KOLEY *v.* KALICHARAN DHARA. 61 I.C. 106.

——O. 22, R. 3—*Legal representative—Death of defendant prior to suit.*

An application for bringing in the legal representative of a deceased deft. lies only if the deft. was alive at the time of filing the suit and not if he was dead before filing it. 12 W. R. 65; 31 Mad. 86, Foll. (*Fletcher and Richardson*, JJ.) BEJOY CHAND MAHUTAP BAHADUR *v.* AMULYA CHARAN MITRA. 24 I.C. 112.

——O. 22, R. 3—Pro-forma *defendant's death—No abatement.*

Where the other proprietors who were joined as defendants were merely formal defendants and were not interested in the result of the suit brought by the plaintiffs and it was found that the plaintiffs were not suing in a representative capacity but they were suing on their own interest. *Held*, the death of one of the proprietors who was not a necessary party to the suit is of no consequence and cannot result in the abatement of the suit either in part or in its entirety. (*Moti Sagar*, J.) LEKHA *v.* BHANI.
1923 Lah. 647.

——O. 22, R. 3—*Death of* pro forma *respondents—No abatement.*

Not bringing on record the representatives of *pro forma* respondents does not cause abatement of the whole appeal. (*Broadway and Jafar Ali*, JJ.) ZAIDA *v.* RAJA.
1923 Lah. 350.

——O. 22, R. 3—*Appeal against some of the defendants only—Effect.*

Where the suit was originally filed against a number of co-promisors some of whom died an appeal against the surviving defendant only does not fail as a whole but the right to prosecute it survives as against him, for a contract entered upon by one or more promisors can be enforced against all or any of them. (*Le-Rossignol and Abdul Quadir*, JJ.) THE FIRM OF GURUDAS RAMKOTURAM *v.* BHAGWAN DAS.
68 I.C. 815=1922 Lah. 182.

——O. 22, Rr. 2 and 3—*Appeal — Death of one respondent— Legal representative not brought on record—Order in appeal is a nullity.*

Where is an appeal against an order in execution proceedings one of the judgment-debtors died and his legal representatives were not brought on the record, the order on appeal is a nullity so far as the deceased judgment-debtor was concerned and did not bind his legal representatives. (*Broadway and Wilberforce*, JJ.) MEHTA BARKAT RAI *v.* MT. GHULAM FATIMA. 70 I.C 929=6 Lah L.J. 1.

——O. 22, Rr. 3, 8 and 9—*Abatement—Order of—Appeal.*

O. 22, R. 3, applies only where an abatement takes place for no application having been made in time to implead the legal representative of a deceased plff. but it does not apply where the suit had abated on account of some other cause. There is no provision in the Code for an appeal from an order dismissing an application by legal representative to be brought on record, nor such an order is a decree. (*Broadway and Dundas*, JJ.) RAM SARUP *v.* MOTI RAM. 1 Lah. 493=57 I.C. 137=2 Lah. L.J. 788.

——O. 22, Rr. 3 and 9—*Co-sharers—Death of one respondent—Abatement—Setting aside—Sufficient cause.*

A suit for a declaration that the land in suit is the village *shamilat* and that plaintiffs are entitled to get a share of the same in proportion to the Khewat, having been dismissed as time-barred, a second appeal was lodged. During the pendency of appeal some of the chief defts. respondents died. *Held*, that the appeal abated against the deceased respondents only and not against the other chief respondent, by the omission to bring the representatives on record. There was no sufficient reason to set aside the abatement, very gross negligence being apparent on the part of the appellants, who though living in a distant village admittedly owned land in the village where the chief respondents reside, and must have occasion to go there to realise rent. (*Scott-Smith and Martineau*, JJ.) DEVIDAS *v.* MAHOMED.
1 Lah. L.J. 26.

——O. 22, R. 3—*Death of appellant—Legal representative brought on record in memo. of objections.*

Where a sole appellant dies and no application is made to bring his legal representatives on the record, the appeal abates. The fact that in a cross-appeal the deceased's legal representatives have been brought on record as respondents will not suffice to prevent his appeal from abating. (*Chevis and Abdul Raoof*, JJ.) SHAMBHU NATH *v.* MUSAMMAT RALLI.
52 I.C. 891=25 P.W.R. 1919.
[See Contra 45 I.C. 949=34 M.L.J. 177.]

——O. 22, R. 3 and O. 41, R. 4—*Decree on ground common to all the defendants—Death of one appellant pending appeal—Legal representatives not brought on record.*

Where one of the appellants died pending an appeal and his legal representatives were brought on record only after the limitation period had expired. *Held* that the decree of the trial Court having proceeded on a ground common to all the defts. was covered by O. 41,

C. P. CODE (V of 1908), O. 22, R. 3.

R. 4 and that the appeal did not abate but could proceed. 23 I.C 91 ; 26 I.C. 486, Foll.; 18 I.C. 182 ; 21 I.C. 951 ; 32 I.C. 829, Dist. (*Chevis and Broadway*, JJ.) PIYARE LAL *v.* CHURA MANI, **46 I.C. 50=84 P.R. 1918.**

——— **O. 22, R. 3**—*Co-sharers—Suit for ejectment and rent—Death of co-plaintiff—Abatement.*

Where during the pendency of a suit for ejectment and arrears of rent by two brothers A and B (not being members of a joint Hindu family). A dies and his legal representatives are not brought on the record within the statutory period, the suit abates only in respect of A's share and not in respect of the share of B. 21 I.C. 951, Dist. (*Scott-Smith and Shadi Lal*, JJ). NIRANJAN NATH *v.* AFZAL HUSSAN. **24 P.W.R. 1917=37 I.C. 777=49 P.R. 1917.**

——— **O. 22, R. 3**—*Applicability—Mortgage suit—Death of plaintiff after preliminary decree—Bequest of interest to B—Application by B to be brought on record—Limitation.*

A died on 28-4-16 after obtaining a preliminary decree, dated 30-3-16 obtained on a mortgage. The period of redemption expired on 30-7-16. B who claimed to succeed to A's interests under a will put in a petition on 26-5-19 to be brought on record and to be given a final decree. *Held*, the suit had abated under O. 22, R. 3. The right to sue in O. 22, R. 3 includes in the case of mortgage suits the right to obtain a final decree after the passing of a preliminary decree. (*Ayling and Venkatasubba Rao*, JJ.) DAKOJU SUBBRAYADU *v* MUSTI RAMADASU, **45 M. 872=42 M.L J 301= 15 L.W. 309=(1922) M.W.N. 375= 68 I.C. 942=30 M.L.T. 202= 1923 Mad, 237 (1).**

——— **O. 22, R. 3**—*Court's discretion to allow amendments under.*

In a case where an institution is represented at different stages of the suit by different representatives and not under the other, the provision of law applicable is O. 22, R. 3 and not O. 22, R. 10 of the C.P.C. and the Courts have in such a case a wider discretion to allow amendments and new pleas to avoid multiplicity of suits provided the character of the suit is not changed and the opposite side is not prejudiced and the trial unembarrassed. (*Krishnan*, J.) SUNDERASAM CHETTIAR *v.* VISWANATH PANDARASANNADHI. **16 L.W. 88= 43 M L.J.147=45 Mad. 703= 31 M.L T. 66=(1922) M.W.N. 444= 72 I.C. 103=1922 Mad. 402.**

——— **O. 22, Rr. 3 and 9**—*Limitation—Legal representatives—Addition after prescribed time—Appeal.*

Where an application to bring the legal representatives of a deceased party on the record is granted by a trial Court without any objection, an objection that the suit has abated by the application not being made within the prescribed period cannot be entertained in

C. P. CODE (V of 1908), O. 22, R. 3.

second appeal. (*Sadasiva Aiyar and Spencer*, JJ.) ALUR LAKSHMI NARASIMHA SASTRULU *v.* VENKATA NARASAMMA. **52 I.C. 614.**

——— **O. 22, Rr. 3 and 4**—*Abatement—Decree—Dismissal.*

Under the present Code it is not necessary to make an order that the suit shall abate (as under S. 366 of the old Code) as it abates *ipso facto* if no application is made under R. 3 or R. 4 of O. 22. But upon a suit abating under R. 3 or R. 4 of O. 22 a decree dismissing the suit must follow. (*Sadasiva Aiyar and Moore*, JJ.) SUPPU NAYAKAN *v.* PERUMAL CHETTY. **19 M.L.T. 364=30 M.L.J. 486= 34 I.C. 372=(1916) 1 M.W.N. 301.**

——— **O 22, R. 3 and S. 115**—*Suit by Mahomedan female for share—Death of plaintiff—Defendant's heirs—If can be made representatives—Augmentation of shares—Prayer—Relief.*

Where in a suit by a Mahomedan female for her share of the estate making the other heirs also *pro forma* defts. the plff. dies, the other heirs may be brought on record as the representatives of the deceased plff. if they are entitled to sue for the recovery of their shares as also the share of the deceased plff. which had devolved upon them and an order refusing this relief can be set aside in revision by the High Court. 25 Bom. 606 and 21 Cal. 927, Considered. (*Benson and Sundara Aiyar*, JJ.) KHATIJA BI *v.* BALU SAHIB. **14 I.C. 544=11 M.L.T. 409.**

——— **O. 22, Rr. 3 and 4**—*Limitation—Legal representatives—One brought on record—Whether saves time as against others.*

Where one legal representative of a deceased party is brought on record in time, there is no bar of time if others are brought in subsequently. 3 All. 517; 12 Bom. 48, Foll. (*Benson and Abdur Rahim*, JJ.) ADUSUPALLI VENKATA ROW *v.* MARIKUTHY AMMAL. **11 M.L.T. 19=(1912) M.W N. 9= 13 I C. 318=22 M.L.J. 169.**

——— **O. 22, R. 3**—*Admission of a person as legal representative—Effect of.*

The admission of a person as a legal representative for the purpose of prosecuting the suit does not conclusively establish his right to do so if his legal position is one of the main issues in the suit itself. Similarly the decision that a person is a legal representative only to a limited extent does not preclude him from proving in the suit what his full rights are. 27 B. 162 ; 28 A. 109, Foll. (*Batten*, J.C.) MT. DHAPU *v.* RAMAUTAR. **70 I.C. 209=1923 Nag. 209.**

——— **O. 22, R. 3**—*Abatement of appeal—Limitation Act, Art 176—C. P. Code Amending Act XXVI of 1920—Effect of.*

The provisions of Act XXVI of 1920 curtailing period of limitation for bringing on record the legal representative of a deceased appellant to three months from the date of his death apply also to cases where the death has taken place even before the passing of the Amending Act. (*Kotwal*, A.J.C.) NIMBA *v.* JANKI. **71 I.C. 176=1923 Nag. 156.**

C. P. CODE (V of 1908), O. 22, R. 3.

———O. 22, R. 3—*Legal representative—Who is.*

The words 'legal representative' cannot be construed to mean all legal representatives. They must include any legal representative to whom the right to sue survives. (*Macnair*, A.J.C.) NARAYAN *v.* AMRITA.

18 N.L.R. 21=65 I.C. 542=1923 Nag. 101 (2).

——O. 22, R. 3—*Joint Hindu family—Manager—Death of plaintiff—Abatement of suit.*

If the manager of a joint family dies after the institution of a suit for the recovery of money advanced out of joint funds, his sons can represent the other members of the family and if they apply within time to carry on the suit it will not abate, irrespective of the fact that some other members of the family are impleaded as parties to the suit beyond the period of limitation. 33 All. 272; 10 Bom. 220; 23 Mad. 125.; 27 I.C. 609; 33 Cal. 329, Ref. (*Stuart and Kanhaiya Lal*, A. J. Cs.) SUGHAR KUNWAR *v.* SITAPAT RAM. **4 O.L.J. 92=39 I.C. 135=20 O.C. 67.**

———O. 22, Rr. 3 and 12—*No applicability to execution proceedings.*

A proceeding for ascertainment of mesne profits under a decree under the Code of 1882, is one in execution and not in the suit and the provisions of O. 22, R. 3 of the Code of 1908 is inapplicable to such a proceeding under R. 12 of the same order. (*Dass and Ross*, JJ.) KEDAR NATH GOENKA *v.* TARINI PRASAD SINGH. **2 P.L.T. 245=61 I.C. 4=1921 Pat 158.**

———O. 22, R. 3—*Limitation—Limitation Act, Art.* 176.

An application under O. 22, R. 3 to bring on record the legal representatives of a deceased appellant is governed by Art. 176, Sch I and S. 6 of the Limitation Act, 1877, does not apply to such an application. (*Parlett*, J.) MA MIN THIN *v.* MAUNG PO WIN.

38 I.C. 488=10 Bur. L.T 27.

——O. 22, R. 3—*Limitation—Limitation Act, S.* 6 (*i*)—*Construction of.*

O. 22, R. 3 should not be construed to mean that where one of the legal representatives applies, he should not be made a party, as the general rule is that all the representatives should join the application. But to expect so is an impossibility in majority of cases. An application by a minor for his substitution as a legal representative is valid by virtue of S. 6 of Lim. Act if made during minority. (*Hartnoll and Twomey*, JJ). MA SEIN HNYIN *v.* LUTCHMAN CHETTY. **5 Bur. L T. 77=15 I.C. 366=6 L B.R 52.**

——O. 22, Rr. 3 (2) and (4) 3—*Legal representative—Addition of, at one stage—Abatement of suit—Order not to be made ex parte.*

An order for abatement of a suit is really a decree and ought not to be made without notice to plff. The substitution of a legal

C. P. CODE (V of 1908), O. 22, R. 4.

representative at one stage of the suit is effective for all subsequent stages. (*Lord Dunedin.*) BRIJ INDAR SINGH *v.* KANSHIRAM.

45 Cal. 94=42 I.C. 43=33 M.L.J. 486=22 M.L.T. 362=6 L.W. 592=126 P.W.R. 1917=15 A.L.J. 777=19 Bom. L.R 866=3 P.L.W. 313=26 C.L.J. 572=104 P.R. 1917=(1917) M.W.N. 811=22 C.W.N. 169=127 P.L.R. 1917=44 I.A. 218 (P. C.).

———O. 22, R. 3 (2)—*Injunction—Death of some of the plffs. appellants.*

In an appeal against a decree for injunction some of the respondents died. Their legal representatives were not at all brought on record. *Held*, that the whole appeal did not abate. It abated only against such of the respondents whose legal representatives were not brought on. (*Scott-Smith*, J.) SAWAN *v.* MEHR DIN. **45. I.C. 963=108 P.W.R. 1918.**

———O. 22, R. 4—Pro-forma *defendant—Death of—Decree passed in ignorance not void.*

The death of a *pro forma* respondent during the pendency of an appeal and the passing of a decree without his legal representative being brought on record do not render the decree a nullity. (*Rafique and Piggott*, JJ.) AMBIKA PRASAD *v.* JHINAK SINGH.

45 All. 286=21 A.L.J. 91=L.R. 4 A. 92=71 I.C. 321=1923 All. 211.

——O 22, R. 4—*Legal representatives—Decree against—Subsequent claim against purchaser in independent title barred.*

Where the legal representatives of a mortgagor are impleaded as parties to a suit for sale by the mortgagee and a decree for sale is passed in execution of which the properties are purchased by a stranger, it is not open to the legal representatives thereafter to claim to redeem the mortgage on the strength of their own independent title as purchasers of a portion of the equity of redemption at a revenue sale. (*Ryves and Gokul Prasad*, JJ.) RAM LALLAN SINGH *v.* HAREKH NARAIN RAI. **20 A.L.J. 641=73 I.C. 920=1922 All 463.**

———O. 22, R. 4—*Applicability—Death of party after preliminary decree—Legal representatives not brought on record—Suit abates.*

A preliminary decree does not put an end to a suit which remains pending till the final decree is passed and therefore R. 4 applies where a defendant dies after the passing of a preliminary decree. Where no application is made under O. 22, R. 4 (1) for the substitution of the legal representative of the deceased within the specified time following his death, the suit abates as against him. The heirs of the deceased cannot apply for the passing of a final decree while the order of abatement remains in force. 30 A. 551, Ref. (*Stuart and Sulaiman*, JJ.) JAGAR NATH UMAR *v.* RAM KARAN SINGH.

20 A.L.J. 576=L.R. 3 A. 460=68 I.C. 261=4 U.P.L.R. (All.) 182=1922 All. 395.

C. P. CODE (V of 1908), O. 22, R. 4.

———**O. 22, R. 4**—*Death of defendant—Person other than legal representative, cannot be impleaded.*

A plaintiff cannot apply to a Court to implead somebody other than the legal representative of a deceased defendant, as a party to the suit and such an application cannot bind the real representative. (*Banerji and Tudball*, JJ.) MUHAMMAD JUNAID *v.* AULIA BIBI.
42 All. 497=61 I.C. 947=18 A L.J. 613.

———**O. 22, Rr. 4 and 11**—*Abatement of appeal—Effect on decree—Death of respondent.*

If the respondent plff. does during the pendency of an appeal and the defts. appellants claim to be her legal representatives, the appeal abated but the suit which had ripened into a decree does not. (*Richards*, C.J. *and Banerji*, J.) SUNDAR PANDE *v.* MUSAMMAT KUMARI.
41 All. 283=50 I.C. 933=17 A.L.J. 306.

———**O. 22, R. 4**—*Mortgage suit—Preliminary decree—Death of deft.—Limitation.*

Where after the passing of the preliminary decree in a suit the deft. died and an application to bring his representatives on record was made more than six months after the date of his death. *Held*, that the application was barred by time since a suit does not end with a preliminary decree but continues up to the final decree. (*Tudball and Rafique*, JJ.) MOTI LAL *v.* RAM NARAIN. **39 All. 551=40 I.C. 1006=15 A L.J. 849.**

———**O 22, R. 4**—*Rent suit—Fixed rate tenants.*

The liabilities of fixed rate tenants to pay rent is joint and several. So if one of them dies during the pendency of an appeal in a suit for recovery of rent and his legal representatives are not brought on record, the appeal abates only so far as the deceased tenant is concerned. (33 Cal. 580, Foll.) (*Chamier and Rafique*, JJ.) ABDUL AZIZ *v.* BASDEO SINGH. **34 All. 604=17 I.C. 89=10 A.L J. 183.**

———**O. 22, R. 4**—*Limitation—Mistake as to—Amendment.*

Where an application to be brought on record on behalf of a minor was made within 6 months through a *bona fide* mistake as to the period of limitation to bring on record a representative which had been reduced to three months by Act XXVI of 1920, the order rejecting the application was set aside. (*Shah and Crump*, JJ.) KARIYAPPA FAKIRAPPA *v.* TANTAPPA.
70 I.C. 832=1923 Bom. 140.

———**O. 22, R. 4**—*Wrong legal representative—Decree, if valid.*

A decree against a person other than the real heir of a deceased debtor does not bind the real heir or the estate of the deceased in his hands. (*Batchelor and Rao*, JJ.) PREMRAJ *v.* JAVARMAL. **18 I C. 881=15 Bom. L.R. 41.**

C. P. CODE (V of 1908), O. 22, R. 4.

———**O. 22, R. 4**—*Appeal—Death of respondent—Remand by appellate Court—Legality of order.*

A suit for cancellation of a sale held under the Putni Regulation was decreed in the court of first instance, upon appeal by the two Zamindars (defendants) that judgment was reversed and the suit was dismissed. The plaintiff thereupon appealed to the High Court. They joined as respondents three sets of persons, *viz.*, (1) the auction-purchaser, (2) the two Zamindars and (3) the persons alleged to be joint tenants in the putni. During the pendency of the second appeal in the High Court the executor to the estate of one of the Zamindar respondents, died on the 10th June 1916. The plaintiffs, it is now asserted, were not aware of this circumstance and the auction-purchaser as also the other Zamindar respondents were equally ignorant of the event. The result was that on the 31st January 1917, when the appeal was taken up for final disposal in this Court, the hearing proceeded on the assumption that all the parties were properly represented on the record. The appeal was heard, the decree of the lower appellate Court was set aside and the case was remanded for reconsideration. When the case went before the District Judge, he was informed on the 20th December 1917, that one of the Zamindar defendants had died during the pendency of the appeal in the High Court and that the representative in interest of that Zamindar was not bound by the order of remand made by the High Court. Thereupon the District Judge held that the appeal could not be reheard by him. *Held*, the order of the High Court was not a nullity by reason of the death of one of the respondents, that the High Court had jurisdiction to hear the appeal and that the District Judge should have reported the case for the orders of the High Court. (*Mookerjee and Cholzner*, JJ.) ABDUL AZIZ *v.* LAKHMI CHANDRA MAJUMDAR. **37 C L J 494=74 I.C. 545=1923 Cal. 676.**

———**O 22, R. 4**—*Death of one defendant—No joint interest with others—No abatement—Legal representative not brought on record.*

If on the death of one of the defendants his legal representatives are not brought on record the question whether the suit abates as a whole depends upon whether the suit can proceed in the absence of the legal representatives of the deceased defendant. Where the lands in dispute are separately held by some of the defendants and the deceased defendant had no joint interest in those plots of land, the suit does not abate. (*Chatterjea and Pearson*, JJ.) SARAT KAMINI DASI *v.* CHAITANYA CHANDRA PROHORAJ. **67 I C. 290=1923 Cal 289.**

———**O. 22, R. 4**—*Joint decree—Death of one of the decree-holders—Legal representative not brought on record—Appeal abates.*

Where an appellate court is called upon to set aside a decree for possession which ensured

C. P. CODE (V of 1908), O. 22, R. 4.

to the benefit of four persons and one of these persons died and his representative in interest had not been brought on record. *Held*, that the appeal had abated. Even if the appeal were to succeed, the representative-in-interest of the deceased plaintiff would not be bound by the judgment on appeal and would be at liberty to execute the decree in its entirety as one of several joint decree-holders. The appeal had consequently become infructuous. (*Mookerjee and Rankin*, JJ.) MIDNAPORE ZEMINDARY CO. *v.* ISHAN CHANDRA CHOWDHURY.
72 I.C. 479=1924 Cal. 346.

———O. 22, R. 4—*Abatement of appeal—Several respondents—Joint cause of action—Death of one respondent.*

Where there is a decree for joint possession in favour of the respondents one of whom dies, the decree cannot be questioned against the legal representatives of that respondent owing to lapse of time without their being brought on record, then the whole appeal abates, for if the appeal succeeds against the respondents who remain alive, there might be conflicting decisions of the court, that is to say, there might be the decision of the first Court in favour of the respondent who has died, a decision which cannot be questioned and the decision of an appellate court contrary to the decision of the first Court which cannot be called in question owing to the abatement. (*Greaves and Panton*, JJ.) SHEIKH DENDOO *v.* SHAIKH SACHOO.
72 I.C 2=1924 Cal. 399.

———O 22, Rr. 4 and 9—*Suit against firm—Death of sole proprietor—Abatement.*

Where a suit was brought against a firm and the alleged sole proprietor died but no steps were taken to bring his legal representatives on record, *held* the suit abated. (*Ghose*, J.) RAM PRASAD CHIMONLAL *v.* ANUNDJI AND CO. **49 Cal. 824=69 I.C. 885=1922 Cal 408.**

———O. 22, R. 4—*Decree for joint possession appeal by defendant—Omission to substitute legal representatives of deceased respondent—Appeal abates.*

Where a joint decree for possession in favour of the several plaintiffs was passed by the trial court and pending an appeal therefrom by the defendant, one of the plaintiffs-respondents died and his legal representatives were not brought on record within time, *Held* the whole appeal abated. 24 C.W.N. 44, Foll. (*Walmsley and Suhrawardy*, JJ.) ARJAN MIRDHA *v.* KALI KUMAR CHAKERBUTTY. **68 I C. 194.**

———O. 22, R. 4—*Death of one wrong-doer—Legal representatives must be brought on record.*

If during the pendency of an appeal from a suit for damages against several joint wrong-doers, one of them dies, his representative must be brought on record and the plff. is not at liberty to continue his appeal against some only of the wrong-doers. (*Mookerjee*, A.C.J. *and Fletcher* J.) KALI NARAIN ROY CHAUDHURI *v.* HARAN CHANDRA GHOSE. **62 I.C. 714.**

C. P. CODE (V of 1908), O. 22, R. 4.

———O. 22, R. 4—*Section applies to proceedings following preliminary decree in mortgage suit.*

All proceedings in a mortgage suit subsequent to the preliminary decree but previous to the final decree are proceedings in a pending suit and an application made therein is not one for execution. Whether therefore the sole judgment-debtor dies before the final decree and the decree holder fails to apply within six months of death to have the legal representatives brought on record, the suit abates under O. 22, R. 4 of the C. P. C. (*Newbould and Buckland*, JJ.) BHUTNATH *v.* TARA CHAND. **33 C L J. 115=59 I.C. 177=25 C W.N. 595.**

———O 22, Rr. 4, 3 and 9 (3) and 11—*Ex-parte order—Setting aside—Liable to be vacated—C. P. Code, O 41, Rr. 20 and 33—Powers under when to be exercised.*

Plff. sued for a declaration that lands attached by a Criminal Court under S. 146, Cr. P. Code, were included in their estate. No question of share was in controversy. The first Court made a declaratory decree in respect of the whole property. The defts. appealed. One of the plff.'s respondents died and his representatives in interest were not impleaded. *Held*, that the appeal as regards the heirs of the deceased respondents became imperfectly constituted, so that the Court can no longer adjudicate upon the matter in controversy. An order for the substitution of the heirs of a deceased respondent made *ex parte* on mis-statement of fact could be set aside during the hearing of the appeal. (*Mookerjee and Panton*, JJ.) KALI DAYAL BHATTA CHARJEE *v.* NAJENDRA NATH PAKRASHI **24 C W.N. 44=54 I.C. 822=30 C L.J. 217.**

———O. 22, R. 4—*Legal representatives—Not brought on record in appeal—Substitution of, in second appeal.*

If during the pendency of an appeal one of the parties died and the appeal was proceeded with without his representatives on record, the High Court cannot order the substitution of such representatives in second appeal as there was no death, pending the second appeal. (*Walmsley and Huda*, JJ.) PROMADA NATH ROY *v.* ABDUL MAJID. **58 I.C. 480.**

———O. 22, Rr. 4 and 12—*Joint decree—Appeal by judgment-debtor—Death of one respondent—Effect of legal representatives not added.*

Where one of the decree-holders respondents dies in an appeal relating to the execution of a joint decree, and his legal representatives are not brought on the record, the appeal cannot proceed against the other respondents alone. (*Woodroffe and Smither*, JJ.) BAKSH ALI SARKAR *v.* SARAT CHANDRA ROY.
46 I.C. 911.

———O. 22, R. 4—*Legal representative—Rights of—Execution of mortgage decree against Hindu widow and reversioner—Objection by*

C. P. CODE (V of 1908), O. 22, R. 4.

widow—Death of widow—Reversioner substituted, if can raise same objection.

In execution of a decree against a widow and the next reversioner in a mortgage executed by them to the plff. the widow raised some objections which were disallowed after which the widow died and the next reversioner was substituted in the place, and he took the same objections. *Held*, that after the widow's death he was clothed with the full rights of a proprietor as the heir of a last male owner and could re-open the matters settled against the widow. (*Chatterjee and Walmsley*, JJ.) UDIT NARAYAN *v.* JASODA SAHUN. **46 I.C. 469 = 27 C.L J. 576.**

———O. 22, R. 4—*Legal representatives—Some heirs of deceased respondent brought on record.*

Where the right of the respondent devolved upon all his heirs so that the decree could not be split up by allowing it to stand in favour of some of the heirs and setting it aside against others, if some of the legal representatives are not brought on record in time, the appeal abates. (*Chatterjee and Richardson*, JJ.) ALI MEA *v.* NANA GAZI. **41 I C. 430.**

———O. 22, R. 4—*Joint possession—Failure to serve notice on some respondents—Dismissal of appeal.*

In an appeal by the defts. against a decree for joint possession of land passed in favour of five plffs. notices of the appeal were not served on two of the plffs.-respondents, and the Court directed the appeal to be dismissed in so far as those two plaintiffs were concerned. *Held*, that the appeal could not proceed and that the suit should be dismissed *in toto* 6 C. W. N. 196; 10 C.W.N. 991, Rel. (*Mookerjee and Beachcroft*, JJ.) BASKER SHEIKH *v.* FAZLE KARIM BISWAS. **28 I.C. 703 = 19 C.W.N. 290.**

———O. 22, R. 4—*Death of certain respondents—Effect.*

Where during the pendency of an appeal in a suit relating to succession, some of the successful respondents died and their legal representatives were not brought on record, the appeal did not abate *in toto* but only as regards the shares of those respondents. (*Broadway and Abdul Qadir*, JJ.) NANDOO SINGH *v.* BALJIT SINGH. **5 Lah. L.J. 203 = 69 I.C. 495 = 1924 Lah. 93.**

———O. 22, R. 4—*Death of one plaintiff respondent—No joint interest—Appeal does not abate against other respondents.*

Where the plffs. are not joint tenants of the property in suit but each one has his own separate share in it and consequently any one of them might have maintained the suit against the defendant in respect of his own share. *Held*, the defendant may maintain an appeal against the surviving respondents-plaintiffs. (*Le-Rossignol and Zafar Ali*, JJ.) LAJJA RAM *v.* SHAMBU NATH. **5 Lah. L.J. 14 = 1923 Lah. 252.**

C. P. CODE (V of 1908), O. 22, R. 4.

———O. 22, Rr. 4 and 6—*Death of one of several respondents—Relief claimed joint.*

When the appellants lived 10 miles from the respondents and no reason had been shown for holding that they were prevented by any sufficient cause from ascertaining the death of one of them. *Held*, the appeal automatically abated against him and his representative at the end of six months. Where relief sought against defendants is joint and indivisible, abatement against one is abatement against all. 1 Lah. 225 and 56 I.C. 927. Foll.; 60 I C. 722, Dist. (*Broadway and Harrison*, JJ.) SARDARA *v.* ALLAHYAR. **73 I.C 604 = 1923 Lah. 132.**

———O. 22, R. 4—*Abatement—Failure to object does not alter the fact of abatement.*

Where on a party's death, no application is put in to bring in his legal representatives within the time allowed by law, the appeal abates and no failure by the persons concerned to object to action taken on an application presented after expiry of such time would alter the fact of abatement. (*Campbell*, J.) WAHID BAKHSH *v* LALTA PERSHAD. **73 I.C. 387 = 1924 Lah. 316.**

———O. 22, R. 4—*Co-sharers—Suit for declaration of title—Death of one—Abatement.*

Where some of the proprietors of a village sue the others for a declaration in respect of the shamilat of the village and one of the defendants dies and his legal representatives are not brought on record within time, the whole suit abates and is liable to be dismissed. (*Chevis and Harrison*, JJ.) SHAH MAHOMED *v.* KARAM ILAHI. **68 I C 121 = 1922 Lah. 131.**

———O. 22, R. 4—*Redemption suit—Death of mortgagor—Failure to bring on record legal representative—Suit abates.*

In the course of an appeal arising from a suit by a second mortgagee to redeem the prior mortgage, the mortgagor-respondent died. The effect of failing to bring his legal representative on record was the abatement of the appeal. (*Chevis and Harrison*, JJ.) NANAK CHAND *v.* RAM CHAND. **4 Lah. L J 189 = 1922 Lah. 101.**

———O. 22, R. 4 and O. 21, R. 63—*Claim suit—Legal representative of deceased decree-holder not brought on record—Effect of.*

Where a defeated claimant files a suit under O. 21, R. 63, C. P. Code, to establish his title but without impleading the legal representatives of a decree-holder who had died prior to the institution of the suit, the legal representative of the deceased-holder is not bound by the decree in the title suit and so far as the deceased decree-holder was concerned, the order dismissing the objection in claim proceedings had become conclusive under O. 21, R. 63, C. P. C. (*Scott-Smith*, J.) PIYARA LAL *v.* MAZHAR KHAN. **16 P.L R. 1922 = 64 I.C. 359 = 4 U.P.L.R. Lah. 23 = 1922 Lah. 78.**

C. P. CODE (V of 1908), O. 22, R. 4.

———**O. 22, Rr. 4 and 11**—*Legal representative—Extention of time whether allowed.*

In a case where the appellant, though represented by counsel, does not put in a formal petition for bringing deceased respondent's representatives on the record within the time prescribed by law, it is not right to extend time to allow him to do so. (*Le-Rossignol, J.*) WALAYAT KHAN *v.* MUST. MALAN.
3 Lah. L.J. 119 = 1922 Lah. 30 (1).

———**O. 22, R. 4**—*Appeal—Death of one respondent—Survival of right—No abatement.*

Where in an appeal from a suit for a declaration that certain properties had been dedicated to waqf and that their alienation was void, one of the plaintiffs (respondents) dies the appeal does not abate as against him. (*Broadway and Martineau, JJ.*) RAHIM BAKSH *v.* CHANNAH DIN. **4 Lah. L.J. 511.**

———**O. 22, R. 4**—*Appeal—Order for abatement is open to—Suit in a representative capacity—No abatement.*

An order declaring the abatement of an appeal on the ground that the legal representatives are not brought on record is a decree and is appealable. Where a suit is brought in a representative capacity and some persons die during the pendency of an appeal from a decree in such suit their legal representatives need not be brought on record. (*Broadway and Abdul Raoof, JJ.*) UDMI *v.* HIRA.
1 Lah. 582 = 60 I.C. 111 = 3 Lah. L.J. 762.

———**O. 22, R. 4**—*Redemption suit—Death of respondent.*

If the legal representatives of the deceased mortgagees are not brought on records within the time the whole appeal will abate, as a whole. (*Scott-Smith and Martineau, JJ.*) BHAGWAN SINGH *v.* JAMAL. **3 Lah. L.J. 252.**

———**O. 22, R. 4**—*Defendants sued jointly as representing the estate of their father—Indivisible liability.*

Where the defendants were sued jointly as representing the estate of their late father and their liability, if any, was joint and indivieible and where one of the defendants died when he was a respondent in the appeal, in the absence of the application to bring the legal representative within time, whole appeal would abate. (*Le Rossignol and Wilberforce, JJ.*) GURDAS MAL *v.* KALSHI RAM. **3 Lah. L.J. 64.**

———**O. 22, Rr. 4 and 11**—*Appeal*—Pro forma *respondent—Substitution of representatives after time allowed.*

Where the representative of a deceased *pro forma* deft. on second appeal till after the expiry of the time it is no ground for dismissing the second appeal. (*Broadway, J.*) ABDULLA *v.* MAHOMED KHAN. **2 Lah. L.J. 601.**

———**O. 22, R. 4**—*Mortgage suit—Death of one of the plffs.*

The first Court granted plaintiffs a joint decree with costs realizable by sale of the mortgaged property. Against this decree defendant-appellant preferred an appeal. It was admitted by appellant that the plff. died in 1915 and that this fact was known to him. In spite of this, however, no steps were taken to bring her legal representatives on the record and it was stated that her heirs are her daughters and not the other respondents, her sons. *Held*, that the decree being joint the appeal abated in its entirety. 6 C.W.N. 196; 10 C.W.N. 981; 11 C.W.N. 504; 31 Cal. 487 P.C.; 6 P.R. 1913; 41 P.R. 1915 and 67 P.R. 1919, Foll. (*Broadway and Bevan Petman, JJ.*) SARDARI LAL *v.* RAM LAL. **1 Lah. 225 = 57 I.C. 199 = 1 Lah. L.J. 225.**

———**O. 22, Rr. 4 and 9**—*Joint interest—Ignorance of law—Failure to bring legal representatives of deceased respondent on file within time—Joint interest of respondents—Abatement.*

Mere ignorance of law is no cause for not applying within time to bring the legal representatives of deceased respondent on file. Where the interests of several respondents are joint and the legal representatives of a deceased respondent are not brought on record the whole appeal must abate. (*Smith and Jones, JJ.*) FATTA *v.* SIKANDAR.
2 U.P.L.R. (Lah.) 112 = 56 I.C. 927 = 2 Lah. L.J. 442.

———**O. 22, R. 4**—*Representative suit—Suit by followers of shrine—Omission to implead legal representatives.*

Where the right to appeal against the deceased plff. respondent did not survive against his legal representatives as he was suing only in his capacity as a follower of the shrine, the appeal did not abate. (*Broadway and Martineau, JJ.*) RAHIM BAKSH *v.* CHANNAN DIN.
55 I.C. 210.

———**O. 22, Rr. 4 and 9**—*Joint right—Ignorance of death—Death of one of the respondents—Ignorance of death, whether an excuse.*

Plffs. sued defts.' co-sharers for a declaration that all the proprietors were entitled to a share in the piece of land in dispute. The trial Court granted the plffs. a decree as prayed. The deft. preferred an appeal, one of the respondents died before filing of this appeal. No application was made to bring his legal representatives on the record till after the expiry of six months. *Held*, the decree of the lower Court so far as the deceased respondent's sons are concerned, could not be set aside and, therefore, the appeal must be held to have abated in its entirety. 84 P.R. 1918, Dist. Ignorance of the death of a respondent or a party is no excuse. (*Broadway, J.*) JAMNA *v.* SARJIT. **52 I.C. 510 = 67 P.R. 1919.**

———**O. 22, R. 4**—*Mortgage joint or indivisible—Death of mortgagee respondent—Failure to bring in legal representavives—Abatement.*

In a suit for redemption of a joint or indivisible mortgage all the mortgagees or their legal representatives must be made parties. This principle applies also to appeals. When one

C. P. CODE (V of 1908), O. 22, R. 4.

of the mortgagee respondents dies and no application is made to bring on record the legal representatives under Art. 177 and the application to have the abatement set aside under Art. 171 is also out of time, the whole appeal abates. (*Scott-Smith and Broadway*, JJ.) FATEH *v.* BHANJU RAM. **49 P.W.R 1917 = 41 I.C. 730 = 96 P.R. 1917.**

——**O. 22, Rr. 4 and 9**—*Joint right—Appeal—Death of one respondent.*

Where the interests of the defts. respondents are joint and decree cannot be reversed without the representatives of the deceased being brought on record, the whole appeal must abate. (*Shadi Lal and Jones*, JJ.) INAYAT *v.* GANGA. **3 P.R. 1916 = 32 I.C. 829 = 260 P.W.R. 1915.**

——**O. 22, R. 4**—*Scope of.*

O. 22, R. 4 (3), C.P.C., does not touch the question as to what happens to the suit or appeal as regards the surviving defts. (*Johnstone and Beadon*, JJ.) HADU *v.* LALA. **15 P.L.R. 1914 = 16 P.W.R. 1914 = 21 I.C. 951 = 41 P.R. 1915.**

——**O. 22, Rr. 4 and 11**—*Joint decree for injunction—Appeal—Co-plffs.—Death of one.*

If an appeal from a joint decree for injunction in favour of several plaintiffs abates against one, the whole appeal abates. (*Robertson*, J.) GAUHAR KHAN *v.* SHER MUHAMMAD KHAN. **107 P.L.R. 1913 = 18 I.C 256 = 84 P.W.R. 1913.**

——**O. 22, R. 4**—*Joint alienees—Appeal—Suit to set aside—Death of one pending appeal.*

Where pending an appeal from a decree dismissing a suit to set aside an alienation jointly to two persons, one of them dies, and his legal representative is not brought on record for two years, the whole appeal abates. (*Shah Din and Chevis*, JJ.) KHUDA BAKSH *v.* MATHARADAS. **85 P.L.R. 1913 = 89 P.W.R. 1913 = 18 I.C. 182 = 62 P R. 1913.**

——**O. 22, R. 4**—*Death of defendant—Legal representative can himself come on record—Right to costs.*

Where a defendant dies pending a suit, it is open to his legal representative to come on record on his application notwithstanding the plaintiff's omission to implead him. In such a case the Court might award costs to the legal representative. (*Schwabe*, C.J. *and Ramesam*, J.) KUPPUSWAMI CHETTY *v.* SINGARAVELU CHETTY. **46 M.L.J. 233 = (1923) M.W.N. 867 = 18 L W. 99 = 75 I.C. 858 = 1923 Mad. 679.**

——**O. 22, R. 4**—*Appeal—Cross-objections—Legal representative brought on record in—Effective for appeal.*

The omission of appellant to bring on record the legal representative of a deceased respondent does not cause an abatement of the appeal if the legal representative applies to be brought on record in the memo. of cross-objections

C. P. CODE (V of 1908), O. 22, R. 4.

filed by the deceased respondent. Bringing on record the legal representative in the memo. of objections has the effect of bringing him on record in the appeal. (*Seshagiri Aiyar and Napier*, JJ.) VENKATASAMI NAICKER. *v.* MUTHUSWAMY PILLAI. **34 M.L.J. 177 = 46 I.C. 949 = 23 M.L.T. 280.**

——**O. 22, Rr. 4 and 11**—*Death of one deft.—Petition for amendment.*

Where the appellant filed a petition for amendment of the decree in the lower Courts, which was against three defendants by increasing costs and interests awarded to him and failing in the lower Court, appealed to the High Court and during the pendency of the appeal one of the defts. died and his legal representatives were not brought on record in time. *Held*, that the amendment of the decree was impossible. (*Spencer and Krishnan*, JJ.) PONNAMBALA MOOTHAN *v.* MAHADEVA PATTAR. **35 I.C. 697 = (1916) 2 M.W.N. 117.**

——**O. 22, R. 4**—*Death of one of the respondents—Appeal—When abates.*

The death of one of the respondents and the not bringing of his representative on the record will not make the appeal abate if the right to sue survives to the appellant; the test to decide whether a right survives is whether the result of the adjudication will affect the deceased party. 30 Mad. 67; 2 M.L.T. 36, Ref. (*Tyabji and Spencer*, JJ.) CHETTIKULAM PRASANNA VENKATACHALA REDDIAR *v.* COLLECTOR OF TRICHINOPOLY. **33 I C. 45 = 38 Mad 1064.**

——**O. 22, R. 4**—*Partition suit—Death of one party pending appeal—Legal representative not brought on record.*

Before the filing of an appeal from decree in a partition suit, one of the respondents died and the appeal was decided without the legal representatives of the deceased being brought on record. *Held*, that the decree of the appellate Court should be reversed and the appeal disposed of afresh. If the Appellate Court finds the appeal not maintainable without the representatives of the deceased being brought on record and there is no reason to excuse delay on the part of plff., the appeal should be dismissed; otherwise it should be dealt with on the merits. A decree for partition cannot be passed without bringing on record the legal representatives of a deceased party. (*Sundara Iyer and Sadasiva Iyer*, JJ.) SHEIK FARID SAHEB *v.* KULSAM BEEBI. **16 I.C. 688 = (1912) M.W.N. 825.**

——**O. 22, Rr. 4 and 10**—*Applicability—Proceedings before final decree.*

Death of judgment-debtor after the preliminary decree but before passing of final decree cannot have the effect against the substitution of legal representative under O. 22, R. 10, C.P.C, applicable. (*Hallifax*, A.J.C.) TULARAM *v.* TUKARAM. **84 I C. 807 = 17 N.L.R. 81.**

C. P. CODE (V of 1908), O. 22, R. 4.

———O 22, Rr. 4, 5 and 9—*Abatement—Substitution of parties.*

Substitution can be made only after an abatement has been set aside on application under O. 22, R. 9 (2), C. P. Code. To set aside an abatement it is necessary to prove that the petitioner was prevented by sufficient cause from continuing the suit It is the duty of the person prosecuting a suit or an appeal to keep himself apprised of the adversary's death. A mere plea of ignorance of the death of an opposite party which took place many months or even years before is not a sufficient ground for setting aside the abatement. (*Das and Macpherson*, JJ.) MAHANTH RAMPERKASH DAS *v.* KUNJ LALL. **4 P.L.T. 867 = 79 I.C. 414 = 1924 Pat. 126.**

———O. 22, R. 4—*Death of judgment-debtor—Limitation to bring his legal representative on record is six months.*

After the death of a judgment-debtor, the decree-holder should apply within six months of his death to bring his legal representative on record, on the analogy of C. P. Code, O. 22, R. 4 and Lim. Act, Art. 177. (*Bucknill*, J.) RAMESHWAR SINGH *v.* MUTHU MISSIR. **62 I.C. 52.**

———O. 22, R. 4—*Suit against joint tort-feasors—Legal representative of one defendant not impleaded—Effect.*

Where in a suit against joint tort-feasors one deft. dies and his legal representative is not brought on record, the suit does not abate as against others, and the decree obtained therein can be executed against the other defts. The result of such a decree is that a decree obtained against some joint tort-feasors bars action against others. (*Das and Ross*, JJ.) GAJO SINGH *v.* AMRIT NARAIN SINGH. **60 I.C. 722 = 2 P.L.T. 234.**

———O. 22, R. 4—*Mortgage suit—Preliminary and final decree.*

If deft. dies after preliminary, but before final decree, a final decree passed without bringing his legal representative on record is a nullity and hence cannot be executed. (*Miller*, C.J., *Coutts and Manuk*, JJ). JUNGLI LALL *v.* LADDU RAMAKWARI. **4 P.L.J. 240 = 50 I.C. 529 = 1919 Pat. 105 (F.B.).**

———O. 22, Rr. 4 and 5—*Decree against Ghatwal in personal capacity—Death of judgment-debtor—Widow, if a legal representative.*

Where a widow succeeds to the *Ghatwal's* personal property as heir she should be brought on record as the representative of the deceased. But as regards the personal debts of the deceased *Ghatwal*, execution could only be taken against property which came into her possession in her personal capacity. No assets that came into her possession by her succession to the *Ghatwali* would be liable for the decree. (*Roe and Coutts*, JJ.) BAIJNATH RAM *v.* CHAND KUMARI. **49 I.C. 478.**

C. P. CODE (V of 1908), O. 22, R. 4.

———O. 22, R. 4—*Decree against one co-administrator—Liability of estate.*

Before a decree absolute was passed, the deft. who was one of the administrators of the estate of the mortgagor and who alone was impleaded, died. The other administrator was attempted to be brought on record in place of deceased. *Held*, that one administrator could not represent the estate and that the other should have been impleaded, that as one alone did not represent the estate, the decree should be taken to have been passed against the deceased administrator personally with the result that the estate of the deceased mortgagor could not be sold in execution of the decree and that the surviving administrator was in no sense the heir or representative of the deceased administrator and could not, therefore, be made a party to the suit. (*Chamier*, C.J. *and Sharfuddin*, J.) MAHABIR SINGH *v.* MOTIRANI KUER. **38 I.C. 782.**

———O. 22, R. 4—*Abatement of appeal against one of the respondents—Abatement against other respondents.*

Where for failure to bring on record the representatives of one of the respondents who is a necessary party, the appeal abates it also, abates as against all the respondents. 35 Bom. 393; 22 Bom. 718; 22 All. 430 Dist. (*Maccoll*, J.) MA ZAN NYEIN *v.* MAUNG KYAW ZAN. **1 Rang. 189 = 74 I.C. 1027 = 1923 Rang. 288.**

———O. 22, R. 4 (1)—*Wrong representative—Impleaded.*

Where a person not entitled has been added as legal representative, the Court can strike him off and substitute the proper representative. (*Kensington*, C.J. and *Shah Din*. J.) MUNSHIRAM *v.* MUSAMMAT MISRI. **9 P.W.R. 1915 = 27 I.C. 598 = 70 P.L.R. 1915.**

———O. 22, R. 4 (2)—*Defences—Power of legal representative.*

A legal representative may on the death of a party, rely on the alternative defence set up by him. (*Batchelor and Rao*, JJ.) BALMUKUND KESURDAS *v.* BHAGWANDAS KESURDAS. **19 I.C. 401 = 16 Bom. L.R. 209.**

———O. 22, R. 4 (2)—*Legal representative cannot alter pleadings.*

The legal representative of a party to a suit occupies the same legal character as the deceased and hence must stick to the position taken up by him in the pleadings. (*Oldfield and Kamesam*, JJ.) KOZHIKOT PATHINHARE KOVILAGATH *v.* SANKARA MENON. **73 I.C. 376 = 1924 Mad. 245.**

———O. 22, R. 4 (3)—*Ignorance of death of Respondent—Sufficient cause.*

There was an affidavit that the appellants, one of them a minor and the other, his brother and next friend, a mere youth, were absent from Multan for the eminently laudable purpose of prosecuting their studies, and were

C. P. CODE (V of 1908), O. 22, R. 4.

therefore not aware of the death of the respondent. *Held* sufficient cause was established to set aside the abatement. (*Abdul Raoof and Campbell*, JJ.) TIRATH RAM *v.* MAHOMED ABDUL RAHIM SHAH. **73 I.C. 616 = 1923 Lah. 546.**

——**O. 22, Rr. 4 (3) and 9 (2)**—*Abatement of suit—Application to substitute names of heirs—Limitation.*

If an application for substitution of names of the heirs of a deceased party is not made within six months of the death, the suit or (appeal) must abate under R 4 (3) unless the plff. or appellant shows, that he had sufficient excuse for not applying in time. (*Johnstone*, C.J. *and Chevis*, J.) DAYA SINGH *v.* BUTA SINGH. **38 I.C. 7 = 118 P R. 1916.**

——**O. 22, R. 4 (3)**—*Joint right—Death of respondent pending appeal—Heir not brought on record till six months—Ignorance of law, if excuse.*

Where during the pendency of an appeal on the death of deft. respondent, his heirs were not brought on record till after six months through ignorance of law, there was no sufficient cause to excuse the delay. In a suit for declaration of share in joint property on the death of a deft. respondent, if his heirs are not brought on record, the suit on appeal abates. (*Johnstone and Beadon*, JJ.) HADU *v.* LALA. **16 P L R 1914 = 21 I.C. 951 = 16 P.W.R. 1914 = 41 P.R. 1915.**

——**O. 22, R. 4 (3)**—*Respondents—Death of one—Representatives not brought on record in time—Abatement.*

If a deceased respondent's representatives are not brought on record in time, the appeal abates as against that respondent alone and not against others. (*Shah Din and Smith*, JJ.) NAZIR KHAN *v.* MANGLI. **231 P.L.R. 1912 = 14 I.C. 585 = 220 P.W.R. 1912.**

——**O. 22, R. 4 (3)**—*Joint decree—Death of one respondent—Ignorance of law.*

An appeal abates on the death of one of two representatives of the body of the respondents, in a case of a joint decree, for failure of bringing the legal representative of the deceased on record within six months from the date of his death. O. 22, R. 4 (3) is imperative, unless the death is fraudulently concealed from the knowledge of the appellant. Mere ignorance of it until after the expiry of the limitation period is no justification to depart from the rule. (*Reid*, C.J. *and Rattigan*, JJ.) MIR NAWAB *v.* HARDEO. **60 P.R. 1911 = 42 P.L.R. 1912 = 12 I.C. 871 = 238 P.W.R. 1911.**

——**O. 22, R. 4 (3)**—*Respondents—Death of one—Abatement of appeal.*

Where one of the respondents to an appeal dies and no heir of his is made a party, the appeal abates only so far as the deceased respondent is concerned and a decree passed against the other respondents holds good 31 Cal. 487, Dist. (*Baillie, S.M.*) SUBKARAM SINGH *v.* RAGHUBANS. **26 I.C. 523 = 1 O.L.J 581.**

C. P. CODE (V of 1908), O. 22, R.

——**O. 22, R. 5 and O. 43, R. 1**—*Appeal—Order dismissing application to be brought on record—Not appealable.*

An order dismissing an application to be brought on record as the representative of a deceased appellant is not appealable. (*Chamier and Piggott*, JJ.) DUNICHAND *v.* AIJNAND. **28 I C. 687 = 13 A.L.J. 381.**

——**O. 22, R. 5**—*Dispute as to right of legal representative—Determination by the Court.*

Where a question arises as to whether a person brought on record is the proper legal representative of the deceased plaintiff it should be determined by the Court. (*Scott*, C.J. *and Shah*, J.) VATSALA BAI *v.* SAMBHAJI. **43 Bom. 168 = 47 I.C. 757 = 20 Bom L.R. 902.**

——**O. 22, R. 5**—*Dispute as to right—Survival of cause of action—Court's duty.*

Where a person entitled to a share on partition dies after the preliminary decree therefor, there is a survival of the cause of action, and the heirs will have to be brought on record and in case of dispute as to who they are, it must be inquired into under O. 22, R 5. (*Batchelor*, C.J. *and Shah*, J.) RAOJI BHIKAJI *v.* ANANT LAXMAN. **42 Bom. 535 = 46 I.C. 750 = 20 Bom. L.R. 671.**

——**O. 22, R. 5**—*Legal representative—Who is.*

For the purposes of O. 22, R. 5, Civil Procedure Code, it is sufficient if a person has succeeded in forcing recognition of his status from the deceased and has intermeddled with the deceased's estate and is actually in possession of a portion of it. (*Le-Rossignol and Martineau*, JJ). GOOR BACHAN SINGH *v.* GIAM SINGH. **1922 Lah. 175.**

——**O. 22, R. 5**—*Legal representative—Dispute as to—Decision of question on appeal.*

A dispute arising in the course of the trial as to the representatives of a deceased party has to be decided after investigation by the trial Court and if it fails to do so, the appellate Court can decide the question. (*Broadway and Abdul Raoof*, JJ.) TAJA *v.* DEVI DITTA. **4 Lah. L.J. 314.**

——**O. 22, R. 5**—*Appeal—Order under—Not appealable.*

There is no appeal from an order determining that a particular person is the legal representative of the deceased party to the suit. (1913) M.W.N. 673; 27 Bom. 152; 28 All. 109. Foll. (*Broadway and Dundas*, JJ.) RAM SARUP *v.* MOTIRAM RAM. **1 Lah. 493 = 57 I.C. 137 = 2 Lah L J. 736.**

C. P. CODE (V of 1908), O. 22, R. 5.

———**O. 22, Rr. 5 and 2**—*Wrong legal representative brought on record—Proper legal representative's rights.*

Where a person who is not the legal representative is in fact brought on record as such and the Court allows the wrong representative to be brought on record and to continue the litigation, the benefit of that litigation may be taken advantage of by the proper legal representative and the representatives on record will be accountable to him. If this is so, the legatees and creditors can proceed against the proper legal representatives if their claim is not barred. Their proper legal representatives will be in a position to get the benefit of the decree and thus to be in possession of assets. (*Schwabe*, C.J., *Coutts Trotter and Kumaraswami Sastri*, JJ.) ZAMINDAR OF BHADRACHALAM *v.* RAJA VENKATADRI APPA RAO
43 M.L.J. 486=16 L.W. 369=
(1922) M.W.N. 532=70 I.C. 689=
31 M.L.T. 221 (H.C.)=46 Mad. 190=
1922 Mad. 467.

———**O. 22, R. 5**—*Appeal—Decision as to legal representative—Appeal.*

An order refusing to implead a person as a representative of a deceased plff. is an adjudication of his claim and hence appealable. (*Oldfield and Seshagiri Iyer*, JJ.) AYYA MUDALI VELAN *v.* VEERAYEE. **43 Mad. 812=**
(1920) M.W.N. 467=58 I.C. 498=
12 L.W. 188=39 M.L.J. 218.

———**O. 22, R. 5**—*Mandatory.*

O. 22, R. 5 of the C.P. Code makes it imperative on the Court to hold an enquiry and to come to a conclusion on the evidence as to which of the rival claimants is the proper representative of the deceased. (*Ayling and Krishnan*, JJ.) PARAMASWAMI AIYENGAR *v.* ALAMELU NACHIAR AMMAL. **42 Mad. 76=**
38 M.L.J. 682=49 I.C. 11=9 L.W. 26=
(1918) M.W.N. 107.

———**O. 22, R. 5**—*Dispute—Duty of Court to decide—Order not appealable.*

Where a question arises as to who are the legal representatives of a deceased plff., it is obligatory on the Court to decide it. Where the Court of first instance, without deciding the question, added the rival claimants as legal representatives and the lower appellate Court called for a finding on the question and itself decided it, its decision is final and no appeal lies therefrom. Nor can the question be agitated in an appeal from the decree. An appeal does not lie from the decree, where the only question raised in the appeal was the propriety of the order passed under O. 22, R. 5 of the C.P. Code. (*Ayling and Phillips*, JJ.) SUBBRAMANIA AIYAR *v.* MUTHU VAITHILINGA MUDALIAR. **44 I.C. 987=**
(1918) M.W.N. 198.

———**O. 22, R. 5**—*Scope of—Inquiry—Delegation.*

Under O. 22, R. 5, the Court to which a petition is presented for the bringing on record of the legal representatives should decide the question itself, and an Appellate Court cannot call on the trial Court, to submit a finding though it can direct the latter to take evidence and submit it. (*Ayling and Seshagiri Aiyar*, JJ.) NARAYANA BHARATIGAL *v.* ITTULI AMMA. **39 I.C. 893.**

———**O. 22, R. 5**—*Suit to establish title by legal representative.*

The plff. in a suit to establish himself as the legal representative of a deceased person, must show not only that he acquired all the rights which the deceased was capable of conferring on him, but also that the plff. actually stepped into the shoes of the deceased with all the attributes that he claimed. Deft. may, in a suit by a person to establish himself as a legal representative, prove that the deceased had no rights to transmit. (*Wallis*, C.J. *and Seshagiri Aiyar*, J.) THIRUVAMBALA DESIKAR *v.* CHINNA PANDARAM. **40 Mad. 177=**
30 M.L.J. 274=34 I.C. 57=
(1916) 2 M.W.N. 43=4 L.W. 306.

———**O. 22, R. 5**—*Appeal—Order declaring a person legal representative.*

The question whether a person should be appointed as the legal representative of a deceased plff. to continue the suit is a question arising for decision in the suit itself and is not appealable under the Civil Procedure Code. (*Benson and Sundara Aiyar*, JJ.) SAMSABISVA *v.* M. K. PATHAMMA. **14 M.L.T. 176=**
(1913) M.W.N. 673=20 I.C. 950=
25 M.L.J. 279.

———**O. 22, R. 5**—*Inquiry into right—Adoption.*

The Court must inquire, under O. 22, R. 5 into the representative character of an adopted son of a deceased plaintiff, applying to be brought on record in the deceased's place, when the defendants deny his character and adoption, even if he be willing to be made a deft. or that he is not the sole legal representative, others being on record. (*Benson*, O. C. J. *and Napier*, J.) VANJINATHAYAR *v.* K. G. VAITHIANAITHYAR. **16 I.C. 798.**

———**O. 22, R. 5**—*Decision on dispute—Effect of.*

In a suit by the alleged legal representatives of a deceased plaintiff under S. 367 of the C.P. Code (1882) the plaintiffs need not pray for a declaration of title to all the properties of the deceased. Such a suit is not barred simply because under O. 22, R. 5 of the new Code, the Appellate Court has still to decide who is the legal representative. But the decision in the suit would be *res judicata* in the appeal. (*Abdur Rahim and Ayling*, JJ.) SIVABAGIATHATCHI *v.* MUTHUKUMARA PILLAI.
9 I.C. 603=9 M.L.T. 403.

———**O. 22, R. 5**—*Order as to legal representative—Appeal.*

No appeal lies against an order deciding that a person is not the legal representative of a

C. P. CODE (V of 1908), O. 22, R. 5.

deceased party as it is not a decree. (*Mittra*, O.A.J.C.) TARACHAND *v.* JANKI.
38 I.C. 833=13 N.L.R. 82.

——**O. 22, R. 5**—*Appeal—Order under, if appealable.*

Where a dispute between a surviving plff. and a third person as to who should be substituted as the legal representative of the deceased plff. is decided by the Court under O. 22, R. 5, the order is not appealable. (*Lindsay*, J.C.) BRIJ MOHAN *v.* RAM MILAN.
20 I.C. 898=16 O.C. 350.

——**O. 22, R. 5**—"*Court*" *meaning of—Question of legal representative—Who to decide.*

The word "Court" in O. 22, R. 5 means the Court before whom the question arises *viz.*, the trial Court if the question arises at the trial stage or the appellate Court if the question arises in appeal. There is no provision in the Code for an appellate Court to delegate its power under the rule; the utmost that can be done is to direct the trial Court to take evidence on the question and return the same. (*Miller*, C.J. *and Coutts*, J.) MT. CHANDMANI *v.* KARTIK SINGH. **3 Pat L.T. 380=65 I.C. 131=1922 P. 197.**

——**O. 22, R. 5**—*Death of respondent—One of the legal representatives impleaded.*

Where pending an appeal, the respondent dies and only one of his legal representatives is brought on record without any objection the decision is binding on the estate. Once the Court decides that a person is the legal representative for the purposes of a suit under O. 22, R. 5 then he represents the estate and the adjudication is binding on it. (*Brown*, A.J.C.) MAUNG PO MYA *v.* MAUNG GYAN BON. **1 Bur. L.J. 272=72 I.C. 203=4 U.B.R. 150=1923 Rang. 114.**

——**O. 22, R. 6**—*Dead man—Decree against nullity.*

A decree passed against a person dead at the time of passing the decree is null and void and incapable of execution. The objection can be taken in execution by the legal representatives of the deceased. 17 All. 478, Foll. (*Richards*, C.J. *and Banerji*, J.) SHRIPAT NARAIN RAI *v.* TIRBINI MISRA. **40 All. 423=43 I.C. 21=16 A.L.J. 327.**

——**O. 22, R. 6**—*Death of one of joint plaintiffs—Decree and judgment is ignorance of—Effect of.*

The effect of allowing an appeal to be heard and a decree passed in ignorance of the death of one of the joint plffs. is that the judgment and decree become a nullity. (*Duval and Newbould*, JJ.) BALARAM PAL *v.* KANYSHA MAJHI. **53 I.C. 548.**

——**O. 22, R. 6**—*Death of respondent—Appeal heard after—Application by legal representatives.*

An application to the lower appellate Court to rehear an appeal as against the legal representatives of a respondent who had died previous to the appeal should be entertained and disposed of on the merits and if it is found that the abatement of the appeal against the decree should be set aside, it should do so and bring the legal representatives on record, and rehear the appeal so far as they were concerned, in their presence. (*Chitty and Beachcroft*, JJ.) ABHOY CHARAN GHOSH *v.* RAJKUMAR GHOSE. **42 I.C. 506.**

C. P. CODE (V of 1908), O. 22, R. 6.

——**O. 22, R. 6**—*Dead man — Decree against nullity.*

A decree against a dead man is a nullity and cannot be executed against his legal representatives. (*Jenkins*, C.J. *and Richards*, J.) NARENDRA BAHADUR CHAND *v.* GOPAL SHAH. **20 I.C. 506=17 C.L.J. 634.**

——**O. 22, R. 6**—*Dead person—Decree null and void—Decre against dead person.*

A suit was dismissed for default and in the application for revival by plff. he added the legal representative of one of the defts. who was dead before the dismissal. A decree was passed against the dead deft., and again the decree was amended on application made to substitute the legal representative. *Held*, the procedure was not to amend the decree but to amend the plaint and order retrial. (*Mookerjee and Beachcroft*, JJ.) DEOSARON LAL *v.* SAYEDUNNESSA BEGAM. **16 I.C. 58=16 C.L.J. 571.**

——**O. 22, R. 6 and O. 41, R. 30**—*Death of appellant before hearing—Appeal cannot be heard on merits.*

Where the appellant had died at the time of hearing of the appeal the District Judge was not competent to proceed with the appeal and it was beyond the jurisdiction to pass an order of dismissal. (*Shadi Lal and Broadway*, JJ.) NARAIN DAS *v.* KALU RAM. **2 Lah. L.J. 144.**

——**O. 22, R. 6**—*Death before judgment.*

Death after hearing but before judgment does not affect the decree. (*Rattigan and Jones*, JJ.) BISHEN DAS *v.* RAM LABHAYA.
106 P.R. 1915=32 I.C. 18=187 P.W.R. 1915.

——**O. 22, R. 6 and O. 20, R. 1**—*Death during argument—Judgment pronounced without legal representative.*

O. 20, R. 1 of the C. P. Code contemplates that all arguments should be heard before the case can be regarded as ripe for judgment. Where a party to a suit died after arguments were partly heard and the Court pronounced judgment legal representative were not brought on record, the judgment is a nullity. Where a party to a suit died after arguments were partly heard and judgment was pronounced on a subsequent day when the arguments were closed without the legal representative being brought on the record, the judgment is a nullity and is not binding on the deceased's representative. (*Ayling and Seshagiri Aiyar*, JJ.) AMERICAN BAPTIST FOREIGN MISSION SOCIETY *v.* AMMALANDHAN. **48 I.C. 859.**

C. P. CODE (V of 1908), O. 22, R. 6.

———O. 22, R. 6—*Dead man — Decree against.*

A suit against a dead man is a nullity. (*Abdur Rahim and Kumaraswami Sastri*, JJ.) UNNAMALAI *v.* MATHAN. 6 L.W. 359 = (1917) M.W.N. 643 = 33 M.L J. 413 = 42 I.C. 630 = 22 M.L.T. 333.

———O. 22, R. 6—*Party dead during hearing—Decree against.*

A decree passed after deft.'s death without a legal representative representing him afterwards, is a nullity. 13 All. 53 P.C.; 26 Bom. 317 ; 17 All. 478, Foll. The decree might be impeached in execution without resorting to a separate suit. (*Oldfield*, J.) SUBRAMANIA AIYAR *v.* VAITHINATHA AIYAR. 31 I.C. 198 = 38 Mad. 682.

———O. 22, R. 6—*Death of respondent not reported to Court—Decree obtained—Validity.*

Where a decree is passed against a party respondent though he had been dead and his legal representatives had not been brought on record, the decree is void. (*Ayling and Tyabji*, JJ.) KALIAPERUMAL KEERUDAYAN *v.* CHIDAMBARAM THANJIRAN. 29 I.C. 10.

———O. 22, R. 6—*Death of respondent before date of hearing—Dismissal of appeal—Rehearing.*

One of the respondents died two days before the hearing but the appeal was heard and dismissed, without anybody knowing that he was dead. Some time later the appellant moved the Court for bringing in the legal representatives of the deceased and for rehearing of the appeal. *Held*, he was not entitled to a rehearing. It is not desirable to give a right to an unsuccessful litigant, to re-argue his case on the ground that one of the parties was dead at the time of hearing. It is the party who has not been heard that can claim a rehearing on the ground that he has been prejudiced. (*Ayling and Seshagiri Aiyar*, JJ.) VELLAYAN CHETTY *v.* JOTHI MAHALINGA AIYAR. 39 Mad. 386 = 28 M.L.J. 138 = 2 L.W. 166 = 28 I.C. 83 = (1915) M.W.N. 201.

———O. 22, R. 6—*Decree against dead person—Execution.*

A person who dies *pendente lite* before a decree is passed against him is not a judgment-debtor and the decree cannot be enforced against his legal representatives under S. 50, C.P.C. (*Kotval*, A.J.C.) BHANJI SINGH *v.* BHAGWATI PRASAD. 55 I.C. 449.

———O. 22, R. 6—*Death of party before argument—Judgment—Jurisdiction—C.P. Code S. 99.*

A Court has no jurisdiction to proceed with the trial and decision of a part-heard case without regard to the death of a party thereto. This defect is not cured by S. 99 of the C.P. Code. The completion of hearing before judgment which is required by O. 20, R. 1 of the C.P. Code, is such a hearing as is provided by O. 18 and includes the hearing of argument. (*Stanyon*, A.J.C.) MANIRAMLALA *v.* AMBAR SINGH. 42 I.C. 161 = 14 N.L.R. 71.

C. P. CODE (V of 1908), O. 22, R. 6.

———O. 22, R. 6—*Death before hearing—Decree nullity.*

An appellant died on the day fixed for the hearing of the appeal but before the hearing. *Held*, his legal representatives were not bound by the decree and the appeal must be re-heard. (*Daniels*, A.J.C.) AMANAT KHAN *v.* MIYAN KHAN. 36 I.C. 498 = 7 O.L.J. 20.

———O. 22, R. 6—*Privy Council—Death of party.*

Where one of the appellants to His Majesty-in-Council died before the passing of the Privy Council decree, and no substitution was made, the Privy Council decree could not be held void by the Courts in India. 1 P.L.T. 325, Foll. The failure to substitute would have rendered the decree void only in so far as it was in favour of the deceased appellant. (*Coutts and Adami*, JJ.) RAI BAHADUR BAIJNATH GOENKA *v.* SIR RAVANESHWAR PRASAD SINGH. 38 I.C. 212 = 1 P.L.T. 426.

———O. 22, R. 6—*Death of party—Representative not brought on record—Privy Council appeal.*

The fact that one of the respondents in the appeal to the Privy Council died before the appeal was heard and his legal representative has not been brought on the record does not make the decree of the Privy Council a nullity and such a decree is binding on all Courts in India. (*Mullick and Sultan Ahmed*, JJ.) DEONANDAN PRASAD SINGH *v.* JANKI SINGH. 5 Pat. L.J. 314 = 1 Pat. L.T. 325 = 2 U.P.L.R (Pat.) 108 = 56 I. C. 322 = 1920 Pat. 266.

———O. 22, R. 6—*Death of defendant—Decree void—Mortgage suit.*

Execution of decree can be objected to on the ground that the judgment-debtor was dead at the time the final decree was passed in a mortgage suit, though he was alive at the time of the preliminary decree, as the decree passed after his death is void. Case-law reviewed. (*Miller*, C.J., *Coutts and Manuk*, JJ.) JUNGLI LAL *v.* LADDU RAM MARWARI. 4 Pat. L.J. 240 = 50 I.C. 529 = 1919 Pat. 103 (F.B.).

———O. 22, R. 6 and O. 23, R. 1 (2)—*Death of party before judgment—Withdrawal of suit.*

The death of a party after hearing is not sufficient cause for refusing to deliver judgment or allowing the withdrawal of a suit which has been completed in every respect except for such delivery of judgment. The provisions of O. 23, R. 1 of the C.P. Code should not be arbitrarily applied. (*Saunders*, J.C.) MA KIN NYUN *v.* MA TIN. 44 I.C. 620 = (1917) 3 U.B.R. 46.

C. P. CODE (V of 1908), O. 22, R. 6.

———O. 22, R. 6—*Dead person — Decree against void* ab initio—*Execution proceedings also void.*

A Court passed a decree against a dead person knowing at the time, that he was dead and his cattle were attached and sold. *Held*, in a suit by the heirs to recover the value of the cattle from judgment-creditor and the auction-purchasers, that the decree and the execution proceedings in pursuance thereof were void *ab initio* and therefore they could succeed. (*Twomey*, J.) MAUNG BA *v.* FATO NGAI.
11 I.C. 782=4 Bur. L.T. 164

———O. 22, R. 6—*Decree against dead man —Void.*

A Court has no jurisdiction to make a decree against or in favour of a person deceased. Such a decree is void and cannot be executed. 17 All. 478; 11 Bom.L.R. 1070, Foll. The only exception to the rule is the case of the death of a deft. between the conclusion of the hearing and the pronouncement of judgment; in such an event, the Court may deliver judgment *nun protunic*. (*Pratt*, J.C.) TOPAN RAM NATHURAM *v.* TEK CHAND. **15 I.C. 882= 5 S.L R. 260.**

———O. 22, R. 8—*Insolvency of appellant. —No limitation for Official Assignee to apply for substitution.*

There is no limitation for the Official Assignee to appear and apply for the substitution in the place of a debtor appellant who, during the pendency of his appeal is adjudicated insolvent, or for the debtor to appear and apply for restoration of his name on the record after the annulment of his adjudication. Until an order under O. 22, R. 8 is obtained the proceedings must be deemed to continue. (*Lindsay and Kanhaiya Lal*, JJ.) KHUNNI LAL *v.* RAMESHAR. **43 All. 621=19 A.L.J. 685= 64 I.C. 52=L.R. 3 A. 40=1922 All. 361.**

———O. 22, R. 8—*Suit in* forma pauperis—*Insolvency of plaintiff—Receiver—Continuance of suit.*

Where a plff. after instituting a suit in *forma pauperis* is adjudicated an insolvent the receiver in insolvency can continue the suit in the same way as the insolvent. (*Richards*, C.J. *and Banerjee*, J.) MUHAMMED ZAKI *v.* MUNICIPAL BOARD OF MAINPURI. **47 I.C. 577= 16 A L.J 440.**

———O. 22, R. 8—*Appellant insolvent during appeal—Right to continue.*

Where pending an appeal the appellant becomes insolvent, the appeal can be continued only by the receiver in insolvency. (*Griffin and Chamier*, JJ.) MANOHAR LAL *v.* DIWAN SINGH. **18 I.C. 922.**

———O. 22, R. 8—*Plaintiff adjudicated insolvent subsequent to suit—Notice to Official Receiver should be given.*

C. P. CODE (V of 1908), O. 22, R. 9.

Where subsequent to the institution of a suit, the plaintiff is adjudged an insolvent, the Court ought to give notice to the Official Receiver to appear, and state his willingness or not to continue the suit and ought not to dismiss the suit before such notice. (*Wallis*, C.J. *and Sadasiva Aiyar*, J.) OFFICIAL ASSIGNEE, RANGOON *v.* CHIDAMBARAM CHETTY.
12 L.W. 551=61 I.C. 300= (1920) M.W.N. 704.

———O. 22, R. 8—*Suit instituted by insolvent after adjudication—Whether receiver can continue it.*

The receiver in whom the estate of an insolvent vests, cannot continue the suit under O. 22, R. 8 instituted by the insolvent after his adjudication, as the latter is not entitled to bring such suit. (*Sadasiva Aiyar*, J.) OFFICIAL RECEIVER OF RAMNAD *v.* PAVADAI CHETTY. **23 I.C. 813.**

———O. 22, Rr. 9 and 4—Ex parte *order—Substitution of legal representative in interlocutory matter—No abatement—C. P. Code* (1882), *Ss.* 366, 368 *and* 371.

The remedy given by S. 371, C. P. Code, 1882, (O. 22, R. 9) to apply for setting aside the abatement applies whether the abatement has been ordered under S. 366 (O. 22, R. 3) consequent on the death of the plff. or under S. 368 (O. 22, R. 4) consequent on the death of a deft. An order abating the suit, may be said to be really tantamount to a judgment in favour of the deft. and should not be made *ex parte* and without notice to the plff. The substitution of the legal representative of a deceased plff. or deft. at one stage of a suit, as for instance on an appeal from an interlocutory order in the suit, is effective for all future stages of the suit. (*Lord Dunedin.*) BRIJ INDAR SINGH *v.* KANSHIRAM. **45 Cal. 94=33 M.L J. 486= 22 M.L.T. 362=6 L.W. 392= 126 P.W.R. 1917=18 A L J. 777= 19 Bom. L R. 866=3 P.L.W. 313= 26 C.L.J. 572=104 P.R. 1917= (1917) M.W.N. 811=22 C.W.N. 169= 127 P.L.R. 1917=42 I.C. 43= 44 I.A. 218 (P.C.).**

———O. 22, R. 9—*Sufficient cause.*

An appellant died and no application was made within six months to bring his heirs on the record. *Held*, the appeal abated automatically. The absence of any order of abatement does not serve as an obstacle to the making of an application for substitution of name which is in effect an application to set aside the order of abatement. O. 22, R. 9 (2) is not controlled by Cl. (3) and the "sufficient cause" mentioned in Cl. (2) is not confined to the circumstances given in S. 5 of the Limitation Act. (*Walsh*, J.) LACHMI NARAIN *v.* MUHAMMAD YUSUF.
42 All. 540=59 I.C. 903=18 A.L.J. 688.

———O. 22, R. 9—*Limitation—Application after six months—Limitation Act, S. 5.*

C. P. CODE (V of 1908), O. 22, R. 9.

S. 5 of the Limitation Act does not apply to an application for substitution filed beyond six months, but the remedy of the party after abatement is to apply to have it set aside on the ground that he was prevented by a suffioient cause, and to this S. 5, Limitation Act, will apply. (*Richards*, C. J. *and Banerji*, J.) SECRETARY OF STATE *v.* JWAHIR LAL
36 All. 235=25 I.C. 48=12 A.L.J. 299.

———O. 22, R. 9—*Setting aside abatement—Sufficient cause must be shown.*

Before an abatement is set aside, the Court has to be satisfied that there was sufficient cause for not applying in time. Ignorance of death, standing by itself, may be sufficient cause ; but if it is accompanied by great delay and dilatoriness it would be otherwise. (*Sanderson*, C. J. *and Richardson*, J.) SARAT CHAND SARKAR *v.* MAIHAR STONE AND LIME CO., LTD. 49 Cal. 62=57 I.C. 917=1922 Cal. 335.

———O. 22, R. 9—*Sufficient cause—Fraud of agent.*

When an appellant dies and his legal representative not being brought on record, the appeal abates. The order of abatement can be set aside if the agent of the representative of the deceased colludes with the other side and does not apply for the substitution in time as under O. 22, R. 9, this is a sufficient reason. (*Chatterjee and Duval*, JJ.) SHIBA PRASAD JANA *v.* HATI MAITY. 53 I.C. 585.

———O. 22, R. 9—*Order of abatement made before expiry of six months—Substitution of legal representative—Limitation Act, Arts.* 171 *and* 176.

An order of abatement was made two days before the expiry of six months and an application for setting aside the order of abatement made within sixty days of that order was dismissed on the ground that it was not made within six months of the death of plff. *Held*, that the application was in time and the suit should be continued after the necessary substitution. (*N. R. Chatterjee and Newbould*, JJ.) SRIMATI PRIYA SUNDARI DASYA *v.* GOLAPDI SHEIK. 31 I.C. 534.

———O. 22, R. 9—*Sufficient cause—Discretion—Application to bring in legal representatives after time.*

Under O. 22, R. 9, C.P.C., it must be shown that the appellant was prevented by sufficient cause from going on with the suit within the time limited by law ; if he so proves, he is entitled, as a matter of right, to have the abatement set aside. The High Court has no discretion in the matter. When succession to the estate of a deceased person is in doubt, a person litigating with the deceased should take every step to bring his representatives on record. (*Sharfuddin and Coxe*, JJ.) GOPAL LAL *v.* KERANI GOPAL. 28 I.C. 803.

———O. 22, Rr. 9 and 3—*Act XXVI of 1920 — Sufficient cause — Abatement setting aside of.*

C. P. CODE (V of 1908), O. 22, R. 9.

Where the appellant had reason to suppose that the enactment of Act XXVI of 1920 would not affect the period of limitation for an application to implead the legal representative of a respondent who had died before the Act came into force, the abatement was set aside. (*Martineau and Campbell*, JJ.) NIAZ AHMAD KHAN *v.* ABDUL LATIF. 1923 Lah. 475.

———O. 22, R. 9—*Paying expenses of appeal will not make a person a party—Death of appellant—Legal representative not trought on record—Abatement.*

An appeal was filed by one D, the real defendant-appellant through one B. During the pendency of the appeal D died but his representative was not brought on record. One M, a trustee of D's estate, paid all the necessary expenses of the appeal but was not brought on record as the legal representative of D. On the question of abatement it was contended that no question of abatement arose. *Held*, the defraying the costs of the litigation out of the trust fund, will not necessarily make him or the estate, a party, and the appeal had abated. (*Broadway and Zafar Ali*, JJ.) DAULAT RAI *v.* LILA RAM. 1923 Lah. 470.

———O. 22, R. 9—*Abatement—Application for legal representative—Order an, is appealable.*

Where a party to a suit dies and more than 3 months after an application is made to bring on record his legal representative, the application is one under O. 22, R. 9 (2) and the order thereon is appealable under O. 43, R. 1 (*k*). (*Moti Sagar*, J.) BADLU *v.* MT. NARAINI. 74 I.C. 17=1924 Lah. 424.

———R. 22, O. 9—*Ignorance of death of party is not an excuse.*

Mere ignorance of the fact of death is not a sufficient excuse under O. 22, R. 9. (*Broadway and Abdul Qadir*, JJ.) CHUNI LAL *v.* KALA KHAN. 4 Lah. L.J. 171=67 I.C. 596=1922 Lah. 61.

———O. 22, R. 9—*Sufficient cause*—Bona fide *mistake.*

Where owing to the mistake of the Court below in not entering the names of the legal representatives of a deceased deft. who had been added as such, the plff. filed an appeal with the name of the deft. on record though deceased, and the mistake was discovered nine months later. *Held*, that O. 22, C.P.C. was not applicable under these circumstances. If they did apply the mistake being a *bona fide* one there would be sufficient ground for extension of limitation period. (*Wilberforce*, J.) KARTAR SINGH *v.* RALLA. 67 I.C. 306=2 Lah. L.J. 44.

———O. 22, R. 9—*Order under—When can be made.*

An order under O. 22, R. 9 of the C.P. Code can only be passed in cases in which abatement takes place by reason of an application not having been made within the time permitted by law to implead the legal representative of a

C. P. CODE (V of 1908), O. 22, R. 9.

deceased plff. The rule has no applicability to cases in which the suit has abated on account of some other cause. (*Broadway and Dundas*, JJ.) RAM SARUP *v.* MOTI RAM.
1 Lah. 493=57 I.C. 187=2 Lah. L.J. 788.

———**O. 22, R. 9**—*Mistake of law.*

An appellant died leaving sons, daughters and a widow. The sons applied to have their names brought on the record as legal representatives and at the hearing it was urged that the appeal had abated inasmuch as the names of the daughters and widow who were also heirs under Muhammadan Law had not been brought on the record. *Held*, that as the parties were governed by customary law, the appellants were justified in believing that they alone were the sole heirs and legal representatives of the deceased and the appeal did not abate. (*Scott-Smith and Abdul Raoof*, JJ.) ABDUL RAHMAN *v.* SHAHA BUDDIN. **55 I.C. 883=1 Lah. 481.**

———**O. 22, R. 9**—*Sufficient cause.*

The legal representative of a deceased party may be added after time, if it appears that the Court had made an order allowing the parties on record to represent all the persons interested under O. 1, R. 8, C.P. Code. (*Shadi Lal and Wilberforce*, JJ.) BHARI *v.* KHANUN.
50 I.C. 422=20 P.R. 1919.

———**O. 22, R. 9**—*Abatement—Effect of.*

When the several defts. had distinct interest in the suit and during the pendency of an appeal, one of the co-defts. having a separate share in the ancestral property in dispute died and no application for the substitution of the name of his legal representative was made until after 6 months and 9 days, the appeal does not abate in respect of the shares of the other defts. 21 I.C. 951; 6 I.C. 721, Ref.; 32 I.C. 829; 18 I.C. 182, Dist. (*Johnstone*, C.J. *and Le-Rossignol*, J.) ZAINABE BIBI *v.* ROHILA. **39 I.C. 277=23 P.R. 1917.**

———**O. 22, Rr. 9 and 4**—*Ignorance of law—Extension of time—Sufficient cause.*

The appellant must prove to get extension of time for bringing the representative of the deceased respondents on record, that he was not aware of death in time. Mere ignorance of law of limitation is no excuse. (*Shadilal and Jones*, JJ.) INANT *v.* GANGA. **3 P.R. 1916=32 I.C. 829=260 P.W.R. 1915.**

———**O. 22, R. 9**—*Death of one of defendants—Legal representative not made party in time—Abatement—When can be set aside.*

Where a deceased defendant was an essential party to suit and the plaintiffs did not take steps to implead his legal representatives on the earliest possible date after the trial Court was again seized of the case on return of the record from the appellate Court, the suit fails, there being no sufficient cause for the delay. (*Le-Rossignol*, J.) GURUMUKH SINGH *v.* KANSHIRAM. **253 P.W.R. 1915=27 I.C. 661=58 P.L.R. 1915.**

C. P. CODE (V of 1908), O. 22, R. 9.

———**O. 22, R. 9**—*Sufficient cause—Slip on the part of Vakil.*

Delay in applying to bring the legal representative on record, caused by a slip on the part of the party's Vakil should be excused if the party himself is not at fault. (*Wallis*, C.J. *and Oldfield*, J.) VAITHYANATHA AIYAR *v.* GOVINDASAMI ODAYAR. **13 L.W. 522=41 M.L.J. 65=62 I.C. 793=(1921) M.W.N. 388.**

———**O. 22, R. 9**—*Order of abatement—Effect of.*

An order of abatement is a judgment and should be followed up by a decree and is appealable as such. If the legal representative of the deceased plff. does not seek to set aside the abatement, the order of abatement is conclusive of the deft.'s rights to the property. 45 Cal. 94; 30 M.L.T. 486. Foll.; 6 Bom. L.R. 638, Dist. (*Seshagiri Aiyar and Moore*, JJ.) RAHIM-UN-NISSA BEGAM *v.* SRINIVASA AIYANGAR. **38 M.L.T. 266=54 I.C. 565=11 L.W. 139.**

———**O. 22, R. 9**—*Sufficient cause—Administrator-General's Act, Ss. 17 and 18.*

Quarrel among legal representatives is no sufficient cause to excuse delay in applying to be brought on record as legal representative under O. 22, R. 9. An Administrator-General who is allowed to take possession of assets of a deceased could not sue to set aside an order of abatement by pleading that the other legal representatives were quarrelling among themselves. (*Sadasiva Aiyar and Napier*, JJ.) KYROON BEE *v.* ADMINISTRATOR-GENERAL OF MADRAS. **31 I.C. 38=2 L.W. 948.**

———**O. 22, R. 9**—*Sufficient cause.*

Where the delay in bringing on record the legal representatives was due to the fact that the legal representatives were minor's who would not have obtained execution without obtaining a succession certificate under Act VII of 1889, and this succession certificate was obtained after the expiry of time fixed for addition of legal representatives. *Held* there is sufficient reason to excuse the delay within the meaning of S. 5 of the Indian Limitation Act, read with O. 22, R. 9, Code of Civil Procedure. (*Kanhaiya Lal*, J.C.) SYED AKHTAR HUSAIN *v.* QUDRAT ALI.
9 O. & A.L.R. 267=73 I.C. 215=26 O.C. 244=1924 Oudh 83.

———**O. 22, R. 9**—*Ignorance of death.*

Where during the pendency of an appeal, the respondent dies and his legal representative is not brought on record within the period of limitation and in consequsnce the appeal abates, the appellant cannot in support of his application to set aside the abatement, plead ignorance of the fact of the death of the respondent. An appellant is bound to be vigilant and must ascertain whether his adversary is dead or alive. (*Lindsay*, J.) MAHAMAD ASKARI *v.* LALU. **45 I.C. 594=21 O.C. 68.**

C. P. CODE (V of 1908), O. 22, R. 9.

——O. 22, R. 9—*Ignorance of death—If a sufficient cause.*

An order as to abatement of an appeal cannot be set aside merely on the statement that owing to his ignorance of the respondent's death, the appellant could not apply within time for bringing the legal representative of the respondent on to the record; especially where no reason was shown why he did not keep himself informed of the occurrence, 12 I.C. 871, Foll. (*Piggott*, J.C.) GOBIND PRASAD *v.* GANGA PRASAD. **24 I.C. 276.**

——O. 22, R. 9—*Death of defendant—Abatement—Order for restitution—Limitation—Art. 177 of Limitation Act.*

Where a suit abates on account of the death of the sole defendant in the suit the abatement must be set aside under O. 22, R. 9, C.P. Code, before a substitution of parties could be made. The period of limitation is that prescribed by Art. 177 of the Limitation Act. (*Coutts and Das*, JJ.) MT. BIBEE KHOZAIMA *v.* THE OFFICIAL LIQUIDATOR OF THE KAYESTHA TRADING AND BANKING CORPORATION. **2 P. 168=1923 P. 417.**

——O. 22, R. 9 (2)—*Application under—Formal order of abatement—Necessity for.*

O. 22, R. 9 (2), C.P. Code, contemplates that a formal order declaring that a suit or appeal has abated should be made before an application under the rule is made. 36 A. 235, foll.; 42 A. 540, not foll. (*Ryves and Gokul Prasad*, JJ.) MUSSAMMAT GUJRATI *v.* SITAI MISSER. **44 All. 459=66 I.C. 554=1922 All. 209.**

——O. 22, R. 9 (2)—*Death of party—Legal representative on record — Abatement—Substitution.*

The mere fact that the representative of a deceased person happens to be already a party on the record in his own right does not dispense with an application for setting aside the abatement and substitution. (*Woodroffe and Mullick*, JJ.) ROMESH CHANDRA DAS *v.* ANTHONY PENHEIRO. **29 I.C. 470.**

——O. 22, R. 9 (2)—*Ignorance of death—Sufficient cause.*

An appellant applied to bring on record the legal representatives of a deceased respondent more than 6 months after his death. He was not aware of the fact of the death of the respondent till he was informed by his pleader that the notice for service on the respondent has been returned unserved as he was dead. *Held*, that there was sufficient reason for excusing the delay. (*Shadi Lal and Martineau*, JJ.) ARUR SINGH *v.* TODAR MAL. **49 I.C. 601=22 P.W.R. 1919.**

——O. 22, R. 9, Cl. (2)—*Ignorance of death—Sufficient cause.*

Delay in bringing the legal representative of a deceased respondent can be excused where it is shown that the appellant was a resident of another district and was ignorant of the death of the respondent. (*Shah Din and Scott Smith*, JJ.) ALLAH YAR *v.* THAKAR DAS. **46 P.W.R. 1918=44 I.C. 9=24 P.L.R. 1918.**

C. P. CODE (V of 1908), O. 22, R. 10.

——O. 22, R. 9 (2)—*Ignorance of death—Application to set aside—Sufficient cause—Lim. Act, Art.* 171.

An application to substitute names made after a year after the death of one of the parties alleging ignorance of the fact of the death by murder was not granted as the applicant had failed to show sufficient cause for delay in applying, since he lived within 15 *Kos* of the deceased's village. (*Johnstone*, C. J. *and Chevis*, J.) THAKUR *v.* NARAIN SINGH. **31 I.C. 697=12 P.W.R. 1916.**

——O. 22, R. 9 (2)—*Neglect of appellant.*

Appellant's carelessness and the culpable means adopted by him to conceal it, is sufficient to reject his application to set aside an order of abatement. (*Kensington*, C.J. *and Rattigan*, J.) MUHAMMAD SUBHAN BAKHSH *v.* ABDUL RAHMAN KHAN. **81 P.W.R. 1915=30 I.C. 717=155 P.L.R. 1915.**

——O. 22, R. 9 (2)—*Ignorance of law.*

Ignorance of the law is no ground for excusing the delay in seeking to set aside the abatement. 81 P.R. 1886, Expl. and Dist. (*Kensington and Chevis*, JJ.) KARAM CHAND *v.* LEHNA. **204 P.L.R. 1912=15 I.C. 708=257 P.W.R. 1912.**

——O. 22, R. 9, Cl. (2)—*Cause of action not surviving.*

O. 22, R. 9, Cl. (2) is restricted to cases of failure to apply "within the time limited by law" for bringing in the legal representative; hence where an abatement takes place owing to the cause of action not surviving, the legal representative cannot have it set aside under O. 22, R. 9, Cl. (2). (*Sadasiva Aiyar and Napier*, JJ.) SUBRAMANIA AIYAR *v.* VENKATARAMIER. **31 I.C. 4.**

——O. 22, R. 9, Cl. (2)—Ex parte *order—Setting aside abatement—Not to be re-opened.*

An order setting aside abatement by a Division Bench cannot be re-opened at a subsequent stage of the case by a different Bench even though the order was made *ex parte*. The proper remedy is by a review. (*Ayling and Tyabji*, JJ.) MURUGA CHETTY *v.* RAJASWAMI. **29 M.L.J. 574=18 M.L.T. 327=2 L.W. 813=30 I.C. 669=(1915) M.W.N. 701.**

——O. 22, R. 10 and S. 47—*Tenancy created* pendente lite—*Joinder of tenant—Bad.*

In execution of a decree for possession and mesne profits, there was an enquiry made as to mesne profits. During the pendency of the suit the defendant had leased the property, but he had surrendered the lease as soon as he came to know of the decree. On the question arising if he could be made party in the execution application and made liable for mesne profits.

C. P. CODE (V of 1908), O. 22, R. 10.

Held, there was no devolution of interest within the meaning of O. 22, R. 10, C.P. Code, nor would question of his liability fall under S. 47, C.P. Code. Injustice arising by adding him as party and general principles referred to, (*Lord Phillimore.*) MAHA RAJA SIR MANINDRA CHANDRA NANDI *v.* RAM LAL BHAGAT.
43 M.L.J. 589=31 M.L.T. 131 (P.C.)=
27 C.W.N. 29=36 C.L.J. 542=
16 L.W. 905=4 U.P.L.R. (P.C.) 88=
20 A.L.J. 988=24 Bom. L.R. 1251=
49 I.A. 220=68 I.C. 973=1 P. 581=
4 P.L.T. 1=1922 P.C. 304 (P.C.)

——O. 22, R. 10—(1882, S. 372)—*Transfer after decree—Suit terminating in decree.*

There is considerable doubt as to whether S. 372 of the C. P. Code, 1882, authorises the addition of a party to the suit after decree. 10 All. 97, Ref. (*Lord Parker*). RAGHUNATH DAS *v.* SUNDAR DAS KHETRI. 42 Cal. 72=
18 C.W.N. 1058=1 L.W. 567=
27 M.L.J. 180=16 M.L.T. 353=
(1914) M.W.N. 747=16 Bom. L.R. 814=
20 C.L.J. 555=13 A.L.J. 154=
24 I.C. 304=41 I.A. 251 (P.C.).

[On appeal from 15 I.C. 288.]

——O. 22, R. 10—*Preliminary decree—Suit pending after—Addition of party.*

Proceedings after a preliminary decree for sale or redemption till the final decree is passed, are proceedings in the suit, and the private purchaser of the property after such a decree acquires an interest which entitles him to be made a party to the suit. (*Chamier and Piggott*, JJ.) MUHAMMAD MASIH ULLAH KHAN *v.* JAROOBAI. 37 All. 226=27 I.C. 771=
13 A.L.J. 307.

——O. 22, R. 10—*Assignment pending suit—Rights of assignee — Interlocutory order—Appeal.*

The plaintiff in an administration suit assigned his interest to the applicant but continued the suit in his own name. The trial Court refused to appoint a Receiver of the property and the plaintiff appealed to the High Court. Pending the appeal, the plaintiff died and the assignee applied to the trial Court to continue the suit but did not apply in the High Court to continue the appeal whereupon the appeal abated. *Held*, that the trial Court had jurisdiction to entertain the application for bringing on record the assignee. Where the High Court sends for the records in an appeal from an interlocutory order the suit is still pending on the file of the trial Court and it has jurisdiction to bring on record the legal representative, of a deceased plaintiff. (*Macleod*, C.J. *and Crump*, J.) BHOGILAL KIRPASHANKER *v.* DARASHA KOOVERJI. 25 Bom. L.R. 308=
75 I.C. 743=1923 Bom. 302.

——O. 22, R. 10 and O. 23, R. 1—*Compromise of suit—Decree not passed—Application by purchaser to be added as a party may be allowed in the discretion of the Court.*

C. P. CODE (V of 1908), O. 22, R. 10.

Where a suit is alleged to have been compromised and a document embodying the compromise has been field in Court, the suit does not cease to be pending until the passing of a decree. Consequently it is open to a person alleging himself to be the purchaser of the property before the compromise is entitled to apply under O. 22, R. 10, C.P. Code, to be added as a party to the suit. An applicant who invokes the aid of O. 22, R. 10 is not entitled as a matter of right to an order in his favour regardless of delay or laches. The Court undoubtedly has a discretion in the matter which must be judicially exercised. Where the result of dismissing the application would be to start a fresh suit between the transferee and the assignor impeaching the compromise as not *bona fide*, the enquiry might be made in the suit itself after the transferee is made a party. 32 C. 483; 13 C.L.J. 487; 43 M. 37; 37 A. 326, Ref. (*Mookerjee and Rankin*, JJ.) LAKSHAN CHUNDER DEY *v.* NIKUNJAMANI DASSI.
27 C.W.N. 755=1924 Cal. 188.

——O. 22, R. 10—*Limitation for impleading assignee.*

In the case of the death of a party after his interest has devolved on another, there is no question of bringing on record the legal representative within the period of 90 days prescribed by law, and even in a case where the devolution took place while the suit was pending in the trial Court, an application under O. 22, R. 10, C.P. Code, can be made in the appellate Court. (*Chatterjee and Pearson*, JJ.) RAJANI KANTA ROY *v.* RAJA JYOTI PRASAD.
27 C.W.N. 710=75 I.C. 255=1924 Cal. 90.

——O. 22, R. 10—*Revision—Dispute as to the factum of assignment—Court's power to decide—C.P.C., S. 115.*

If a person applies to be substituted or added under O. 22, R. 10 of the C.P. Code on the ground of assignment during the pendency of suit and it is disputed, the Court has power to decide that dispute. O. 22, R. 10 of the C.P. Code is not confined to cases of admitted assignment, creation or devolution of interest. An improper exercise of discretion by the lower Court is not a ground for revision by the High Court. (*N.R. Chatterjee and Newbould*, JJ.) ENDAY ALI HOWLADAR *v.* BINODINI DUTTA. 51 I.C. 233=
29 C.L.J. 362.

——O. 22, R. 10 and O. 43, R. 1, Cl. (1)—*Appeal—Suit by Hindu widow—Adoption pending suit—Widow allowed to prosecute suit though divested, on strength of ante-adoption agreement.*

When during the pendency of a suit brought by a Hindu widow she adopted and the adopted son stepped into her rights; the Court held that the plff. was entitled to prosecute the suit under an ante-adoption agreement with the natural father of the adopted son. *Held*, the order is not one under R. 10 of O. 22 of the C.P. Code and is not appealable under

C. P. CODE (V of 1908), O. 22, R. 10.

O. 43, R. 1, Cl. (1). (*D. Chatterjee and Beachcroft, JJ.*) PROMOTHA NATH ROY *v.* DINAMONI CHOWDHRANI. **32 I C. 888 = 20 C.W.N. 582.**

——O. 22, R. 10—*Defendant's transferee.*

A person can continue a suit as a defendant under O. 22, R. 10 which is not restricted to plaintiff and their representatives only. 22 All. 380, Ref. An admission by a defendant of a transfer of the property in suit is sufficient to entitle the transferee to be made a party under O. 22, R. 10, C.P.C., as well as under O 1, R. 10 (ii), C.P.C. (*Holmwood and Mullick, JJ.*) KRISTAKUMAR DAS *v.* GIRISH CHANDRA PODDAR. **27 I.C. 704.**

——O. 22, R. 10—*Devolution—Meaning of—Successor in interest—Rights of.*

In the event of a devolution of interest of the plaintiff *pendente lite*, the successor in interest of the plaintiff may come on record with the lease of the Court under O. 22, R. 10, but if he does not, the plaintiff may continue the suit, and the result will bind the successor. (*Mookerjee and Beachcroft, JJ.*) RAICHARAN MANDAL *v.* BISWANATH MANDAL. **26 I.C. 410 = 20 C.L.J. 107.**

——O. 22, R. 10—*Execution proceedings—Decree-holder — Assignment, derivatively — Application for substitution.*

An application for substitution by an assignee decree-holder is within O. 22, R. 10 of the Code even though the assignment was obtained not directly but only derivatively from a party to the suit. (*Chatterjee and Walmsley, JJ.*) PRASANNA KUMAR PANJA *v.* ASUTOSH ROY. **20 I C. 685 = 18 C W.N. 450.**

——O 22, R. 10—Ex parte *order—Substitution of party—Notice to parties interested.*

The absence of the words in S. 372, C.P.C., 1882, providing for service of notice in writing and hearing their objections in O. 22, R. 10 of the Code of 1908, does not justify the inference that an order for substitution may be made *ex parte* without notice and such an order made *ex parte* cannot be recalled even upon objection of parties interested. A judicial order which may possibly affect or prejudice any party cannot be finally made unless the party affected has had an opportunity of being heard. It is based on the plainest principles of justice. An order for substitution may be passed by consent of parties or after notice to all persons interested. It may be made *ex parte* but it can then be challenged by parties interested, such *ex parte* orders may be revoked at the instance of any party prejudiced thereby. No order for substitution should be made upon an application which is not supported by affidavit or is not verified. The position of the party substituted is exactly the same as that of the original person. (*Mookerjee and Beachcroft, JJ.*) AJANT SINGH *v.* SUNDAR MAL. **16 I.C. 567 = 17 C.W.N. 862.**

C. P. CODE (V of 1908), O. 22, R. 10.

——O. 22, R. 10—*Execution proceedings—Applicability to.*

Rule 10 of the O. 22 of the Civil Procedure Code, is by implication applicable to proceedings in execution. (*Casperss and Sharfuddin, JJ.*) MIDNAPORE ZEMINDARI CO., LTD *v.* KUMAR NARESH NARAIN. **39 Cal. 220 = 11 I C. 939 = 16 C.W.N. 109.**

—— O 22, Rr. 10 and 4—*Execution proceedings.*

S. 368 of the C.P.C. of 1882 does not apply to execution proceedings. (*Chevis, J.*) AMOLAK RAM *v.* SHANU RAM. **99 P W.R. 1911 = 10 I.C. 403 = 174 P.L R. 1911.**

——O. 22. R. 10—*Applicability of.*

O. 22, R. 10 applies only to cases which do not fall under the preceding rules of the same Order. (*Ayling and Venkatasubba Rao, JJ.*) DAKOJI SUBBARAYADU *v.* MUSTI RAMADASU. **43 M. 872 = 42 M.L.J. 301 = 15 M L.W. 309 = (1922) M.W.N. 375 = 68 I C. 942 = 30 M.L.T. 202 = 1923 Mad. 237 (1).**

——O. 22, R. 10—*Pendency of suit.*

Quære: Whether the expression the pendency of the suit in O. 22, R. 10, C.P. Code, covers the period between the original and an amended decree. (*Oldfield and Ramsam, JJ.*) NARAYANA AIYAR *v.* BIYARI BIVI. **43 M.L J. 559 = (1922) M.W.N. 731 = 16 L W. 623 = 69 I.C. 977 = 32 M.L T. 98 = 1923 Mad. 57.**

——O. 22, Rr. 10 and 3—*Public trust—Death of trustee—Subsequent trustees impleaded as parties—Defences open to.*

Where a public trust is represented at different stages of a suit by different representatives, one not claiming under the other, the rule applicable to the case is O. 22, R. 10 and not O. 22, R. 3 of the C.P. Code. In a case falling under O. 22, R. 10, the Court has wider discretion to allow amendment and new pleas at the instance of a representative than it has under O. 22, R. 3 on the application of a legal representative. (*Ayling and Krishnan, JJ.*) SUNDARESAN CHETTY *v.* VISVANATHA PANDARASANNADHI AVERGAL. **45 Mad. 703 = 43 M.L J. 147 = 16 L.W. 83 = 31 M L.T. 66 (H.C.) = 1922 M.W.N. 444 = 72 I.C. 103 = 1922 Mad. 402.**

——O. 22, R. 10—*Order under, is appealable.*

An order purporting to be passed under O. 22, R. 10 by a Court of First Instance is appealable though on the facts the order should not have been passed under the rule. (*Wallis, C.J., Spencer and Kumaraswami Sastri, JJ.*) MUTHIAH CHETTIAR *v.* GOVINDOSS KRISHNADOSS. **44 Mad. 919 = ((1921) M.W.N. 659 = 41 M.L.J. 316 = 68 I.C. 337 = 14 L.W. 287 (F.B).**

C. P. CODE (V of 1908), O. 22, R. 10.

———O. 22, R. 10 — *Compromise — Assignment* pendente lite—*Addition of a party.*

A transferee *pendente lite* added as a party to the suit is bound by all orders passed up to that date and cannot raise defences not open to the transferor. But when once he is made a party, a subsequent compromise between the transferor and the opposite party is not binding on him against his will. (*Oldfield, Seshagiri Aiyar and Kumaraswami Sastri, JJ.*) POLICHERLA VEERARAGHAVA REDDI *v.* CHERLA SUBBA REDDI. 43 Mad. 37=37 M.L J. 449= 26 M.L.T. 339=10 L.W. 281= 53 I.C. 428=(1919) M.W.N. 699

———O 22, R. 10—*Applicability — Devolution of interest—Plaint returned for proper presentation—Effect.*

Where a plaint is returned for presentation to the proper Court, any devolution of interest which took place while the proceedings were pending in the first Court must be taken to be a devolution in the course of the suit which was subsequently tried in the second Court (*Seshagiri Aiyar and Napier, JJ.*) S. V. SITARAMASWAMY *v.* NARASAMMA. 8 L.W. 21= 48 I.C. 840=41 M. 510.

———O. 22, R. 10—*Transfer after decree—Appeal.*

O. 22, R. 10, C. P. C., applies to cases of devolution of interest pending suit and not to cases of persons acquiring interest after decree for the purpose of preferring an appeal against a concluded decree; where merits are in favour of the appellant, the appeal however may be admitted under S. 146, C. P. C. (*Oldfield and Bakewell, JJ.*) SUBBA PILLAI *v.* RANGASAMI. 40 I.C. 846=(1917) M.W.N. 306.

———O. 22 Rr. 10 and 11—*Insolvency—Ss. 61 and 67 of the Provincial Insolvency Act.*

Quaere.—Whether an Official Receiver's successor on the resignation of his office can continue the proceedings without his name being brought on record. When the change of *personnel* was intimated to the Court which, notwithstanding proceeded to pronounce decision on the merits, the records must be deemed to have been amended by substitution of the new Receiver's name in place of one who resigned office. (*Sadasiva Aiyar, J.*) RAMRAMA AIYAR *v.* OFFICIAL RECEIVER, TINNEVELLY. 5 L.W. 507=40 I C. 170=32 M.L.J 520.

———O. 22, R. 10—*Other cases—Devolution—Pendency of a suit—O. 22, R. 4—Survival of right to sue.*

The devolution spoken of in R. 10 of O. 22 is not confined to devolution in ways other than by death. The first four rules of O. 22 cannot apply to a case in which the death of the defendant occurs between the passing of preliminary and final decrees in a suit, as there is then no right to sue surviving. (*Hallifax, A.J.C.*) TULARAM *v.* TUKARAM. 64 I.C. 307=17 N.L.R. 81.

———O. 22, R. 10—*Adopted—Devolution* pendente lite—*Adoption by widow.*

C. P. CODE (V of 1908), O 22, R. 10.

An adoption is not the creation of an interest within O. 22, R. 10, C. P. C., but is the creation of a status. It does not operate as a devolution of interest or as an alienation. (*Batten, Prideaux and Mitra, A.J. Cs.*) GANPAT RAO *v.* LAXMI BAI. 43 I C. 64= 15 N.L.R. 24.

———O. 22, R. 10—*Devolution of interest—Gift by father to son—Suit for pre-emption—Right to continue the suit.*

Where a father a co-sharer in a village had filed a suit for pre-emption in respect of a sale made by another co-sharer and during the pendency of the suit executed a deed of gift of all his properties in favour of his only son. *Held* that the son was entitled as donee to maintain the suit in the place of his father. (*Simpson and Wazir Hassan, A.J.Cs.*) MIRZASADIQ HUSAIN *v.* MAHOMED KARIM. 9 O.L J. 456= 70 I.C. 58=25 O C. 319=1922 Oudh. 289.

———O. 22, R. 10—*Assignment pending appeal.*

The rule does not apply to cases of assignment of interest which is the subject-matter of litigation between the date of decision of the first Court and the filing of appeal. (*Kendall and Daniels, A.J. Cs.*) NARAIN SINGH *v.* DEPUTY COMMISSIONER, PARTABGARH 38 I.C. 511=20 O.C 31.

———O. 22, R. 10—*Delay—Interest—Addition of party—Discretion.*

The 'interest' contemplated in O. 22, R. 10 is any interest which will be vitally affected by the suit. The addition of a party, however, to a suit under that rule is a matter within the discretion of the Court. Deliberate delay in applying for the addition of a party, will be a ground for rejecting the application. (*Roe and Imam, JJ.*) HARIHAR PRASAD *v.* GENDI LAL. 43 I. C. 811.

———O. 22, R. 10—*Defendant's transferee—"Interest"—Meaning—Leases granted by defendant during pendency of suit.*

Plff. obtained decree for possession and mesne profits, and deft. during pendency of suit granted leases to different persons. *Held*, the lessees could be made parties to proceedings for ascertainment of mesne profits and compelled to account for profits. 39 Cal. 220, Ref. (*Chamier, C. J. and Sharfuddin, J.*) RAMKUMAR LAL *v.* MUKUND SAHI. 1 P.L J. 596=38 I.C. 237.= 2 P.L.W. 424=1917 Pat 34.

———O. 22, R. 10—*Trespasser—Suit by—Real owner.*

A suit for recovery of money due to an estate instituted by a trespasser cannot be continued by the real owner of the estate, the former cannot be said to be suing on behalf of the person who might be found to be entitled to the estate. (*Chamier, J. and Sharfuddin, J.*) KESHO PRASAD SINGH *v.* LAL BRIJMOHAN LAL. 1 P. L. W. 355=36 I.C. 184= 2 P.L.J. 199.

C. P. CODE (V of 1908), O. 22, R. 10.

———O. 22, R. 10—*Mesne profits—Assignees of right to recover mesne profits—Continuance of suit.*

The assignees of a right to recover mesne profits given by a decree in a suit ought to apply for continuance of the suit under O. 22, R. 10, C.P.C. Failure so to apply will not, however, under particular circumstances, take away the right of the assignees to continue the suit. (*Chamier*, C. J. *and Kingsford*, J.) HARI PRASAD MISSER *v.* KODO MARYA.
1 P.L.J. 427=37 I.C. 998=3 P.L.W. 392.

———O. 22, R. 10—*Insolvency—Pendency of suit against insolvent.*

The insolvency of the defendant in a money suit does not affect the devolution of any interest on the Official Receiver within O. 22, R. 10, C.P.C. (*Hayward*, A. J. C.). JITHA LAL KALIANJI *v.* GANGARAM NAOOMAL.
29 I.C. 30=8 S L R. 325.

———O. 22, R. 11.
See also O. 22, R. 4—APPEAL.

———O. 22, R. 11—*Revision proceedings*

The principle recognised in O. 22, R. 11 applies not only to suits but to revision proceedings as well. A rule issued at the instance of a party who is dead at the time is a nullity. (*Mookerjee and Beachcroft*, JJ.) ANANDAMOYI DASI *v.* RUDRA MAHANTA. 21 I.C. 407=18 C.L.J. 141.

———O. 22, R. 11—"*Right to sue*"—*Meaning.*

"The right to sue" means the right to prosecute by law or to obtain relief by means of legal procedure. (*Tyabji and Spencer*, JJ.) CHETTIKULAM PRASSANNA VENKATACHALA REDDIAR *v.* COLLECTOR OF TRICHINOPOLY.
33 I.C. 46=38 M. 1064.

———O. 22, R. 12—*Joint decree—Death of one decree-holder—Legal representative not brought on record—Effect.*

Where in an appeal against a joint decree in favour of many persons, one of them dies and his legal representatives are not brought on record, the appeal abates as against all of them. (*Daniels*, J.) GAJRAJ TEWARI *v.* BHAGIRATH PANDE. 74 I.C. 14=1924 All. 95.

———O 22, R. 12—*Mortgage decree—Sale on non-payment in time—Death—If heirs to be impleaded.*

Where under a mortgage decree the property is to be sold if money is not paid in a certain time, it is not necessary that the heirs of a deceased party should be impleaded before the right of sale is exercised. (*C. C. Ghose and Panton*, JJ.) HEMENDRA LAL SINGH DEO *v.* FAKIR CHANDRA DATTA. 50 Cal. 650=74 I.C. 929=27 C.W.N. 521=1923 Cal. 626.

———O 22, R 12—*Applicability—Execution proceedings—Appeal.*

The provisions of O. 22 relating to the abatement of suits and appeals do not apply to execution proceedings or to appeals from orders made in such proceedings. (*Campbell*, J.) MIR KHAN *v.* SHARFU. 5 Lah. L.J. 163=74 I.C. 377=1923 Lah. 360.

C. P. CODE (V of 1908), O. 23, R. 1—Appellate Court.

———O. 22, R. 12—*Execution of decree—Death of party—Legal representatives not brought on record—Appellant one of legal representative—Right to object.*

Where the party on record is the legal representative of a deceased judgment-debtor and admits, he is in possession of a portion of the estate of the deceased, he cannot object to the execution on the ground that legal representatives have not been brought on record. His liability will extend only to the assets of the deceased in his lands. (*Ayling and Tyabji*, JJ.) MAHOMED NAINA MARKOYA *v.* SHEIK MARKOYA. 28 I.C. 925.

———O. 23 and O. 21, r. 2—*Legality of compromise—Application for enquiry into—Adjournment of summons.*

No jurisdiction is conferred on the Court by the mere fact that either an enquiry into the terms of the contract was applied for by the creditor, or the summons for evidence of the alleged compromise was adjourned by the Court. (*White*, C.J. *and Oldfield*, J.) LODD GOVIND DOSS *v.* RAMDOSS VISHNUDOSS.
(1912) M.W.N. 1265=17 I.C. 752=24 M.L.J. 88.

———O. 23, R. 1.
APPELLATE COURT.
ARBITRATION.
BAR OF FRESH SUIT.
CO-PLAINTIFF.
DISSOLUTION OF PARTNERSHIP.
EFFECT OF ORDER.
EXECUTION PROCEEDINGS.
FINALITY OF ORDER.
FORM OF ORDER.
FORMAL DEFECT.
GROUNDS FOR.
LATE STAGE.
LEAVE TO WITHDRAW.
MINOR.
MORTAGE SUIT.
ORDER AS TO COSTS.
PARTITION SUIT.
PLEADER'S AUTHORITY.
PROBATE PROCEEDINGS.
PUBLIC TRUST.
RELIEFS.
REVISION.
SEVERAL DEFENDANTS.
WITHDRAWAL WITHOUT LEAVE.

Appellate Court.

———O. 23, R. 1—*Appellate Court can allow withdrawal.*

A Court of appeal has power to grant permission to withdraw a suit with liberty to file a fresh suit. (*Ryves*, J.) TEWARI GAJRAJ SINGH *v.* SRI THAKURJI MAHARAJ.
74 I.C. 894=1924 All. 260.

C. P. CODE (V of 1908), O. 23, R. 1—Appellate Court.

———**O. 23, R. 1**—*Appellate Court—Power of.*

In proper cases High Court on appeal can take action under O. 23, R. 1 multifariousness is a defect of a formal nature. (*Piggott and Walsh, JJ.*) AFZAR SHAH *v.* G. LACHMI NARAIN. **40 All. 7=42 I.C. 866= 15 A.L.J. 809.**

———**O. 23, R. 1 (2)**—*Appellate Court—Grant of leave.*

An Appellate Court has power, to give plaintiff permission to withdraw his suit with liberty to bring a fresh one. 8 All. 82, foll.; 27 M.L.J. 244 and 35 Bom. 261, Not. foll. (*Chamier and Piggott, JJ.*). AFZAL BEGAM *v.* AKHARI KHANAM. **37 All. 326= 28 I.C. 857=13 A.L.J. 444.**

———**O. 23, R. 1**—*Appellate Court—Leave to withdraw suit.*

An Appellate Court can grant leave to the plaintiff to withdraw his suit with liberty to sue again in respect of the same subject-matter. 35 Bom. 261, Dist.; 22 Bom. L.R. 774 Foll. (*Shah and Crump, JJ.*) SHEIKH HASAN GHULAM MOHIDIN *v.* MAHOMAD ALI SHEIKH MAHOMED. **22 Bom. L.R. 1183= 59 I.C. 210=45 B. 206.**

———**O. 23, R. 1**—*Appellate Court—Leave to withdraw—Grant of.*

An Appellate Court can allow a plaintiff appealing against an order dismissing his suit to withdraw his suit with liberty to bring a fresh suit. (*Macleod, C.J. and Heaton, J.*) CHHANUBHAI MANSUKH *v.* DHAYA BHAI GOVIND. **44 Bom. 598=67 I.C. 530= 22 Bom. L R. 774.**

———**O. 23, R. 1 and O. 41, R. 11**—*Appellate Court—Grant of leave.*

The Appellate Court cannot allow a withdrawal of a suit with leave to file a fresh suit on the same cause of action after the deft. has obtained a decree in his favour. (*Scott, C. J. and Batchelor, J.*) EKANATH RONOJI *v.* RANOJI BIVAJI. **35 Bom. 261=10 I.C. 813= 13 Bom. L.R. 237.**

———**O. 23, R. 1**—*Appellate Court—Powers of.*

To give an appellate Court jurisdiction to act under O. 23, R. 1, cl. (2) there must be either some formal defect or something in the nature of a formal defect *ejusdem generis* under subclause (*b*). Otherwise the Court has no jurisdiction to act under the order. (*Greaves, J.*) UDOY CHAND *v.* MULLA REASAT HOSSAIN. **70 I.C. 484=1922 Cal. 58.**

———**O. 23, R. 1**—*Appellate Court—Grant of leave.*

The statement in a judgment concerning a point not raised before the Court, but which will have the effect of prejudicing the right of the plffs. to bring a fresh suit, ought not to be allowed to stand. A plff. should not be allowed to withdraw a suit with liberty to bring a fresh

C. P. CODE (V of 1908), O. 23, R. 1—Appellate Court.

suit after an appeal has been filed against the appellate decree. (*Fletcher and Huda, JJ.*) AMBIKA CHARAN CHAKRAVARTY *v* SARAT CHANDRA BASU. **45 I.C. 913.**

———**O. 23, R. 1**—*Appellate Court—Appeal by some defendants only—Withdrawal of suit against them in appeal leaving intact decree against non-appealing defendants should not be allowed—Effect—Ryotwari tracts—Irrigation disputes—Decree against Government—Ryots when aggrieved by—Appeal from decree against Government—Their right of.*

O. 23, R. 1, C. P. C., which gives a plaintiff the right to withdraw his suit and abandon part of his claim is inapplicable to the case of a plaintiff-respondent. Assuming that the appellate Court can in the exercise of its discretion, allow a plaintiff-respondent to withdraw his suit as against the defendant-appellant, it will not be a sound exercise of such discretion to allow the withdrawal in a case in which some of the defendants only have appealed, and they will be aggrieved by the decree of the Court below being allowed to stand as against the other defendants who have not appealed.

Ryots in ryotwari tracts whose lands are irrigated by a Government tank are prejudicially affected by a decree against the Government affecting the water-supply to that tank can appeal against the same though the Government does not choose to appeal against it. (*Ayling and Odgers, JJ.*) DHARMA RAJA *v.* PETHU RAJA. **45 M.L.J. 212=18 L.W. 243= (1923) M.W.N. 677=46 Mad. 811= 74 I.C. 4=1923 Mad. 79.**

———**O. 23, R. 1**—*Appellate Court—Powers of.*

An appellate court can, in a proper case, when reversing the lower Court's decree, give the plff. leave to withdraw the suit with liberty to file a fresh suit. In such a case where the appellate Court allows the appeal to be withdrawn with liberty to file fresh suit, the lower Court's decree is wiped out and the subsequent suit is not barred as *res judicata*. 27 M. L. J. 244; 35 Bom. 261, Dist. (*Wallis, C.J., Abdur Rahim and Srinivasa Aiyangar, JJ.*) BALIDE KAMAYYA *v.* PREGADDA PAPAYYA. **40 Mad. 259=21 M.L.T. 82= (1917) M.W.N. 217 and 246= 5 L.W. 588=37 I.C. 414= 32 M.L.J. 477 (F. B.).**

———**O. 23, R. 1**—*Appellate Court—Whether can permit withdrawal with liberty.*

O. 23, R. 1 implies that a suit has not yet been disposed of and an appellate Court cannot permit a plaintiff-appellant to withdraw his suit with liberty to bring a fresh suit. (*Oldfield and Napier, JJ.*) CHORUGUDI CHINNA KATAYYA *v.* VARADARAJA APPA ROW. **27 M.L.J. 244=16 M.L.T. 185= 28 I.C. 388=1 L.W. 613.**

[Overruled by F.B., in 37. I.C. 414= 40 Mad. 259.]

C. P. CODE (V of 1908), O. 23, R. 1—Appellate Court.

———O. 23, R. 1—*Appellate Court—Withdrawal of suit—Grounds for.*

Where it is apparent from the plaint and the proceedings in the lower Court that the plaintiff has no clear conception of his rights leave to withdraw with liberty to file a fresh suit will be granted. (*Sundara Aiyar and Sadasiva Aiyar*, JJ.) CHIDAMBARA MUDALI *v.* KOZHANDAVELU MUDALI. **17 I.C. 398 = (1912) M.W.N. 1003.**

———O. 23, R. 1—*Appellate Court—Withdrawal of suit—If can be permitted in appeal.*

An appellate Court ought not to allow a suit to be withdrawn with leave to bring a fresh suit, by a plaintiff who has been unsuccessful in the lower Court. (*Batten*, J.C.) SINGHAI *v.* KANHAI. **61 I.C. 584.**

———O. 23, R. 1—*Appellate Court—Right to withdraw suit in, is not an absolute right.*

An appellant is not entitled to withdraw his suit in the appeal Court under O. 23, R. 1 (1) as a matter of course. In other words a plaintiff-appellant has no absolute right to withdraw his suit in appeal. (*Dalal*, A.J.C.) SAIYED ASHIAQ HUSSAIN *v.* SAIYED BUNYAD HUSSAIN. **9 O. & A.L.R. 415 = 1923 Oudh 252.**

———O. 23, R. 1—*Appellate Court—Power, when exercised.*

A plaintiff-appellant is not, as a matter of right entitled to withdraw his suit in appeal as the effect of granting an application therefor would be to deprive the defendant of the benefit of the adjudication already made in his favour by the lower Court. 29 Bom. 13; 35 Bom. 261; 11 M. L. T. 390, Ref. (*Piggott* J.C. *and Lindsay*, A.J.C.) GHAZANFAR HUSSAIN *v.* RAM RATAN LAL. **20 I.C. 17.**

———O. 23, R. 1—*Appellate Court, whether can allow withdrawal of suit—Jurisdiction.*

Where evidence to meet the issues framed has been adduced by both parties and on these issues a decision has been arrived at and a decree has been passed, and that decree has been upheld on appeal, the High Court in Second Appeal has no power to allow withdrawal of the suit and to deprive the defendant of the advantage he has gained from the decision of the issues in his favour. (*Adami*, J.) DEBENDRA CHANDRA *v.* CHADHURI BANDHU. **61 I.C. 831 = 2 Pat. L.T. 891.**

———O. 23, R. 1—*Appellate Court—Power of.*

An appellate Court has no power under O. 23, R. 1 (2) of the Code to allow a suit to be withdrawn in appeal as distinguished from the appeal itself, with liberty to institute a fresh suit as that would be tantamount to setting aside the decree in the suit. (*Pratt*, J.C. *and Kemp*, A.J.C.) RASOOLBUX *v.* ALLAHBUX. **51 I.C. 879 = 13 S.L.R. 72.**

C. P. CODE (V of 1908), O. 23, R. 1—Bar of Fresh suit.

Arbitration.

———O. 23, R. 1—*Arbitration—Award—Withdrawal of suit.*

The Court has no jurisdiction to allow withdrawal of a suit with leave to file a fresh one when a valid award is made to it after reference. (*Kanhaiya Lal*, A. J. C.) ABDUL KARIM *v.* MUHAMMED HUSSAIN. **32 I.C. 347 = 2 O.L.J. 497.**

Bar of Fresh Suit.

———O. 23, R. 1—*Bar of fresh suit—Ejectment—Withdrawal without leave for fresh suit—Second suit after notice—Subject-matter.*

Plff. first brought a suit for the ejectments of defts. who claimed to be permanent tenants on the allegation that they were not such and that he was entitled to determine the tenancy. There being no sufficient notice to quit, he withdrew the suit without leave. Having then given a formal notice to quit, the plff. brought a second suit for ejectment. *Held*, that the suit was not barred. The term "subject-matter" in the rule meant the series of acts of transactions alleged to exist giving rise to the relief claimed and the suits were not in respect of the same subject-matter as in the first suit the series of acts was incomplete owing to want of notice while in the second suit the series of acts was complete because of the notice to quit. The same result followed if the term "subject-matter" is used in the sense of the bundle of facts which have to be proved in order to entitle the plff. to relief. The causes of action in both suits were not the same as in the first suit there was no cause of action for want of notice and in the second suit the giving of notice constituted a cause of action. (*Scott*, C.J. *and Batchelor*, J.) RAKHMA BAI *v.* MAHADEO. **42 Bom. 185 = 43 I.C. 752 = 20 Bom. L.R. 35.**

———O. 23, R. 1 (3)—*Bar of fresh suit—Subject-matter.*

In O. 23, R. 1 (3) strict construction must be put on the term same "subject-matter." A second suit on a cause of action and relief different from those in the first which was withdrawn without permission cannot be a suit on the same subject-matter. The plff. can in this suit contest allegations of the defence in the first suit. (*Wallis*, C.J., *Abdur Rahim, and Srinivasa Aiyengar*, JJ.) PANDILLPALLI SINGA REDDI *v.* YEDDULA SUBBA REDDI. **39 Mad. 987 = 31 M.L.J. 48 = 20 M.L.T. 62 = (1916) 2 M.W.N. 1 = 35 I.C. 185 = 4 L.W. 1.**

———O. 23, R. 1 (3)—*Bar of fresh suit—Suit by reversioner for declaration that alienation not binding—Fresh suit for possession.*

A prior suit by a reversioner for a declaration that an alienation by a widow was not binding upon him, will bar a second suit by him for possession on the same ground, if the former was withdrawn without obtaining permission to bring fresh suit under the Rule. (*Ayling and*

C. P. CODE (V of 1908), O. 23, R. 1—Bar of Fresh suit.

Tyabji, JJ.) SENNVA REDDIAR *v.* VENKATACHELLA REDDIAR. **28 I.C. 91=2 L.W. 177**
[But see 35 I.C. 185=32 Mad. 987.]

——O. 23, R. 1—*Bar of fresh suit—Legal representative of deceased defendant — Suit withdrawn with liberty to bring fresh suit.*

Where the legal representatives of a deceased deft. are not brought on record, within time and the suit as against that defendant abates and the plaintiff thereupon withdraws his suit with permission to bring a fresh suit, no fresh suit can lie against the legal representative of the deceased deft. not on record. (*Sadasiva Iyer and Spencer*, JJ.) GADE SHESHAMMA *v.* BULUSU VENKATA SURYA NARAYANA.
38 Mad. 643=14 M.L.J. 488=22 I.C. 260=(1914) M.W.N. 61.

——O. 23, R. 1 (3)—*Bar of fresh suit—Different cause of action—No bar.*

O. 23, R. 1 (3) does not bar a suit on a different cause of action. (*Miller and Abdur Rahim*, JJ.) SOMASUNDARA AVALAPPA NAICKER *v.* MURUGAPPA CHETTIYAR. **36 Mad. 325=12 M.L.T. 371=23 M.L.J. 638=18 I.C. 49=(1913) M.W.N. 86.**

——O. 23, R. 1 (3)—*Bar of fresh suit—Effect.*

The withdrawal of suit bars only the plff. and his privies from bringing a fresh suit but not a person who has purchased the plff.'s interest at a sale in execution under an attachment prior to the withdrawal. (*Chapman and Roe*, JJ.) SHIB NATH SINGH *v.* TIN KAURI. **1 Pat. L.W. 741=39 I.C. 276=1917 Pat. 141.**

Co-plaintiff.

——O. 23, R. 1—*Co-plaintiffs — Withdrawal of unnecessary plffs.—Effect.*

Withdrawal by unnecessary plffs. from a suit does not necessitate the dismissal of the suit. (*Hopkins*, S.M. PHAGOO KURMI *v.* DHARMARAJ. **2 U.P.L.R. (B.R.) 105=60 I.C. 592.**

——O. 23, R. 1—*Co-plaintiffs—Withdrawal of some plaintiffs—Legality.*

Where the Court allows some plaintiffs to withdraw with liberty to file a fresh suit without the consent of the others, the Court acts without jurisdiction and a fresh suit is barred. (*Jwala Prasad and Ross*, JJ.) MT. RAM DEI. *v.* MT. BAHU RANI. **1 P. 228=1922 P. 489.**

Dissolution of Partnership.

——O. 23, R. 1—*Dissolution of partnership and accounts—Amount due to one deft. ascertained and Court-fee paid thereon—Effect of withdrawal by plff.*

In a suit for dissolution of partnership and accounts the withdrawal of the suit by the plff. after the share due to a deft. has been ascertained and Court-fee paid thereon, does not prevent that deft.'s claim being tried. (*Sankaran*

C.P. CODE (V of 1908), O. 23, R. 1—Execution Proceedings.

Nair and Ayling, JJ.) TOMMINIDI ADAYYA *v.* CHILUKURI PENKATARAYUNDU
(1914) M.W.N. 185=23 I.C. 392=15 M.L.T. 245.

Effect of Order.

——O. 23, R. 1—*Effect of order—Granting leave—Fresh suit.*

When permission is granted to withdraw part of a claim with liberty to bring a fresh suit, O. 2, R. 2, C.P.C., is no bar to the suit. 17 All. 53, Foll. (*Chevis*, J.) BUTA *v.* BISHEN DAS.
37 P.L.R. 1911=9 I.C. 986=176 P.W.R. 1911.

——O. 23, R. 1—*Effect of order—Grant of leave.*

Allowing a suit to be withdrawn giving the plff. liberty to bring a fresh suit, places the plff. in the same position he would have been in, had he brought no suit at all. (*Chamier*, J.C.) PARBHU DAYAL *v.* MANDAN SINGH.
12 I.C. 323.

——O. 23, R. 1—*Effect of order—Presumption—Objection to other order.*

An order under O. 23, r. 1 (2) gives rise to a rebuttable presumption that the Court passing it was satisfied that conditions mentioned in either the sub-rule (*a*) or (*b*) were fulfilled. So while questioning the validity of such an order it must be proved that none of the conditions mentioned in cls. (*a*) or (*b*) were satisfied and the mere fact that the Court did not give reasons for its order will not be a sufficient ground for an objection to the order. (*Miller*, C.J., *Mullick and Jwala Prasad*, JJ.) RAJ KUMAR MAHTON *v.* RAM KHELAWAN SINGH.
3 P.L.T. 80 (F.B.)=1922 Pat. 17=64 I.C. 337 (2)=1922 P. 44.

Execution Proceedings.

——O. 23, R. 1 (3)—*Execution proceedings.*

R. 1 (3) of O. 23 has no application to execution proceedings. (*Sadasiva Iyer and Spencer*, JJ.) PALANIANDI PILLAI *v.* PAPATHI AMMAL.
15 M.L.T. 100=22 I.C. 76=(1914) M.W.N. 189.

——O. 23, R. 1—*Execution proceedings.*

O. 23, R. 1, does not apply. (*White*, C.J. *and Oldfield*, J.). GOVIND DOSS *v.* RAMDOSS KISHUNDOSS.
(1912) M.W.N. 1245=17 I.C. 752=24 M.L.J. 88.

——O. 23, R. 1—*Execution proceedings—Withdrawal of—Order of rejection—Appeal.*

O. 23, R. 1, C. P. Code, does not in terms apply to withdrawal and abandonment or execution proceedings but there is nothing to prevent a decree-holder from withdrawing his execution application. If the Courts persists in selling property of the judgment-debtor in spite of the prayer of the decree-holder not to proceed with execution it acts without jurisdiction. (*Jwala Prasad and Ross*, JJ.) CHAUDHURY RAM PRASAD RAI *v.* MAHESH KANT.
1 Pat. 232=3 Pat. L.T 445=65 I.C. 122=1922 P. 525.

C.P. CODE (V of 1908), O. 23, R. 1—Finality of order.

Finality of Order.

———O. 23, Rr. 1 and 2—*Finality of order—Withdrawal with liberty*—Res judicata.

An order granting withdrawal of a suit with liberty to bring a fresh suit although given for insufficient reasons becomes final and cannot be re-opened in a fresh suit on the merits, nor can it operate as *res judicata*. (*Karamat Hussain*, J.) CHHAJJU *v.* KHYALI RAM.
14 I.C. 175=9 A.L.J. 378.

——O. 23, R. 1—*Finality of order—Institution of subsequent suit.*

If the Court allows a suit to be withdrawn with permission to sue afresh, the Court trying the subsequent suit cannot enter into the question whether the order of the former Court was properly made. (*Chatterjee and Newbould*, JJ.) SAMADDI SHEIKH *v.* FULBASH BEWA.
66 I.C. 704=1923 Cal. 269 (1).

———O. 23, R. 1—*Finality of order—Subsequent suit.*

An order granting leave to withdraw a suit with leave to institute a fresh one under O. 23, R. 1, in circumstances beyond the scope of the rule is not without jurisdiction and is not null and void. A fresh suit instituted upon such leave granted is competent and the subsequent Court trying this suit cannot decide the question whether the order of the first Court was properly passed or not. (*Mookerjee*, A.C.J., *Fletcher*, *Chatterjee*, *Teunon and Chaudhuri*, JJ.) HRIDYANATH ROY *v.* RAMCHANDRA.
48 Cal. 138=31 C.L.J. 482=58 I.C. 806=24 C.W.N. 723 (F.B.).
[Overruling 33 I.C. 670=44 Cal. 367.]

———O. 23, R. 1 and S. 11—*Finality of order—Irregularity in order.*

An order under O. 23, R. 1, C. P. C., which is beyond the competency of the Court to pass, is not a nullity but an order passed in the irregular exercise of jurisdiction. Such an order does not operate as a *res judicata* so as to bar subsequent suit for the same relief. 44 Cal. 367, Diss.; 13 M.I.A. 160, Dist. Even if such an order is a nullity it cannot be treated as *res judicata* since the claim is undisposed of. (*Abdur Rahim and Srinivasa Iyengar*, JJ.) THULJRAM ROW *v.* GOPALA IYAR.
(1917) M.W.N. 234=21 M.L.T 229=40 I.C. 611=32 M.L.J. 434.

———O. 23, R. 1—*Finality of order—Effect of withdrawal.*

A party has a *locus penetentiæ* to prosecute his suit even after his withdrawal application, if not acted upon by the Court and the suit dismissed. *Contra* :—He cannot withdraw his petition of withdrawal except on good grounds; and cannot prosecute his suit till the petition is on record. (*Sundara Iyer and Sadasiva Iyer*, JJ.) MUKKAMMAL *v.* KALLIMUTHU PILLAY.
15 I.C. 882=(1912) M.W.N. 997.

——O. 23, R. 1—*Finality of order—Plea of* res judicata.

C. P. CODE (V of 1908), O. 23, R. 1—Form of order.

When plaintiff brings a fresh suit after withdrawal of the first with permission the defendant cannot plead *res judicata* in the subsequent suit. (*Kanhaiya Lal*, A.J.C.) MAUNOOLA *v.* KEDARNATH.
22 I.C. 918.

———O. 23, R. 1—*Finality of order—Not open to objection in a subsequent suit.*

If an order is passed with jurisdiction under O. 23, R. 1 (2), C.P.C., it is not void even though it is passed improperly and it is not open to an objection in a subsequent suit between the parties regarding the subject matter of the prior suit. (*Miller*, C.J., *Mullick and Jwala Prasad*, JJ.) RAJ KUMAR MAHTON *v.* RAM KHELWAN SINGH.
3 P.L.T. 80=64 I.C. 387=1922 Pat. 17=1922 P. 44 (F.B.).

———O. 23, R. 1—*Finality of order—No formal defect—Institution of fresh suit*—Res judicata—*Power of co-ordinate Courts.*

An Appellate COurt which passes an order allowing withdrawal of the suit and granting permission to the plff. to bring another suit on the same cause of action when there is no formal defect acts without jurisdiction and the order passed by it is not only illegal, but void and a nullity. A fresh suit on the cause of action is barred by the rule of *res judicata* the decision of the trial Court having become final between the parties. 20 C.W.N. 1000; (1918) 3 P.L.J. 404, foll. It is quite competent for any Court whether exercising higher, lower or co-ordinate jurisdiction to ignore an order passed by an appellate Court. In determining the question of *res judicata* it is entitled to consider the question of the competency of the Court which passed the previous decree or order. 31 C.L.J. 272, Foll. (*Coutts and Sultan Ahmad*, JJ.) RAMA SINGH *v.* JANAK SINGH.
1 P.L.T. 300=1920 Pat. 232=56 I.C. 697=2 U.P.L.R.(P.) 121.
[See Contra 58 I.C. 806=31 C.L.J. 482 (F.B.).]

———O. 23, R. 1—*Finality of order—Appellate Court—Improper grant of leave.*

An Appellate Court has no jurisdiction to dispose of a case properly constituted otherwise than on the merits. It cannot allow a withdrawal of the suit dismissed by the trial Court for want of evidence, on the ground that the necessary evidence has not been let in. A subsequent suit brought in pursuance of the withdrawal will be barred by the rule of *res judicata*. 12 W.R.P.C. 43; 24 Cal. 616 P.C. 21 All. 505 P.C., Ref. (*Chapman and Roe*, JJ.) SATIYABADI GOUNTIA *v.* BEDIADHA BARPANDE.
46 I.C. 392=3 P.L.J. 404.

Form of Order.

———O. 23, R. 1—*Form of order — Limitation of time.*

The Court has no power to impose the limitation of time for institution of the subsequent suit at the time of withdrawal of the first.

C. P. CODE (V of 1908), O. 23, R. 1—Form of order.

(*Macleod*, C.J. *and Heaton*, J.) RAMA CHANDRA KOLAJI PATIL *v.* HANMANTA LAXMAN KADASKAR. **22 Bom. L.R 939 = 38 I.C. 45 = 44 B. 939.**

———O. 23, R. 1—*Form of order—Permission need not be express.*

The permission mentioned in O. 23, R. 1, C.P.C., need not be express. It is sufficient if the grant of permission can be implied from the order, read with the application on which the order was passed. 3 P. R. 1905 and 97 P. R. 1916, Diss. The defts. cannot question the propriety of the order granting the permission which has become final, at the time of filing a fresh suit. (*Shadi Lal and Martineau*, JJ.) BANWARI LAL *v.* KISHEN DEVI.
67 I.C. 1002 = 2 Lah. L.J. 242.

———O. 23, R. 1—*Form of order—Permission for fresh suit—Must be express.*

A permission for fresh suit under O. 23, R. 1, must be express. 4 C.W.N. 110; 9 M.L.T. 468; 28 I.C. 91, Dist. (*Rattigan*, J.) JITA SINGH *v.* HARI SINGH. **37 I.C. 128 = 97 P.R. 1916.**

———O. 23, R. 1—*Form of order—Construction—Order permitting withdrawal without expressly granting sanction—Fresh suit.*

Where on a petition presented under O. 23, R. 1, C.P.C., for liberty to withdraw from the suit with permission to bring a fresh suit the Court passed the order "Plff. is permitted to withdraw from the suit." *Held*, that the order must be read with the petition and construed as granting it (*i. e.*), as granting permission to file a fresh suit. 35 Cal. 990, Appr. (*Wallis*, C.J., *Sadasiva Iyer and Kumaraswami Sastri*, JJ.) NARAYANA TANTRI *v.* NAGAPPA. **44 I.C. 889 = 34 M.L.J. 515.**

———O. 23, R. 1—*Form of order—Withdrawal of suit—Order of Court granting leave—Form of.*

The procedure under O. 23, R. 1, C. P. Code, is that the plaintiff withdraws his suit. The suit is not dismissed at all and the act is the act of the plaintiff, not of the Court. Where there was no application and no withdrawal and the suit was dismissed, the Court remarking that the plaintiffs might sue afresh if they chose. *Held*, that there was no grant of leave to withdraw the suit with liberty to sue afresh. (*Dalal and Simpson*, A.J.Cs.) FATEH SINGH *v.* JAGANNATH BAKHSH SINGH.
10 O.L.J. 132 = 74 I.C. 549 = 1923 Oudh 242.

———O. 23, R. 1—*Form of order.*

Where a plaintiff files a petition under O. 23, R. 1, praying for withdrawal of the suit with permission to bring a fresh suit on the same cause of action, the Court cannot refuse the permission and at the same time allow the case to be withdrawn; the proper order is to reject the petition and if the plaintiff does not adduce evidence then to dismiss the suit. An application to withdraw with permission to bring a fresh suit in no way means an application to withdraw if no such permission is granted. (*Adami*, J.) SUGGI LAL *v.* WALLIULLAH.
56 I.C. 756 = 1 P. L.T. 299.

———O. 23, R. 1—*Form of order—Application for withdrawal of suit with leave to bring a fresh suit—Procedure.*

If a plaintiff applies for a withdrawal of suit with permission to bring a fresh suit, the Court cannot divide the application into two parts allowing the suit to be withdrawn and refusing the permission to bring a fresh suit, but it can dismiss the application and hear the suit or dismiss it if the plaintiff does not desire to proceed. (*Coutts*, J.) SHAMANANDAN *v.* MULCHAND. **1 Pat. L.T. 291 = 56 I.C. 286 = 1921 Pat. 208.**

Formal Defect.

———O. 23, R. 1—*Formal defect—Allegation—Proof—Leave to withdraw—Revision.*

A Court ought not to grant leave to withdraw a suit with liberty to sue afresh on a mere allegation that there is a formal defect, without satisfying itself that it does exist as a matter of fact. An order granting leave to withdraw without sufficient or proper cause can be interfered with in revision. (*Richardson*, J.) SRIMATI KIRANMOY DASI *v.* RAMA NATH PAL.
64 I.C. 556.

———O. 23, R. 1—*Formal defect—Meaning of.*

Objections to jurisdiction and Court-fees are only formal defects. (*Oldfield and Sadasiva Aiyar*, JJ.) KANNUSAMI PILLAI *v.* JAGATHAMBAL. **41 Mad. 701 = (1918) M.W.N. 497 = 24 M.L.T. 46 = 8 L.W. 145 = 46 I.C. 265 = 35 M.L.J. 27.**
[On appeal from (1918) M.W.N. 106 = 43 I.C. 985 = 7 L.W. 131.

———O. 23, R. 1 (2)—*Formal defect—Sufficient ground.*

In a suit for possession of certain items of properties, one of the items (a house) was valued at Rs. 200 but on enquiry it was found to be worth more than Rs. 6,000. Plffs. applied for leave to withdraw their claim with respect to that item with liberty to file a fresh suit. *Held*, that the application must fail as the defect was not of a formal nature and there was no sufficient ground within O. 23, R. 1, Cl. (2), (1914) M.W.N. 832, Foll. (*Abdur Rahim*, J.) JAGATHAMBAL *v.* KANNUSWAMI PILLAI.
(1918) M.W.N. 106 = 43 I.C. 985 = 7 L.W. 131.

———O. 23, R. 1—*Formal defect—Nature of, to be specified.*

A plff. who has misunderstood his case is not entitled on that ground to be allowed to harass the opposite party again. He must specify the formal defect or the ground on which his application for withdrawal for leave to sue is based.

C. P. CODE (V of 1908), O. 23, R. 1—Formal defect.

and the Court must show by its order the fact which make the provisions as to withdrawal applicable. A mere general statement that there are formal defects is not sufficient. (*Stanyon*, A.J.C.) PUNDALIK *v.* CHANDRABHAN. 43 I.C. 346.

——— O. 23, R. 1 (2) (a) (b)—*Formal defect—Other sufficient grounds*—Ejusdem generis.

Leave to withdraw a suit with liberty to bring a fresh suit can only be given when the suit must fail by reason of some formal defect, or if there are other sufficient grounds for allowing the plff. to institute a fresh suit. The "sufficient grounds" contemplated in O. 23, R. 1 (2) of the C. P. Code (1908) should be grounds analogous to the grounds given in the first clause. It is not sufficient for the Court merely to record a vague opinion that there is a defect which may materially affect the decision. The Court is required to make a serious enquiry as to whether the suit must fail or not. (*Roe and Jwala Prasad*, JJ.) MAHENDRA RAM *v.* SINGI LAL.
48 I.C. 197=3 P.L.J. 681.

Grounds for.

——— O. 23, R. 1—*Grounds for—Failure to include cause of action.*

The omission to include inconsistent causes of action in the plaint is no sufficient ground for giving permission to bring a fresh suit. 7 M.L.J. 288, Ref. (*Rafique*, J.) MANBHARI *v.* SUMER CHAND. 25 I.C. 175=A.L.J. 441.

——— O. 23, R. 1—*Grounds for—Gap in evidence.*

O. 23, R. 1 should not be invoked to help a plaintiff to make up a gap in the evidence during the pendency of his appeal. The absence or incompleteness in evidence is not a sufficient ground for granting permission. (*Rafique*, J.) KHUBCHAND *v.* AJODHIA PRASAD.
21 I.C. 76=11 A.L.J. 783.

——— O. 23, R. 1—*Grounds for—Non-service on heirs of deceased defendant.*

The fact that notices on the heirs of a deceased defendant could not be served is no ground for allowing plaintiff to withdraw a suit with liberty to file a fresh suit. (*Shah*, A.C.J. *and Crump*, J.) LAKSHMIBAI JAGANNATH JOSHI *v.* YESHWANT VITHAL BAGKAR.
24 Bom. L.R. 909=75 I.C. 283=47 B. 92=1922 Bom. 449 (1).

——— O. 23, R. 1—*Grounds for—Non-production of document in time—Leave to withdraw with liberty.*

Failure to produce documents in time is not a sufficient ground for allowing the plaintiff to withdraw his suit with liberty to sue again. The order granting leave was set aside in revision. (*Scott*, C.J. *and Beaman*, J.) BAI KASHIBAI *v.* SHIDAPPA ANAPA PUJARI.
37 Bom. 682=21 I.C. 23=15 Bom. L.R. 323.

C. P. CODE (V of 1908), O. 23, R. 1—Grounds for.

—— O. 23, R. 1—*Grounds for withdrawal—Sufficient cause—Additional evidence.*

There is no proper reason to allow a party to withdraw his appeal and suit so as to allow him an opportunity to bring a fresh suit on the same cause of action, on the ground that he desired to adduce additional evidence. (*Teunon and Newbould*, JJ.) BENODE BEHARI PATI *v.* CHOUDHURI & CO. 50 I.C. 453.

—— O. 23, R. 1—*Grounds for—Reliefs not properly asked for.*

Plff. being entitled to one of the three reliefs sued for one, which, however, was substantially fruitless, the High Court refused to permit withdrawal as plff. deliberately took the course. (*Fletcher and Newbould*, JJ.) AGHORE NATH SHAH *v.* NATABAR BAIRAGI. 41 I.C. 406.

—— O. 23, R. 1—*Grounds for—Additional evidence.*

A trial Court dismissed the suit. On appeal, the Appellate Court coming to the conclusion that the plffs. had not produced important evidence recorded an order dismissing the appeal and then granted leave to the plffs. to withdraw the suit with liberty to bring a fresh suit on the same cause of action. *Held*, that the order of the Appellate Court was self-contradictory inasmuch the suit could not be allowed to be withdrawn after the dismissal of the appeal which would operate as *res judicata* between the parties in respect of all questions in controversy in the suit and the reason assigned did not justify an order under O. 23, R. 1, C.P.C., Cl. (*b*) must be read with Cl. (*a*) so that permission cannot be granted except on grounds which are of the same nature as those mentioned in Cl. (*a*). An order under O. 22, R. 1, cannot properly be made on the ground that plff. has failed to produce evidence in support of his claim. (*Mookerjee and Cuming*, JJ.) HRIDAY NATH PARAI *v.* AKSHAY LAL.
25 C.L.J. 464=39 I.C. 963.

—— O. 23, R. 1—*Grounds for—Defect of evidence.*

An Appellate Court permitting a plff.-applt. to withdraw his suit (which was dismissed by the Court of First Instance), with liberty to bring a fresh suit, on the ground that he had not been able to adduce all the evidence which he would have liked to adduce, acts without jurisdiction. (*Sanderson*, C.J. and *Newbould*, J. KALI PRASANNA SIL *v.* PANCHANAN NANDI.
44 Cal. 367=33 I.C. 670=28 C.L.J. 489=20 C.W.N. 1000.

[Overruled on the question as to effect of the order, 58 I.C. 806=31 C.L.J. 452.]

——— O. 23, R. 1—*Grounds for—Grant of leave—Scope of the rule.*

The only power under which a Court can permit withdrawal of a suit with liberty to institute a fresh suit is that given by O. 23, R. 1, of the Code and can only be exercised when the provisions of that rule are satisfied. The object of the rule is not to enable a plff. to

C. P. CODE (V of 1908), O. 23, R. 1—Grounds for.

commence trial afresh in order to avoid the result of his previous misconduct of the case as originally framed. (*Brett* and *Carnduff*, JJ.) HIRA LAL MITRA *v.* UDAY CHANDRA DEY.
16 C.L.J. 193=14 I.C. 33=16 C.W.N. 1027.

——O. 23, R. 1—*Grounds for—Withdrawal of suit—Bar of O. 2, R. 2, C. P. Code.*

Where a suit is brought for the interest due on a mortgage, it is not a sufficient cause for granting leave to withdraw the suit with liberty to sue afresh that a subsequent suit for the principal would be barred by O. 2, R. 2, C. P. Code, (*Scott Smith*, J.) PARDUMAN CHAND *v.* GANGA RAM. 66 I.C. 285.

——O. 23, R. 1—*Grounds for*—Ejusdem generis.

'Sufficient grounds' in O. 23, R. 1 (2) (*b*) are *ejusdem generis* with the defect referred to in R. 1 (2) (*a*). An order under O. 23, R. 1 giving permission to withdraw, is open to revision. 27 M.L.J. 480; 25 C.L.J. 454, Rel. on. (*Scott Smith*, J.) MUNNA LAL *v.* CHHABIL DAS. 46 I.C. 181=117 P.W.R. 1918.

——O. 23, R. 1—*Grounds for—Withdrawal—Discretion.*

Where the subject-matter of a suit is undervalued and the right valuation will exceed the pecuniary jurisdiction of the Court, the Court exercises a wrong discretion in sanctioning a withdrawal. (27 M.L.J. 480, Foll.) 'Other sufficient grounds' in O. 23, R. 1 do not bear the *ejusdem generis* interpretation. (*Oldfield and Sadasiva Iyer*, JJ.) KANNUSAWMI PILLAI *v.* JAGATHAMBAL. 41 Mad. 701=(1918) M.W.N. 497=24 M.L.T. 46=35 M.L.J. 27=46 I C. 265=8 L.W. 145.

——O. 23, R. 1—*Grounds for—Non-joinder of parties—Powers of Appellate Court.*

An Appellate Court cannot permit a plaintiff on appeal to withdraw his suit after decree has been passed against him by the trial Court without assigning any reasons. Mere non-joinder of parties is not a ground. Under the Code no suit can be dismissed for non-joinder of parties and the proper course is for the Appellate Court to add the necessary parties and dispose of the appeal in some lawful manner including remand, if necessary. 11 Mad. 322, Ref. *Quaere*:—Whether an appellate Court as such can permit the withdrawal of a suit. 27 M.L.J. 244, Doubted. (*Sadasiva Iyer*, J.) VEERA REDDY *v.* AKKA REDDY. 28 I.C. 487.

——O. 23, R. 1, Cl. 2—*Grounds for—Discretion.*

Discretion vested in a Court is not judicially exercised if it allows a plaintiff to withdraw a suit in spite of deft.'s opposition, to condone plaintiff's defects in conducting the suit due to his own default and for which no excuse was attempted. The words "sufficient grounds" in O. 23, R. 1 (2) (*b*) are *ejusdem generis* with the defect referred to in R. 1, Cl. 2 (*a*) of

C. P. CODE (V of 1908), O. 23, R. 1—Grounds for.

the said order. 9 M.L.T. 204, Foll. *Oldfield and Seshagiri Iyer*, JJ.) AIYA GOUNDAN *v.* JAYAN MANDALATHIPATHI GOPANNA MAUBADIAR. 1 L.W. 726=16 M.L T. 283=27 M.L.J. 480=26 I.C. 57=(1914) M.W.N. 832.
[But see 46 I.C. 265=41 Mad. 701.]

——O. 23, R. 1—*Grounds for—Defect curable by amendment.*

An application for leave to withdraw a suit with liberty to bring a fresh suit should not be granted if the defect is such that it can be cured by amendment of the plaint. (*Lindsay*, J. C.) RAMESHWAR BAKSH SINGH *v.* RASUL BEG. 46 I.C. 603=21 O C. 66.

——O. 23, R. 1—*Grounds for—Evidence—Wrong pedigree filed—Not a sufficient ground.*

If a pedigree filed with the plaint was proved to be wrong according to the statement of the plff. it is not a sufficient ground to allow withdrawal of the suit with permission to bring a fresh one. (*Stuart*, A.J.C.) GULAB DEI *v.* PATAN DIN. 30 I.C. 351=2 O L.J. 461.

——O. 23, R. 1—*Grounds for—Additional evidence.*

Once a party has been allowed to produce his evidence and has had a trial; he cannot be allowed to withdraw from the case and have a fresh trial merely on the chance of his being able to produce additional evidence in support of his case. (*Lindsay*, *A.J.C.*) MT. SUKHDAI *v.* BHAGWAN PRASAD. 20 I.C. 542.

——O. 23, R. 1—*Grounds for—Improper grant of leave—Remedy of aggrieved party—Appeal—Revision—Suit.*

The circumstances contemplated by O. 23, R. 1 of the Code are confined to those mentioned in Cls. (*a*) and (*b*) of R. 1, sub-r. (2) of the Order, and do not include a case where the Court making the order is not satisfied that the circumstances mentioned in cls. (*a*) or (*b*) exist. If the Court is not satisfied that the circumstances contemplated in the rule exist then it has no jurisdiction to make the order as the jurisdiction is only conferred where the court is so satisfied. If this condition is not fulfilled it is clear that the jurisdiction does not arise. In all cases where an order under the rule is made it must be presumed in the absence of proof to the contrary that the Court was satisfied that the conditions in one or other of the cls. (*a*) and (*b*) existed. Where the court had jurisdiction to make the order, it is not open to the Court in a subsequent suit to question the propriety of his decision, or to consider whether in fact there existed a formal defect or other sufficient ground for the order. Where jurisdiction is conferred to determine a particular question and the Court having jurisdiction determines it, the decision is binding upon the parties, whether right or wrong, until it is set aside by some process known to the law in that suit. This may be done either by review of judgment or by appeal or revision where such

C. P. CODE (V of 1908), O. 23, R. 1—Grounds for.

procedure is permitted by law in the particular case. It cannot be done in a collateral proceeding. To hold otherwise would be to destroy the finality of all legal proceedings and to render a determination of rights by a Court of law impossible. 24 C.W.N. 723 (F.B.) foll; 3 P.L.J. 404; (1920) Pat. 232 overruled. (*Dawson Miller, C.J. Mullick and Jwala Prasad, JJ.*) RAJKUMAR MAHTON *v.* RAM KHELAWAN SINGH.
1 P. 190=3 P L T. 80=
64 I.C. 337=1922 Pat. 17=
1922 P. 44 (F B.).

——O. 23, R. 1, S. 115—*Grounds for—Inability to produce witness, if reason for withdrawal—Revision.*

Inability to produce important evidence is not a sufficient ground, under O. 23, R 1, Sub-R. (2), Cl. (*b*) of the Code, to allow a plaintiff to withdraw his suit with liberty to bring a fresh one and a Court which does so, acts illegally and with material irregularity, in the exercise of its jurisdiction and the order is liable to be set aside in revision. (*Das and Ross, JJ.*) UCHANT AHIR *v.* BASWAN AHIR.
2 P L T 634=61 I.C. 639=6 P.L.J 112.

Late Stage.

——O. 23, R. 1—*Late stage—Leave to withdraw—Not to be granted—Second appeal.*

A plff. will not be given leave to withdraw a suit with liberty to sue afresh at a late stage of the case in second appeal. (*Mitra, A.J.C.*) BALIRAM *v.* GANPAT. 47 I.C. 906.

Leave to withdraw.

——O. 23, R. 1—*Leave to withdraw suit with liberty—Grant of, Privy Council on appeal.*

The Privy Council on appeal allowed the suit with reference to a portion of the subject-matter to be withdrawn with liberty to sue again. (*Mr. Ameer Ali*) RAVANESHWAR PRASAD SINGH *v.* BAIJNATH RAM GOENKA.
42 Cal. 897=2 L.W. 358=
19 C W.N. 481=17 M L.T. 321=
21 C L J. 412=13 A.L.J. 501=
28 M.L.J. 383=17 Bom. L.R. 442=
(1915) M.W.N. 869=28 I.C. 699=
42 I.A. 79 (P.C.).

——O. 23, R. 1—*Leave to withdraw—Power of Revenue Court to grant.*

Quære—If a Revenue Court can grant permission to withdraw a suit or application with liberty to file a fresh suit or application in a civil court. (*Walmsley and B. B. Ghose, JJ.*) SASI KANTA ACHARJA *v.* SALIM SHEIKH.
50 Cal. 626=27 C.W.N. 987=74 I C. 1001=
1923 Cal. 624.

——O. 23, R. 1—*Leave to withdraw part of the claim—Power of Court to grant leave.*

On an application by plaintiff to withdraw a part of his claim with liberty to bring a fresh suit on the ground of misjoinder of causes of action and parties, the Court, found there was no misjoinder as alleged in the petition but still granted the leave without stating any grounds for allowing the same. *Held*, that the plff. ought not to have been allowed leave to withdraw a part of the claim. (*N. R Chatterjea and Panton, JJ.*) GOPAL CHANDRA BANDOPADHYA *v.* BENDOE BEHARY ROY MANDAL. 64 I.C. 82.

C. P. CODE (V of 1908), O 23, R. 1—Leave to withdraw.

——O. 23, R. 1—*Leave to withdraw—Decree based upon concurrent findings of fact—Second Appeal.*

Where the decree is based upon a concurrent finding of fact, the Court cannot grant leave to withdraw, as the question whether such leave should be given in Second Appeal depends upon whether the Court is satisfied that the decree against the plff. should be set aside. (*Sanderson, C J. and Richardson, J.*) RAM KUMAR BANIKYA *v.* SAFIUNISSA BIBI. 63 I C. 169.

——O. 23, R. 1—*Leave to withdraw—Additional relief—Bengal Tenancy Act, S. 52—Suit for enhancement of rent—Withdrawal.*

If in a suit for enhancement of rent the plff. also claims additional rent on the basis of excess area, but gives no necessary evidence under S. 52, he should be allowed to withdraw with liberty to bring a fresh suit. (*N. R Chatterji and Panton, JJ.*) INDU BHUSAN SARKAR *v.* JATU MALIK. 62 I C. 693.

——O. 23, R. 1—*Leave to withdraw suit—Not a decree and not appealable.*

An order granting permission to the plff. to withdraw a suit or to abandon a part of his claim is not a decree and is not therefore appealable. 18 C. 322; 27 C. 362; 15 A. 169; 17 A. 97, Rel. (*Abdul Raoof and Martineau, JJ.*) SANT RAM *v.* MT. SAHIB KAUR.
63 I.C. 719=1922 Lah. 267.

——O. 23, R. 1—*Leave to withdraw—Application to withdraw suit can itself be withdrawn.* (1912) M. W. N. 997 Rel. (*Odfield, J.*) LAKSHMANA PILLAI *v.* APPALWAR ALWAR AYYANGAR. 31 M L T. 461 (H C.)=
17 L.W. 832=71 I C 288=
44 M.L.J. 77=1923 M. 246.

——O. 23, R. 1—*Leave to withdraw—Amendment.*

Where a suit for possession is based on a compromise filed in a previous suit in Court, though the suit is based on title, the plaintiff could be allowed to amend the plaint by asking for specific performance of the agreement filed in the previous suit. (*Bakewell and Napier, JJ.*) PALAVALASA APPALASWAMI *v.* DANTALWRI NARAYANA. 34 I C 446=
(1916) 1 M.W.N. 276.

——O. 23, R. 1 and S. 115—*Leave to withdraw—Reasons not covered by sub-rule (2)—Revisions—High Court.*

Where no formal defect necessitating failure of the suit is shown to exist, there must still

C. P. CODE (V of 1908), O. 23, R. 1—Minor.

be a defect which has the effect of shutting out a fair trial on the merits and arising out some error made in good faith by the plaintiff which can only be effectively set right by a trial *de novo*. The High Court has power to interfere in a case where withdrawal of a suit has been improperly allowed. 33 Cal. 487, Foll. (*Drake Brockman*, J.C.) DOMA *v.* DAYA RAM.

48 I.C. 1005.

Minor.

——**O. 23, R. 1**—*Minor—Leave to withdraw—Duty of Court.*

Courts should be very jealous of the interests of the minors and should not allow a suit instituted on a minor's behalf to be withdrawn without being satisfied that it is for his benefit. Where a next friend of a minor withdraws a suit or abandons a portion of the claim without the leave of the Court the minor is not prevented from bringing a fresh suit for the same relief. (*Scott-Smith and Martineau*, JJ.) RAJADA *v.* GHULLA.

59 P.R. 1919=47 I.C. 508=
164 P.W.R. 1918.

Mortgage Suit.

——**O. 23, R. 1**—*Mortgage suit—Suit for redemption.*

When a plaintiff finds that a subsequent mortgage is invalid and falls back on his original mortgage the suit on which was withdrawn, he is barred from bringing fresh suit. (*Sadasiva Aiyar and Napier*, JJ.) PAYKAT MANAKKAL *v* THEYYANKARAN.

32 I.C. 624=(1916) 1 M.W.N. 171.

Order as to Costs.

——**O. 23, R. 1**—*Order as to costs—Leave to withdraw suit on payment of costs—Omission to pay costs within time fixed—Effect of.*

Where leave to withdraw a suit with liberty to bring a fresh suit is given on payment of defendant's costs within a fixed time, the non-payment of the costs within the time does not operate as a dismissal of the suit or as a bar to the institution of the fresh suit, unless the order granting leave had itself provided that on such non-payment the suit should stand dismissed. Otherwise, if a fresh suit is brought without payment of costs the proper procedure is to stay the hearing until the costs are paid. 19 C.L.J. 529 foll; 14 C.L.J. 105; 31 C. 965; 2 C.L.J. 480, Ref. (*Mookerjee*, A.C.J. *and Fletcher*, J.) DEB KUMAR ROY CHOUDHURY *v.* DEB NATH BARNA BIPRA.

64 I.C. 738.

——**O. 23, R. 1**—*Order as to costs—Condition.*

Permission granted in each case must be construed in accordance with the wording of the order giving leave to withdraw from the suit. When permission was given to institute a fresh suit it was ordered that plff. should pay deft.'s costs, as a condition precedent to the institution of the fresh suit. *Held*, the order should be strictly complied with and that plff. should not be allowed to pay after institution of the second suit. (*Fletcher and Richardson*, JJ.) SUBALCHANDRA *v.* MOSARAFALI.

38 I.C. 476.

——**O. 23, R. 1**—*Order as to costs—Suit withdrawn with liberty on payment of costs—No time fixed for payment—Procedure.*

When leave was granted to withdraw a suit on payment of costs, but no time was fixed for payment, the plff. could institute a fresh suit and make payment subsequently. A Court when giving leave to withdraw a suit with liberty to bring a fresh suit on paying deft.'s costs should fix a time for such payment and direct that in default the original suit will stand dismissed with costs. (*Jenkins*, C.J. *and Woodroffe*, J.) SADHU CHARAN TEWARI *v.* BAIKUNTA NATH MADAK. **23 I.C. 210=19 C.L.J 529.**

——**O. 23, R. 1**—*Order as to costs—Failure to pay.*

The failure to strictly carry out statutory directions or judicial orders does not necessarily oblige a Court to dismiss suits as improperly instituted. A plaintiff withdrew his suit with leave to lodge a fresh one. The leave was conditionally granted, that before institution defendant's costs must be paid. The plaintiff brought a suit without paying the costs and defendants objected that as the costs were not paid, the suit should be dismissed. The Court ordered payment within a day and it was accordingly made. *Held*, the suit was competent, but the date of institution is that of deposit and not of the presentation of plaint. (*Mookerjee and Carnduff*, JJ.) SAJJAD HOSSAIN *v.* RAMLAL SHAHU. **15 I.C. 159.**

——**O. 23, R. 1 (2)**—*Order as to costs—Fresh suit by others.*

Members of a joint Hindu family can sue without payment of costs on condition of payment of which one of them withdrew the previous suit filed by him alone. The new plffs. may ask that the first plff. be made a deft. It was also held that the suit might be regarded as instituted on the day on which the costs were paid one month later. (*Mookerjee and Teunon*, JJ.) GOPI LAL *v.* NAGGU LAL.

14 C.L.J. 105=10 I.C. 6=
15 C.W.N. 998.

——**O. 23, R. 1**—*Order as to costs—Non-payment of—Effect of.*

If permission is granted to withdraw a suit on payment of costs, the payment of costs is not a condition precedent to the institution of the suit and non-payment will not deter the plff. from filing a fresh suit. (*Ayling and Seshagiri Iyar*, JJ.) (DASARATHY NAIDU *v.* PALALA KUMARAMUL. **7 L.W. 557=(1918) M.W.N. 427=45 I.C. 969=24 M.L.T. 311.**

——**O. 23, R. 1 (3)**—*Order as to costs—Institution of fresh suit without payment of costs*

C. P. CODE (V of 1908), O. 23, R. 1—Partition suit.

Where a plff. is allowed to withdraw a suit with permission to bring a fresh suit, on payment of the defendant's costs in the first suit, and no limit of time is provided within which such costs are to be paid, the second suit is maintainable even though the costs of the first suit are not paid until after the institution of the second suit. *Semble* :—The second suit would be maintainable even though the period of limitation expired before the institution of the second suit inasmuch as the first suit would be pending until the costs have been paid. In such cases the Court should limit the time within which the costs should be paid and should direct that on failure to pay the costs within that time the original suit shall stand dismissed. 31 Cal. 965, Foll. (*Chamier*, C.J. *and Sharfuddin*, J.) KULDIP SINGH *v.* KULDIP CHOUDHURI. **3 P.L.J. 68=44 I.C. 79=4 P.L.W. 134.**

Partition Suit.

——O 23, R. 1— *Partition suit—Leave to withdraw—Partition Act, Ss. 2 and 3.*

Where in a partition suit the Court has made an order under S. 2 of the Partition Act and the deft. claimed to buy the plaintiff's share under S. 3 of the Act, the Court will not be exercising a sound judicial discretion in allowing the plff. to withdraw the suit with liberty to sue afresh. (*Piggott and Walsh*, JJ.) UMRAO SINGH v. UMRAO SINGH. **47 I.C. 905=16 A L J. 584.**

——O. 23, R. 1—*Partition suit—Preliminary decree—Withdrawal.*

A party cannot be allowed in a partition suit to withdraw the suit after the passing of a preliminary decree. O 23, R. 1, C.P.C., does not apply to such a case. 31 Bom. 271, Dist. (*Sankaran Nair and Sadasiva Aiyar*, JJ.) UNNI MOYAN *v.* KATTIYAMMA. **(1912) M.W.N. 494=14 I.C. 269=11 M.L.T. 390.**

Pleader's Authority.

——O. 23, R. 1— *Pleader's authority—"All necessary acts"—Meaning of.*

Where a vakalatnamah gave a pleader power to do 'all necessary acts' in connection with the suit, *Held*, that the words 'all necessary acts,' included an authority to withdraw suit also. (*Coxe and Imam*, JJ.) KILASH CHANDRA KAR *v.* HARADHAN CHATTERJEE. **14 I.C. 190=16 C.W.N. 932.**

Probate Proceedings.

——O. 23, R. 1—*Probate proceedings.*

O. 23, R. 1, C. P. C., is not applicable to probate proceedings. 20 C.W.N. 986 and 21 Bom. 335, Rel.; 38 Bom. 309, Dist. Even if O. 23. R. 1, C.P.C., were considered applicable the necessary permission to bring a suit was given as in the statement made by them, they said that they intended to file a regular suit, and asked for permission to withdraw from their application and plaintiff was allowed to withdraw. 34 M.L.J. 515 and 35 Cal. 990 (995), Foll. (*Shadi Lal and Martineau*, JJ.) BANWARI LAL *v.* KISHEN DEVI. **67 I.C. 1002=2 Lah. L J. 242.**

C. P. CODE (V of 1908), O. 23, R. 1—Revision.

——O. 23, R. 1—*Probate proceedings.*

O. 23, R. 1, does not apply to an application for probate. If an executor improperly withdraws the applicant is not precluded from again, in discharging his duty, obtaining the findings of the Court on the genuineness of the will. (*Chapman and Atkinson*, JJ.) JUGESHWAR NATH SAHAI *v.* JAGDHARI PRASAD. **2 P L.J. 533=5 P.L.W. 230=40 I.C. 345=1917 Pat. 192.**

Public Trust.

——O. 23, R. 1, S. 92 and O. 1, R. 10—*Public trust—Scheme suit—Withdrawal of—Court has power to transfer parties and decide the suit on its merits.*

Where in a scheme suit under S. 92 of the Code, the plff. applies to withdraw the suit and it appears that his object is to prevent the Court from deciding the suit on merits, the Court can under powers given to it under O 1, R. 10 transpose some of the defendants as plffs. and proceed with the suit notwithstanding the withdrawal of the plff. (*Sadasiva Iyer and Odgers*, JJ.) MAHOMED SIRAJUDDIN *v.* GHULAM JAILANI. **59 I.C. 238=12 L.W. 25.**

Reliefs.

——O. 23, R. 1—*Reliefs not properly asked for—Grounds for.*

Plff. being entitled to one of the three reliefs, sued for one which, however, was substantially fruitless, the High Court refused to permit withdrawal as plff. deliberately took the course. (*Fletcher and Newbould*, JJ.) AGHORE NATH SHAH *v.* NATABAR BAIRAGI. **41 I.C. 406.**

Revision.

——O. 23, R. 1—*Revision—Order passed without recording grounds.*

An order granting leave to withdraw without considering or recording any grounds for allowing withdrawal is a wrong exercise of jurisdiction and a revision would lie. (*Banerji*, J.) RAHMAT ULLA *v.* DHARAM SINGH. **20 A.L.J. 90=L.R. 3 A. 93=64 I.C. 948=1922 All. 185.**

——O. 23, R. 1—*Revision—Application to withdraw—Dismissal.*

Plff.'s application to withdraw with liberty to bring fresh suit was disallowed and the suit dismissed. The application was allowed on appeal on the ground that there was a formal defect in the frame of suit. *Held*, there was proper exercise of jurisdiction by the Lower Court and no revision lay. (*Piggott and Walsh*, JJ.) RATAN LAL *v.* MUHAMMAD HAMIDULLAH KHAN. **19 A.L.J. 47=L.R. 2 A. 5=60 I.C. 899=2 U.P.L.R. (All.) 403.**

——O. 23, R. 1 and S. 115—*Revision—Improper grant of leave.*

C. P. CODE (V of 1908), O. 23, R. 1—Revision.

A Court ought to be very slow to give liberty to bring a fresh suit after a case has been heard out on the merits and an Appellate Court ought seldom or never to do so except when the application was made to the first Court and the Appellate Court thinks that it should have been granted. An order for costs in deft.'s favour does not compensate the latter for being sued a second time. It is for the trial Court to say if there are other sufficient grounds, within the meaning of O. 23, R. 1 of C.P.C. The High Court cannot interfere under S. 115, C.P.C., where the lower Court has jurisdiction to allow a withdrawal but makes a mistake of law. (*Richards*, C J. *and Banerjee*, J) JHUMKU LAL *v.* BISHESHAR DAS.

40 All. 612=46 I.C. 71=16 A.L.J. 493.

———**O. 23 R. 1 (2) and S. 115**—*Revision—Grounds for withdrawal of suit—Formal defect.*

When there is nothing to show that the Judge has exercised any judicial mind or considered whether there was any ground on which he could grant permiesion to withdraw under O. 23, R. 1, the Court acted illegally or with material irregularity and the High Court would interfere in revision. 11 C.L J. 45 ; 11 C.L J. 512, Ref. (*Knox*, J.) RAMAKRISHNA *v.* RAMKIRPA. **14 I.C. 97=9 A.L.J. 388.**

———**O. 23, R. 1**—*Revision—Leave to withdraw suit with liberty—Costs to follow the event—Order negativing costs of successful party—Interference on appeal.*

When leave to withdraw the suit with liberty is granted, costs must follow the event. Where in the matter of costs there is an omission to consider the necessary circumstances there is not a sound exercise of discretion and the High Court is entitled to interfere in revision. (*Macleod*, J.) KHIM CHAND NARATTAMDAS BHAVSAR *v.* SOBHACHAND BHOGILAL. **23 Bom. L R. 242= 47 B. 559=72 I C. 824= 1923 Bom. 206.**

———**O. 23, R. 1 and S. 115**—*Revision—Withdrawal of suit in Appellate Court.*

The fact that through the mistake of the writer who drew the plaint some important items were left out is no ground for permitting withdrawal with liberty to bring first suit. The High Court acting under S. 115, C.P.C., remanded the case to the Appellate Court for re-hearing from the point at which it stood when the order allowing the withdrawal of the suit was made by it. 11 C.L J. 45 and 512; 16 C.W.N. 1027 ; 25 C.L.J. 454, Foll. (*Chitty and Beachcroft*, JJ.) SHANU SHEIKH *v.* DHANI SARKAR. **41 I C 934.**

———**O. 23, R. 1 and S. 115**—*Revision—Leave to withdraw—Insufficient grounds.*

That the primary Court granted leave to plff. to withdraw his suit with liberty to bring a fresh suit, on insufficient grounds, is no ground for revision unless the lower Court acted without jurisdiction or with material irregularity. (*Fletcher and Smither*, JJ.) BASUDEB NARAYANSINHA *v.* KADAMBINI DASI. **40 I.C. 77.**

C. P. CODE (V of 1908), O. 23, R. 1—Revision.

———**O 23, R. 1 and S. 115**—*Revision—Powers of High Court.*

The High Court under S. 115, C.P.C. or by S. 25 of Act IX of 1887, can set aside orders improperly passed under O. 23, R 1, C P C. It can also interfere in such case under S. 107 of the Government of India Act. It is improper for a Court to allow a plff. to withdraw his suit with liberty to bring a fresh suit in the absence of the deft. without giving the deft. an opportunity to contest it. (*Mookerjee and Cuming*, JJ.) RAJENDRA LAL SUR *v* ATAL BIHARI SUR. **44 Cal. 454=39 I C 969= 23 C L J. 455.**

———**O. 23, R. 1 and S. 115**—*Revision—Withdrawal of suit.*

The High Court has power to revise the order granting withdrawal of suit with liberty to bring a fresh one without any formal defect. (*Chatterjee and Newbould*, JJ.) RAMCHANDRA DAS *v.* HACHUNIYA FAKIR. **38 I.C. 848.**

———**O. 23, R. 1 and S. 115**—*Revision—Improper grant of leave.*

After evidence on both sides has been adduced, permission should not be given to the plaintiff to withdraw the suit with liberty to bring a fresh suit without specifying any defects in the plaint. Such permission if granted can be revoked by the High Court in revision and remanded. (*Teunon and Sheepshanks*, JJ.) RAJAENDRA NATH *v.* BAIKUNTH NATH. **34 I.C. 934.**

———**O. 23, R. 1 and S. 115**—*Revision—Jurisdiction.*

An application for permission to withdraw a suit with liberty to bring a fresh suit must be dealt in its entirety and the order granting the leave without giving the permission to bring a fresh suit is without jurisdiction and revisable. (*Mookerjee and Teunon*, JJ.) BHAGWAT PRASAD *v*, LACHMI PERSHAD. **10 I C. 346.**

———**O. 23, R. 1 and S. 115, Cl. (c)**—*Revision.*

An ill-advised grant of a permission to withdraw a suit with leave to sue again is a material irregularity as is contemplated in S. 115, Cl. (*c*) of the C.P.C. (*Oldfield and Seshagiri Iyer*, JJ.) AIYA GOUNDAN *v.* JAYAN MANADLATHIPATHI GOPANNA MAURADIYAR.

1 L W. 726=16 M L T 253= 27 M.L J. 480=26 I C. 87=(1914) M W.N. 832.

———**O. 23, R. 1 and S. 115**—*Revision—Formal defect.*

The existence of formal defect is a condition precedent to the exercise of jurisdiction under O. 23, R. 1 and the High Court would set aside in revision an order improperly made if it is prejudicial to the deft. (*Mullick and Thornhill*, JJ.) NATHUNI RAM *v.* SHEO KOER.

5 P L.W. 104=3 P.L J. 460= 46 I.C. 179=1918 Pat. 220.

C. P. CODE (V of 1908), O. 23, R. 1—Several defendants.

Several Defendants.

———O. 23, R. 1—*Several defendants—Plaintiff's liberty to withdraw claim against some—Court's power to award costs.*

A plaintiff may withdraw his claim against some defts. at any time before actual judgment under O. 23, R. 1. A Court has power under O. 23, R. 1. (3), C.P.C., to award against the plff. such costs as it deems fit even R. 278 (*a*) of Civil Rules of Practice does not apply. (*Napier*, J.) INDOOR SUBBARAMI REDDY *v.* NELATUR SUNDARAJA AIYANGAR.
18 M.L.T. 460=31 I.C. 312=(1915) M.W.N. 1021.

——O. 23, R. 1—*Several defendants—Withdrawal against some—Effect.*

If the plff. in an action for mesne profits exonerates some defts. he cannot get a joint decree as against others. (*Das and Adami*, JJ.) TILAKDHARI SINGH *v.* RAM PRASAD SINGH.
62 I.C. 25.

———O. 23, R. 1—*Several defendants—Withdrawal of suit against one of the defendants—Principal and surety.*

An order allowing the withdrawal of a suit against a principal in order to proceed against the surety does not amount to a withdrawal under O. 23, R. 1. (*Pratt*, J.C. *and Fawcett*, A.J.C.) BAHROOMAL *v.* MAZAR.
32 I.C. 870=13 S.L.R. 92.

Withdrawal without leave.

——O. 23, R. 1—*Withdrawal without leave—Subsequent suit on different ground not barred.*

Where in a suit for ejectment on the ground of trespass by the deft. the latter pleaded a tenancy right and the suit was withdrawn without liberty to bring a fresh suit, a subsequent suit for possession on the ground that the defendant's tenancy had been determined by a notice to quit, is not barred. (*N. R. Chatterjee and Duval*, JJ.) ABDULLA *v.* AKHIL CHANDRA BISWAS. 39 I.C. 84.

———O. 23, R. 1—*Withdrawal without leave—Effect.*

Where plff. withdrew part of a claim without permission, his suit for the same is barred under O. 23, R. 1 though he may allege a false and different cause of action. (*Mookerjee and Beachcroft*, JJ.) DANESH MOLLA *v.* DHANANJOY BISWAS. 40 I.C. 408=29 C.L.J. 11.

——O. 23, R. 1 (3)—*Withdrawal without leave—Return for altering valuation—Dismissal of suit—Fresh suit—Maintainability.*

The Court returned the plaint for amendment but the plff. applied for dismissal of the suit. This was done and no permission to sue afresh was granted under O. 23, R. 1, C.P.C. *Held*, that the second suit was barred and that O. 7, R. 11 (*b*) had no application to this case, as it

C. P. CODE (V of 1908), O. 23, R. 1—Withdrawal without leave.

was not the Court that required plff. to correct the valuation. (*Rattigan*, C.J.) MAKHDUM SHEIKH HASSAN *v.* GAURI SHANKAR.
68 I.C. 271=129 P.R. 1919.

———O. 23, R. 1—*Withdrawal without leave—Effect of.*

Where leave to withdraw is granted without express liberty to sue again, a fresh suit on the same cause of action is barred. (*Rattigan*, C.J.) KANSHI RAM *v.* RAO BALDEO SINGH.
68 I.C. 478=136 P.R. 1919.

———O. 23, R. 1—*Withdrawal without leave—Bar to suit.*

Where a suit brought by A against B about his sonship, was withdrawn without obtaining liberty to bring a fresh suit, and consequently was dismissed, the question of A's sonship, is *res judicata* in a subsequent suit between the legal representatives. (*Johnstone and Chevis*, JJ.) KESAR SINGH *v.* SANT SINGH.
19 P.L.R. 1914.

———O. 23, R. 1—*Withdrawal without leave—Consolidation of claims.*

Where a Court allows withdrawal without liberty to bring a fresh suit, but allows the plff. to consolidate that claim with a claim in another suit, the plff. cannot bring a fresh suit in respect of the matter. (*Sadasiva Aiyar and Burn*, JJ.) LAKSHMANAN CHETTY *v.* MUTHAYA CHETTY. 40 M L J. 126=62 I.C. 833=29 M.L T. 189.

———O. 23, Rr. 1 and 3—*Withdrawal without leave—Suit dismissed at parties' request—Effect.*

A dismissal of a suit at the request of parties, on a petition of a compromise being filed, operates as a withdrawal of the suit without permission to bring a fresh one. (*Drake-Brockman*, J.C.) MAHOMED ALI KHAN *v.* SHUJAT ALI KHAN. 46 I.C. 913.

———O. 23, R. 1 (3)—*Withdrawal without leave—Subject-matter if means property in suit—Suit on different cause of action.*

The words "subject-matter" used in O. 23, R. 1 (3) are not to be identified with the "property" in the suit. They mean the cause of action for a claim. A suit as a different cause of action though relating to the same property is not barred, if the suit is withdrawn without leave of Court. (*Wazir Hasan*, A.J.C.) PUTTOO KHAN *v.* AHMAD ZAMAN KHAN.
9 O.A.L.R. 978=74 I C. 56=1924 Oudh. 160.

———O. 23, R. 1—*Withdrawal without leave—Same cause of action—Subsequent suit with added prayer—Bar.*

Where a prior suit in which the plaintiffs claimed a declaration of their title to a certain War Bond in the hands of one of the defendants was withdrawn without liberty to bring a fresh suit, and the plaintiffs brought another suit for the consequential relief of the recovery

C. P. CODE (V of 1908), O. 23, R. 2.

of the War Bond or its value. *Held* that O. 23, R. 1, C.P. Code, barred such a subsequent suit. (*Pratt and Macgregor*, JJ.) MAUNG MU *v.* MAUNG KAW GYI. **1 R. 618=77 I.C. 393=1924 Rang. 127.**

———**O. 23, R. 2**—*Limitation—Fresh suit.*

Where under the order of the Revenue Court a plff. was required to institute a suit in a Civil Court within three months and the plff. after filing it in a Civil Court within that period, withdrew it and then reinstituted it beyond three months but within the ordinary period of limitation, *held* the suit is within time. (*Piggott*, J.) SHAIK MAHOMED *v.* QUADIR BAKHSH. **25 I.C. 188=12 A.L.J. 989.**

———**O. 23, R. 2**—*Adjustment—Award—Supersession of—Subsequent reference through Court.*

In a suit for dissolution of a partnership and taking accounts the parties referred their disputes to arbitration without the intervention of the Court. An award was made and the plff. applied to the Court to file the award as an adjustment under O. 23, R. 3, C.P. Code. Subsequently both the parties applied to the Court to appoint an arbitration for settling their disputes. The Court made an order accordingly but the arbitration failed. Thereupon the plff. sought to proceed with his application under O. 23, R. 3, C.P. Code. *Held* that the previous arbitration proceedings had been annulled when the parties agreed to the appointment of an arbitrator by the Court and that the prior award could not be filed as an adjustment under O. 23, R. 3, C.P. Code. (*Macleod*, C.J. *and Coyajee*, J.) KHIMCHAND NAROTAMDAS *v.* BHOGILAL HIRACHAND. **24 Bom. L.R. 361=67 I.C. 918=46 Bom. 854=1922 Bom. 436.**

———**O. 23, R. 2**—*Limitation—Withdrawal of suit—Fresh suit.*

The fact that a suit is withdrawn does not entitle the plff. in a fresh suit, to any deduction of time during which the former suit had been pending. 11 W.R. 5 (P.C.), Dist. 9 Cal. 255 (P.C.), Ref. to. (*Mookerjee and Beachcroft*, JJ.) UPENDRA NATH NAG *v.* SURYA KANTA ROY CHOWDHURY. **20 I.C. 205.**

———**O. 23, R. 2**—*Several plaintiffs—Suit withdrawn with liberty—Subsequent filing of separate suits—Whether barred.*

Where several plffs. having sued jointly but wishing to avoid difficulties as to misjoinder had withdrawn their suits with permission to bring fresh suits, the subsequent filing of separate claims is not barred by the former suit. (*Shah Din and Chevis*, JJ.) ATHA SINGH *v.* ISHAR SINGH. **163 P.L.R. 1914=23 I.C. 458=99 P.W.R. 1914.**

———**O. 23, R. 3.**

ADJUSTMENT.
APPEAL.
ARBITRATION.

C. P. CODE (V of 1908), O. 23, R. 3—Adjustment.

BINDING ON PARTIES.
DUTY OF COURT.
EFFECT OF COMPROMISE.
EFFECT OF DECREE.
EXECUTION PROCEEDINGS.
GUARDIANSHIP PROCEEDINGS.
LEGALITY OF COMPROMISE.
LEGALITY OF DECREE.
MATTERS OUTSIDE SUIT.
MODE OF ENFORCEMENT.
MORTGAGE DECREE.
ORAL COMPROMISE.
PARTIAL COMPROMISE.
PARTITION SUIT.
PLEADER'S AUTHORITY.
PRELIMINARY DECREE.
PROBATE PROCEEDINGS.
PUBLIC TRUST.
RECORD OF COMPROMISE.
REVENUE PROCEEDINGS.

———**O. 23, R. 3.**

See also (1) CONTRACT ACT, S. 74.
(2) DECREE.

Adjustment.

———**O. 23, R. 3**—*Adjustment at a meeting of share-holders.*

It is abundantly clear that whatever may take place at the shareholders' meeting, it is not an adjustment within the provisions of the Code. (*Mr. Ameer Ali*). (SETH) KHVALDAS TRIBHOVANDAS *v.* SAKERLA BULAKHIDAS. **43 M.L.J. 763=38 M.L.T. (P.C.) 424=28 C.W.N. 930=79 I.C. 452=1923 P.C. 178 (P.C.).**

———**O. 23, R. 3**—*Adjustment—Arrangement prior to decree to treat it as inexecutable.*

Courts will not give effect to an arrangement entered into by parties prior to decree to treat the decree to be passed as in part inexecutable. (*Oldfield and Seshagiri Iyer*, JJ.) ARUMUGAM PILLAI *v.* KRISHNASWAMI NAIDU. **43 Mad. 725=39 M.L.J. 222=36 I.C. 976=12 L.W. 41.**

———**O. 23, R. 3**—*Adjustment—Agreement to be bound by decision in another suit.*

An agreement between the parties to a suit to abide by the decision which may be made in another proceeding amounts to an adjustment of the suit when that decision is actually passed. 37 Mad. 408, Dist. (*Spencer and Krishnan*, JJ.) V. SREENIVASACHARIAR *v.* KUMARA THATHACHARIAR. **8 L.W. 470=24 M.L.T. 386=31 I.C. 340=(1918) M.W.N. 746.**

———**O. 23, R. 3**—*Adjustment—Agreement to abide by decision in another suit.*

Where in a suit for the amount due under a pro-note the parties agreed to abide by the decree of another Court in a suit for the cancellation of the same pro-note the agreement is not binding on the parties in the subsequent suit. The agreement cannot be regarded as an adjustment of the subject-matter of the suit by

C. P. CODE (V of 1908), O. 23, R. 3—Adjustment.

a lawful agreement or compromise. The ordinary rule is that when the Court is seized of a case, it has jurisdiction to decide it in the manner prescribed by law and that parties have no right to interfere with its authority to do so. There are, no doubt, well understood exceptions to this rule but when the exceptions do not apply, the rule must prevail. 38 Bom. 69; 31 Mad. 1, Ref. (*Miller and Sundara Aiyar*, JJ.) RAJA OF VENKATAGIRI *v.* CHINTA REDDY. **37 Mad. 408 = 22 M.L.J. 447 = 11 M.L.T. 209 = 15 I.C. 378 = (1912) M.W.N. 393.**

———O. 23, R. 3—*Adjustment—Mere offer not enough.*

Where in a suit for possession the plff. offered to take up the deft. as tenant on certain terms which however the deft. rejected, there was no adjustment either in whole or in part under O. 23, R. 3 and the Court had no right to presume that the parties had agreed that tenancy should be established and fix a rent of its own accordingly. (*Piggott*, A.J.C.) GETI ARA BEGAM *v.* JAGAN NATH. **9 I.C. 426.**

———O. 23, Rr. 3 and 1—*Adjustment—Withdrawal of suit on compromise—Duty of Court—Compromise—What constitutes.*

Under R. 1 the Court has to deal with plff. alone, but under R. 3 the Court has to deal with plff. and deft. and has to find out if there is any agreement between them for compromise. An agreement by which plff. makes some concession with regard to his claim and the deft. on the other hand makes a concession for his costs to which he is entitled, constitutes compromise. (*Roe and Jwala Prasad*, JJ.) MUHAMMAD ABDUL GHANI *v.* BALMOKUND SUKUL. **37 I.C. 421.**

———O. 23, R. 3—*Adjustment—Agreement to abide by the sums fixed by the other side.*

An agreement by parties to a suit to abide by sums to be mentioned by the other side in settlement of the litigation, is a lawful adjustment within O. 23, R. 3, C. P. C. (*Hayward*, J.C. *and Crouch*, A.J.C.) MAHOMED UMAR *v.* CHIMANSINGH. **25 I.C. 935 = 8 S L R. 91.**

Appeal.

———O. 23, R. 3—*Appeal—Power of Appellate Court to question compromise.*

The question as to the validity of consent decree cannot be gone into in appeal against that decree. 5 C. W. N. 877, Foll. (*Mookerjee and Carnduff*, JJ.) NITYAMONI DASI *v.* GOKUL CHANDRA. **9 I.C. 210 = 13 C.L J. 16.**

———O. 23, R. 3—*Appeal—Order holding that no compromise is proved.*

R. 3 of O. 23, C. P. Code applies, as its very wording shows, only where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit. The rule does not lay down what the Court is to do if it finds that there has been no adjustment, compromise, or satisfaction. Consequently the order passed by the lower Court in the present case finding that there has been no compromise is not an order under R. 3 of O. 23 and is not appealable. (*Martineau*, J.) SHANTI SARUP *v.* THE FIRM OF JAHANGIR MAL BANSI MAL. **73 I.C. 177 = 1924 Lah. 248.**

———O. 23, R. 3—*Appeal—Consent decree—What is.*

A decree dismissing the suit on the ground that a plea in bar of the suit on the basis of an alleged compromise is established cannot properly be said to be one made under O. 23, R. 3. (*Stanyon*, A.J.C.) RENUKA *v.* ONKAR. **46 I.C. 778**

———O. 23, R. 3—*Appeal—Suit—Meaning of—Proceedings under O. 21, R. 90.*

'Suit' in R. 3 includes the appellate stages and execution proceedings following the decree. An application under O. 21, R. 90 to set aside a sale, is a suit or proceedings within O. 23, R. 3, and a compromise made therein should be recorded not under R. 2 of O. 21 but under R. 3 of O. 23. (*Das and Ross*, JJ.) JAGDISH MISSER *v.* SURESHWAR MISSER **2 P.L.T. 278 = 62 I C. 608 = 6 P.L.J. 253.**

Arbitration.

———O. 23, R. 3—*Arbitration—Reference to—Decree on compromise—Effect of.*

Where the parties to a suit for partition compromise it by agreeing to refer the matter to arbitration there is an end of the suit and the Court cannot supersede the decree and proceed with the suit, if arbitration fails. (*Lord Shaw.*) SADIK HUSAIN *v.* KANIZ ZEOHRA BEGAM. **33 All. 743 = 38 I.A. 181 = 13 C.W.N. 1005 = (1911) 2 M.W.N 132 = 10 M.L.T. 178 = 13 Bom. L R. 826 = 14 C.L J. 313 = 8 A L J. 1164 = 14 O.C. 289 = 12 I.C 15 = 21 M L J. 1151 (P.C.).**

———O. 23, R. 3—*Arbitration—Award—Misconduct—Jurisdiction to enquire.*

It is impossible to conceive that it was intended when an application was made to the Court under O. 23, R. 3, C. P. Code, that all that the Court has to do was to satisfy itself that there had been an agreement to refer and an award, and that it is bound to pass a decree in terms of the award, without considering any objection raised by one party or the other that there had been misconduct on the part of the arbitrators, such as in any other case would vitiate an award. (*Macleod*, C.J. *and Crump*, J.) THAKORE DAS *v.* LALLUBHAI. **25 Bom. L.R. 452 = 75 I.C. 102 = 1923 Bom. 401.**

C.P. CODE (V of 1908), O. 23, R. 3—Arbitration.

——**O. 23, R. 3**—*Arbitration—Award, if can be recorded as adjustment.*

Where in a suit, a reference to arbitration is made by the parties without the intervention of the Court and an award is made thereon, it can be recorded as an adjustment under O. 23, R. 3 of the Code and a decree can be passed in terms of the award. (*Macleod*, C.J. *and Fawcett*, J.) MANILAL MOTILAL *v.* GOKALDOS ROWJI. **45 Bom. 245 = 59 I.C. 53 = 22 Bom. L.R. 1043.**

——**O. 23, R. 3**—*Arbitration—Award—Decree.*

A person cannot apply for a decree on an award under O 23, R. 3 of the Code, which deals only with adjustment of suits by agreement or compromise. (*Macleod*, J.) SHAVAKSHA DINSHA DAVAR *v.* TYABJI HAJI AYUB. **40 Bom. 386 = 37 I.C. 140 = 18 Bom. L.R. 589.**

——**O. 23, R. 3**—*Arbitration—Agreement to refer.*

A mere agreement to refer to arbitration, even though in other respects valid, is not such an adjustment in whole or in part of the suit, as the Court can give effect to under O. 23, R. 3, C.P.C. (*Beaman and Hayward*, JJ.) VYANKATESH MAHADEV *v.* RAMACHANDRA KRISHNA. **38 Bom. 687 = 27 I.C. 46 = 16 Bom. L.R. 653.**

——**O. 23 R. 3 and S. 38**—*Arbitration—Award—Adjustment.*

When a suit is referred by parties to arbitration and an award is made, the submission and the award may be regarded as an agreement adjusting or compromising the suit and a decree passed in terms of the award. The words "any other law for the time being in force" in S. 89 apply to O. 23, R. 3, and therefore when an award made on a reference to arbitration in a pending suit without the intervention of the Court is disputed by a party the Court should inquire whether the award which is alleged to be an adjustment or compromise was justly, legally and properly arrived at. (*Davar*, J.) HARIKBAI *v.* JAMNA BAI. **37 Bom. 639 = 19 I.C. 786 = 15 Bom. L.R. 340.**

——**O. 23, R. 3**—*Arbitration—Award in a pending suit—Private arbitration—If enforceable.*

Where in a pending suit the parties submitted their disputes to private arbitration, the award cannot be enforced under O. 23, R. 3, C.P. Code. 25 C.W.N. 127 and 40 Bom. 386, followed; 45 Bom. 245 dissented from. Necessity for arbitration through Court pointed out. (*Rankin*, J.) AMAR CHAND CHAMARIA *v.* BANWARI LAL RAKSHIT. **49 Cal. 608 = 69 I.C. 808 = 1922 Cal. 404.**

——**O. 23, R. 3**—*Arbitration in pending suit, reference to, cannot be given effect to.*

An informal reference to arbitration in a pending suit cannot be given effect to under O. 23, R. 3 of the Code or under the Arbitration Act even if there is a written submission. (*Rankin*, J.) DEKARI TEA CO. *v.* THE ASSAM BENGAL RAILWAY. **26 C.W.N. 127 = 61 I.C. 919 = 47 Cal. 6.**

C. P. CODE (V of 1908), O. 23, R. 3—Arbitration.

——**O. 23, R. 3**—*Arbitration—Reference to Court.*

An application by the parties to the suit requesting the Court to dispose of the suit on the ascertainment of a simple fact is to be dealt with under O. 23, R. 3, C. P. Code; it is not in the nature of a reference to arbitration. (*Sharfuddin and Coxe*, JJ.) KHOBHARI SAH *v.* JHAMAN SAH. **31 I.C. 220 = 23 C.L.J. 482.**

——**O. 23, R. 3**—*Arbitration—Award without intervention during pendency.*

In the absence of consent an award made without the intervention of the Court during the pendency of a litigation cannot be recorded as an adjustment under O. 23, R. 3 of the C. P. Code, and cannot be enforced under S. 89 of the C. P. Code. 37 Bom. 639; 26 Bom. 76, diss. (*Shadi Lal*, C J. *and Leslie Jones*, J.) HARI PERSHAD *v.* SOOGAN DEVI. **3 Lah. L J. 162.**

——**O. 23, R. 3**—*Arbitration—Compromise outside Court—Local Commissioner—Effect of.*

A compromise by the parties before a Local Commissioner appointed to investigate their case is not a lawful compromise and no decision can be based on it, if either party has the option to repudiate it afterwards on certain conditions. (*Shad Din*, J.) RAM LAL *v.* GOPI. **24 P.R. 1914 = 58 P.W.R. 1914 = 23 I.C. 710 = 196 P.L.R. 1914.**

——**O. 23, R. 3 and Sch. II, R. 17**—*Arbitration—Award—Compromise amending award—Decree based thereon.*

Proceedings under R. 17, Sch. II of the C.P. Code can be compromised and a decree passed thereon. (*Scott-Smith*, J.) SOHAMARI BAI *v.* CHATTAN RAM. **27 P.W.R. 1914 = 23 I.C. 591 = 69 P.L.R. 1914.**

——**O. 23, R. 3**—*Arbitration—Partial award—Decree on—Power of Court to pass.*

Where the parties to a suit referred to arbitration to three individuals the matters in dispute between them in the suit as well as certain other matters not forming the subject of the suit, two of the arbitrators were absent and thereupon the parties agreed to abide by the decision of the third arbitrator. That arbitrator gave his decision so far as the dispute in suit was concerned and deferred an enquiry into other matters. Owing to the obstruction of the defendants the arbitrator could not pass an award in respect of the matters outside the suit. On an application to the Court to have the award on the subject-matter of the suit recorded under O. 23, R. 3, C.P.C. *Held*, that it was open to the Court to record the decision of the arbitrator, and pass a decree thereon even though the award was partial. There is no

C. P. CODE (V of 1908), O. 22, R. 3—Arbitration.

rule of law that a partial award is invalid and the question has to be decided on the intention of the parties the matter being a subject of contract between them (*Phillips and Devadoss*, JJ.) ALAGU PILLAI *v.* VELUCHAMI.
45 M L J 76=32 M.L T. (H C) 369=(1923) M.W.N. 331=74 I C. 609=18 L.W. 26=(1923) M W.N. 509=1923 Mad. 576.

——**O. 23, R. 3**—*Arbitration—Reference—Award.*

A private reference to arbitration in a pending suit followed by a lawful award is a lawful agreement amounting to an adjustment. 26 Bom. 76; 21 Cal. 903; 34 Mad. 326, Foll.; 33 Bom. 69, Diss. It is doutful whether a mere reference to arbitration can be a valid adjustment under S. 375, C.P. Code so that a decree might be passed under the section. (*Miller and Sadasiva Aiyer*, JJ.) NANJAPPA *v.* NANJA RAO. **23 M.L.J. 290=(1912) M.W.N. 1091=16 I.C. 478=12 M.L.T. 183.**

——**O. 23, R. 3**—*Arbitration—Agreement to refer.*

An agreement to refer to arbitration together with the award can be treated as an adjustment. A simple agreement to refer cannot be so treated. (*Ayling and Spencer*, JJ.) T. VENKATACHELLAM REDDI *v.* T. RUNGIAH REDDI. **36 Mad. 353=21 M.L J. 990=10 M.L.T. 248=12 I.C 372=(1911) 2 M.W.N. 219.**

——**O. 23, R. 3**—*Arbitration—Reference during pendency of suit without reference to Court—Award—Decree.*

If a matter in dispute in a suit is during the pendency of the suit referred to arbitration, the award may be recorded as an agreement adjusting or compromising the suit and a decree may be passed accordingly. The provisions of Sch. II, C.P. Code, do not apply to the case. (*Prideaux*, A.J.C) GHUNARI KURMI *v.* PURSHOTTAM. **49 I C. 746.**

——**O. 23, R. 3 and Sch. II, Para. 16**—*Arbitration—Reference in pending suit—If competent.*

Parties to a pending litigation cannot make a reference to private arbitration without reference to the Court. Neither an agreement to refer, without the intervention of the Court, nor a disputed award made thereon is within O. 23, R. 3. 38 Bom. 687, Foll.: 40 Bom. 386, Not foll; 30 Cal. 218, Rel. on; 29 Cal, 167 (P.C.), Ref. (*Stanyon*, A.J.C.) PUPHI BAI *v.* ANSUYA BAI. **46 I.C. 902.**

——**O. 23, R. 3**—*Arbitration—Award—Compromise modifying — Decree on—Power of Court to pass decree.*

It is competent to a Court on an application under Sch. II. para 20, C.P. Code, to pass a decree on an award as modified by a lawful

C. P. CODE (V of 1908), O. 23, R. 3—Binding on parties.

compromise filed by the parties. (*Kanhaiya Lal*, J.C. *and Daniels*, A.J.C.) HAKIM FAZAL AHMAD *v.* ENAYAT AHMAD.
9 O.L J 219=68 I.C 209=25 O.C. 213=1922 Oudh 189.

——**O. 23, R. 3**—*Arbitration — Private reference—Acceptance of award.*

The question whether there has been an adjustment should be decided by a consideration of O. 23, R. 3, C.P. Code apart from a consideration of the provisions relating to arbitration. If the parties to a suit agree to refer matters in dispute to arbitration without the intervention of the Court and subsequently accept the award, such acceptance is an adjustment within the meaning of O. 23, R. 3. 33 Bom. 69, Foll. (*Fox*, C.J. *and Hartnoll*, J.) SHANMUGAM CHETTY *v.* ANNAMALAY CHETTY.
5 Bur. L.T. 125=13 I.C. 959.=6 L.B.R. 55.

——**O. 23, R. 3**—*Arbitration—Agreement appointing trustees to hold plaintiff's share—If reference to arbitration.*

An agreement appointing trustees to represent the plaintiff in taking an account from and effecting partition with defendant and thereafter to hold plaintiff's share in trust for him is a mere agreement to refer to arbitration and not an adjustment of the dispute. (*Fawcett*, J.C. *and Crouch*, A.J.C.) GHULAM DUSTAGIR KHAN *v.* GHULAM HUSSEIN KHAN.
27 I.C. 369=6 S L.R. 187.

——**O. 23, R. 3**—*Arbitration—Agreement by parties to abide by a sum named by pleaders—Award.*

An agreement by the parties to a suit to abide by a sum to be named by their pleaders is not a lawful adjustment until that sum is named and the parties request the Court to pass a decree for the sum so named. (*Pratt*, J.C. *and Crouch*, A.J.C.) SEUMAL NIHALCHAND *v.* PARSOMAL. **19 I.C. 450=6 S.L.R. 166.**

Binding on Parties.

——**O. 23, R. 3**—*Binding on parties—Fact certified to Court by pleaders of parties.*

Where a compromise effected by the parties is conveyed to the Court by pleaders on both sides, the parties cannot object on the ground that the pleaders had no such authority. (*Abdur Rahim and Oldfield*, JJ.) PAMBAYAM CHETTY *v* KANDASWAMI IYER.
60 I C. 22=12 L.W. 562.

——**O. 23, R. 3**—*Binding on parties—Decree wrongly passed—Effect of.*

A consent decree wrongly passed owing to some legal or technical defect is not a nullity. The Court has jurisdiction to pass a right as well as a wrong decree and if it decides wrongly the wronged party can only take the course prescribed by the law for setting matters right. 32 M.L.J. 494, Foll. A party to a consent decree which the Court had jurisdiction to pass

C. P. CODE (V of 1908), O. 23, R 3—Binding on parties.

or any one deriving title under him is precluded from going behind the terms to which he has voluntarily submitted on the ground that the decree was wrongly passed. (*Phillips and Napier*, JJ.) KALIANA RAMA AIYAR *v.* SIVARAMA CHETTIYAR. **51 I.C. 439.**

——O. 23, R. 3—*Binding on parties—Wrong decree.*

A consent decree cannot be challenged on the ground that it is erroneous in law, nor on the grounds on which a contract can be impeached. 29 Cal. 854, F. (*Benson and Sundara Aiyar*, JJ.) KUMARA VENKATA PERUMAL *v.* THATHA RAMASWAMI CHETTY. **35 Mad. 75 = 9 I.C 875 = (1911) 1 M.W.N. 290 = 9 M.L.T. 487 = 21 M.L.J. 709.**

Duty of Court.

——O. 23, R. 3—*Duty of Court—Consent decree—Nature of.*

A Court making a decree by consent is performing a Judicial and not a Ministerial Act. The Court must be satisfied that the agreement is lawful and it can pass a decree in accordance therewith only in so far as it relates to the suit. (*Mookerjee and Buckland*, JJ.) BHARAT RAMANUJA *v.* SARAT KAMINI DASI. **25 C.W.N. 806 = 34 C L.J. 96 = 66 I.C. 273 = 1922 Cal. 358.**

——O. 23, R. 3—*Duty of Court—Refusal to give effect to compromise by Court—Rent suit.*

A compromise entered into by some tenants out of those holding undivided shares in land might not be given effect to by the Court, inasmuch as rent could not be decreed at different rates against different tenants. (*Richardson and Shamsul Huda*, JJ.) BROJESHWAR *v.* SYAMA CHARN. **50 I.C. 383.**

——O. 23, R. 3—*Duty of Court—Admission by one and denial by the other—Jurisdiction of Court—To bind principal by compromise.*

On an admission by one party and denial by the other that a pending suit has been settled by a lawful agreement out of Court, the Court can decide the fact of such settlement and grant a decree in accordance therewith, if it is established. Though a party left the general conduct of the litigation to his agents, he is not bound to accept any terms of compromise that those persons may arrange. The implied authority of such persons extends only so long as the litigation proceeds in the ordinary way, but they cannot consent to a decree on compromise, without special authority. (*D. Chatterjee and Newbould*, JJ.) ANDI KRISHNA DUTTA *v.* PRIYA SANKAR MAJUMDAR. **36 I.C. 375 = 21 C.W.N. 366.**

——O. 23, R. 3—*Duty of Court—Compromise decree—Purdanashin Lady.*

A Court must be satisfied before sanctioning a compromise to which a *pardanashin lady* is a party, that terms were understood by the lady and she acted on independent advice.

C.P. CODE (V of 1908), O. 23, R. 3—Effect of compromise.

The terms of settlement must be examined with care and caution. (*Mookerjee and Beachcroft*, JJ.) KSHETRA MONI DASI *v.* AMODINI DASI. **16 I.C. 611.**

——O. 23, R. 3—*Duty of Court—Proof of compromise.*

It is not essential before a court can pass a decree in accordance with a compromise that all the parties to it should assent to it before the court. The Court can enquire if an assent had been given elsewhere and if this is proved, it can pass a decree in accordance with the compromise thus assented to. (*Scott-Smith*, J.) MAHANT RAGHBIR SINGH *v.* CHANAN SINGH. **69 I.C. 395 = 1923 Lah. 204.**

——O. 23, R. 3—*Duty of Court—Fraud—Decree.*

A Court may or may not pass a decree in accordance with a compromise shown to be fraudulent. (*Atkinson*, J.) ASSAM PANDEY *v.* RAJMON MISSER. **52 I.C. 103.**

——O. 23, R. 3—*Duty of Court—Compromise—Not registered—Whether Court can act upon.*

Where a document evidencing a compromise is presented to a Court, an objection regarding registration is insufficient to prevent the Court, if it accepts the compromise, from acting upon it. (*Fawcett*, A. J. C. *and Kennedy*, J. C.) CHELLARAM *v.* KIMATRAM. **61 I C. 118 = 14 S.L.R. 245.**

Effect of compromise.

——O 23, R. 3—*Effect of—Compromise—Power of Court to go behind—Dekhan Agri. Rel. Act*, (XVII *of* 1879), S. 12.

In a suit to recover the amount of a promissory note from an agriculturist, the latter admitted the note but denied consideration and prayed for an account. When the suit came on for hearing a compromise was presented to the Court under which the defendant agreed to pay the amount of the suit and costs in instalments. The defendant, when examined, said that he had agreed to the compromise though he did not understand the accounts and that he had received only a small amount from the plaintiff many years ago. The Court disregarded the compromise and dismissed the suit on the merits. On appeal:—*Held, by Macleod, C.J.*, that, on an application to record an agreement under O. 23, R. 3, Civil Procedure Code, the Court could go behind the transaction provided it was perfectly clear that the whole of the plaintiff's claim was admitted. *Held, by Shah, J.*, that inasmuch as the defendant admitted the plaintiff's claim without full knowledge of his legal rights, the application of S. 12 of the Dekkan Agriculturist's Relief Act was not excluded by O. 23, R. 3 of the Civil Procedure Code. 8 Bom. 20; 34 Bom. 503; 35 Bom. 120; 37 Bom. 614, Ref. *Per Macleod, C. J.*—O. 23, R. 3 does not oust the jurisdiction of the Court in this class of cases from

C. P. CODE (V of 1908), O. 23, R. 3—Effect of compromise.

inquiring into the nature of the admission so as to satisfy itself whether the admission is true and made by the debtor with a full knowledge of his legal rights as against the creditor. *Per Shah, J.*—" According to the decisions the provisions of O. 23, R. 3, C.P.C. whenever they are applicable must be given effect to even in cases which are governed by the Dekkhan Agriculturists' Relief Act. Thus if in any suit it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by a lawful agreement or compromise, the Court shall order such agreement or compromise to be recorded and pass a decree in accordance therewith so far as it relates to the suit." (*Macleod, C. J., and Shah, J.*) GOTURAM RADHAKISAN *v.* BARKU DODHU.
25 Bom. L R. 88=46 Bom. 560=67 I.C. 253=1922 Bom. 331.

———O. 23, R. 3—*Effect of Compromise—Landlord and tenant.*

A compromise in a suit for ejectment under which the deft, is to hold the land in dispute as under-raiyat of the plff. and is not liable to be ejected is admissible in evidence and binding equally on both the parties. 47 Cal. 485 (P. C.) Foll. (*Mookerjee* A.C.J. *and Fletcher*, J.) PROTAP CHANDRA PAL *v.* NITTYANAND NAG.
57 I.C. 751.

———O. 23, R. 3—*Effect of compromise—Settlement of all points in dispute—Intention of parties to have a formal document drawn up.*

The parties to a suit settled all the matters in dispute between them in the presence of some mediators, put the agreement into writing and signed the same but the razinamah recited that the vakils should be consulted, and another razinamah should be prepared and filed in Court in accordance with the reliefs, claimed by each party. It was found that the recital only meant the mention in the razinamah of certain facts which had no reference to the points in dispute, and the drafting of a more formal document of compromise to be presented in Court, the compromise already arrived at was conditional either on the mention of those facts or the presenting into Court of the more formal document. The compromise was complete and enforceable. (*Spencer and Krishnan, JJ.*) KAMALAMBAL *v.* DORASAMI CHETTIAR.
35 I.C. 26=11 L.W. 179.

——O 23, R. 3—*Effect of compromise—Relief granted to defendants—Execution.*

Where a Court passes a decree on the basis of a compromise there is nothing to prevent it from granting a relief to a defendant which can be executed provided that relief has been agreed to by the parties and is one of the considerations on which the compromise is based. 18 Mad. 410; 30 Mad. 478; 5 C.W.N. 485, Ref. to. (*Lyle, A.J.C.*) BISHESHAR SINGH *v.* MAHOMED YASIN ALI KAHN.
25 O.C. 53=9 O. L.J. 276=68 I.C. 232=1922 Oudh 150.

C. P. CODE (V of 1908), O. 23, R. 3—Effect of decree.

Effect of Decree.

———O. 23, R. 3—*Effect of decree—Contract.*

A consent order is only an order of the Court carrying out the agreement between the parties. A contract of the parties is not the less a contract and subject to the incidents of a contract because there is superadded the command of the Judge. A consent decree is just as binding on the parties thereto as a decree after a contentious trial but it cannot have greater validity than the compromise itself. (*Mookerjee and Walmsley, JJ.*) AMRITA SUNDARI *v.* SHERAJADDIN AHAMED.
29 I.C 156=19 C.W.N. 563.

———O. 23, R. 3—*Effect of decree—Liability contractual.*

A compromise is a binding agreement between the parties and none the less so binding, because followed by a decree. (*Jenkins, C.J. and Mookerjee, J.*) KESHAL PANDA *v.* BHOBANI PANDA.
21 I.C. 538=18 C.L.J. 187.

———O. 23, R. 3—*Effect of decree—Rights of absent respondents.*

In an appeal, the appellant and a respondent who appeared, compromised their rights and certain shares where assigned to the absent respondents. A decree was passed and one of the respondents not appearing objected that he was not liable under the compromise decree. *Held*, the fact that he objected to the execution would not preclude him from asserting his right given by the decree by a separate suit. (*Chitty and Teunon, JJ.*) DEBENDRA NARAYAN SINHA *v.* NARENDRA NARAYAN SINHA.
19 I.C. 915.

———O. 23, R. 3—*Effect of decree.*

A consent decree binds the parties to the suit until it is set aside, just as much as if it had been passed after contest. (*Wallis, C.J. and Seshagiri Aiyar, J.*) THIRUVAMBALA DESIKAR *v.* CHINNA BANDARAM. **40 Mad. 177=30 M.L J. 274=(1916) 2 M.W.N. 43=34 I.C. 57=4 L.W. 306.**

———O. 23, R. 3—*Effect of decree—Binding effect.*

A decree passed under O. 23, R. 3 in terms of a compromise arrived at between parties to suit becomes final and conclusive, if not appealed against so that a deft. who is a party to the suit, but not a party to the compromise is bound by the decree if it is not appealed against. (*Spencer and Phillips, JJ.*) KANNAYYA *v.* RAMANNA.
31 I.C. 21.

———O. 23, R. 3—*Effect of decree—Misapprehension as to rights.*

Where the rights asserted on the one side and denied on the other, are fairly considered and a compromise is entered into, it will hold good even if one of the parties was under a misapprehension as to his rights. 31 Mad. 474 Foll. (*Wallis and Sadasiva Aiyar, JJ.*) VENKATAGIRI NAYANIVARU *v.* SUBRAYALU NAYANI.
24 I.C. 491.

C. P. CODE (V of 1908), O. 23, R. 3—Effect of decree.

———**O. 23, R. 3**—*Effect of decree—Principles of.*

A contract of a compromise which has passed into a decree is governed by the same principles as are applicable to the construction of contracts. (*Sundara Iyer and Ayling*, J.) THAYAMMALACHI *v* RAJALI.
10 M L.T. 326=12 I C. 334=(1911) 2 M.W.N. 327.

———**O. 23, R. 3**—*Effect of decree—Waiver.*

A judgment by consent operates as a waiver of any defect in the process or pleadings or irregularities in the proceedings, provided it does not go to the jurisdiction. (*Benson and Sundara Aiyar*, JJ.) KUMARAVENKATA PERUMAL *v.* THATHA RAMASWAMI CHETTY.
35 Mad. 75=(1911) 1 M.W N. 290=9 M.L.T. 487=9 I.C. 875=21 M.L J. 709.

Execution Proceedings.

———**O. 23, R. 3**—*Execution Proceedings—Compromise.*

O. 23, R. 3 of the C.P. Code is inapplicable to execution proceedings. (*Mitra*, A. J. C.) SAKHARAM *v.* BHIVRABAI. **44 I.C. 164.**

Guardianship Proceedings.

———**O. 23, R. 3**—*Guardianship proceedings.*

O. 23, R, 1 does not allow a plff. who has appealed to get rid of the decree that has been made by the simple process of withdrawing the suit. The procedure of withdrawal laid down in O. 23, R. 1 applies only to pending suits and before the decree has been made. 29 Bom 13; 35 Bom. 261, Foll. A party in whose favour a decree or order is passed could however set aside by adjustment or compromise under O. 23 R. 3. A guardian appointed by the Court cannot be removed by a compromise as it would have the effect of withdrawing from the jurisdiction of the Court the question of the welfare of the minor and would defeat the provisions of Ss. 40 and 42 of the Guardians and Wards Act. (*Pratt*, J. C. *and Crouch*, A.J.C.) SHEIK MAHOMED *v.* MUSSAMMAT RADHIBAI. **47 I.C. 817=12 S.L.R. 14.**

Legality of Compromise.

———**O. 23, R. 3**—*Legality of compromise—Compromise affecting puisne mortgagee.*

It is incumbent on a Court to pass a decree in terms of compromise only if the same is lawful *i.e.* enforceable in law. One test to apply is, were the parties competent to enter into the agreement in order to gain their object. Where after a mortgage decree to which the puisne mortgagee was a party, the mortgagee and prior mortgagee put in appeal a petition of compromise which increases the amount payable to the latter, a decree cannot be passed in accordance therewith, as it undoubtedly prejudices the rights of the puisne mortgagee and hence cannot be said to be lawful. (*Mookerjee and Chotzner*, JJ.) MALCHAND BOID *v.* OSMAN ALI MANDAL.
38 C.L.J. 272=1924 Cal. 159.

C.P. CODE (V of 1908), O. 23, R. 3—Legality of compromise.

———**O 23, R. 3**—*Legality of Compromise—Award—Private reference—Enforcement of—Lawful compromise—Allotment of share in excess.*

An award made on a reference to arbitration without the intervention of the Court is enforceable as a compromise under O 23, R. 3, C. P. C. A compromise is not unlawful merely because the parties do not get the shares to which they would be legally entitled. (*Teunon and Beachcroft*, JJ.) SASIBALA DASI *v.* KAMIKSHANATH DUTT. **55 I.C. 716.**

———**O. 23, R. 3**—*Legality of compromise—Portion of claim not within jurisdiction—Effect of.*

Where the claim is beyond the jurisdiction of the trial Court, it is not competent to the Court to pass a compromise decree. Its duty is to return the plaint under O. 7, R. 10, C. P. C. Per *Coutts Trotter*, J. :—The compromise may be regarded as an abandonment of the claim so far as it was beyond the jurisdiction of the Court and the decree on the compromise was valid. (*Sadasiva Iyer and Coutts Trotter*, JJ.) GOVINDASWAMI KADAVARAN *v.* KALIAPERUMAL. **(1922) M.W.N. 83=66 I C 837=16 L.W. 155.**

———**O. 23, R. 3**—*Legality of compromise—Office—Compromise as to.*

A dispute involving the right to the office of an *archaka*, once brought before a Court for adjudication cannot be settled by a mere *razinama* between the parties, irrespective of its legality or propriety. (*Sadasiva Aiyar and Tyabji*, JJ.) SUNDARAMBAL AMMAL *v.* YOGAVANAGURUKKAL. **1 L W. 276=26 M.L J. 315=23 I.C. 72=(1914) M.W.N. 286.**

———**O 23, R. 3**—*Legality of compromise—Power of the Court in recording consent decree.*

The Court in recording a consent decree is bound to consider whether the compromise is a lawful one. (*Benson and Sundara Iyer*, JJ.) KUMARA VENKATA PERUMAL *v.* THATHA RAMASWAMI CHETTI. **35 Mad. 75=(1911) 1 M.W N. 290=9 M L T. 487=9 I.C. 875=21 M.L.J. 709.**

———**O. 23, R. 3**—*Legality of compromise—Compromise in fraud on some of the parties—Not allowed.*

The Court will refuse to accept compromise between plaintiff and one defendant if the result of it would be to deprive the other defendants of the fruit of their success. (*Dalal*, A.J.C.) SAIYED ASHFAQ HUSSAIN *v.* SAIYED BUNYAD HUSSAIN. **9 O. & A.L R. 415=1923 Oudh 252.**

———**O. 23, R. 3**—*Legality of compromise—Violation of statute—No recognition.*

C. P. CODE (V of 1908), O. 23, R. 3—Legality of decree.

A Court will not recognise any compromise, of an action with the facts of which it is entirely unacquainted or if one of the terms of the compromise is a clear violation of a statutory rule. (*Sultan Ahmad*, J.) MUSSAMMAT SAKLI *v.* RAM KISHUN. 55 I C 804 = 2 U P L.R. (P) 31

Legality of decree.

——O. 23, R 3—*Legality of decree—Contrary to—Impartible Estates Act.*

Where a mortgage is invalid under S. 4 of Mad. Im. Est. Act, (II of 1901) it cannot be given effect to by the device of a consent decree in a suit against the mortgagor. It is open to the sons of the mortgagor to object to a final decree being passed as the mortgage was invalid. (*Abdur Rahim and Oldfield*, JJ.) RAM CHANDRA SURU *v.* AKELA VENKATALAKSHMINARAYANA. (1919) M.W.N. 332 = 50 I C. 577 = 37 M L J. 65.

——O. 23, R. 3—*Legality of decree—Compromise decree creating mortgage and in default sale of property, if lawful agreement—Decree whether in excess—Transfer of Property Act, S. 99—Application of.*

A decree in terms of a compromise between parties to a suit creating a mortgage on the property for the amount and in default of payment within the time fixed, directing a sale, is a mortgage decree and can be executed as such. Such an agreement is lawful and the decree based upon it is not beyond the scope of S. 375 of C. P. Code (1882), S. 99 of T. P. Act, does not apply to this case. (*Oldfield and Krishnan*, JJ.) KANDULA PEDA LINGA REDDI *v.* KAKUMANU HANUMAYYA. 37 I C 764.

——O. 23, R. 3—*Legality of—Duty of Court—Passing of decree.*

O. 23. R. 3 of the C.P. Code does not compel the Court to pass a decree in accordance with a compromise. The Court must see that the compromise is a lawful agreement within the meaning of O. 23, R. 3 of the C.P. Code, before it is recorded and a decree is passed in accordance with the terms thereof and will look into the merits when necessary, to determine its *bona fides*. (*Miller*, C.J. *and Mullick*, J.) SETH HUKUM CHAND *v.* RAJA RAM BAHADUR SINGH. 4 P.L J. 580 = 53 I C. 833 = 1919 Pat. 305.

Matters Outside Suit.

——O. 23, R. 3—*Matters outside suit—Decree beyond scope of litigation.*

Registration where there is a compromise beyond the scope of a suit and the compromise has not been registered but the parties have acted on it there is an equitable estoppel and the parties cannot resile from the compromise. (*Lord Shaw.*) MUHAMMAD MUSSA *v* AGHORE KUMAR. 42 Cal 801 = 42 I.A. 1 = 17 Bom. L R 420 = 21 C L.J. 231 = 28 M L J 518 = 19 C W.N. 250 = 13 A L J 329 = 17 M.L T 143 = 2 L W. 288 = 28 I C. 910 = (1915) M.W.N. 621 (P.C.).

C. P. CODE (V of 1908), O. 23, R. 3—Matters outside suit.

——O. 23, R. 3—*Matters outside suit—Testamentary suit—Compromise—Validity of.*

Where in a testamentary suit, consent terms are proposed one of which falls within the testamentary jurisdiction and others do not, the decree may properly embody all the terms in a schedule for reference but its operative part should be confined to such terms as are within its jurisdiction; and the testamentary Court should leave the parties to take separate proceedings under the ordinary original civil jurisdiction to enforce the remaining terms if necessary. (*Martin*, J.) BAI MONGHIBAI *v.* BAI RAMBHALAXMI. 59 I C. 344 = 22 Bom. L.R. 1286.

——O. 23, R. 3—*Matters outside suit affected—Decree—Form of.*

Where a compromise is not within the scope of the suit, no decree could be made to give effect thereto under O. 23, R. 3, Civil Procedure Code. When the compromise has been effected between the parties, the proper course to follow is to recite the compromise in the decree completely, but to pass a decree in accordance therewith only in so far as it relates to the suit. (*Mookerjee and Panton*, JJ.) JIBAN KRISHNA CHAKRAVARTHI *v.* RAMESH CHANDRA DAS. 38 C.L.J. 72.

——O. 23, R. 3—*Matters outside suit—Decree on compromise, if can deal with.*

Where a consent decree in partition suit between brothers purported to deal with the rights in the mother's share after her death, *Held*, that such a matter did not relate to the suit and the decree was without jurisdiction and did not operate as *res judicata*. The facts as a whole must be looked into to see whether matters had been introduced which did not relate to the suit. (*Rankin*, J.) SASHI BHUSAN *v.* HARI NARAYAN. 25 C.W.N. 990 = 66 I.C. 705 = 48 Cal. 1039.

——O. 23, R. 3—*Matters outside suit—Compromise—Decree—Form of.*

Where a compromise goes beyond the subject-matter of the suit, the proper procedure for the Court is to recite the compromise in the decree but to make part of the decree only so much of the compromise as relates to the subject-matter of the suit. 47 Cal. 485 (P C.), Ref. (*Mookerjee and Panton*, JJ.) JIVAN KRISHNA CHAKRAVARTHY *v.* RAMESCHANDAR DAS. 63 I C. 47.

——O. 23 R 3—*Matters outside suit—If can be dealt with by decree.*

A decree passed on compromise in so far as it relates to property extraneous to the suit is without jurisdiction and inoperative. 78 P. R. 1917, Foll. (*Scott-Smith*, J.) KARTAR SINGH *v.* INDAR SINGH. 31 I.C. 273 = 31 P.R. 1919.

——O. 23, R. 3—*Matters outside suit—Procedure.*

Where a petition includes matters not in suit the Court should pass a decree with regard to

C. P. CODE (V of 1908), O. 23, R. 3—Matters outside suit.

matters in suit only and not to reject the petition entirely. (*Scott-Smith and Broadway, JJ.*) HARI CHAND *v.* MAGHI MAL.
98 P W.R. 1917=78 P R. 1917=40 I C. 675=112 P.L R. 1917.

——**O. 23, R. 3**—*Matters outside suit—Rights of parties.*

A valid and binding compromise operates as a bar to the trial of any question forming the subject-matter of the compromise Where the Court sanctions a compromise, but some of its provisions could not be embodied in the decree because they did not relate to the suit, these provisions could be enforced against the minors though not by way of execution of the compromise decree. (*Abdur Rahim and Oldfield, JJ.*) RAJAGOPALAN *v.* T. S. SUBRAMANIA IYER.
33 I.C. 354=(1919) M.W.N. 356.

——**O. 23, R. 3**—*Matters outside suit—Compromise decree—Binding nature of—Estoppel.*

A compromise decree constitutes an estoppel by matter of record between the parties to the compromise, though it relates to matters outside the suit. (*Bakewell and Phillips, JJ.*) ARYAPUTHURA GOUNDEN *v.* ETTIA GOUNDEN. **(1917) M.W.N. 751=6 L.W 635=42 I.C. 228=33 M.L J. 615.**

——**O. 23, R. 3**—*Matters outside suit—Compromise decree—Execution of—Terms of the razinamah reproduced in the decree.*

Where a compromise decree, while incorporating *in extenso* the terms of a compromise petition, adopts them and makes them executable only so far as they concern the suit and where the terms not so adopted do not relate to the suit either directly or indirectly as indicating a *quid pro quo* on which the settlement of the plaint claim was based, *Held*, that the terms so omitted to be adopted are not executable with the decree. (*Oldfield and Sadasiva Aiyar, JJ.*) SUBANARAYANA AIYAR *v.* MAYA THEVAN.
30 I.C. 263=2 L.W. 608.

——**O. 23, R. 3**—*Matters outside suit—Compromise decree—Some terms of razinamah not relating to the subject-matter of the suit—Jurisdiction of Court.*

Where a certain term of a *razinamah* does not relate to the subject-matter of the suit, the Court has jurisdiction to embody it as part of the decree if that term forms the consideration for the *razinamah*. (1914) M.W.N, 256, Foll. (*Sankaran Nair and Ayling, JJ.*) RATNASAWMI CHETTY *v.* RATNAMMAL.
27 M.L.J. 388=15 M L.T. 415=24 I C. 135=1 L.W. 546.

——**O. 23, R. 3**—*Matters outside suit—Inclusion of terms—Objections as to—Where be taken.*

An objection to the inclusion of a term in a compromise decree, on the ground that it goes beyond the subject-matter, ought to be taken by way of appeal and cannot be urged when execution is sought. 36 Cal. 193, Not foll. Whether any term in a compromise decree is covered by the subject-matter must be decided from the frame of the suit, the relief claimed, and the relief allowed by the decree or adjustment made by agreement. The terms and conditions in a compromise decree forming the consideration for the compromise must be incorporated in the decree, where they have a binding effect even if they go beyond the subject-matter of the suit. (*Ayling and Sadasiva Aiyar, JJ.*) SABAPATHY PILLAY *v.* VENMAHALINGA PILLAI. **38 Mad. 959=15 M.L.T. 206=26 M L.J. 331=23 I.C. 581=(1914) M.W.N. 256.**

C. P. CODE (V of 1908), O. 23, R. 3—Mortgage decree.

——**O. 23, R. 3**—*Matters outside suit—Consideration.*

A settlement of disputes forming the subject-matter of a suit must be followed up by a decree even though the consideration therefor relates to matters extraneous to suit. (*Mullick and Jwala Prasad, JJ.*) RAMPADARATH SING *v.* SOHARI KOERI. **52 I.C. 20=4 P.L J. 667.**

——**O. 23, R. 3**—*Matters outside suit—Duty of Court.*

A Court should record the entire compromise filed by the parties and draw up a decree giving the parties the right to execute the decree in respect of the matters which properly fall within the scope of the action, leaving it to the parties to enforce by whatever means they like that portion of the compromise referring to matters outside the scope of the suit. (*Chapman, Atkinson and Ali Imam, JJ.*) CHARU CHANDRA MITRA *v.* SAMBHU NATH PANDEY.
3 P.L J. 265=4 P.L.W. 393=46 I.C. 338=1918 Pat. 193 (F.B.).

——**O. 23, R. 3**—*Matters outside suit—Compromise.*

Per *Jwala Prasad*, J.—The words "so far as it relates to the suit" in O. 23, R. 3 of the C.P. Code show that all the terms which form the consideration for the adjustment of the matter in dispute whether they form the subject-matter of the suit or not, become related to the suit and can be embodied in the decree 30 Mad-478, Foll. (*Chapman and Jwala Prasad, JJ.*) KARU MIAN *v.* TEJO MIAN. **3 P. L. J. 43=43 I. C. 282=3 Pat. L.W. 141.**

Mode of Enforcement.

——**O. 23, R. 3**—*Mode of enforcement—Remedy by execution.*

Once a compromise decree has been passed with reference to the rights of the parties to a suit, their further remedy is by way of execuion and not by a suit. (*Bevan Petman, J.*) NIKA MAL *v.* MARWARI BANK LTD.
52 I. C 188=151 P. R. 1919

Mortgage Decree.

——**O. 23, R. 3**—*Mortgage decree—Adjustment before final decree.*

The proceedings after a preliminary decree in a mortgage suit are proceedings in a suit to

C. P. CODE (V of 1908), O 23, R. 3—Mortgage decree.

which O. 23, R. 3 of the C. P. Code applies. (*Mitra*, A.J.C.) DHARAM SINGH *v.* GANESH RAM. **43 I.C. 399.**

——**O. 23, R. 3 and O. 34, R. 4**—*Mortgage decree.*

O. 23, R. 3 empowers the Court to pass a decree in accordance with the terms of settlement and rules over O. 34, R. 4. (*Das and Adami*, JJ.) ARUNBATI KUMARI *v.* RAM NIRANJAN, **58 I. C. 299=2 P.L T. 38.**

——**O. 23, R. 3 and O. 34, R. 5**—*Mortgage decree—Part payment out of Court between the dates of the preliminary and final decree.*

If the preliminary decree is satisfied in part out of Court, the Court, at the final taking of accounts will permit such payment towards the satisfaction of the decree and nothing in O. 34, R. 5 prevents such an adjustment. (*Sharfuddin and Roe*, JJ.) JOGENDRA PRASAD NARAYAN SINGH *v.* GOURI SHANKAR PRASAD SAHU. **2 Pat. L.W. 66= 40 I.C. 138=2 Pat. L.J. 533.**

Oral Compromise.

——**O. 23, R. 3**—*Oral compromise—Mortgage—Whether can be superseded by oral compromise.*

The mere fact of an oral compromise having been come to cannot supersede the mortgage unless the Court accepts it and passes a decree in accordance with it. (*Banerji*, J.) RAMRATAN SUBBAN. **24 I.C. 93=12 A.L.J. 672.**

Partial Compromise.

——**O. 23, R. 3 and O. 21, R. 90**—*Partial compromise—Not binding on persons not parties to the compromise — Revision —C. P. Code, S. 115.*

A compromise is not binding on a person who is not a party to it. When a raiyat's holding is sold in execution of a rent decree and an application to set aside the sale is made by the mortgagee of the holding who had purchased it in execution of his mortgage decree and the matter is compromised as between them without reference to the judgment-debtors the Court cannot enforce the compromise as against the judgment-debtors who were not parties to it. (*Richardson and Beachcroft*, JJ.) ABDUL KARIM *v.* MEHERUNESSA. **45 I.C. 33.**

——**O. 23, R. 3**—*Partial compromise—Compounding with some defendants—Decree of withdrawal, whether can be made.*

Where a plaintiff compounded his differences with some of the defendants and prayed for withdrawal of suit, the proper order of the Court to pass would be one of dismissal for want of prosecution, (*Chatterjee and Beachcroft*, JJ.) BROJENDRA KUMAR DAS *v* GOBINDA MOHAN DAS. **34 I.C. 186=20 C.W.N. 752.**

——**O. 23, R. 3**—*Partial compromise—Some of the parties only agreeing.*

C. P. CODE (V of 1908) O. 23, R. 3—Pleader's authority.

Where on appeal to the High Court all the parties to the decree of the lower Court except one, compromised the matter, it is binding on those who were parties to it, (except the one that did not sign it) as the compromise did not in terms modify the decree but only altered the mode of payment. (*Abdur Rahim and Spencer*, JJ.) ACHAMA NAIDU *v.* KRISHNASWAMY NAIDU. **34 I.C. 518.**

——**O. 23, R. 3**—*Partial compromise—Compromise with one deft. only.*

Where the plff. in an ejectment suit against two defts. could have maintained the suit against one only, he can enter into a compromise with one deft. only, to the effect that the result of the suit shall not affect him and that deft. with respect to a particular property involved in the suit. (*Das and Adami*, JJ.) BHAGWATI KUER *v.* JAGDAM SAHAY. **62 I.C. 933=2 Pat. L.T. 471.**

Partition suit.

——**O. 23, R. 3**—*Partition suit—Compromise between some of the sharers*

A partition of joint property cannot be effected by a compromise as between some of the co-owners and a decree based on such a compromise does not bind the persons who are not parties to the compromise. (*Mookerjee and Beachcroft*, JJ.) GOBIND CHANDRA SARDAR *v.* BHAGBAT SARDAR. **27 I.C. 242.**

——**O. 23, R. 3**—*Partition suit—Consent decree—Partnership.*

A consent decree cannot be validly passed on a compromise among some only of the parties in a partition suit. (*Mookerjee and Carnduff*, JJ.) NITYAMONI DASI *v.* GOKUL CHANDRA. **9 I.C. 210=13 C.L.J. 16.**

Pleader's authority.

——**O. 23, R. 3**—*Pleader's authority*—Vakalatnama *express in terms.*

Where by a *Vakalatnama* the plaintiffs expressly specify that the presentation to the Court of petitions relinquishing the claim, compromise and withdrawal of suit by the pleader, is binding on them, and the pleader does present a compromise, the plaintiffs are bound by his acts. (*Piggott and Walsh*, JJ). HUKUM SINGH *v.* TANDA SINGH. **19 A.L.J. 63=60 I.C. 912= L.R. 2 A. 21=2 U.P.L.R. (All.) 405.**

——**O. 23, R. 3**—*Pleader's authority—Petition of compromise presented by vakils—Authority.*

Where a *razinamah* petition was presented by the vakils at the instance of the parties and was acted upon by the Court the question of the authority of the pleaders to compromise does not arise, as the compromise is by the parties and not by the pleaders. (*Abdur Rahim and Oldfield*, JJ.) PAMBAYAM CHETTY *v.* KANDASWAMI AIYAR. **60 I.C. 22=12 L.W. 562.**

C. P. CODE (V of 1908), O. 23, R. 3—Pleader's authority.

——— **O. 23, R. 3**—*Pleader's authority—Consent decree—Counsel acting on acquiescence of appellant's agent.*

Where the applicant challenged the consent decree on the ground that his counsel misapprehension against instructions:—*Held*, on the facts proved that the agent of the appellant acquiesced in the settlement though under protest proposed by the counsel in the interest of his chief and that he accepted it when every attempt to raise money necessary to satisfy plaintiff's claim failed, the decree was binding on him. Two propositions are well settled; first that express authority is not needed for a counsel to enter into a compromise within the scope of the suit; and secondly where there is limitation of authority and that limitation is communicated to the other side, consent by counsel outside the limits of his authority would be of no effect. (*Das and Bucknill, JJ.*) NILMONI CHAUDHURI *v.* KEDAR NATH DAGA. **3 P.L.T. 371=1 P. 480=67 I C. 96=1922 P. 232.**

Preliminary Decree.

——— **O. 23, R. 3**—*Preliminary decree—Appeal from—Compromise.*

In a suit for taking partnership accounts after a preliminary decree has been passed the suit is still pending in the Original Court for the purpose of proceeding to final decree, and if an appeal is preferred from the preliminary decree the jurisdiction of the Original Court to record a compromise under O. 23, R. 3, C.P.C. is not ousted by reason of the appeal. (*Fawcett, J.C. and Kemp, A.J.C.*) CHELLARAM KHIALDAS *v.* SETH KIMATRAM. **52 I.C. 869=13 S.L.R. 135.**

Probate Proceedings.

——— **O. 23, R. 3**—*Probate proceedings—Compromise.*

A compromise of, in probate case is binding only upon the parties to it. (*Chatterjea and Mullick, JJ.*) SHYAM LAL *v.* RAMESWAR BASU. **33 I C. 273=23 C.L.J. 82.**

——— **O. 23, R. 3**—*Probate proceedings—Probate and Administration Act, (V of 1881), S. 83—Proof of will before division of property.*

Parties cannot be permitted by the Court to divide the testator's property under a compromise before the will is proved. A compromise in a probate case only makes the case non-contentious, but does not take away the Court's duty to grant or refuse probate. An objector in probate proceedings may, despite his agreement to compromise, subsequently require the question of the execution of the will to be tried. On the objector's withdrawal from contest on compromise, the case cannot be dismissed in accordance with the terms of compromise, but probate in common form should be granted. (*Mullick and Kingsford, JJ.*) JANAK BATI THAKURAIN *v.* GAJANAND THAKUR. **20 C.W.N. 986=1 Pat. L J. 377=37 I.C. 12=1 Pat. L.W. 41.**

C. P. CODE (V of 1908), O. 23, R. 3—Record of compromise.

Public Trust.

——— **O. 23, R. 3**—*Public trust—Compromise by trustee.*

A *bona fide* compromise by the trustee of a public trust relating to trust properties is a lawful compromise. (*Abdur Rahim and Oldfield, JJ.*) PAMBAYAM CHETTY *v.* KANDASWAMI AIYAR. **60 I C. 22=12 L.W. 562.**

Record of Compromise.

——— **O. 23, R. 3**—*Record of compromise by guardian.*

Where the guardian of a minor auction purchaser enters into a compromise on the minor's behalf in a proceeding to set aside a sale under O 21, R. 90, without leave of the Court, and no leave is expressly recorded, the Court ought not to record the compromise. (*N. R. Chatterji and Panton, JJ.*) SITALA DAS MUKERJI *v.* BHUT NATH NASKER. **62 I.C. 688.**

——— **O. 23, R. 3**—*Record of compromise—Consent decree—Appeal.*

A decree under O. 23, R. 3 can be passed only after there has been an order that the compromise be recorded; this is not a mere matter of form and a consent decree passed without such order is liable to be set aside on appeal notwithstanding the bar under S. 96 (3). (*Jenkins, C J. and Chatterjee, J.*) PABAN SARDAR *v.* BHUPENDRA NATH NAG. **33 I.C. 769=43 Cal. 85.**

——— **O. 23, R. 3**—*Record of compromise—Petition not presented by parties.*

A deed of compromise which had been executed by the parties in the presence of the Tahsildar was forwarded by the latter to the Civil Court in which the suit was pending. *Held*, that the mere fact that the document was not presented by the parties themselves was immaterial. (*Scott Smith and Broadway, JJ.*) HARI CHAND *v.* MAGHI MAL. **78 P.R. 1917=112 P L.R 1917=40 I.C. 675=93 P.W.R. 1917.**

——— **O. 23 R. 3**—*Record of compromise—Party's signature.*

A party present in Court at the time of compromise and does not object to it, is bound by it though he has not signed it especially if he gets some benefit under it. (*Johnstone and Rattigan, JJ.*) AMIR *v* FAKIRA. **212 P.L.R. 1914=25 I C 874=139 P.W.R. 1914.**

——— **O. 23, R. 3**—*Record of compromise—Essential.*

The Court should first pass an order directing the compromise to be recorded and then pass a decree in accordance therewith. (*Rattigan and Shadi Lal, JJ.*) MUHAMMAD RASHID *v.* RAHMATULLAH. **212 P.L.R. 1914=24 I.C. 630=134 P.W.R. 1914=96 P.R. 1914.**

C. P. CODE (V of 1908), O. 23, R. 3—Record of compromise.

——— **O. 23, R. 3**—*Record of compromise—What is.*

An order of Court adjourning a case and incidentally noting the fact of an agreement made out of Court between the parties as a ground of adjournment is not a record of the terms of the compromise. S 92 does not prevent oral evidence of the terms of the compromise being given. (*White, C.J. and Sankaran Nair, J.*) SAMBANDA MUDALIAR *v.* CHINNASAWMI SAH. **29 I.C. 860.**

Revenue Proceedings.

—— **O. 23, R. 3**—*Revenue proceedings.*

R. 3 of O. 23, C.P.C., applies to civil as well as revenue proceedings. (*Stuart and Kanhaiya Lal, A J.Cs.*) SHANKAR SINGH *v.* KALKA BAKSH SINGH. **39 I.C. 346=21 O.C. 346.**

—— **O. 23, R. 4**—*Execution proceedings.*

Provisions as to withdrawal do not apply to execution proceedings. Therefore an application for execution of a decree cannot be withdrawn with liberty to make a fresh application. (*Richards, C.J. and Banerjee, J.*) MATA PALAT *v.* BENI MADHO. **12 A.L.J. 236=22 I.C. 961=36 All. 172.**

——— **O. 23, R. 4**—*Execution proceedings—Compromise—Legality of.*

O. 23, R. 4 of the C.P. Code is explicit in its terms and declares O. 23 to be inapplicable to proceedings in execution of a decree or order. Consequently an arrangement entered into after decree for payment of the sum decreed in instalments is not binding and limitation for execution of the decree runs nevertheless. (*Broadway, J.*) BANARSI DAS *v.* RAMZAN. **72 I.C. 477=1924 Lah. 342.**

—— **O. 23, R. 4**—*Compromise in execution—Dismissal of application for execution consequently—Estoppel.*

Where an execution application was dismissed on the basis of a compromise which provided for a particular method of satisfaction and also for a fresh application if the compromise was not carried out, and on the decree-holder filing another application when the full amount was not paid, the deft. contended that the compromise could not be enforced in execution, *Held*, that the deft. was estopped and that O. 23, R. 4 does not affect the rule of estoppel. (*Benson and Abdur Rahim, JJ.*) SHRI RANGA BHUPALA BALAI RAO GARU *v.* NAYANIM BAHADUR VARU. **13 I.C. 81.**

——— **O. 24, Rr. 1, 2 and 3**—*Execution proceedings - Applicability of provisions*

Where the amount deposited in Court in execution might have been immediately on deposit paid out to the decree-holder in part discharge of his claim, the judgment-debtors were relieved from paying any interest on that amount on the analogy of O. 24, Rr 1, 2 and 3, C. P. C. (*Richards, C. J. and Banerji, J.*) AMTUL HABIB *v.* MUHAMMAD USUF **40 All. 125=43 I. C. 620=16 A.L.J. 15.**

C. P. CODE (V of 1908), O. 25, R. 1.

——— **O. 24, R. 2**—*Invalid—Tender—Cessation of interest.*

Where a mortgagee refuses to receive the mortgage money deposited in Court and a suit for redemption is filed by mortgagor subsequently, the plaintiff is entitled to cessation of interest from the date of the service of the plaint and the summons on the deft. (*Seshagiri Aiyar and Napier, JJ.*) SUBRAMANIA AIYAR *v.* NARAYANSWAMI VANDYAR. **34 M.L.J. 489=48 I.C. 688=7 L.W. 537.**

——— **O. 24, R. 4, S. 35**—*Award of costs—Discretion of Court.*

Where the amount for the recovery of which the suit has been instituted has been deposited in Court, the Court has got a discretion as to the disposal of costs. (*Benson and Abdur Rahim, JJ.*) RAMASWAMI REDDY *v.* LAKSHMIAMBAL AMMAL. **13 I.C. 200=(1911) 2 M.W.N. 568.**

——— **O. 24, R. 4 (2)**—*Deposit of amount—Costs, award of—Court, duty of.*

Where the defendant pays money into Court under O. 24, R. 4 (2) and says that the plaintiff never made any demand for it before suit, and the plaintiff denies it, the Court should record a finding as to whether a demand was made or not, so as to determine by whom the costs should be paid. (*Wallis, J.*) JAYANTI KISTAPPA *v.* JAYANTI CHINIAPPA **13 I.C. 188=(1912) M.W.N. 38.**

——— **O. 25, R. 1**—*Temporary residence is not within the rule.*

Temporary residence in British India for purposes of suit is not residence within the rule. (*Macleod, C. J.*) HANIF *v.* KULSUM. **23 Bom. L.R. 1263=46 Bom. 589=64 I.C. 703=1922 Bom. 299.**

——— **O. 25, R. 1**—*Security—After-acquired property of insolvent—Suit by undischarged bankrupts — Security for costs—C. P. Code, S. 151.*

An undischarged insolvent sued for the recovery of a sum due in respect of brokerage from the defendant and earned by him subsequent to his adjudication, the amount claimed being in excess of the amount of his debts proveable in insolvency. Defendant applied for an order that plaintiff was suing merely for the benefit of the Official Assignee and so an order as to security for the costs of the suit should be made. *Held*, that the plff. was not a nominal plff. suing merely for the benefit of the Official Assignee and so no order as to security for costs should be made. The application is not covered by any provision in the C. P. Code but that Code not being exhaustive, it must be dealt with under the general law. (*Greaves, J.*) E. D. MURRAY *v.* EAST BENGAL MAHAJAN FLOTILLA CO., LTD. **46 Cal. 166=22 C.W.N. 1018=48 I C. 622.**

——— **O. 25, R. 1 and O. 41, R. 10**—*Security for costs of appeal, when to be demanded.*

C. P. CODE (V of 1908), O. 25, R. 1.

There is no hard and fast rule that unless a plff. appellant has no interest in the litigation but he is a mere puppet in the hands of others, there cannot be any orders against him for security for costs. 5 Bom. L.R. 661, Appr. (*Holmwood and Imam*, JJ.) CHANDRA KANTA GANGULY *v.* SAROJINI DEBI. **32 I.C. 786,**

———**O. 25, R. 1**—*Security for costs—When to be demanded.*

A Court has power to demand security for costs where it finds that the plff. is not the real litigant but a puppet in the hands of others. Where the plff. has got a substantial interest in the suit the order for security should not be made, nor should it be made merely because the plff. is a poor man and cannot pay the costs if he loses. 2 Cal. 233; 14 Cal. 533, Rel. on. (*Stephen and Mullick*, JJ.) HARINATH SINGH *v.* RAM KUMAR BAGCHI. **18 C.W.N 119 = 20 I.C. 703 = 19 C.L.J 89.**

———**O. 25, R. 1**—*Pauper appeal—Security for costs—Grounds.*

Very special grounds should be required before a suitor in *forma pauperis* should be required to give security for costs. A mere suggestion that somebody else is financing is not such a ground. (*Lentaigne*, J.) MA SAW *v.* MAUNG SHWE GON. **2 Bur. L.J. 78 = 75 I.C. 309 = 1923 Rang. 245.**

———**O. 25, R. 1 (3)**—*Suit for payment of money—Suit for dissolution of partnership accounts and recovery of stridhanam property is not.*

A suit for dissolution of partnership and account and for the recovery of the stridhanam property belonging to a female plaintiff is not a suit for payment of money within O. 25, R. 1 (3), C. P. Code. (*Greaves and Ghose*, JJ.) AMULYA SUNDARI DASSYA *v.* SYAMA SUNDAR SAHA. **68 I.C. 607 = 1923 Cal. 316 (2).**

———**O. 25, R. 1 (3)**—*Security for costs—When can be made.*

Security for the defendant's costs cannot be ordered if there are grounds tending to prove that the defence is true; and so no order should be made before the written statement is filed. (*Fletcher*, J.) GEORGIANA MAJOR *v.* MAURICE EDWARD BANDMANN. **18 I.C. 217.**

———**O. 25, R. 1 (3)**—*Suit for payment of money—Suit for declaration of title to moveables or their value.*

A suit for a declaration of title to certain moveables and for recovery of possession of the same or in the alternative to obtain a decree for their value is virtually a suit for payment of money within O. 25, R. 1 (3), C.P.C. 17 Cal. 610; 32 Bom. 602, Foll. (*Brett and Carnduff*, JJ.) ANANDAMOYEE CHOWDHURANI *v.* GOKUL CHANDRA ROY. **14 I.C. 290 = 16 C.W.N. 763.**

———**O. 25, R. 1 (3) and O. 33**—*Pauper, woman—Security for costs.*

C. P. CODE (V of 1908), O. 25, R. 1.

A woman allowed to bring a pauper suit cannot be required to furnish security for costs, as an order of security would mean a refusal of permission to sue as a pauper. 12 C.W.N. 163, Foll. (*Fox*, C.J. *and Twomey*, J.) MA GUN *v.* THA HNIN. **8 L.B.R. 387 = 36 I.C. 320 = 10 Bur. L T. 105.**

See also (*Macleod*, J.) BAI LAXMI *v.* HARJIVAN NATHU. **13 Bom. L.R. 955 = 12 I.C. 538 = 36 Bom. 415.**

———**O. 25, R. 2**—*Next friend of minor plaintiff unable to give security for costs—Suit, if, should be stopped.*

A suit by a minor plff. should not be stopped merely on the ground that the next friend is unable to give security for costs; the other parties concerned have a right to ask for the removal of the next friend or if the suit is not a just one, for stay of the same. (*Robertson*, J. BHAJ BHAISHANKAR *v.* MULJI ASHARAM. **13 Bom. L.R. 480 = 11 I.C. 551 = 35 Bom. 389.**

———**O. 26**—*Scope of.*

O. 26 amplifies and explains S. 75. (*Abdul Raoof and Harrison*, JJ.) SAWAN WAL *v.* RAMAQ MAL. **3 Lah. 209 = 68 I.C. 802 = 1922 Lah. 47.**

———**O. 26**—*Interlocutory order appointing Commissioner—Revision.*

The High Court refused to interfere in revision with an interlocutory order of the lower Court directing a Commissioner to ascertain mesne profits as the applicant had a remedy by way of appeal from the final decree. (*Spencer*, J.) HUSSAIN SAHIB *v.* HAMMAD SAHIB. **16 L.W. 312 = (1922) M W N. 562 = 74 I.C. 812 = 31 M.L T. 180 = 1923 Mad. 43.**

———**O. 26**—*Commissioner's report—Objection to, should be heard by the Court.*

Where the report of a Commissioner appointed by Court is objected to by both parties and the Court without hearing the objections appointed a second and a third Commissioner and finally acted on the first Commissioner's report. *Held*, that the course followed was improper and that the Court should have heard the objections and tried them. (*Ayling*, O.C.J. *and Krishnasami Rao*, J.) AMMA NEITHIAR *v.* SUBRAMANIYYAN. **14 L W. 620 = 68 I.C. 469 = (1921) M W.N. 843.**

———**O. 26**—*Scope of.*

In the rules of practice of the Court of Judicial Commissioner of Sind there is nothing prohibiting the granting of copies of cross interrogatories to the opposite party before a commission is issued for the examination of a witness and it is reasonable that each side should know the questions the other desires to put. (*Pratt* J.C.) *In the matter of application by* BIBI SARAN. **39 I.C. 944 = 10 S.L.R. 210.**

———**O. 26, R. 1**—*Examination of witnesses on commission—Grounds for.*

C. P. CODE (V of 1908), O. 26, R. 1.

The Courts should not allow witnesses to be examined on commission without adequate reason. The grounds upon which the Courts can issue commission to examine witnesses are ordinarily those specified in O. 26, R. 1. (*Batchelor*, A.C.J. *and Shah*, J.) PANACHAND v. MANOHARALAL. 42 Bom. 136 = 43 I.C. 729 = 20 Bom. L.R. 1.

——O. 26, R. 1—*Commission to examine specific witness—Witness not named examined—Effect.*

Where at the instance of one side a commission was issued for taking the evidence of a particular witness and in spite of the objection of the other side another witness was also examined, *Held*, that the Court would be justified in ignoring the evidence of such person. (*Sanderson*, C.J., *Mookerjee and Fletcher*, JJ.) RAMCHENDUR GOURI SHANKER v. GANPATRAM BISWANATH. 59 I.C. 539 = 47 Cal. 883.

——O. 26, Rr. 1 and 4—"*May*," *meaning of—Discretion to issue commission.*

In the case of a witness not under the control of the party asking for a commission, who resides beyond the limits fixed under O. 16, R. 19 (*b*), a commission should issue as a matter of right, unless the Court is satisfied the party is merely abusing the Court's authority to issue process. It is not for the Court to decide whether the party will be benefited or not, as it is a matter entirely for the party. The word "may" in O. 26, Rr. 1 and 4 means "is given authority to". (*Wallace*, J.) JAGANNATHA SASTRY v. SARATHAMBAL AMMAL. 46 Mad. 574 = 17 L W. 251 = (1923) M W.N. 157 = 71 I.C. 530 = 44 M L.J. 202 = 1923 Mad. 321.

——O. 26, R. 1—*Commission—When should be issued whether benefit to the party praying therefor should be considered.*

The Court ought to issue commissions for the examination of witness at the instance of a party if all the conditions requisite therefor are fulfilled, irrespective of whether that party will be ultimately benefited thereby. (*Abdul Rahim and Sundara Aiyar*, JJ.) VIDYA PARNA v. SHETHAMMA. 12 I.C. 74 = 21 M.L J. 889.

——O. 26, R. 1—'*Any person*'—*Plaintiff—Grounds for issuing commission.*

The general rule is that evidence of a plaintiff in a case ought not to be taken on commission except for very strong reasons. Mere inconvenience or great distance from the Court to the plff.'s place of residence, is not a sufficient ground. (*Rigg*, J.) S.A. MUDALIAR v. ABDUL RAHMAN BROTHERS & CO. 57 I.C. 955 = 13 Bur L.T. 33.

——O. 26, R. 2—*Discretion of Court—Revision.*

Examination of witnesses on commission is in the discretion of the Court. Dismissal of application without enquiring or satisfying that evidence is unnecessary or irrelevant is

C. P. CODE (V of 1908), O. 26, R. 4.

sufficient for interference in revision. (*Robinson*, C.J. *and Heald*, J.) S.R.M.M. CHETTY v. P.L.N.N. NARAYAN CHETTY. 64 I.C. 821 = 11 L B.R. 65.

——O. 26, R. 4—*Examination of witnesses—Rights of plaintiff and defendant—Discretion of Court—Interference—Revision.*

Where an application is made by a defendant, who lawfully resides out of the jurisdiction of the Court, according to the ordinary course of his life and business, the Court will not regard the case with the same strictness as the case of the plaintiff who has instituted his suit in a forum of his choice though he resides beyond the jurisdiction of such Court. *Ross* v. *Woodford*, (1894) 1 Ch. 38 and *New* v *Burns*, 64 L.J.Q B. 104, Ref. In cases under O. 26, R. 4, C. P. Code, a distinction has been observed between an application by a plaintiff asking for a commission to examine himself and an application by a defendant asking for a commission to examine himself. O. 16, Rr. 19 and 21 apply to persons who are ordered to attend in person to give evidence, including persons who may be parties to a suit, but are required to give evidence as witnesses. They have no application to a case where a party to a suit desires to give evidence of his own motion in his own favour. Such a case is governed by O. 26, R. 4, C. P. Code; A Court of appeal should exercise great caution when invited to interfere with an order of the trial Court made with jurisdiction in the exercise of its discretion as to granting a commission. Each case depends on its own circumstances and no rule as to the exercise of that discretion could be laid down. If the Appellate Court deems that the discretion was wrongly exercised, if it deems that the case in all its bearings was not laid before the Court below, if it sees that the Court below misapprehended an important part of the case, the Court will interfere. The High Court in revision set aside the order of the lower Court, where that Court overlooked the distinction which should be observed in the treatment of an application by the defendant as distinguished from a similar application by the plaintiff, and ordered the defendant to be examined on commission on payment of costs to the plaintiff for cross-examination. (*Mookerjee and Panton*, JJ.) KUMAR SARAT KUMAR RAY v. RAM CHANDRA CHATTERJEE 35 C.L.J. 78 = 68 I.C. 9 = 1922 Cal. 42.

——O. 26, R. 4—*Grounds for issuing commission.*

The issue of a commission to examine a witness is a matter of judicial discretion and will not be granted unless the application is made *bona fide*, the issue in respect of which the evidence is required is one which the Court ought to try, that the witness to be examined would give evidence material to the issue and unless there are some good reasons why the witness cannot be examined in Court. (*Fletcher*, J.) A.F. SALEJI v. AHAMAD MUSAJI SALEJI. 19 I.C. 618.

C. P. CODE (V of 1908), O. 26, R. 4.

———O. 26, R. 4—*Non-resident defendant—Examination on commission—Refusal—Effect of.*

It would be unfair to compel a deft. who resides at Colombo to come to Cuttack where a suit for account has been instituted against him, to be examined in Court or practically to abandon his defence. He should be examined on commission. (1894) 1 Ch. 38, Rel. Where interrogatories for the examination of the deft. cannot be issued owing to the plff.'s failure to furnish a translation of their account papers, the commission should be issued without the interrogatories. The Court should exercise its discretion judicially. If there has been an erroneous exercise which has prejudiced the parties, the Court of appeal can set matters right, whether the order directs the issue of a commission or rejects the application. (*Mookerjee and Beachcroft, JJ.*) ADAMJI KHADI BAI v. ISSUF AHMED MULLA. **16 I.C. 750.**

———O. 26, R. 4 — *Commission to examine defendant—Residence out of Br. India more than 200 miles away is a sufficient ground.*

Where the defendant is his own sole witness and applied for a commission to hear himself examined as he was living more than 200 miles away in a Native State, the application should be allowed. (*Zafer Ali, J.*) ELVERS v. AMERICAN MOTOR COMPANY. **78 I.C. 923=1924 Lah. 476.**

———O. 26, R. 7—*Commissioner—Demeanour of witnesses.*

A Commissioner for the examination of witnesses is entitled by law to note his observation as to the demeanour of the witnesses examined by him. (*Sanderson, C. J., Woodroffe and Mookerjee, JJ.*) MARIAM BIBEE v. MUHAMMAD IBRAHIM. **48 I.C. 561=28 C.L.J. 306.**

———O. 26, Rr. 9, 16, 17 and 18—*Agra Tenancy Act—Applicability to.*

Report of a Commissioner appointed by an Asst. Collector in a suit for profits under S. 164 of the Agra Ten. Act, cannot be admitted in evidence according to Rr. 9, 16, 17 and 18 of O. 26, C. P. Code. (*Piggott and Ryves, JJ.*) BAKHTAWAR LAL v. SHEO PRASAD.
39 All. 694=42 I.C. 720=16 A.L.J. 766.

———O. 26, R. 9—*Local investigation by Court itself.*

A Court by which a suit is being tried does not act irregularly and improperly in itself making a local investigation in the course of the trial and supplementing the evidence by what was noted on the spot. (*Carnduff and Chapman, JJ.*) ASHRAF ALI v. MUHAMMAD ALI. **24 I.C. 618.**

———O. 26, R. 9 and O. 18, R. 18—*Local investigation—Investigation by Court—Judgment.*

A Court can hold a local investigation under O. 26, R. 9 and a commission is to issue only if it cannot do it itself; but a Judge making an investigation should put the result on record for the scrutiny of the parties and he cannot use the information obtained as a basis for his judgment though he may do so for understanding the evidence. 1 C.W.N. 682, Rel. on. (*Mookerjee and Carnduff, JJ.*) RAI KISHORI GHOSE v. KUMADHINI KANTA GHOSE.
14 I.C. 377=13 C.L.J. 138.

C. P. CODE (V of 1908), O. 26, R. 9.

———O. 26, Rr. 9 to 12—*Application for local investigation by Court on the day set down for trial—Refusal.*

An application for local investigation was made on the day set down for trial and the Court dismissed it as being too late. *Held*, that the discretion vested in the Court was properly exercised and cannot be interfered with in second appeal. (*Carnduff, J.*) RAJENDRA NARAIN SAHA v. ASHUTOSH SANYAL.
13 I.C. 195.

———O. 26, R. 9 and O. 18, R. 8—*C.P. Code (1882), S. 392—Local investigation in person.*

A Judge may make a local inspection in person at his discretion. Under the present Code, a Judge may issue a commission in any case where he deems it fit to do so, irrespective of his own convenience. S. 392 of the old Code compared. 39 Mad. 501 Cons.; 31 Bom. 38 (P.C.) Expl. (*Spencer and Ramesam, JJ.*) SABAPATHI PATHAN v. NATESA THEVAN.
44 Mad. 640=40 M.L.J. 884=18 L.W. 520=29 M L.T. 279=62 I.C. 790=(1921) M.W.N. 336.

———O. 26, R. 9—*Commission for local investigation—Evidence closed.*

A commission for local investigation cannot be issued after the evidence is closed and the case is ready for judgment. (*Kanhaiya Lal, A.J.C.*) SUNDAR LAL v. SITA RAM.
51 I.C. 399.

———O. 26, R. 9—*Local investigation—Judgment based on.*

O. 26, R. 9 gives no power to a Court to itself hold a local inspection. A Judge can hold it only for the purpose of understanding the evidence and for no other purpose. He must decide the case on the evidence adduced before him, and if he finds that complete justice cannot be done without local investigation, he has power, under this rule, to appoint a commission for this purpose, though the plff. has not applied for the same. The judgment of a Court based entirely on a legal investigation of the Judge cannot be sustained. (*Das, J.*) DWARAKA PRASAD v. MAKHU LAL.
32 I.C. 241.

———O. 26, R. 9—*Local investigation by Court—Value of procedure.*

It is a matter of doubt whether under the present code the Court can legally hold any local investigation in person but if it does so, the result of such investigation must be made a matter of record, so that the party adversely affected by it may meet it and it should be used only to enable the Judge to understand

C. P. CODE (V of 1908), O. 26, R. 10.

the evidence and not for the purpose of basing his decision thereon. 14 I.C. 377, Ref. to. (*Kingsford*, J.) ANANT LAL SAHU *v.* GOKUL SAHU. 35 I.C. 344.

——O. 26, R. 10—*Defendant not appearing before Commissioner cannot object to report.*

A deft. who does not appear before a Commissioner cannot ordinarily object to his report. (*Mookerji*, A.C.J. *and Fletcher*, J.) KAMINI KISHORE SEN *v.* PARBARTYA TIPERAH RAJ. 60 I.C. 434.

——O. 26, R. 10—*Local investigation—Irregular—Acquiescence by party—Effect.*

Where a party to a local investigation, which he knew to be badly and carelessly carried out, goes on with the trial with such knowledge, he cannot at the last moment ask for giving fresh evidence. (*Sharfuddin and Coxe*, JJ.) SHIDDESWARI DASYA *v.* SHASHI BHUSHAN CHAUDHURY. 16 I.C. 89.

——O. 26, Rr. 10 and 12—*Objection to Commissioner's report.*

Parties are entitled to object the Commissioner's report and prove their objection by examining the Commissioner or other witness. (*Broadway*, J.) HARCHARAN DAS *v.* DANPAT MAL DEWAN CHAND. 42 I.C. 221 = 164 P.W.R. 1917.

——O. 26, R. 10—*Practice — Party not challenging the report.*

When a Commissioner is appointed to hold at local inspection and to make a report and his report is subsequently not challenged by either party the Court should, if it thinks it as not an accurate report, give the Commissioner an opportunity of giving evidence in support of his report. It is against established practice to find fault with the report behind the Commissioner's back and to reject it *in toto*, without his being examined and allowing him substantiate the report. If there is a material error in the report it is the duty of a Court to send it back for review or reconsideration by him. (*Atkinson*, J.) AJODHYA PRASAD SINGH *v.* KAMAL NARAIN SINGH. 38 I C. 491.

——O. 26, R. 10 (2) — *Commissioner — Examination of—When can be allowed.*

Where objection is taken to the report of a Commissioner on the ground that he did not give any reasons for his findings, the Commissioner should, as a general rule, be examined as a witness. (*Mookerjee and Beachcroft*, JJ.) SITARAM *v.* RAM PROSAD RAM.
19 C.L J. 87 = 22 I.C 868 = 18 C.W.N. 697.

——O. 26, R. 10 (3)—*Local investigation—Result unsatisfactory—Procedure.*

Where the result of a local investigation is unsatisfactory the Court is not bound to order another inquiry. It can decide the case on the evidence. 28 C.L.J. 600, Dist. (*Beachcroft*, J.) GORIBULLAH *v.* MODU. 30 I.C. 301.

C. P. CODE (V of 1908), O. 26, R 13.

——O. 26, R. 10, Cl. (3)—*Report of local investigation—Refusal by Appellate Court to accept—Procedure.*

Where an Appellate Court refuses to accept the report of the Commissioner for local inquiry, it is not bound to order a fresh local enquiry. It can proceed upon the other materials available. It is within the discretion of a Judge to accept the report of a Commissioner. A Court is bound to see that there is some real ground for examining the Commissioner. It has a discretion in such matters to permit or refuse a party to examine the Commissioner. (*Fletcher and Panton*, JJ.) CHOWDHURY JADVENDRA *v.* GAJENDRA NARAIN DAS.
47 I.C. 650 = 28 C.L J. 208.

——O. 26, Rr. 11 and 12—*Commissioner to take account—Ignorance of language—Validity of appointment.*

A Local Commissioner appointed by consent of parties cannot be superseded simply on the ground that he is incompetent to go into the accounts, being ignorant of the language. Objections to the report of a Commissioner cannot be raised for the first time in Second Appeal especially when it is not taken as a ground of appeal nor raised in the lower Court. (*Kensington*, C.J. *and Shah Din*, J.) MUNSHI RAM *v.* MISRI.
9 P.W.R. 1915 = 27 I.C. 598 = 70 P.L.R. 1915.

——O. 26, Rr. 12 and 16—*Preliminary decree for dissolution of partnership—Formal order in Form 21, Appendix D.*

In a suit for dissolution of partnership and accounts an order was passed giving a preliminary decree for dissolution and on the same, an order was passed appointing *inter alia* a receiver to take accounts with instructions to submit a report, *Held*, the Court should pass a formal preliminary decree in Form 21, Appendix D of the Code, and it should also record the fact of the appointment of the receiver. (*Johnstone and Chevis*, JJ.) MURLI MAL DAYA CHAND FIRM *v.* LACHMAN.
72 P.L.R. 1914 = 22 I C. 526 = 45 P.W.R. 1914.

——O. 26, Rr. 12 and 16—*Objection to Commissioner's report—Examination of Commissioner.*

If objections are filed upon the report of a Commissioner, the objectors should be allowed to examine the Commissioner to substantiate their objection by his evidence. (*Johnstone and Chevis*, JJ.) MURLI MAL DAYAL CHAND FIRM *v.* LACHMAN. 72 P.L.R 1914 = 22 I.C. 526 = 45 P.W.R. 1914.

——O. 26, Rr. 13 and 14—*Partition suit—Application for appointment of Commissioner for division.*

An application for the appointment of a Commissioner to divide the properties by metes and bounds after the passing of the preliminary

C. P. CODE (V of 1908), O. 26, R. 13.

decree, is an application in the suit and not in execution. (*Sadasiva Aiyar and Spencer*, JJ.) ALUR LAKSHMI NARASIMHA SASTRULU *v.* VENKATA NARASAMMA. **52 I.C. 614.**

———O. 26, Rr. 13 and 14—*Appeal—Application for partition by compromise is not application for execution.*

An application for the appointment of a Commissioner to make shares under a compromise decree for partition, not being an application for execution, is not barred by time. Therefore if a Court wrongly treates it as an application for execution no appeal will lie. (*Oldfield and Sadasiva Iyer*, JJ.) SRINIVASA MUDALI *v* RAMASWAMI MUDALI. **2 L.W. 693 = 18 M.L.T. 143 = 30 I C. 380 = (1915) M.W N. 725.**

———O. 26, R. 14—*Partition—Decree—Execution—Casting lots for division—Validity.*

A casting of lots for the purpose of allotting shares to the parties is not opposed to O. 26, R. 14. The most equitable way by which properties could be assigned to co-parceners will be to draw lots after dividing the properties with reference to the number of sharers. This procedure is neither unwarranted nor illegal. (*Seshagiri Aiyar and Napier*, JJ.) ANANTA RAMAPPA *v.* SUBRAYA. **29 I C. 245 = 2 L.W. 430.**

———O. 26, R. 14—*Commissioner, allotment by—Approved by order of Court—Effect.*

An order of Court approving of the allotment and division made by a Commissioner for partition, is binding upon the parties even though a fresh decree was not passed in accordance with the Commissioner's report. A mere repudiation of the allotment by any of the parties will not extinguish the rights created by the Court's order. (*Benson and Sundara Aiyar*, JJ.) WADALMANTI SHRINIVASA *v.* WADALMANTI VENKAT RAMAIAH. **14 M L.T. 157 = 20 I.C. 908 = (1914) M.W.N. 144.**

———O. 26, R. 14—*Commissioner's report—Objection.*

Objections are entertainable to the report of the Commissioner under O. 26, R. 14. (*Lindsay J.C. and Kanhaiya Lal*, A.J.C.) ABDUL BASIT *v.* ABDUL SALAM. **25 I.C. 227.**

———O. 26, R. 14 (2)—*Commissioner's report—Objection to—Power of Appellate Court to entertain.*

In dealing with the objections to the report of a Commissioner, an Appellate Court has the same power as the Original Court, and a party cannot be heard in the Appellate Court unless he had filed his objections in the Original Court. (*Twomey*, C.J. *and Ormond*, J.) MA DWE *v.* MA TIN LUN. **56 I.C. 972 = 12 Bur. L.T. 228.**

———O. 26, R. 15—*Fees—Local investigation—Suit pending in Sub-Court — District Court disallowing portion of fee to Commissioner.*

C. P. CODE (V of 1908), O. 26, R. 17.

The Dt. Judge has no power to disallow a portion of the remuneration claimed by a Commissioner for local investigation in connection with a suit pending in the Court of the Subordinate Judge. The matter is one which must be dealt with by the Subordinate Judge in whose Court the suit is pending. (*Teunon and Newbould*, JJ.) PANCHANAN SEN *v.* MADHU SUDAN MULLIK. **44 I.C. 496 = 23 C.W.N 295.**

———O. 26. R. 15—*Fees due to Commissioner—Recovery of—Execution.*

The order of a Court directing the parties to a partition suit to deposit the Amin's fees is not capable of execution as there is no final decree in the case. (*N. R. Chatterjee and Walmsley*, JJ.) LALIT MOHAN BANERJEE *v.* BASDEO NARAIN SINGH. **21 I.C. 191.**

———O. 26, R. 15 — *Commission — Commissioner—Fees—Method of realisation.*

It is not proper that the Commissioner should be left to realise his fees by execution. The proper course is to call on the plffs. to deposit the full amount in Court and refuse to draw up the decree before the sum is so deposited. If the deft. also is liable to pay a share, the plff. ought to be made to deposit it in Court and such sum ought to be allowed to the plff. in the decree. (*Mookerjee and Teunon*, JJ.) NANDA LAL SARKAR *v.* BENODE BEHARI ROY. **9 I.C. 313 = 15 C.W.N. 221.**

———O. 26, R. 15—*Commissioner's fees—Duty of Court to fix—Deposit before passing final orders—Reduction of Commissioner's bills.*

Under O. 26, R. 15, the Court has to order the parties to make the deposits for the necessary remuneration of the Commissioners, and as it has to be entered in the decree, it is necessary to determine the fee of the Commissioner before the final disposal of the case. There is no justification for the Court to re-open the matter of the Commissioner's fees which had been fixed in the presence of the parties and paid by them after the case was disposed of, when the Commissioners applied for withdrawal of the amount deposited by the parties as their remuneration. 15 C. W. N. 221, Foll. There must be some confidence reposed in the Commissioners, who are pleaders and officers of the Court and their report as to the amount of work done by them can only be set aside on substantial and definite grounds. (*Jwala Prasad*, J.) BHAGAVAT SAHAI *v.* BRIJ BHUKHAN PRASAD SINGH. **57 I.C. 291 = 1 P.L.T. 171.**

———O. 26, R. 17—*Examination of witness on commission—Reading over to witness not necessary—Effect of—Perjury.*

The provisions of O. 26, R. 17 of the C. P. Code with regard to the examination of witnesses in Court does not require that the statements of the witness after they have been recorded should be read over to them and the same procedure should be considered applicable in the case of statement of witness recorded on commission. Consequently where statements recorde-

C. P. CODE (V of 1908), O. 27, R. 1.

on commission were not read over to the witness they are admissible in evidence and it is open to the Court to grant sanction for perjury in respect of such statements. (*Daniels*, A. J. C.) MT. FEROZA JAN *v.* MIRZA AMIR ALI. 9 O.L.J. 593=9 O. & A L.R. 103= 24 Cr. L.J. 781=74 I.C. 445= 1923 Oudh 119.

——O. 27, R. 1—*Plaint—Facts to be set forth.*

A plaintiff need not set forth in his plaint nothing more than the facts entitling him to the decree that he asks for. He need not allege reply to probable defences. (*Martineau and Campbell*, JJ.) NIAZ AHMAD KHAN *v.* ABDUL LATIF. 1923 Lah. 475.

——O. 29—*Suit against a Railway Company—Form of—Railways Act, Ss.* 140, 141.

Neither O. 29 of the Code nor Ss. 140 and 141 of the Railways Act say anything about the manner in which a suit against a Railway Company is to be framed. The form in which a Company is to be sued is given in Sch. I, App. A. of the Code. (*Ross*, J.) SINGHI RAM BIHARI LALL *v.* AGENT, E. I RY. 64 I.C. 125=2 Pat. L.T. 679.

——O. 29, R. 1—*Suit against companies —Frame of.*

O. 29, R 1 requires that a suit against companies should be framed, so as to describe them by the proper names. (*Mookerjee and Roe*, JJ.) INDIA GENERAL S. N. R. CO. *v.* LAL MOHAN SAHA. 43 Cal. 441=31 I.C. 35= 22 C.L.J. 241.

——O. 29, R. 1—*Suit by Corporation—Plaint signed by Principal Officer, who is also on* Am-Mukhtear.

In a suit by a Corporation the plaint if signed by the Principal Officer of the Corporation who was also an *am-Mukhtear* is sufficient compliance with O. 29, R. 1 and the part of his being an *am Mukhtear* in addition, would not invalidate his act as the Principal Officer. (*Mookerjee and Beachcroft*, JJ.) CHANDRA SHEKHAR ZAMINDARI CO., LTD. *v.* RAMKUMAR HALDAR. 22 I.C. 674=20 C.L J. 39.

——O. 29, R. 1—*Company—Right to sue* in forma pauperis.

It is open to a company in liquidation to sue *in forma pauperis* through its liquidator. (*Bakewell and Kumaraswamy Sastri*, JJ.) PERUMAL KOUNDAN v. VENKATASWAMY NAYADU. 41 Mad. 626=45 I.C. 154= 35 M.L.J. 421.

——O. 29, R. 2—"*Notice to be served after suit properly framed.*"

A plff. is bound to serve notices according to O. 29, R. 2 after amendment of the plaint has been made and the suit properly constituted. (*Mookerjee and Roe*, JJ.) INDIAN GENERAL S. N. AND R. Co. *v.* LAL MOHAN SAHA. 43 Cal. 441=31 I.C. 35=22 C.L.J. 241.

C. P. CODE (V of 1908), O. 30, R. 1.

——O. 30—*Suit against firm—Defendant also described as owner of Firm—Mere surplusage.*

Where a suit filed against a firm, but the defendant being shown as the owner of the firm and a question of limitation is passed by the heirs of the defendant who are subsequently impleaded the suit must in effect be treated as one against a firm and the subsequent words of description mere surplusage. (*Shah*, A.C.J. *and Crump*, J.) MOTILAL JASRAJ *v.* CHANDMAL HINDUMAL. 26 Bom L.R. 1081= 77 I.C. 1055=1924 Bom. 155.

——O. 30—*Scope of provisions.*

The effect of the provisions regarding suits against partners in the firm name is merely to give a compendious mode of describing in the writ the partners who compose the firm; in effect the partners are sued individually. The firm name is a mere expression and not a legal entity. (*Ghose*, J.) RAM PROSAD CHIMON LAL *v.* ANUNDJI & CO. 49 Cal. 524= 69 I.C. 885=1922 Cal. 408.

——O. 30, R 1—*Firm carrying on business in different places—Identity, determination of.*

In the case of firms carrying on business in different parts of the country or of the province some times constituted of the same people, some times constituted with the omission of one person who has no interest in a branch of business in one of the towns or with the addition of a new person who has an interest confined only to that branch of business, a Court should analyse the facts as thoroughly as ito an in order to determine whether the firms or persons so carrying on business are really the same legal entity or person in each place. A firm without being a branch in the sense that it is subordinate to and under the control of a firm in a different town and compelled to render an account to the latter, might still be in substance the same business so as to make it carry on business in its own place, if it is transacting the business of the different firm in its own place as agent for that firm, purchasing and selling goods and obtaining orders, forwarding or receiving orders to and from that firm and merely remunerating itself by being allowed to make a definite profit out of certain transactions or a limited profit out of all transactions. (*Walsh and Ryves*, JJ.) FIRM, KIRPA RAM SITA RAM *v.* FIRM, MANGAL SEN BISHAN MAL. 3 U P.L.R. (All.) 18= 65 I.C. 98=1922 All. 367.

——O. 30, R. 1—*Firm — Plaint signed by one partner.*

One person carrying on business in the name of a firm cannot sue in the name of the firm. A firm must consist of two or more persons and one partner can sign and verify the plaint in a suit by the firm. (*Sunder Lal*, J.) FIRM SWARATH RAM *v.* SARUP LAL RAM. 26 I.C. 131=12 A.L J. 1020.

C. P. CODE (V of 1908), O. 30, R. 1.

———O. 30, R. 1—*Title of the suit—Defect in.*

The plaintiff who was a minor was described in the title of the plaint as "owner of the shop C". It was stated in para 4 of the plaint, "As the plaintiff the owner of the shop is a minor, this suit is not barred by limitation." The suit was dismissed by the trial Court holding that the plaintiff was the shop and not the minor, *Held* the dismissal was wrong. (*Macleod* C.J. *and Crump*, J.) CHANBASSAPPA MALLAPPA *v.* MALKAPPA LINGAPPA. **77 I C. 476 = 1923 Bom. 368.**

———O. 30, R. 1—*Suit by one firm against another—Reference to arbitration by representatives—Validity of.*

Where a suit is brought by one firm against another through their representatives they can agree to refer the dispute to arbitration and the validity of the award is not affected by the fact that the minor members of the firm did not sign the reference to arbitration. 68 I.C. 750; 25 I.C. 955; 50 I.C. 471; 19 I.C. 363; 16 A. 23, Ref. (*Broadway*, J.) FIRM OF BISHAMBAR MAL PALA MAL *v.* FIRM OF GANGA SAHAI NIHAL CHAND. **5 Lah. L J. 5 = 71 I.C. 734 = 1923 Lah. 212.**

———O. 30, R. 1—*Firm including a minor partner — Reference of suit to arbitration—Sanction of Court is not necessary.*

Where a suit is brought against a firm, the mere fact that there is a minor member of the firm, does not bring the suit within the purview of O. 32. Where the matter is referred to arbitration, it is not necessary that the Court should give assent under O. 32, R. 7. (*Harrison*, J.) SUKHA NAND *v.* BEHARI RAM ISHAR DAS. **68 I.C. 750 = 1923 Lah. 103.**

———O. 30, R. 1—*Firm—Suit by—Misdescription.*

Where a firm continues to be known by its old name but the name of the actual head of the firm is sometimes added to the old name, the omission of such addition from the name of the firm in a suit does not amount to a misdescription. (*Chevis and Shadi Lal*, JJ.) CHELA RAM SANT *v.* KISHAN CHAND. **3 P.W.R. 1918 = 44 I.C. 283 = 155 P.L.R. 1917.**

———O. 30, R. 1—*Suit against firm.*

It is permissible in India as it is in England to sue only the solvent members of a firm when a decree is sought against it. (*Oldfield and Sadasiva Aiyar*, JJ.) RAMASWAMI NAIDU *v.* MATHUSAMAIA PILLAI. **41 Mad. 923 = 35 M L.J. 581 = 48 I.C. 756 = (1918) M.W.N. 796.**

———O. 30, R. 1—*Bank—Suit by or against—Manager—Claim for relief against.*

A bank being a limited company can be sued only in its own corporate personality and not in the name of its manager and if sued in the name of its manager, the manager is not personally liable. So an application to amend the plaint by insertion of a prayer for relief against the manager in the alternative should be refused though he can be added as a party independently. The trial of a suit against a bank will be concerned only with the bank's liability and the manager's conduct can affect it only so far as he may be found to have acted within the scope of his authority. (*Oldfield and Bakewell*, JJ.) CHALAPURAM BANK, LTD. *v.* ZAMORIN RAJA AVERGAL. **40 I.C. 549 = (1917) M.W.N. 359.**

C. P. CODE (V of 1908), O. 30, R. 3.

———O. 30, Rr. 1 and 2—*Suit by some of the members of the firm — Addition of others—Limitation.*

A suit on behalf of a partnership firm, by one partner as agent, is not barred by limitation. When the other co-partners are joined as plaintiffs, the suit would be barred on the latter date. (*Seshagiri Iyer*, J.) MARAYYA CHETTI *v.* SAMI CHETTY. **28 I.C. 210 = 2 L.W. 239.**

———O. 30, R. 1—*Firm—Change of partners—New firm—Suit on old contract does not lie.*

The cause of action in respect of a contract with a firm vests in all the partners jointly and if after the contract, one of the partners retires and a stranger comes in, the new partnership cannot enforce the contract entered into by the old. If the new partnership brings a suit in its own name, it cannot by substituting the names of the old partners alter the period of limitation for instituting the suit and avoid the bar of limitation. (*Kemp*, A.J.C.) FIRM OF MANGOOMAL JETHANAND *v.* FIRM OF ARATMAL SATRAMDAS. **16 S.L.R. 152 = 65 I.C. 26 = 1922 Sindh 13.**

———O. 30, R. 2—*Suit against a firm—Dissolution before suit—Effect of.*

A suit contemplated by O. 30 of the C. P. Code may be brought by or against a firm in the firm's name even though the firm may have been dissolved before the date of the suit, provided the cause of action arose before the dissolution. The proceedings in a suit so brought continues in the name of the firm, even though the name of the partners are disclosed. (*Mookerjee and Pantan*, JJ.) PULIN BEHARI ROY *v.* MAHENDRA CHANDRA GHOSAL. **67 I.C. 10 = 34 C L.J. 405.**

———O. 30, R. 3 and O. 34, R. 1—*Suit relating to firm property—Mortgage—Services of summons on the manager, if sufficient.*

A mortgage suit by or against the firm is on the same footing as others relating to the properties of the firm and the service of summons on the manager of the firm is service on all partners of the firm. (*Knox and Griffin*, JJ.) HARDWARI MAL *v.* ATHERTON WEST. **12 I.C. 629.**

———O. 30, Rr. 3 and 5—*Suit against firm—Dissolution before suit—Leave to serve by registered post—High Court Rules, Ch. VII, R. 11, Ex parte decree.*

C. P. CODE (V of 1908), O. 30, R. 4.

An *ex parte* decree was obtained against a firm which had been sued in the firm name and served as such with the leave of Court, by registered post. It was alleged in an application to set aside the *ex parte* decree by the applicant that the summons was not duly served and that the firm had long ceased to carry on business as such firm but was being wound up by the applicant. *Held*, a suit can be brought against a firm in its firm name even if it be a dissolved firm provided only that the liability arose at a time when the firm was in existence. Under O. 30, R. 3, the only way in which such writ can be served is by serving it either upon a partner or by serving it at the principal place at which the partnership business is carried on in British India on a person having at the time of service the control or management of the partnership business. If rule 11 of Chapter VIII of the High Court Rules is applied, it is necessary that it should be so applied as to comply with O. 30, R. 3. (*Rankin*, J.) HAKJI-BANDAS GORDHANADAS *v.* BHAGWANDAS PURSRAM. **49 C. 394=69 I.C. 236=1922 Cal. 390.**

——**O. 30, R. 4**—*Suit by firm—Death of one of the respondents—No substitution—Defect of parties.*

O. 30, R. 4 of the C. P. Code applies only to a case where the suit is brought in the name of the firm. Where it is brought by the individual proprietors and they succeed in obtaining a decree and pending an appeal, one of them dies but his legal representative is not brought on record, the appeal fails for defect of parties. (*N. R. Chatterjee and Greaves*, JJ.) MONMOHAN PANDAY *v.* BIDHU BHUSAN RAY CHOWDHURY. **48 I C. 309=28 C.L.J. 268.**

——**O. 30, R. 4**—*Suit by or against firm carrying on business in other names—Death of one of the plaintiffs—Representatives, if to be joined—Contract Act, S. 45.*

In a suit by or against a firm trading in different name if one of the partners be dead, it is not necessary to join the representatives of the deceased as a party, since O. 30, R. 4, C.P.C., contains a modification of S. 45 of the Contract Act. (*Fletcher*, J.) BAL KISEN DAS DAGA *v.* KANHAYA LAL **21 I.C. 509=17 C L J. 648.**

——**O. 30, R. 4**—*Suit against individuals—Practice—Pleading.*

A person who sues some of the partners in their individual capacity cannot change his front and sue for a relief against them as partners. S. 43 of the Contract Act does not apply to such a case. (*Johnstone and Le Rossignol*, JJ.) RAMADIN *v.* MUNSHI RAM. **76 P.R. 1915=31 I.C. 209=154 P.W.R. 1915.**

——**O. 30, R. 4**—*Contract Act, S. 45—Debts due to firm—Necessary parties.*

The legal representative of a deceased partner is not a necessary party in suits by the surviving partner for recovery of the debts due to the firm, but they may apply to Court to be joined as parties. (*Hartnoll, Offg. C.J. and Twomey*, J.) OODAYAPPA CHETTY *v.* RAMASWAMY CHETTY. **7 Bur. L.T 261=24 I.C. 268=8 L B.R. 180.**

C. P. CODE (V of 1908), O. 30. R. 9.

——**O. 30, Rr. 5 and 7**—*Scope of.*

The concluding words in O. 30, R. 5 lay down a definite rule of law that service on a person without notice is equivalent to service as a partner, R. 7 must be read subject to R. 5 and it contemplates a case where service is on a manager. (*Mookerjee and Beachcroft*, JJ.) BAISHNAB CHARAN SHAHA *v.* BANK OF BENGAL. **19 C.L.J. 581=26 I.C. 866=19 C.W.N. 1008.**

——**O. 30, R. 6**—*Suit against a Firm—"Individuality"—Meaning of.*

O. 30, R. 6 of the Code entitles a plaintiff suing a firm to know who the persons are who constitute that firm and the information cannot be withheld. The word "Individuality" in O. 30, R. 6 is not synonymous with "in person." No partner can be forced to appear in person, but in his absence, after service of summons, he will be dealt with *ex parte*. If appearance is put in for him, it will be reckoned as his individual appearance. (*Le Rossignol*, J.) BRIDGES AND CO *v* SHAMAS DIN AND CO. **105 P L R. 1918=78 P.R. 1918=47 I.C. 422=155 P W.R. 1918.**

——**O. 30, R. 8**—*Appearance under protest.*

The deft. entered appearance under protest denying that he was a partner in the deft.'s firm. Plff. got an *ex parte* order for adjournment in order that he might serve a duplicate writ of summons on the defendants, *Held*, that the order for adjournment though objected to by the defendant should stand. But the deft. had a right to have the question whether he was a partner in the deft.'s firm decided by the Court. (*Macleod*, C.J.) VITHALDAS *v.* HANSRAJ. **64 I.C. 688=23 Bom. L R. 1249.**

——**O. 30, R. 9**—*Partnership suit—Surety bond.*

A surety bond executed in a partnership suit enures for the benefit of all those who eventually get a decree. Each of the parties to a partnership suit is really in turn plaintiff and defendant and in both capacities comes before the Court. 7 Bom. 167, Rel. on. (*Scott-Smith*, J.) AMBA *v.* BAIJNATH. **42 I.C. 436=167 P.W.R. 1917.**

——**O. 30, R. 9**—*Suit by partner for recovery of money from another partner.*

No suit lies as between partners or between firms having common partners for recovery of monies without asking for accounts. The scope of O. 30, R. 9, C.P.C., is not to lay down when and under what circumstances suits can be laid as between partners. It only lays down the possibility of such suits and the procedure to be followed therein. 34 Mad. 112; 28 Mad. 344, Dist. (*Abdur Rahim and Oldfield*, JJ.) LAKSHMANAN CHETTY *v.* NAGAPPA CHETTY. **45 I.C. 86=34 M.L.J. 408.**

C. P. CODE (V of 1908), O. 30, R. 9.

———O. 30, R. 9—*Suit by one firm against another having partners.*

A suit lies by one firm against another firm notwithstanding that the firms have common partners. The law in India as laid down in O. 30, R. 9, C.P.C., contemplates suit between the same parties in different capacity. (*Sadasiva Aiyar and Phillips*, JJ.) VELLAYAPPA MOOTHAN *v.* KRISHNA MOOTHAN.
44 I.C. 428=34 M.L J. 32.

———O. 30, R. 10—*Jurisdiction of Court—Residence of defendant.*

A plaintiff is entitled to sue a defendant, in the name of the firm, in respect of a firm transaction under O. 30, R. 10, his residence is of no importance to determine the jurisdiction of the High Court. (*Harrington*, J.) E. D. SASOON AND CO. *v.* M. S. E. ANGULLIA AND CO. **10 I C. 895.**

———O. 31, Rr. 1 and 2—*Co-administrators—Suit by one to recover rent impleading others as co-defendants.*

One of several administrators of an estate can maintain a suit to recover rent with the consent of the other administrators who are impleaded as *pro forma* defendants. (*Newbould and Duval*, JJ.) NAZIR AHAMAD *v.* RAGBAT ALI. **53 I.C. 478 (1).**

———O. 31, R. 1—*Trust—Suit for possession of trust property—Party—Beneficiary, if a necessary party.*

Under O. 31, R. 1 a beneficiary is not a necessary party to a suit as he can be represented by his trustee. A *shebait* of an idol therefore can sue for possession of property belonging to the idol. (*Mookerjee and Beachcroft*, JJ.) SIDHUSAHU *v.* GOPICHARAN DAS.
18 I.C. 989=17 C L.J. 283.

———O. 31, R. 1—*Executor—Right to sue.*

Under S. 82 of the Prob. and Admn. Act and O. 31, R. 1, C.P.C., no one but an executor is competent to prosecute a suit as representative of the deceased. (*Sultan Ahmad*, J.) SAKLI *v.* RAM KISAN DAS. **35 I C. 805=2 U.P.L.R. (Pat.) 31.**

———O. 31, R. 1—*Applicability—Suit for declaration of right of worship in temple and for injunction.*

O. 31, R. 1 are not applicable to a suit for a declaration of the plaintiff's right to worship in a temple and for an injunction restraining the defendant from interfering with his right. The trustee of the temple is not, therefore, a necessary party to such a suit. (*Robinson*, O.C.J. *and MacGregor*, J.) SAKLAT *v.* BELLA. **63 I.C. 963=13 Bur. L.T. 183.**

———O. 31, R. 1—*Trustees and executors—Necessary parties.*

In suits between beneficiaries of property vested in trustees of executors and third persons, the beneficiaries must be represented by trustees or executors. (*Young*, J.) COWASJI *v.* BELLA. **30 I.C. 809=11 Bur. L.T. 259.**

C. P. CODE (V of 1908), O. 32, R. 1.

———O. 31, R. 2—*Suit against temple—All trustees are necessary parties.*

In a suit against a temple all the trustees are necessary parties even though there is an agreement between them authorising one of them to represent the temple. (*Odgers and Devadoss*, JJ.) ADIRAJU ARASU KANNIKKE BALLALA *v.* PATTU. **1922 Mad. 405 (1).**

———O. 32—*Does not apply to execution proceedings.*

O. 32 does not directly apply to proceedings in execution. The '*lis*' in respect of which a minor defendant is required to be represented by a guardian, is at an end after the decree is passed and in determining whether a minor is sufficiently represented in execution proceedings a Court may look at the substance of the transaction. (*Sanderson*, C.J. *and Richardson*, J.) FANI BHUSAN *v.* SURENDRA NATH. **64 I.C. 25=35 C.L.J. 9.**

———O. 32—*Applicability — Probate proceedings.*

Until a contest arises in a probate proceedings, O. 32 has no application to the proceedings. (*Richardson and Huda*, JJ.) RADHASHYAM DASYA *v.* RANGA SUNDARI.
39 I.C. 664=24 C.W.N. 541.

———O. 32, R. 1—*Suit by minor in forma pauperis—Next friend need not be a pauper.*

A minor who is not possessed of sufficient means within the definitions of pauperism for the purpose of O. 31 is entitled to be allowed to sue in *forma pauperis* by a next friend although the next friend is not a pauper. (*Rankin and Ghose*, JJ.) NAIN BALA DASSYA *v.* JAMINI SUNDARI, **37 C.L J. 394=70 I.C. 919=1923 Cal. 656.**

———O. 32, Rr. 1 and 4 (2)—*Next friend other than certificated guardian—Notice to guardian defective—Irregularity.*

Where a Court appointed a person other than a certificated guardian as the next friend of the minor, defective service of notice upon the guardian under O. 32, R. 4 (2) is only an irregularity and the minor is properly represented. (*Coxe*, J.) KARIM KHAN *v.* SALAMUDDI. **13 I.C. 595.**

———O. 32, R. 1 — *Guardian-ad-litem—Gross negligence—Effect.*

Where a guardian *ad litem* appointed by Court, does not, in spite of his endeavours to obtain instructions from the minor, receive them and leaves the decision in hands of the Court, he is not guilty of gross negligence and the decree cannot be set aside therefor. (*Lindsay*, J.C.) GIRJA DAYAL *v.* RAGHU MAL. **33 I.C. 481.**

———O. 32, R. 1—*Suit against minor—Burmese Buddhist Law—Breach of promise of marriage—Compensation.*

The minority of the youth is no defence to a suit for compensation for breach of promise of marriage under the Burmese Buddhist Law.

C. P. CODE (V of 1908), O. 32, R. 2.

The suit, however, must be brought in the manner prescribed in O. 32, C. P. C., and a personal decree can be passed against the minor. (*Heald*, A.J.C.) MAUNG NYEIN *v* MA MYIN. 46 I.C. 421 = (1918) 3 U.B.R. 75.

——— O. 32, R. 2—*Plaint filed by minor without next friend—Election to proceed after attaining majority—Effect.*

Where a minor files a plaint and before it is put up before the Court, attains majority, and applies to be allowed to proceed with it, the plaint must be deemed to have been properly presented on the day of the application to proceed with the plaint. (*Banerjee and Piggott*, JJ.) NASIRUDDIN HUSSAIN *v.* ASHFAQ HUSSAIN. 46 I.C. 747 = 16 A.L.J. 737.

———O. 32, R. 2—*Appeal— Minor —No Guardian* ad litem.

An appeal by an infant not represented by a guardian *ad litem* is not entertainable; the Court remanded the case for disposal. (*Mookerjee and Carnduff*, JJ.) MISRI SAHU *v.* VISHNU NATH SAHU. 82 I C. 985 = 29 C.L.J. 419.

——— O. 32, Rr. 2 and 12—*Suit by minor without next-friend—Dismissal of suit—Propriety of—Minor attaining majority during pendency of suit.*

Where the plaintiff who was a minor brought a suit without a next-friend and his minority was not apparent on the face of the record but is proved on the trial of an issue in the suit itself, the Court ought not to dismiss the suit at once but should allow a reasonable time for a next friend to come on the record and go on with the suit and it is only if no one comes forward that it should reject the plaint. 13 C. 189, relied on. It is no doubt open to the minor on attaining majority to drop the suit as not properly instituted but he is not bound to do so; he could affirm the previous proceeding and continue the suit. (*Krishnan and Ramesam*, JJ.) PUPPOOTH *v* V. M. RAMAN SOMAYAJIPAD. 44 M.L.J. 515 = 32 M.L.T. 107 (H C.) = (1923) M.W.N. 301 = 17 L.W. 558 = 74 I.C. 309 = 1923 Mad. 853.

———O. 32, R. 2 (1)—*Plaint by minor without next friend—Rejection of plaint not proper.*

The procedure to reject the plaint filed by a minor without a next friend is improper. The court has to grant time for doing so. (*Scott-Smith and Fforde*, JJ.) ALI AHMAD *v* SAID MIAN. 4 Lah. 390 = 78 I.C. 1028 = 1924 Lah. 188 (1).

———O. 32, R. 3.

ABSENCE OF FORMAL ORDER.
CONFLICT OF INTEREST.
DEFECTIVE APPOINTMENT.
EXECUTION PROCEEDINGS.
NO GUARDIAN APPOINTED.
NOTICE.
OFFICER OF COURT AS GUARDIAN.
MISCELLANEOUS.

C. P. CODE (V of 1908), O. 32, R. 3—Absence of formal order.

Absence of Formal Order.

———O. 32, R. 3—*Absence of formal order—Minor — Decree against — Absence of order appointing guardian* ad-litem.

A decree against a properly represented minor is binding upon him, but if he has not been properly represented, the decree is a nullity and a claim brought to have it declared that the decree is a nullity is superfluous. The absence of a formal order appointing a guardian *ad litem* is nothing more than a mere irregularity. (*Richards*, C.J. *and Banerji*, J.) POKHPAL SINGH *v.* CHIDDU SINGH. 16 I.C. 903 = 9 A.L.J. 653.

———O. 32, R. 3—*Absence of formal order of appointment, if vitiates the suit—Guardian* ad litem*—Certificated guardian.*

The certificated guardian of a minor must be appointed guardian *ad litem* unless for special reasons the Court thinks that some one else should be appointed in the interests of the minor. The absence of a formal order of appointment is not fatal to the suit where the minor was effectively represented by him in the suit with the tacit sanction of the Court. (*Coxe and Chatterjee*, JJ.) JANKI DAS *v.* MOHABIR PRASAD. 22 I.C. 240.

———O. 32, Rr. 3 (1) and (2)—*Absence of formal order of appointment—Minor, if bound by decree.*

A guardian not formerly appointed by the Court if he has been recognised as acting on behalf of a minor and has not been guilty of negligence but has done all that can be done on behalf of the minor, the decree is binding on the minor and it cannot be set aside merely on the ground of non-compliance with O. 32, R. 3 (1) and (2) of C.P. Code. Where there has been no formal order of appointment, the Court has to look carefully into the proceedings and the decree can be held into, be binding, on the minor only if it appears that the case was properly conducted on his behalf. (*Chevis and Roof*, JJ.) UDHAM SINGH *v.* GURDIP SINGH. 49 I.C. 964 = 39 P.W.R. 1919.

———O. 32, R. 3—*Absence of formal order—"Omission to pass formal order under" does not vitiate proceedings.*

Where a Court issued notices as required by O. 32, R. 3, sub-rule 4 on an application made by plffs. for appointment of guardian *ad litem* who took proper steps and defended the case an omission to pass a formal order would not vitiate all proceedings but is an irregularity that could be condoned. (*Shadi Lal and Le-Rossignol*, JJ.) NARAIN DAS *v.* RALLI BROTHERS. 61 P.R. 1915 = 31 I.C. 45 = 186 P.W.R. 1915.

———O. 32, R. 3—*Absence of formal order of appointment—Compromise—Sanction of Court.*

Where the Court by its action had given its sanction to the appearance of a person as a guardian, the absence of a formal order of

C. P. CODE (V of 1908), O. 32, R. 3—Absence of formal order.

appointment is not necessarily fatal to the proceedings. Even an omission to serve the minors concerned or their mother personally was treated as mere irregularities covered by section 578 of the old Code of Civil Procedure and not errors fatal to the suit. The presumption is that the proceedings of the Court had been carried out regularly and in accordance with the law and this presumption is found stronger when it is found that an application and an affidavit such as is held in connection with the appointment of a person as guardian *ad litem* of a minor was on the record and that the guardian had subsequently appeared and filed a compromise on behalf of the minor to which the Court had accorded its sanction. (*Kanhaiya Lal*, J. C.) MATA GHULAM SINGH *v.* SITAL PRASAD.

26 O.C. 113=74 I.C. 409=1923 Oudh 206.

———**O. 32, R. 3**—*Absence of formal order—Father acting as guardian—Effect.*

Where a father acted as the guardian-*ad-litem* of his minor son, the fact that there was no formal order of Court appointing him will not vitiate the proceedings, if the minor was in no way prejudiced thereby. (*Kanhaiya Lal*, J.C.) DARSHAN SINGH *v.* RATAN LAL.

9 O. & A.L.R. 463=74 I C. 821=1924 Oudh 178.

———**O. 32, R. 3**—*Absence of formal order—Appointment of guardian—Formalities.*

Absence of a formal order giving sanction under O. 32, R. 3, C.P.C., is not fatal to the proceedings and the minor is bound by the orders passed therein if as a matter of fact the minor has been represented by a guardian with the permission of the Court. (*Jwala Prasad and Coutts*, JJ.) KESHAWESARINDRA SAHI DEBENDRA *v.* BALA DASSI.

4 Pat. L J. 213=46 I.C. 245=1919 Pat. 121.

———**O. 32, R. 3**—*Absence of formal order.*

Where an application to appoint guardian *ad litem*, is made and the guardian nominated, is allowed to represent the minor at the trial, the suit need not be dismissed for want of a formal order. (*Chamier*, C.J., *Sharfuddin* and *Kingsford*, JJ.) RAM ASRAY SINGH *v.* SHEONANDAN.

1 Pat L.J. 573=1 Pat. L.W. 35=35 I.C. 868=1917 Pat. 21.

———**O. 32, Rr. 3 and 7**—*Absence of formal order—Reference to arbitration—Minor substantially represented in proceedings by guardian—Award not a nullity.*

The mere fact that leave of the Court has not been obtained for a reference to arbitration on behalf of a minor will not vitiate the reference and the award where the interest of the minor have in no way been prejudiced. If a minor is substantially represented by a guardian *ad litem* an appointment by the Court under O. 32, R. 3 can be assumed from the action of the Court in accepting the pleas of the major defendant on behalf of the minors also. In the

C. P. CODE (V of 1908), O. 32, R. 3—Conflict of interest.

case of a joint Hindu family, the manager can act on behalf of the minors without specific appointment as guardian in the interests of the whole of the family including the minors and the Court must decide whether or not he was acting in the interests of the minor. 43 C. 290: 30 C. 1021; 36 A. 69; 28 A. 25, referred to (*Pipon*, J.C.) CHET RAM *v.* KANSHI RAM.

71 I.C. 7.

———**O. 32, Rr. 3 and 4**—*Absence of formal order—Guardian ad litem without formal appointment—Irregularity—Whether curable.*

If a guardian, not formally appointed by Court, conducts the defence of the suit on behalf of minors it is only a curable irregularity. (*Parlett*, J.) SILAM KALIA *v.* SILAM SITAMA.

33 I.C. 941=9 Bur. L.T. 158.

Conflict of Interest.

———**O. 32, R. 3 (3) and (4)**—*Conflict of interest—Notice to minor—Adverse interest of guardian—C. P. Code*, 1882, S. 456.

When the C. P. Code of 1882 was in force objection could not be taken to the appointment of a guardian *ad litem* on the scope of want of notice to the minors. Where the guardian *ad litem* of the minor deft., is their father and the mortgagor of the suit property, it does not necessarily follow that his interests are adverse to the minors who with him form a joint family. (*Banerji and Piggott*, JJ.) THAKUR GANESHI SINGH *v.* SHYAM SINGH.

52 I.C. 636.

———**O. 32, R. 3**—*Conflict of interest—Father guardian of the minor.*

The appointment of father as guardian *ad litem* without his consent and who does not appear and passing decree *ex parte* even against the minor is illegal. (*Piggott and Walsh*, JJ.) BRAIJ NATH RAI *v.* DHARAM DEO TEWARI.

38 All. 315=35 I.C. 707=14 A.L.J. 353.

———**O. 32, R. 3**—*Conflict of interest—Guardian ad litem—Not properly appointed—Effect—Father, if proper guardian.*

The mere absence of formal order of appointment of a guardian *ad litem* is not fatal to the suit if the minor was properly represented by a person with the sanction of the Court. There is no objection to a father acting as guardian *ad litem* and confessing judgment where there is no basis for the suggestion that the loan, which is the subject-matter of the suit, was for immoral purposes. 30 Cal. 1021, Ref. (*Sundar Lal*, J.) RAMNAIN SHUKUL *v.* GANGA SHUKUL.

25 I.C. 620.

———**O. 32, R. 3 (3)**—*Conflict of interest—Suit on mortgage executed by father of a Hindu family—If can be appointed guardian of minor son.*

In a suit against a father and his minor son on a mortgage executed by the father acting as manager of the family the father should not be appointed as guardian *ad litem* of his son as

C. P. CODE (V of 1908), O. 32, R. 3—Conflict of interest.

there is a clear conflict of interest between them. (*Mookerjee and Carnduff, JJ*). BAL KRISHAN LAL *v.* TOPESWAR.
15 C.L.J. 446 = 14 I.C. 845 = 17 C.W.N. 219.

——O. 32, R. 3—*Conflict of interest—Next friend indebted to minor—Rejection of suit.*

The indebtedness of a next friend to the minor is governed for concluding that he is suing to avoid payment of the debt. O. 32 is not exhaustive and the Court can dismiss a suit filed by a next friend, if it is not in the interests of the minor. (*Wallis, C.J. and Seshagiri Aiyar, J.*) LAXMANAN CHETTY *v.* LAXMANAN CHETTIAR. **25 I.C. 738 = 1 L.W. 875.**

Defective Appointment.

——O. 32, Rr. 3 and 7—*Defective appointment—Minor—Representation of, in suit—No order appointing guardian—Compromise by person professing to act as guardian—Invalid.*

Two minor defts. were described in the title of the suit as "minors under the guardianship of H" but no order was made by the Court appointing H as guardian *ad litem* as required by O. 32, R. 3, of the C.P. Code. It was found that H was a mere tool in the hands of the plaintiff in the suit and that the suit compromised by the plaintiff obtaining a decree against the minor defts. *Held*, that the minors were not in law represented in the suit and that the decree was not binding on them. (*Sir John Edge*) PARTAB SINGH *v.* BHABUTI SINGH.
35 All. 487 = 40 I.A. 182 = 16 O.C. 247 = 17 C.W.N. 1165 = 14 M.L.T. 399 = 25 M.L.J. 492 = 11 A.L.J. 901 = 18 C.L.J. 384 = (1913) M.W.N. 785 = 21 I.C. 288 = 15 Bom. L.R. 1001 (P.C.).

——O. 32, R. 3 (4)—*Defective appointment—Redemption against members of joint family—Minor members—Guardian* ad litem *appointed—Irregularity—Decree, whether binds minor—Minor's right to set aside.*

Where there has been an irregularity in the appointment of a guardian *ad litem* for a minor deft. in a suit, the moment it is shown that there has been no fraud and that the minor's interests have not prejudiced by the irregularity, the minor's claim to set aside the proceedings must be denied. (*Piggott and Walsh, JJ.*) RAMBRICHH RAM *v.* TARAK TEWARI.
33 I.C. 803 = 14 A.L.J. 589.

——O. 32, R. 3—*Defective appointment Minor—No representation*—Ex parte *decree—Suit to set aside.*

Where in a suit against a person and his minor nephews, on the refusal of that person to act as guardian for his nephews and represent them because they were in the custody of their mother, the Court without giving any notice to the minors or their mother appointed the *Amin* to act as the minor's guardian *ad-litem* and he made no defence. The suit was decreed *ex parte* against the minors, *Held*, that the minors not being properly represented in the suit and the *ex parte* decree having been passed without notice to them or their natural guardian, the minors were entitled to a declaration that the *ex parte* decree was not binding on them. 30 Cal. 1021; 32 All. 287, Ref. (*Richards and Banerji, JJ.*) BHAGWAN DAYAL *v.* PARAMSUKH DASS.
37 All. 179 = 27 I.C. 623 = 13 A.L.J. 179.

C. P. CODE (V of 1908), O. 32, R. 3—Defective appointment.

——O. 32, R. 3—*Defective appointment—Respondent minor not represented—Decree in his favour.*

The fact that a respondent decree-holder was not properly represented at the instance of the appellant-judgment-debtor does not make a decree passed in the appeal in favour of that respondent void and incapable of execution. (*Karamat Hussain and Tudball, JJ.*) GOBARDHAN SAHI *v.* MAHABIR SINGH.
34 All. 321 = 14 I.C. 506 = 9 A.L.J. 290.

——O. 32, R. 3—*Defective appointment—Mother, guardian of minor—Not duly appointed—Decree on arbitration consulted by mother—Whether binds minor.*

The mother, natural guardian of a minor, not being duly appointed by Court as guardian, consented to an arbitration. The decree based on the award was held to be not binding on the minor as he was not properly represented as required by O. 32, R. 3 of Civil Procedure Code and the irregularity cannot be condoned. (*Shah and Hayward, JJ.*) SADASHIV RAMCHANDRA *v.* TRIMBAK KESHO.
44 Bom. 202 = 56 I.C. 399 = 22 Bom. L.R. 266.

——O. 32, R. 3—*Defective appointment—Notice to minor and guardian—Failure of—Appointment of guardian* ad litem—*Decree passed—Decree, whether, when avoidable.*

A brother who was also the manager of the joint family was appointed guardian *ad litem* of the minor though notices to the minor and his mother were not issued and a compromise decree was passed. *Held*, the decree could not be set aside unless it is shown that the interests of the minor were both duly protected or shown that the guardian colluded with the plff. or acted fraudulently or with negligence. (*Kanhaiya Lal, A.J.C.*) SHRIPAL SINGH *v.* JAGADISH NARAIN. **7 O.L.J. 219 = 56 I.C. 313 = 2 U.P.L.R. (J.C.) 77.**

——O. 32, Rr. 3, 4 and 11—*Defective appointment — Omission to consult minors' wishes is not a defect.*

Though the mother of a minor defendant is the person who should be appointed his guardian *ad litem* in the absence of the father still a decree passed against the minor represented by some other person as guardian *ad litem* is not a nullity. Though the Court should in every case consult the wishes of a minor before appointing any person as guardian *ad litem* in the suit, there is nothing in the C.P.C. which requires it to do so in a case coming within

C. P. CODE (V of 1908), O. 32, R. 3—Defective appointment.

O. 32, R. 11, C.P.C. O. 32, R. 3, Cl. 4 applies only to cases where an application is made for the appointment of a guardian in the name of or on behalf of the minor or the plaintiff. O. 32 R. 11 empowers the Court to appoint any guardian where the guardian for the suit retires, dies or is removed by the Court pending the suit, and there is nothing which requires the Court to give notice to the minors before making the order under this rule. (*Das and Adami*, JJ.) SRI THAKUR RADHA KRISHNA GOPAL LALJI v. BABU LAKSHMI NARAYAN.

1 Pat. L R. 86=2 Pat. 273=4 Pat. L.T. 329=(1923) Pat. 189=71 I.C. 341=1923 P. 385.

———O. 32. Rr. 3 and 4—*Defective appointment*—Ex parte *decree*—*Suit to set aside.*

A minor is not a party to the suit, unless he is represented in the record of the suit by a guardian competent to act as such. Where the record of the suit itself shows that the minor is wholly unrepresented or that he is represented by a guardian disqualified from acting as such guardian under express provision of the Statute the result is that the minor is not a party to the suit and a judgment rendered against the minor is without jurisdiction and is null and void. But where he is properly a party to the suit and he is properly a party if he is represented on the record by a guardian not disqualified from acting, the jurisdiction of the Court to try and determine the case against the minor is complete, and such jurisdiction will not be ousted even if the Court did not follow the appropriate procedure for the appointment of the guardian. It is the court that must decide the question of jurisdiction and where the record, on the face of it, shows that the minor was properly a party to the suit, the judgment rendered in such a suit will not be declared a nullity in a collateral proceeding brought to impeach its validity, though it may be set aside if it be shown that the defect or the irregularity in the proceedings affected the merits of the case between the parties. 30 C. 1021 followed; 15 C.L.J. 446; 25 C.W.N. 791 dissented; 32 C. 296 distinguished. The contravention of the provisions of O. 32, R. 4 Cl. 3, C.P. Code, does not deprive the Court of its jurisdiction to decide the case. The Court has no jurisdiction to render judgment against one who is not a party to the suit though it has jurisdiction to render judgment against one who is party to a suit but who has not been brought before it by reason of the failure on the part of the court to follow the particular procedure laid down in the Code. The one affects the existence of the jurisdiction of the Court; the other affects the exercise of it. (*Das and Adami*, JJ.) PANDE SATDEO NARAIN v. RAMAYAN TEWARI. **4 Pat. L T. 147=2 Pat. 386=71 I.C. 705=1923 P. 252 (2).**

———O. 32, Rr. 3 and 4—*Defective appointment—Duty of Court—Absence of notice to guardian*—Ex parte *decree—Decree if binding on minor.*

C. P. CODE (V of 1908), O. 32, R. 3—Execution proceedings.

It is duty of the Court to appoint a guardian-*ad-litem* for a minor defendant under O. 32, R. 2, C.P.C. No person can be appointed guardian without his consent. At the same time where the court has given sanction and approval for the appearance of a person as guardian, the absence of formal order of appointment is not always fatal to the proceedings. A mere irregularity in the appointment of a guardian-*ad-litem* will not render the decree passed against the minor null and void, unless it is proved that the minor's interest have suffered thereby. At the same time where no notice or summons is served on the guardian of the minor, and no order was made appointing a guardian for the minor and there was no appearance by the so-called guardian at any stage of the proceedings, a decree passed against the minor is not binding on him. 26 C.L.J. 253; 37 A. 179; 20 C.L.J. 469; 2 P.L.T. 617 Relied on. (*Jwala Prasad and Adami*, JJ.) RANI CHATTRA KUMARI DEBI v. PANDA. RADHA MOHAN SINGARI.

3 Pat. L.T. 451=66 I.C. 137=1922 P. 291.

Execution Proceedings.

———O. 32, Rr. 3 and 4—*Execution proceedings—Applicability of the rule—Minor judgment-debtor.*

The provisions of O. 32, C.P. Code, relating to "suits by or against minors" are not directly applicable to proceedings in execution, after the rights of the parties have merged in a good and valid decree. The "lis" in respect of which a minor defendant is required to be represented by a duly appointed guardian is at an end when the decree is passed. For determining whether a minor was sufficiently represented in the execution proceedings. Courts can look at the substance of the transaction. (*Sanderson*, C.J. *and Richardson*, J.) FANI BHUSAN BHUIAN v SURENDRA NATH DAS.

64 I.C. 25=25 C L.J. 9.

———O. 32, R. 3——*Execution proceedings—Execution sale—Guardian* ad litem *of minor not appointed.*

An execution sale held of a minor's property without appointing a guardian *ad litem* is materially irregular and the guardian of the minor can set it aside. (*Sharfuddin and Coxe*, JJ.) KESHAWE SURENDRA SAHI v. DEVENDRA BALA DASI. **29 I C. 211.**

———O. 32, R. 3, Cl. (4)—*Execution proceedings—Next friend of minor—Selection of.*

There is no rule that only the natural or certificated guardian of a minor can act as his next friend for the purpose of legal proceedings. A duly appointed guardian for a suit is fully entitled to represent the minor in all proceedings which take place in execution of the decree. (*Kanhaiya Lal and Daniels*, A. J. Cs.) KANIZ MEHDI BEGUM v. RASUL BEG.

48 I.C. 89=3 O.L.J. 551.

C. P. CODE (V of 1908), O. 32, R. 3—No guardian appoint d.

No Guardian Appointed.

——O. 32, R. 3—*No guardian appointed—Dismissal of entire suit—Common interest.*

Where one of the defts. in a suit for a declaration of a right of way is a minor, and he is not represented by a guardian the suit ought to be dismissed. No effective decree can be made in the absence of one of the persons jointly interested in the alleged servient tenement. 25 C.W.N. 249 at p. 252, foll. (*N. R. Chatterjea and Panton*, JJ.) SADHU CHARAN PAL *v.* INDRA MOHAN MISTARI, **64 I C. 90.**

——O. 32, R. 3—*No guardian appointed—Decree without guardian* ad litem, *whether valid.*

A minor against whom a decree has been made in a suit, in which he was not represented by a guardian occupies the same position as if he were not a party to the litigation. The plff. can therefore on the setting aside of the decree, proceed with the suit. (*Mookerjee and Walmsley*, JJ.) BANESWAR PRAMANIK *v.* TARAPADA BHATTACHARJEE.

41 I.C. 872=26 C L.J. 258.

——O. 32, R. 3—*No guardian appointed—Minor—Not represented in the record—Decree—Nullity.*

A decree against a person, neither a party, nor properly represented in the record is a nullity and need not be set aside. A decree against a person who is really a minor but impleaded as a major in the suit is not binding on him for he is not a party in the proper sense of the term. 32 Cal. 296; 31 All. 572, Ref. (*Jenkins*, C.J. *and Chatterjee*, J.) PURNA CHANDRA KUMAR *v.* BEJOY CHAND.

18 C.L.J. 18=18 I.C. 859=17 C.W.N. 549.

——O. 32, R. 3—*No guardian appointed—Minor—Guardian* ad litem—*Not appointed—Decree and sale against minor—Nullity.*

A decree-obtained against a minor without an order of appointment of a guardian *ad litem* and without obtaining his consent is a nullity, and a sale in execution of such a decree is without jurisdiction and void. (*Chitty and Teunon*, JJ.) SHAMBHU MAHTO *v.* MIDNAPORE ZEMINDARI CO., LTD. **18 I.C. 90.**

——O. 32, Rr. 3 and 5—*No guardian appointed.*

A decree against a minor without a guardian *ad litem* at the time is void, as also all further proceedings. Subsequent appointment of a guardian in execution proceedings will not validate the decree nor other proceedings in its execution. The Court has no jurisdiction to sell the minor's interests even though they were safe-guarded by other defts. having a common defence. (*Sadasiva Iyer and Moore*, JJ.) CHAUDHARY KRISHNAYYA *v.* KORIPALLI RAJU. **35 I.C. 155=31 M.L.J. 39.**

C. P. CODE (V of 1908), O. 32, R. 3—Notice.

——O. 32, R. 3—*No guardian appointed—Decree against minors not represented—Subsequent decree against their property represented—Execution of former decree with knowledge of the guardian subsequently appointed—Validity.*

A decree was obtained against certain minors without their being represented by a guardian. Subsequently the decree was set aside and another decree was passed after a guardian was properly appointed. Execution, however, was taken out under the former decree and the proceedings were carried on to the knowledge of the guardian appointed under the subsequent decree and the properties sold in Court auction. *Held*, that the sale was good and must be upheld. (*Miller and Tyabji*, JJ.) GANAPATHI MUDALIAR *v.* KRISHNAMACHARIAR.

25 I.C. 187=27 M.L.J. 218.

Notice.

——O. 32, Rr. 3 and 4—*Notice—Guardian appointed without notice to minor and his mother—Effect.*

If notice of appointment of guardian *ad litem* is not given to the minor concerned or their mother, they are not bound by the decree passed against the guardian *ad litem* who was a Court Nazir and who had no funds or instructions to defend the suit. (*Tudball and Rafique*, JJ.) BRIJ NARAIN RAI *v.* MANGLA PRASAD.

41 All. 235—17 A.L.J. 249=50 I.C. 101=1 U.P.L.R. (H.C.) 49.

——O. 32, R. 3 (4)—*Notice—Guardian ad-litem, appointment of—Notice to minor, if necessary—Mother acting as guardian—Effect of.*

Two minors represented to be majors were substituted as defts. on the death of their father. Their mother, also a deft. in the suit appeared and filed her written statement in which she stated that her two sons improperly described as majors were in fact minors. *Held*, Per *Teunon*, J.—That the provisions of O. 32, R. 3 (4) imperatively required service of notice upon the minors, and the same not having been complied with, the minors were not represented in and were properly speaking, no parties to the suit. The decree consequently was not binding on the minors. Per *Huda*, J.—Further notice on the minors was not necessary, as the mother by appearing in the suit for herself and for her minor sons consented to act as guardian of the minors and the order appointing her as such guardian was quite correct. (*Tuenon and Huda*, JJ.) SYED ALI SARKAR *v.* MANIKJAN BIBI. **48 I C. 728.**

——O. 32, R. 3 (4)—*Notice—Absence of, to minor—Effect.*

In the absence of proof of fraud or collusion, the mere fact that notice of appointment of a guardian *ad litem* was not issued to the minor, does not entitle him to treat the proceedings as a nullity. Case Law reviewed. (*Abdul Raoof and Campbell*, JJ.) PHULLI *v.* DEBI PARSHAD. **75 I.C. 449=5 Lah. 38=1923 Lah. 575.**

C. P. CODE (V of 1908), O. 32, R. 3—Notice.

——— **O. 32, Rr. 3 (4)**—*Notice—Guardian* ad litem—*Omission to give notice to minor.*

The appointment of a guardian *ad litem* is not vitiated by the absence of notice to a minor. There is nothing in the Code requiring the plff. to issue a fresh summons to a minor defendant after he attains majority. (*Ayling and Srinivasa Aiyangar*, JJ.) ENUGA SUNDAR RAMA *v.* BAZAWADA PATTABHI RAM REDDI. **(1917) M.W.N. 495=42 I.C. 421=6 L.W. 272.**

——— **O. 32, Rr. 3 and 4**—*Notice—Minor party—Court guardian — Notice to natural guardian.*

When the appointment of a guardian *ad litem* is proposed, notice must always be sent to the natural guardian of the minor or the person with whom he lives. A Court can appoint an officer of Court as guardian only when there is no other guardian available. 37 All. 179; 30 Cal. 1021, ref. O. 32, R. 4 and other rules as to the appointment of guardian must be read with R. 3. (*Srinivasa Iyengar*, J.) NACHEAPPA CHETTY *v.* CHINNIAH AMBALAM. **36 I.C. 794=4 L.W. 362.**

——— **O. 32, R. 3**—*Notice—Minor legal representatives of deceased judgment-debtor—Guardian—Procedure.*

In an application to bring on record, minor legal representatives of a deceased judgment-debtor, by their mother as guardian, the Court must serve notice on the mother and if she is willing to be guardian, record an order appointing her as guardian and give her time to show cause why the decree should not be executed. (*Hallifax*, A.J.C.) ADKIA *v.* SHANKAR RAO. **69 I.C. 787.**

——— **O. 32, R. 3 (4)**—*Notice—Proper representation—Decree on failure of it.*

If a guardian *ad litem* is appointed when the deft. is a major without giving any notice of such appointment it is no proper representation and the decree is not binding on him. (*Lindsay*, J.C.) GHANSHAYAMDAS *v.* HARDU. **32 I.C. 380=2 O.L.J. 562.**

——— **O. 23, Rr. 3 and 4**—*Notice to minor—Failure to give—Effect of—Minor, wishes of—Mother or grand-mother.*

An order appointing a guardian *ad litem* of a minor defendant without notice to the minor, is without jurisdiction. In appointing a guardian *ad litem* the wishes of the minor defendant, should, if possible, be considered. A mother or in her absence a grandmother may be appointed and the fact that she is a pardanashin lady is not a disqualification. (*Miller*, C.J. *and Ross*, J.) RAJENDRA PRASAD *v.* ROBODH CHANDRA. **2 Pat. L.T. 116=6 Pat. L.J. 82=59 I.C. 916=1921 Pat. 156.**

——— **O. 32, R. 3 (4)**—*Notice—Fraud—Minor—Guardian* ad litem—*Appointment of—Service of notice—Fraud—Negligence*

In the absence of the father, the mother is the natural guardian of minor irrespective of the family being joint or separate. Notice under O. 32, R. 3 (4) for the appointment of a guardian *ad-litem* must be served upon the natural guardian. If a guardian *ad-litem* is guilty of negligence and makes no attempt to protect the minor's interests the decree passed in the suit will not be binding on the minor. Where a decree which cannot be split up is set aside on the ground of fraud at the instance of one of the defts. the entire decree must be set aside. (*Jwala Prasad*, J.) BHAIRO PRASAD SAHU *v.* RAM CHANDRA PRASAD. **45 I.C. 253=4 Pat. L.W. 373.**

C.P.CODE (V of 1908), O. 32, R. 3—Officer of Court as guardian.

Officer of Court as Guardian.

———**O. 32, R. 3 and O. 9, R. 2**—*Officer of Court as guardian—Minor—Guardian* ad-litem *—Appointment of officer of Court—Procedure as to service of summons.*

Where an officer of Court is appointed as guardian *ad-litem* of a minor deft. due notice of such appointment should be given to that officer and the suit should not be dismissed on the mere ground that process fees are not paid for the issue of summons on him. The procedure in such cases is to serve the summons first on the minor and after hearing what he has to say, decide whether a guardian is to be appointed at all and if so the person to be appointed. (*Rattigan*, J.) GOBIND RAM *v.* MUHAMMAD ALI. **35 P.R. 1912=115 P.W.R. 1911=11 I.C. 317=211 P.L.R. 1911.**

———**O. 32, Rr. 3 (4) and 4 (4)**—*Officer of Court as guardian—Omission to adduce evidence when amounts to negligence.*

The father of certain minor defendants in a suit refused to be their guardian *ad litem* and thereupon the Head Clerk of the Court was appointed guardian. The plaintiff was a stranger who was not aware of the existence of any other relatives of the minors. There was no affidavit by him that there was no other person fit and willing to act as guardian of the minors. There was also no distinct notice to the father of the minors of the appointment of an officer of the Court as guardian *ad litem* but the father himself did not adduce any evidence and the suit was decreed. Subsequently the minor sued to set aside the decree on the grounds that they were not validly represented in the prior suit and that their guardian *ad litem* was grossly negligent in the conduct of the case. *Held*, that the defects, if any, in the appointment of the guardian did not vitiate the decree. 32 A. 287; 20 M.L.J. 591 (P.C.); 31 A. 572; 19 M.L.J. 631 (P.C.), referred to. *Held*, further, that in the absence of proof that the guardian *ad litem* could have adduced any useful evidence or was aware of such evidence being available, his omission to let in evidence in the prior suit did not constitute negligence or fraud. (*Oldfield and Ramesam*, JJ.) RAMASWAMI CHETTY *v* DORAISWAMI. **44 M.L.J. 299=17 L.W. 638=73 I.C. 409=1923 Mad. 465.**

C. P. CODE (V of 1908), O. 32, R. 3—Officer of Court as Guardian.

———O. 32, R. 3—*Officer of Court as guardian—Guardian's address and whereabouts known—Procedure illegal—Decree — Setting aside—Inherent power of Court.*

Where a Court after knowing of the existence and address of the guardian of the minor defendants in a suit, did not order fresh notice to the guardian but made the Head Clerk of the Court the guardian of the minors and proceeded with the suit in consequence of which there was no proper defence to the plaintiff's suit. *Held*, that the decree and the execution sale which followed it were illegal and not binding on the minor and that the Court had inherent power to set aside the decree and the execution sale after impleading the auction-purchaser as a party. 35 A. 331 P.C.; 43 M. 94; 42 I.C. 711 Ref. (*Devadoss*, J.) JAMBU AMMAL *v.* MINOR NATARAJAM PILLAI. **31 M L.T. 216 (H.C.)= 1922 Mad. 485.**

———O. 32, R. 3 (4)—*Officer of Court as guardian.*

When a suit is filed against a minor in respect of whom a proper guardian has already been appointed but whose identity or appointment is not known to the plff. the Court is competent to appoint an officer of the Court a guardian *ad litem*. (*Lindsay, J.C.*) GIRJA DAYAL *v.* RAGHU MAL. **33 I C. 481.**

Miscellaneous.

———O. 32, Rr. 3 and 4—*Guardian* ad litem—*Mother acting as such — Failure to defend suits—Right of minor to set aside decree.*

Where the mother of the plaintiff who was then a fatherless minor, had to borrow money to recover possession of certain property belonging to her husband and she borrowed money mortgaging property on behalf of the plaintiff, the mortgage decrees obtained by the creditors against the minor represented by his mother as guardian *ad litem* are valid and binding on the plaintiff and the plaintiff is not entitled to set aside such decrees alleging that the mother was not a fit and proper person to have been his guardian *ad litem* in those civil suits. The mere fact that the mother did not defend those suits on the mortgages, would not make the decrees invalid. (*Richards, C.J. and Banerji, J.*) COLLECTOR OF MEERUT *v.* UMRAO SINGH. **29 I.C. 220=13 A.L J. 437.**

———O. 32, R. 3 (1)—*Guardian* ad litem *—Court—Duty of.*

It is obligatory on the Court under O. 32, R. 3 (1) of the Code to appoint a proper person to be guardian of a minor defendant for the suit. (*Mookerjee and Panton, JJ.*) ANNADA PROSAD *v.* UPENDRA. **34 C.L.J. 293= 65 I.C. 18=26 C.W.N. 781.**

———O. 32, Rr. 3 and 15—*Procedure to appoint guardian for a lunatic.*

Before appointing a guardian *ad litem* for a deft. who is alleged to be but never adjudged as of unsound mind, there must be a Court's finding that he is incapable to protect his own interest and then the provisions of R. 3, must be complied with before such appointment. (*Newbould and Ghose, JJ.*) KAMINI KUMAR TALUKDAR *v.* SHIB SUNDARI DEVI. **62 I.C. 770.**

———O. 32, R. 3—*Non-appearance of proposed guardian.*

Where the proposed guardian does not appear, the Court must be moved to appoint one of the officers as guardian *ad litem*. Otherwise the decree will be null and void. 15 C.L.J. 3, Foll. (*Mookerjee and Holmwood, JJ.*) DINABANDHU NANDI *v.* MASHEIDA KHATUM. **17 I.C. 263=16 C.L.J. 318.**

———O. 32, R. 3—*Suit by minor*—Bona fide *mistake—Amendment.*

Where the fact of plaintiff's minority was not apparent on the face of the plaint but was discovered only in the course of an enquiry on objection being raised by the defendant, an opportunity should be given on application being made to amend the plaint as the plaintiff had no knowledge of his minority and had no intention of leaving the Court. (*Harrison, J.*) MT. DURGA DEVI *v.* GUR NARAIN. **1924 Lah. 157.**

———O. 32, Rr. 3 and 4—*Object of.*

The object of Rr. 3 and 4 of O. 32, C.P. Code is that the minor in suit should be represented by fit person so that his interests will be properly guarded. (*Kanhaiya Lal, A. J.C.*) SRIPAL SINGH *v.* JAGDISH NARAYAN. **7 O L.J. 219=36 I C. 318= 2 U.P.L.R. (J.C.) 77.**

———O. 32, R. 3—*'Married woman,' meaning of.*

'Married woman' in C.P.C. (1882), refer to *femme covert* as opposed to *femme sole* and so does not apply to a widow. (*Stuart and Kendall, A.J.Cs.*) GUR NARAIN *v.* GULZARI LAL. **1 O L J. 503=25 I.C. 917=17 O.C. 318.**

———O. 32, R. 3—*Mis-representation—Major described as minor—Decree not binding.*

A major plff. who is described as a minor and is represented in the suit through a guardian cannot be treated as a party to the suit and is not bound by the decree passed in the suit. (*Jwala Prasad, J.*) SAKAL SINGH *v.* CHANDER DIP LAL. **49 I.C. 627.**

———O. 32, Rr. 3 and 7—*Compromise not sanctioned by Court on behalf of minors, effect.*

A compromise not expressly sanctioned by the Court, though beneficial to the minors is not binding on the minors. (*Chapman, Atkinson and Imam, JJ.*) CHARU CHANDRA *v.* SAMBHU NATH. **3 Pat. L.J. 255= 4 Pat. L.W. 393=46 I.C. 368= (1918) Pat. 193 (F.B.).**

———O. 32, Rr. 3 and 4—*Reference to arbitration by next friend or guardian* ad litem *without leave of Court.*

C. P. CODE (V of 1908), O 32, R. 4.

There is no provision in the C. P. Code, for the formal appointment of a next friend in a suit by a minor. If a next friend or guardian *ad litem* refers a suit to arbitration without the leave of the Court, a suit will lie to set aside any decree based on an award of the arbitrators in such reference without leave. (*Parlett*, J.) ILAM KALIA *v.* SILAM SITAMA.
33 I.C. 941=9 Bur. L.T. 138.

——**O. 32, R. 4**—*Vakil—Officer of the Court.*

A vakil is an officer of the Court for purposes of O. 32, R. 4, C. P. C. (*Piggott and Walsh*, JJ.) MOHAN LAL *v.* GANGA PRASAD.
45 A. 395=L.R. 4 A. 352=1923 A. 298 (1).

——**O. 32, R. 4**—*Suit on mortgage by manager of joint Hindu family—Minor members impleaded—Manager appointed guardian* ad litem—*Decree is a nullity.*

Where in a suit to enforce a mortgage executed by the manager of a joint Hindu family he is himself appointed guardian *ad litem* of the minor members impleaded in the suit, and a decree is passed on confession of judgment, the decree is a nullity as against the minors for the manager was not a proper person to be appointed as guardian. 25 B. 337; 30 C. 1021, 38 A. 315; 43 A. 104, Ref. (*Lindsay and Ryves*, JJ.) MURLIDHAR *v.* PITAMBAR LAL.
20 A L J 329=4 U.P.L R. (A) 170=1922 All. 91.

——**O. 32, R 4**—*Appeal against minor—Costs of guardian* ad litem—*Duty of appellant to pay.*

Where an appeal is filed against a minor under the guardianship *ad litem* the appellant must pay to the guardian such sum of money as would enable him to oppose the appeal. (*Rafique*, J.) KADAR RAI *v.* SHEOPAL RAI.
28 I.C. 852

——**O. 32, R. 4**—*Guardian* ad litem—*Appointment—Consent of proposed guardian—Absence of—Decree against minor—Legality of.*

No person can be appointed a guardian *ad litem* of an infant without his consent. In the present case the mother of the infants was appointed without her consent. She never entered appearance and never defended the suit on behalf of the minors without a formal order for appointment. *Held* that in the events which had happened, it was plain that infants were not represented at all and they were in no sense parties to that litigation. Consequently they were not affected by the decree. When a guardian has not been validly appointed in respect of a minor, he is not a party to the suit and is not bound by the decree made against him. (*Mookerjee and Chotzner*, JJ.) UMAPATI SAMANTA *v.* SHEIKH MOSEETULLAH.
37 C.L J. 496=1923 Cal. 692.

——**O 32, R. 4**—*Guardian* ad litem—*Appointment of—Consent is necessary.*

C. P. CODE (V of 1908), O. 32, R. 4.

The effect of O. 32, R. 4 is that no person can be appointed a guardian *ad litem* without his express consent. The question of consent will always be one of importance, on the merits. (*Richardson and Shamsul Huda*, JJ.) RADHASHYAM DASYA *v.* RANGA SUNDARI DASYA.
59 I.C. 664=24 C.W.N. 541.

——**O. 32, R. 4**—*No applicability to probate proceedings.*

O. 32, R. 4 of the C.P. Code does not apply to a non-contentious proceeding in probate. Where citations are issued to minors as being concerned, the Court must see not only that a guardian is appointed but that he has taken upon himself the responsibility of protecting the interests of the minors. (*Greaves and Newbould*, JJ.) SACHINDRA NARAIN SAH *v.* HIRONMOYEE DASI. **59 I.C. 435=24 C.W.N, 538.**

——**O. 32, R. 4**—*Next friend—Conflict of interest with that of minor.*

If the personal interest of the next friend conflicts with his duty towards the minor, then, unless he shows *uberrima fides*, he cannot act as the minor's next friend. In such a case the minor is not properly represented and the decree in the suit would not bind him. 22 W.R. 290. Foll. A guardian may refuse to litigate on his ward's behalf, a claim which he knows to be false and unfounded. (*Richardson and Shamsul Huda*, JJ.) BEJOY SINGH HAZARI *v.* MATHURIYA DEBYA. **56 I.C. 97.**

——**O. 32, R. 4 and O. 41, R. 33**—*Minor—Duty of Court to watch interests of minor—Appellate Court—Interference by.*

Where it appears to an Appellate Court on an examination of the record that a minor has not been properly represented in the suit, the decree cannot be allowed to stand even though there has been no appeal by the minor which in the absence of proper representation it was obviously impossible for him to present. (*Beachcroft*, J.) ERFANUDDIN MOLLA *v.* BADAN SHEIKH. **51 I.C. 583.**

——**O. 32, R. 4**—*Adverse interest—Effect of.*

A minor, who is represented by a guardian who is the nominee of a party whose interest is adverse to the minor's, is not properly represented in the suit. (*Chitty and Beachcroft*, JJ.) SUDHIR CHANDRA DAS *v.* GOBINDA CHANDRA ROY. **45 Cal. 838=41 I.C. 503=21 C.W.N. 1043.**

——**O. 32, R. 4**—*Guardian* ad litem—*Appointment without consent—Invalidity.*

A guardian *ad litem* of a minor cannot properly be appointed without his express consent. If not so appointed, the minor is not properly represented before the Court and is in no way bound by a decree passed against him or a sale held thereunder. (*Mookerjee and Beachcroft*, JJ.) KRISHNA CHANDRA *v.* JOGENDRA NARAIN. **20 C.L.J. 469=27 I C. 139=19 C.W.N. 537.**

C. P. CODE (V of 1908), O. 32, R 4.

——O. 32, R. 4—*Guardian* ad litem—*Appointment of.*

No person can be appointed guardian *ad litem* without his consent. If the person proposed to be appointed as guardian *ad litem* does not appear and take upon himself his duties as such guardian, the plff. must get one of the officers of the Court appointed as guardian *ad litem*. (*Mookerjee and Carnduff*, JJ.) BAL KISHAN LAL *v.* TOPESWAR SINGH. 18 C.L J. 446 = 14 I.C. 845 = 17 C.W.N. 219.

——O. 32, R. 4—*Court guardian—Omission to record reasons for appointment of.*

The omission to record reasons undes O. 32 r. 4, cl. 2 for the appointment of a Court guardian is only an irregularity and will not by itself vitiate the decree if the minor is in fact properly represented by a guardian appointed by Court. Where however the appointment of a Court guardian is secured by fraud and by false statements and concealment of material particulars the minor is not bound by the decree passed in the suit or by the sale held in execution of the decree. 37 A, 179, followed. (*Krishnan and Ramesam*, JJ.) PUPPOOTH *v.* V. M. RAMAN SOMAYAJI PAD. 44 M L J 315 = 32 M.L T, 107 (H C.) = (1923) M.W N. 301 = 17 L.W. 558 = 1923 Mad. 553.

——O. 32, R. 4—*Certificated guardian—Another guardian for suit cannot be appointed.*

In cases where a certificated guardian of a minor is appointed the appointment of another guardian for the suit is illegal and a decree obtained in such a suit is liable to be set aside. (*Sadasiva Aiyar and Spencer*, JJ.) BHIMAJI *v.* RAJABHAI HUSSAIN SAHIB. 43 Mad. 808 = 12 L.W. 114 = 39 M.L J. 239 = 59 I.C. 812 = 28 M L.T, 295.

——O. 32, R. 4—*Defect in appointment of guardian* ad litem.

Defect in following the rule as to representation of minors is not necessarily fatal to the proceedings and does not render invalid a decree passed against the minors (*Oldfield and Phillips*, JJ.) KUPPUSAMY AIYANGAR *v.* KAMALAMMAL. 43 Mad. 842 = 12 L W. 243 = 59 I.C. 662 = 39 M.L.J. 375.

——O. 32, R 4—*No guardian appointed—Decree is a nullity.*

Where there is no appointment and appearance of a guardian *ad litem* for a minor, the decree passed is, as against the minor, a nullity and not binding on him. (*Coutts and Ross*, JJ.) RAMPIRIT *v* THAKUR. 2 Pat. L T. 617 = 62 I C. 495 = (1921) Pat. 335.

——O. 32, R. 4—*Want of consent of guardian.*

The mere omission to obtain the consent of the person whom it is proposed to appoint guardian of a minor is not fatal to the proceeding unless the minor was prejudiced by the

C. P. CODE (V of 1908), O. 32, R. 4.

defect. (*Chapman and Jwala Prasad*, JJ.) SURAJ DEO NARAIN *v.* SARJUG PRASAD. 1 P.L.W. 647 = 2 P.L.J. 390 = 40 I.C. 227 = (1917) Pat. 198.

——O. 32, R. 4—Ex parte *decree against minor represented by guardian* ad litem—*Binding nature.*

A father can be guardian *ad litem* of his minor son for the protection of the latter's interest. The decree against a minor in a case in which he is fully represented by his father as guardian *ad litem* though *ex parte* is binding on him. (*Mullick and Atkinson*, JJ.) INDRA DEO NARAYAN *v.* MATUKDHARI. 37 I.C. 389.

——O. 32, Rr. 4 (1), (2), and (3)—*No appointment without consent of guardian.*

O. 32 (4) and (3) controls both Sub-R. (1) and Sub-R. (2) and places a material restriction upon the court exercising power thereunder. No person who is competent to act as guardian either under Sub-R. (1) or under Sub-R. (2) shall be appointed, without his consent. (*Mookerjee and Panton*, JJ.) ANNADA PRASAD *v.* UPENDRA. 34 C L.J. 293 = 68 I.C. 18 = 26 C.W.N. 781.

——O. 32, R. 4 (2)—*Guardian* ad litem—*Failing to furnish security—Effect of.*

If a person who is appointed guardian of a minor conditional on his furnishing security, fails to furnish the security and the necessary certificate is not issued to him, he cannot be regarded as a proper guardian *ad litem* of the minor and the minor is not represented in a suit by such person unless the latter is formally appointed guardian *ad litem* of the minor. (*Chatterjea and Panton*, JJ.) BHUTNA *v.* SATYA KINKAR. 34 I.C. 368.

——O. 32, R. 4 (2)—*Guardian* ad litem—*Appointment of—Revision.*

O. 32, R. 4 (2) requires that when a guardian has been appointed by a competent authority, he alone can represent the minor unless it is for the welfare of the minor to appoint another, under O. 32, R 4 (2). The appointment of a guardian *ad litem* is a matter of procedure, and an error therein is not revisable ordinarily. (*Mullick and Thornhill*, JJ.) MAHOMED ABDUS SALAM *v.* KAMAL MUKHI. 46 I.C. 316 = 5 P.L W. 92.

——O. 32, R. 4 (3)—*Consent—Need not be express.*

The consent of a person to be appointed guardian *ad litem* need not be express but may be implied from conduct as where notice is served on him to show cause why he should not be appointed, and he does not appear in answer thereto. An irregularity in the appointment of a guardian *ad litem* is no sufficient ground for setting aside the proceedings at the instance of the minor. (*Walsh and Gokul Prasad*, JJ.) CHHATTER SINGH *v* TEJ SINGH. 43 All. 104 = 18 A.L J 956 = 59 I.C. 671 = 2 U.P.L.R. (All.) 334.

C. P. CODE (V of 1908), O. 32, R. 4.

———O. 32, R. 4 (3)—*Guardian cannot be appointed without his consent.*

Where a proposed guardian of a minor does not signify his consent, the Court should not appoint him as guardian. The provision as to the consent is mandatory and imperative and where a person is appointed without his consent, the infant is not represented and a decree against the infant in that suit is not binding on him. (*Mookerjee and Panton*, JJ.) ANNADA *v.* UPENDRA. **34 C.L.J. 293=65 I.C. 18=26 C.W.N. 781**

———O. 32, R 4 (3)—*Guardian* ad litem—*Appointment of—Consent—Married woman—Validity.*

A woman, appointed guardian *ad litem* of a minor against the provisions of S. 457 of the Old Code, does not represent a minor validly, and so the whole proceeding is a nullity and must be quashed. No person can be appointed guardian *ad litem* of a minor without his consent; so that where a mother was proposed to act and she did not consent, the Court could not appoint her as guardian *ad litem*. 5. Bom. 306; 32 Cal. 296, *Rel.* on. (*Mookerjee and Teunon*, JJ.) NARSING *v.* JAHI MISTRY. **13 I.C. 414=15 C.L J. 3.**

———O. 32, R. 4 (3)—*Consent of proposed guardian—Absence of*—Ex parte *decree.*

O. 32, R. 4 (3) makes it imperative that the consent of the proposed guardian should be obtained for his appointment and the appointment of any person as guardian *ad litem* without his consent is not a legal appointment. An *ex parte* decree obtained against both the major and minor defendants without a guardian properly appointed for the minor, is liable to be set aside so far as the minors are concerned, though the proposed guardian subsequently made an unsuccessful application to set aside the *ex parte* decree against the minors. (*Seshagiri Aiyar and Kumaraswami Sasiri*, JJ.) SHROOF SAHIB *v.* RAGHUNATHA SIVAJI. **29 I.C. 579=18 M.L.T. 401.**

———O. 32, R. 4 (3)—*Guardian* ad litem—*Appointment of certificated guardian—Consent—Implied.*

The consent referred to in O. 32, R. 4 (3) of the Code, may be either expressed or implied. Where the proposed guardian of a minor deft. in a suit is also the certificated guardian of the minor, the omission of such guardian to appear before the Court in response to a notice intimating the proposal to appoint him as the guardian of the minor deft. is tantamount to an indication of his willingness to act as guardian *ad litem* and the Court is fully justified in appointing such guardian as the guardian of the minor deft. (*Konhaiya Lal*, A.J.C.) BAIJ NATH *v.* KADHA RAWAN PRASAD. **43 I.C. 862.**

———O. 32, R. 4 (3)—*Certified guardian—Duty to appoint—Appointment of another—Effect.*

C. P. CODE (V of 1908), O. 32, R. 5.

A Court is bound to appoint the certificated guardian as the guardian *ad litem*, unless it considers otherwise for special reasons to be recorded. Where the guardian however, objects, the Court must appoint some other person. There is nothing however in O. 32, R. 4, Cl. (3) which requires the Court to obtain the express consent of the guardian to act before appointing him in that capacity, and where the guardian so appointed is a certificated guardian, whom the Court was bound to appoint, consent may be properly presumed when he makes no objection. Where the interests of a minor have not been prejudiced, any defect in the procedure for the appointment of his guardian is not fatal. (*Miller* C.J. *and Foster*, J.) THAKUR TEJESHWAR-DUTT *v.* LAKHAN PRASAD SINGH. **4 Pat. L.T. 127=1 Pat. L.R. 89=(1923) Pat. 88=2 P. 296=1923 P. 231.**

———O 32, R. 4 (3)—*Appointment without consent of guardian is a nullity—Prejudice of minor whether necessary for setting aside the decree.*

An appointment without his consent of a guardian for a minor in a suit is without jurisdiction. The provisions of O. 32, R. 4 (3) in respect of consent are mandatory and there is nothing in the law to suggest that, unless it is established that the minor is prejudiced, he cannot get relief. (*Coutts and Das*, JJ.) SHAIKH SAJJAD HUSSAIN *v.* SAKAI RAI. **2 P. 7=4 P. L.T. 575=1922 P. 448.**

———O. 32, R. 4( )—*Guardian* ad litem—*Appointment of.*

O. 32, R. 4 (3) is mandatory and a Court has no jurisdiction to appoint a guardian *ad litem* on behalf of a minor, without his consent. 16 C. L J. 318; 20 I.C. 578, Foll; 30 Cal. 1021 (P.C.), Dist. (*Mullick and Atkinson*, JJ.) MOHAN KKISHNA DAR *v.* HAR PRASAD. **40 I.C. 2.**

———O. 32, R. 4 (4)—*Minor—Court guardian—Funds.*

The appointment of an officer of the Court as guardian *ad litem* of the minors in a suit without requiring the party at whose instance he is appointed to deposit the necessary funds to enable the guardian to defend the case, is a farce. (*Richards and Banerji*, JJ.) BHAGWAN-DAYAL *v.* PARAM SUKH DASS. **13 A.L.J. 179=27 I.C. 623=37 All. 179.**

———O. 32, R. 5—*Appointment of guardian*—Ad litem—*Appeal from decree cannot be preferred by another next friend.*

Where a guardian *ad litem* has been once appointed by the Court for a minor deft. his appointment enures for the *lis* in the course of which it was made unless and until revoked by the Court. Consequently an appeal against a decree passed against the minor can only be preferred by him. 44 A 35; 22 M. 187; 2 A.L.J. 482, foll. (*Stuart and Ryves*, JJ.) SHAMBOO *v.* KANHAYAN. **44 A. 619=20 A.L.J. 699=L.R. 3 A. 512=1922 All. 332 (2).**

C. P. CODE (V of 1908), O. 32, R. 6.

——O. 32, R. 6—*Minor—Not represented, effect of—Ignorance of decree-holder.*

If a minor defendant to a mortgage suit is not properly represented in it by a guardian *ad litem*, then a decree-holder purchaser of property brought to sale in execution of the mortgage-decree does not acquire the right, title and interest in the property of the minor. But in a mortgage suit, the interest of an infant of whose existence the mortgagee had no knowledge, is represented by his father and passes to the purchaser at an auction-sale. (*Mookerjee and Beachcroft*, JJ.) HALLI JHA *v.* LAL SINGH. 27 I.C. 425.

——O. 32, R. 6—*Creditor—Minor plaintiff—Right of debtor to demand security.*

Where a defendant admitted liability for a debt but refused to pay it to the minor legal representative of the deceased creditor unless his interests were safeguarded. *Held*, that the defendant was not legally bound to pay the money to the minor till he was satisfied that his interests would not suffer and that, therefore, in a suit by the minor's next friend for the debt the defdt. should not be made liable for the plff.'s costs. (*Broadway and Abdul Qadir*, JJ.) THAKAR DAS *v.* THE FIRM OF BASHI MAL KISHEN CHAND. 64 I.C. 385.

——O. 32, Rr 6 and 7—*Guardian ad litem position of—Trustee—Suit by minor against guardian on attaining majority.*

The guardian *ad litem* of the minor is a trustee and must act strictly in the interests of the minor. If the minor is injured by reason of the guardian not carrying out his duties efficiently, the minor can sue for redress and claim that so far as equity demands, the decree should be set aside or modified. 35 P.R. 1898, Foll.; 2. P. R. 1912, Ref; 3 W. R. 43, Cited, (*Kensington and Chevis*, JJ.) IRSHADUL HAQ *v.* MUHAMMAD-UN-NISSA.
14 I.C. 180=127 P.W.R. 1912.

——O. 32, R. 6—*Payment of decree amount to next friend—Leave of Court not obtained—Effect—Right to claim contribution,*

O. 32, R. 6 prohibits the next friend of a minor decree-holder from realising money due under a decree without leave of Court. If one of several judgment-debtors pay the whole decree amount to the next friend without leave of Court, the decree is nevertheless subsisting and hence he is barred from claiming contribution from the other debtors. (*Phillips and Venkatasubba Rao*, JJ.) ABBOY NAIDU *v.* RAMACHANDRA NAIDU, (1923) M.W.N. 925=19 L.W. 686=1924 Mad. 279.

——O. 32, R. 6—*Conflict of interest with minor.*

Where the surety for the guardian of a minor owed some moneys to the minor's estate and the Court ordered attachment of the property of the surety on an application by the guardian of the minor. *Held*, that neither R. 6, O. 32, nor S. 145, C.P.C. authorised the Court to adopt such a course. (*Sadasiva Iyer and Spencer*, JJ.) NADAMALIJI KURUGODAPPA *v.* ANGADI SOOGAMMA. 41 Mad. 40=(1917) M.W.N. 490=39 I.C. 928=22 M.L.T. 320.

C. P. CODE (V of 1908), O. 32, R. 7—Effect of Want of Sanction.

——O. 32, R. 6 (2)—*Scope—Power of next friend to draw money from Court—Manager of joint family.*

A Court cannot under O. 32, R. 6, C P.C. order payment of money to a person not appointed guardian by any competent authority without demanding security from him. A next friend of a minor even if he is the managing member of a joint Hindu family of which both are the members, is not entitled to draw money from Court on behalf of the minor without furnishing the security. 36 Mad. 295 (P.C.), Foll. (*Oldfield*, J.) KRISHNA AIYAR *v.* CHAKRAPANI. 29 I C. 475.

——O. 32, R. 7.

EFFECT OF WANT OF SANCTION.
EXECUTION PROCEEDINGS.
POWER OF NATURAL GUARDIAN.
PROOF OF SANCTION.
REFERENCE TO ARBITRATION.
MISCELLANEOUS.

Effect of Want of Sanction.

——O. 32, R. 7—*Effect of want of sanction—Minor—Compromise—Leave of Court—Not obtained—Decree enforceable against adults—C P. Code, S. 462.*

A compromise of suit made on behalf of a minor without strict compliance with the provisions of S. 462 of the C.P. Code of 1882 (O. 32, R. 7) is not enforceable against the minor. But the adult parties who are co-obligees with the minor are not on that account exonerated from liability. (*Sir Lawrence Jenkins.*) JAMNA BAI SAHEB MOHITAI AVERGAL *v.* VASANTA RAO. 39 Mad. 409=43 I A. 99=14 A.L.J 534=18 Bom. L.R. 432=31 M L J. 18=3 L.W. 540=24 C L.J. 74=20 M.L T. 31=34 I C. 213 (1916) 1 M W.N. 482 (P.C.).

——O. 32, R. 7—*Effect of want of sanction—Minor—Compromise without leave—Invalid, though supportable on other grounds.*

A mortgage given by a trustee in pursuance of a compromise in a suit in which he was the guardian *ad litem* of a minor, without the sanction of the Court, is invalid on that very ground though supportable as a proper act on the part of the trustee. The provision of law making it necessary to obtain the leave of the Court is of great importance to protect the interests of minors and in the absence, of such leave, a compromise cannot be supported. (*Lord Parmoor*). SUBRAMANIAM CHETTIA *v.* RAJA RAJESWARI DORAI. 39 Mad. 116 29 M.L.J. 856=19 M L.T. 150=(1916) 1 M.W.N. 100=3 L.W. 149=20 C.W.N. 201=23 C.L.J. 337=18 Bom. L.R. 360=32 I.C. 268=14 A.L.J. 183 (P.C.)
[Affirming 2 I.C. 963=6 M.L.T. 143.]

C. P. CODE (V of 1908), O. 32, R. 7—Effect of Want of Sanction.

——O. 32, R. 7—*Effect of want of sanction —Compromise— Avoidance of — No leave of Court.*

A minor, whose guardian does not get leave of the Court for compromise may avoid the compromise. In absence of an order granting permission the presumption is that no permission was granted. (*Rafique and Piggott, JJ.*) BADRI PRASHAD *v.* GOPAL BEHARI LAL. 30 I.C. 782=17 A.L.J. 789.

——O. 32, R. 7—*Effect of want of sanction —Minor—Guardian* ad litem—*Minor's mother consenting to arbitration—Decree upon award.*

The mother of an infant consented to a decree on an award which the minor sued to set aside on attaining majority. *Held*, having regard to the terms of the award and the subsequent result of the decree, namely a sale at an undervalue in favour of the defts, it was clear that the minor was not effectively represented in the proceedings initiated by the defts. in 1901, and that the decree was, therefore, null and void. (*Shah and Hayward, JJ.*) SADASHIV RAM CHANDRA DATAR *v.* TRIMBAK KESHAV. 44 Bom. 202=86 I C. 899= 22 Bom. L.R. 266.

——O. 32, R. 7 (S. 462, Old Code)—*Effect of want of sanction—Minor, compromise without leave.*

Where minor comes forward to set aside the compromise, the Court has no power to uphold it on the ground that it was for the benefit of the minor. (*Chandavarkar and Heaton, JJ.*) BHIWA JOTIBA *v.* DEV CHAND BECHAR. 35 Bom. 322=10 I.C. 909= 13 Bom. L.R. 280.

——O. 32, R. 7 (1882, S. 462)—*Effect of want of sanction—Court of Wards Act (Act IX B.C. of 1879), Ss. 18, and 57—Applicability to compromise of suit by Court of Wards on behalf of a minor.*

When suit is compromised by the Court of Wards on behalf of a minor ward, the compromise does not require the leave of the Court in order that it may be binding ; and O. 32, R. 7 or S. 462 of the Code of 1882 is not applicable to the case. (*Fletcher and Richardson, JJ.*) NAKYNO DEWANI *v.* JERANG DEWAN. 37 I.C. 971=44 Cal. 829.

——O 32, R. 7—*Effect of want of sanction —Suit for relief abandoned by next friend— Fresh suit—Maintainability.*

A suit on behalf of a minor was withdrawn by his next friend without any reason and the Court did not give permission to such withdrawal nor purport to consider whether the withdrawal was for the benefit of the minor. *Held*, the minor is not debarred from bringing a fresh suit for the relief which was abandoned in the previous suit. A Court should be very jealous of the interest of minors and should not allow a suit or part of a suit to be withdrawn without being satisfied that it is for their benefit. 27 Mad. 377 ; 29 Cal. 735, Rel. (*Scott-Smith and Martineau, JJ.*) RAJADA *v.* GHULLA. 164 P.W.R. 1918=47 I.C. 808= 59 P.R. 1919.

C. P. CODE (V of 1908), O. 32, R. 7—Effect of Want of Sanction.

——O. 32 R. 7—*Effect of want of sanction —Guardian and minor—Compromise of suit by guardian* ad litem *without sanction of Court—Effect—Suit by minor to set it aside, if lies.*

A decree based on a compromise by a guardian *ad litem* of a minor without the sanction required by O. 32, R. 7, C. P. C. is voidable at the instance of the minor, who can avoid it only if he is prejudicially affected by it. A suit lies at the instance of a minor to set aside such a compromise effected by his guardian *ad litem*. (*Shahdin and Chevis, JJ.*) DALO MAL *v.* SUNDAR. 2 P.R. 1912=42 P.W.R. 1912= 11 I.C. 523=134 P.L.R. 1911.

——O. 32, R. 7—*Effect of want of sanction —Decree in favour of minor—Transfer of decree by next friend is not binding on minor.*

The next friend of a minor cannot transfer to a third party, the decree in favour of the minor, without leave of the Court under O. 32, R. 7 of the Code. The word 'Suit' in the rule does not mean only a suit in which a decree has not been passed, and so leave of Court can be obtained at any stage. (*Spencer and Ramesam, JJ.*) KANAKAYYA *v.* KOTTAYYA. 13 L.W. 637=41 M.L.J. 75= 63 I.C. 285=(1921) M.W.N. 437.

——O. 32, R. 7—*Effect of want of sanction —Compromise on behalf of minor—Sanction of Court not obtained—Compromise not enforceable— Hardship to party—Restoration to previous position not possible—Compensation —Minor's liability to pay.*

A compromise entered into on behalf of minor is unenforceable against him if the sanction of the Court is not obtained and it is no ground for refusing to set it aside that it would entail hardship on the other party or that it is impossible to restore the parties to the position which they held before. The abandonment of a suit by the other party is no service to the minor for which the minor should pay compensation before setting it aside. (*White, C.J. and Ayling, J.*) SETHURAM *v.* VETKATRAO. 12 I.C. 499=34 Mad. 315.

——O. 32, R. 7—*Effect of want of sanction. —Second mortgage voidable.*

If some of the judgment-debtors admitted the mortgage and executed another mortgage of the same property to decree-holders, in which the minors are not made parties and permission of the Court was not obtained in time, the second mortgage is voidable by the minor. (*Macnair, A.J.C.*) BHAGIRATH *v.* NARAIN. 58 I.C. 178.

——O. 32, R. 7—*Effect of want of sanction*

Under O. 32, R. 7, Cl. (2) of the C.P. Code an agreement of compromise entered into by the guardian of a minor without the sanction

C. P. CODE (V of 1908), O. 32, R. 7—Effect of Want of Sanction.

of the Court is voidable against all the parties other than the minor. (*Mittra*, A.J C.) SAKHARAM *v.* BHIVRABAI. 44 I C. 165.

——— O. 32, R. 7, (2)—*Effect of want of sanction—Minor—Compromise.*

A compromise entered into on behalf of a minor, without the leave of the Court is voidable under O 32, R. 7 (2) of the Code. (*Fawcett and Kennedy*, J.C.) CHELLARAM *v.* KIMATRAM. 61 I.C. 118=14 S.L R. 295.

Execution Proceedings.

———O. 32, R. 7—*Execution proceedings—Agreement varying terms.*

An agreement varying terms of a decree between parties some of whom are minors is not enforceable unless sanctionned by Court. (*Sadasiva Iyer and Napier*, JJ.) SETHURAMA SAHIB *v.* CHOTTA RAJA SAHIB 40 I.C. 820=(1917) M.W.N 327.

——— O. 32, R. 7—*Execution proceedings—*

A compromise effected after the passing of a decree is governed by O. 32, R. 7. Sanction of the Court is necessary where the minor is a party to the adjustment. (*Sadasiva Iyer and Moore*, JJ.) DAVUD ROWTHER *v.* PARAMASAWMI PILLAI. 35 I.C. 70=31 M.L J. 207.

——— O. 32, R. 7—*Execution proceedings—Omission to record sanction—Cancellation of the order.*

In proceedings to set aside an execution sale, a Court recorded an order of compromise between the parties some of whom were minors, subsequently on objection by some of the parties as to the invalidity of the compromise for want of sanction, the Court vacated the order. *Held*, that R. 7 does not apply but the principle therein applies to execution proceedings. But an omission to record the sanction does render the compromise *ultra vires* especially in the absence of prejudice to the minors, who could only apply for review. (*Mullick and Sultan Ahmad*, JJ.) RAMGULAM SAHU *v.* SAM SAHAI DAS. 5 Pat. L J 379=1 Pat L T. 663=1920 Pat. 358.

Power of Natural Guardian.

———O. 32, R. 7—*Power of natural guardian—C P. Code* (1882), *S.* 462—*Minor—Father and managing member as guardian* ad litem—*Compromise—Leave of Court, if necessary.*

Where the father or managing member of a joint Hindu family is appointed guardian *ad litem* of a minor co-parcener, his powers as such father or manager, are controlled by S. 462 of the C.P. Code of 1882 so far as they relate to the minor's interest in the suit, and he cannot, without leave of the Court, enter into any agreement of compromise on behalf of the minor, with reference to the suit. (*Mr. Amir Ali.*) GANESHA ROW *v.* TULJA RAM ROW. 36 Mad. 295=40 I.A. 132=17 C W.N 765=11 A.L J 589=18 C L.J, 1=15 Bom. L.R. 526=14 M L T. 1=(1913) M.W.N. 575=19 I.C. 515=25 M.L.J, 150 (P.C.)
[Reversing 21 M.L.J. 1093=3 I.C. 928=6 M.L.T. 325.]
[Which affirmed 19 M.L.J. 4=1 I.C 880=4 M.L.T 288]

——— O. 32, R. 7—*Power of natural guardian.*

After appointment of a guardian *ad litem* the powers of natural guardian to deal with the minor's interest so far as they are involved in the suit are suspended. (*Macleod*, C. J. *and Heaton*, J.) GURMALAPPA MALLAPPA *v.* MALLAPPA MARTANDAPPA. 22 Bom. L.R. 725=37 I.C. 417=44 Bom 574.

——— O. 32, R. 7—*Powers of natural guardian — Arbitration — Reference — Guardian of minor.*

A natural guardian can on behalf of a minor enter into an arbitration so as to be binding on minor if it is proper, reasonable and for benefit of minor. (*Shah and Hayward*, JJ.) SADASHIV RAMCHANDRA *v.* TRIMBAK KASHEO. 44 Bom. 202=56 I.C. 399=22 Bom L.R. 266.

——— O. 32, R. 7—*Power of natural guardian—Transfer of, decree.*

Decree is property and hence the guardian can transfer a decree in favour of the minor, without the sanction of Court. (*Abdur Rahim and Odgers*, JJ.) GOVINDARAJULU NAIDU *v.* RANGA RAO. 40 M.L.J. 124=13 L W. 97=(1921) M.W.N. 98=62 I C. 265=29 M L.T. 99.

[But see 41 M.L J. 78.]

——— O. 32, R. 7—*Powers of natural guardian—Guardian* ad litem—*Power of.*

The powers of guardian *ad litem* are controlled by the provisions of the Civil Procedure Code and what a person can do as a manager of the family he cannot do when appointed a guardian. (*Kanhaiya Lal*, A.J.C.) SRIPAL SINGH *v.* JAGADISH NARAIN. 7 O.L J. 219=56 I.C. 313=2 U.P. L. R. (J.C.) 77.

Proof of Sanction.

———O. 32, R. 7—*Proof of sanction—C. P. Code of* 1882, S. 462—*Minor—Compromise—Sanction of Court—Formalities.*

In cases coming within S. 462 of the C.P. Code, 1882, it is not sufficient proof of compliance with the section that the minor is described in the title to the suit as minor "under the guardianship named" and that the terms of the compromise were before the Court. There ought to be evidence that the attention of the Court was directly called to the fact

C. P. CODE (V of 1908), O. 32, R. 7—Proof of Sanction.

that the minor was a party to the compromise, and it ought to be shown, by an order on petition (or in some way not open to doubt) that the leave of the Court was obtained. In the absence of such evidence, the compromise and decree in pursuance thereof are not binding on the minor, who should be remitted to his original position in the suit. (*Sir John Edge*) PARTAB SINGH *v.* BHABUTI SINGH.

35 All 487=
40 I.A 182=16 O. C. 247=
17 C.W.N. 1166=14 M.L.T. 299=
25 M L J. 492=11 A.L.J. 901=
18 C.L J. 384=(1913) M.W.N. 785=
21 I.C. 288=15 Bom. L.R. 1001 (P.C.)

———**O 32, R. 7**—*Proof of sanction.*

Where in a compromise on a suit some facts, likely to affect minor's benefit are kept away from Court's notice, the minor cannot be said to be bound by the compromise. In giving permission to compromise a suit on behalf of a minor the Court could record an order stating that it considers a compromise to be for minor's benefit but such an order is not essential to the validity of the compromise. The addition of the words "expressly recorded in the proceedings" in rule 7 has not changed the pre existing practice under S. 462 of the Old Code. (*Richardson and Sham Sul Huda, JJ.*) BEJOY SINGH HAZARI *v.* MATHURIYA DEBYA. **36 I C. 97.**

———**O 32, R. 7—(1882) S 462**—*Proof of sanction.*

The provisions of the section prohibit a guardian for the minor to compromise a suit against a minor unless Court's formal leave is obtained by petition or directing court's attention otherwise to the minor being a party and approved by it. If not, it is not binding on the minor, who is relegated to his original rights. Where on the petition for compromise an order of the Court contained the following words: "The guardian of the minor defendants permitted to file a *solenamah* on behalf of the minors. Decree in terms of the petition of compromise which should be embodied in the decree." They did not show that the terms were explained to the Court or the materials were placed before the Court in order to determine that the compromise was beneficial to the interest of the minors or otherwise, and consequently it could not bind them. (*Mookerjee and Beachcroft, JJ.*) MOHABIR PROSAD *v.* BANDI PROSAD. **16 I.C. 397.**

———**O. 32, R. 7**—*Proof of sanction—Compromise—Sanction of Court based on mistake.*

A decree passed under a misapprehension of a material fact as to the true position of the minor is not binding on the minor. *Shadi Lal and Wilberforce, JJ.*) JHANDA SINGH *v.* LACHMI. **1 Lah. 344=68 P.L.R. 1920=**
56 I.C. 878=22 P.W.R. 1920.

———**O. 32, R. 7**—*Proof of sanction—Reference to arbitration—Compromise by guardian* ad litem *subsequent to reference—Benefit—Duty of Court—Arbitrators accepting compromise.*

C. P. CODE (V of 1908), O. 32, R. 7—Proof of Sanction.

After referring a pending suit to arbitration the parties entered into compromise amicably settling their dispute and the arbitrators reported to the Court to that effect requesting it to pass a decree in accordance with the compromise, which was done. *Held*, that the report of the arbitrators embodying the compromise entered into between the parties was not an award. The decree passed in accordance with the compromise was not binding on the minor inasmuch as the compromise was not sanctioned by the Court. O. 32, R. 7, C. P. C. (*Abdul Raoof, J.*) GHULAM RASUL *v.* BEGAN.
55 I.C. 218.

———**O. 32, R. 7**—*Proof of sanction—Scope of.*

The mere omission to record in the order granting leave to enter into the proposed compromise that the Court had considered the terms and regarded them to be beneficial to the minor does not invalidate the consent decree The Court is generally presumed to have done its duty in the matter and is deemed to have been satisfied before giving permission that the compromise was for the benefit of the minors O. 32, R. 7, does not compel the Judge to reduce this matter to writing, though it is exceedingly desirable he should do so. 29 Mad. 104; 17 All. 531; 8 C.L.J. 31, Ref. (*Shadi Lal, J.*) JANKI *v.* NAUNIHAL. **9 P L.R. 1917=**
39 I.C. 53=36 P.R. 1917.

———**O. 32, R. 7**—*Proof of sanction—Minor—Compromise—Sanction of Court—Some terms, not embodied in decree—Sale in pursuance of compromise—Sale by father and guardian* ad litem.

Where a suit on behalf of a minor is compromised and a petition and *razinamah* are filed, stating that it is for the benefit of the minor and the Court passes an order 'granted' it implies that it applied its mind and sanctioned the compromise on behalf of the minor. The order of the Court need not on the face of it state in so many words that the Court considered the settlement and came to the conclusion that the settlement was in the interest of the minor. 28 All. 585; 36 Mad. 205; 39 Mad. 115. Ref.; 26 Bom. 109, Foll. Where an arrangement is sanctioned by the Court involving the sale of a minor's properties it can be effected by the guardian *ad litem*. Where in pursuance of a compromise a sale deed was executed of the minor's properties by the father and the guardian *ad litem* the sale is good although the guardian *ad litem* had no power to act on behalf of the minors, as the father must be deemed to have acted as guardian. 25 All. 407. Foll. (*Abdur Rahim and Oldfield, JJ.*) RAJAGOPALAN *v.* T. SUBARAMA IYER.
53 I.C. 354=(1919) M.W.N. 356.

———**O. 32, R. 7**—*Proof of sanction—Compromise decree is not sanctioned.*

Mere recording a compromise and passing a decree according to it is no sanction by the

C. P. CODE (V of 1908), O. 32, R. 7—Proof of Sanction.

Court and therefore not binding on the minor. (*Ayling and Tyabji, JJ.*) DEVALURU VIJAYA RAMAYA *v.* DAVALURU VENKATASUBBA RAO. **39 Mad. 853=32 I.C. 881=30 M.L.J. 465.**

——— **O. 32, R. 7**—*Proof of sanction—Agreement on behalf of minor party—Sanction of Court.*

It is not necessary that the sanction of the Court, if otherwise proved, must be in express terms. (*Evans, J C.*) BAJRANG SINGH *v.* RAI AMERPAL SINGH. **14 I.C. 6.**

——— **O. 32, R. 7**—*Proof of sanction—Minor—Compromise by next friend — Compromise sanctioned by court—Rights of minor to challenge the compromise later--Concealment of facts not relating to property in dispute if a ground.*

A compromise entered into by next friend of a minor, duly sanctioned by the Court and a decree passed thereon, cannot be set aside at the instance of the minor in subsequent proceedings on attaining majority on any ground much less on the mere ground that certain facts unconnected with the property in dispute, were withheld from the court's notice. The Court cannot go into the facts of the previous case and determine whether sanction had been properly granted or not and whether there had been a proper exercise of its judicial discretion in the matter. (*Evans and Piggot*, A. J. Cs.) AMARPAL SINGH *v.* CHHABRAJ KOER. **11 I.C. 105.**

——— **O. 32, R. 7**—*Proof of sanction—Omission to have it expressly recorded—Effect of.*

In order to attract the provisions of O. 32, R. 7, C. P. Code, it is enough to show that the attention of the Court was directly called to the fact that a minor was a party to the compromise and that the leave of the Court was obtained on petition or in some way not open to doubt. No particular formula is necessary to be used by the Court in order to grant the leave and when it is shown that an application was made by the guardian to the Court asking for leave to enter into the compromise and the Court makes a note of that application and passes a decree in terms of that compromise, it must be held that the leave of the Court was expressly recorded within the meaning of O. 32, R. 7, C. P. Code, (28 A. 595, Ref.) Even if the leave of the Court is not expressly recorded that would not make the decree a nullity. It would only make the decree voidable at the option of the minor and so long as it is not avoided in a proper proceeding, no objection can be taken in the execution proceedings as regards the validity thereof. (*Mullick and Kulwant Sahay, JJ.*) ISHAN CHANDRA KUNDU *v.* NILARATAN ADHIKARI. **2 Pat. 538=4 Pat. L.T. 311=1 Pat. L.R. 217=(1923) Pat. 184=1923 P. 375.**

——— **O. 32, R. 7**—*Proof of sanction—Compromise — Express approval of Court whether necessary.*

C. P. CODE (V of 1908), O. 32, R. 7—Reference to Arbitration.

The fact that the petition of compromise gave notice to Court that minors' interests were affected and that the Court passed a decree accordingly does not amount to sanction of Court. The attention of the Court must be expressly drawn to the fact and its approval obtained. The Court's attention is drawn only when leave is asked to settle the case on behalf of the minors. (*Das and Ross, JJ.*) RAM GULAM SAHU *v.* DURGA PERSHAD. **6 Pat. L J. 190=2 Pat. L.T. 325=60 I.C. 980=(1921) Pat. 235=3 U.P.L.R. (Pat.) 75.**

——— **O. 32, R. 7**—*Proof of sanction—Compromise by guardian.*

No next friend or guardian can compromise a case for minor without the leave of the Court expressly recorded. (*Chamier, C.J. and Kingsford, J.*) HANUMAN RAI *v.* JAGDIS RAI. **35 I.C. 673=1917 Pat. 77.**

Reference to Arbitration.

——— **O. 32, R. 7**—*Reference to arbitration—Leave of Court, if necessary.*

In the case of a minor party leave of Court need not be obtained before making an application to refer a dispute to arbitration. 28 All. 35, Foll. (*Richards, C.J., Banerjee and Ryves, JJ.*) LATAWAN *v.* LACHIYA. **36 All. 69=21 I.C. 989=12 A.L.J. 57.**

——— **O. 32, R 7**—*Reference to arbitration—Minor plaintiff represented by his mother and guardian—Decree in terms of award—Decree passed without reference to O. 32, R. 7—Validity—C. P. Code, Sch. II, Para 20.*

A minor represented by his mother referred a dispute to arbitration out of Court. After the award was published, the mother on behalf of her minor son applied to the Court under Sch. II, Para. 20, C.P.C. that the award be filed in Court in order that a decree be passed in terms of it. The Court accordingly passed a decree but without certifying that it was for the benefit of the minor. *Held*, that O. 32, R. 7 of the C. P. Code had no application to the facts of the case inasmuch as it could not be said that there had been an agreement on behalf of the minor with reference to the suit in which the next friend was acting and that the decree could not be set aside on that ground. (*Scott, C J., Macleod and Shah, JJ.*) HANMANTRAM *v.* SHIVNARAYAN. **43 Bom. 268=48 I.C. 238=20 Bom. L.R. 970 (F.B.).**

——— **O. 32, R. 7**—*Reference to arbitration on behalf of minor.*

An agreement of reference to arbitration on behalf of a minor without the consent of the Court is invalid. The minor on attaining majority can have the award set aside. (28 All. 35, Diss.) (*Scott, C.J. and Chandavarkar, J.*) ATMA RAM YEKOPA VANI *v.* BILA GANPAT VANI. **19 I C. 424=16 Bom. L.R. 223.**

C.P. CODE (V of 1908), O. 32, R. 7—Reference to Arbitration.

———O. 32, R 7—*Reference to arbitration. Suit against firm—Minor.*

Though one member of firm is minor sanction of Court is not necessary to refer a suit against that firm to arbitration. (*Harrison*, J.) SUKHANAND *v.* BEHARI RAM.
1923 Lah 103.

———O. 32, R. 7—*Reference to arbitration—Benefit to minor—Court, duty of.*

Where the guardian of a minor party to a suit wishes to refer the matter to arbitration. the Court ought to fully apply its mind to the matter and consider the circumstances of the case and see if the reference would be for the minor's benefit. Where it accords sanction to the reference without any valid reason the reference is bad and the whole proceeding is vitiated (*Abdul Raoof*, J.) MT. BHAKTAWAR *v.* KESAR SING, GURDIT SINGH.
39 I.C. 31=6 P.W.R. 1921.

———O 32, R. 7 and Sch II, Para 1—*Reference to arbitration - Next friend of minor—Leave of Court—Ratification.*

An application of the next friend of a minor under Sch. II, Para. 1, C.P. Code comes within O. 32, R. 7 of the Code. Unless the leave of the Court is expressly obtained and recorded, the application will have the same effect and be open to the same objection as would any other agreement or compromise entered into by such guardian or next friend witnout the leave of the Court. Where, however, the minor on attaining majority ratifies the proceedings he cannot attack the awards as being void against him. 95 P. R. 1912, Foll.; 39 Mad. 1031, Ref. (*Rattigan*, C.J. *and Abdul Raoof*, J.) MUHAMMAD IBRAHIM *v.* ALLAH BAKSH.
52 I.C. 327=145 P.R. 1919.

———O 32, R. 7—*Reference to arbitration*

An agreement to refer matters to arbitration through Court cannot be challenged on the grounds of the parties being minors, and of the sanction of the Court being not obtained under O. 32, R. 7. (*Reid*, C.J.) BUDH SINGH *v.* RAM NATH. 251 P.W.R, 1912=17 I.C. 388=128 P.R. 1912.

———O. 32, R. 7 and Ss. 462 and 506 (1882)—*Reference to arbitration.*

To safeguard the interest of a minor, the Legislature have imposed upon the Court the *quasi* tutelary responsibilities under O. 32, R 7. The application to refer a question to arbitration is an 'agreement' within the meaning of O. 32, R 7 because the rule has reference to the suit. Hence for the validity of such reference for all purposes and against all parties including minor, previous sanction and its express record by the Court, must be obtained under Sch. 2, Para. 1, lest the whole of the proceedings will be voidable as against all others except the minor as in the cases of other agreements or compromises. It is an open question whether the minor's guardian-*ad litem*'s or next friend's binding by oath the other party

C. P CODE (V of 1908), O. 32, R. 7—Miscellaneous

obviates the necessity of express sanction. (*Robertson, Rattigan and Shah Din*, JJ.) GANESH *v.* MULCHAND. 93 P.R. 1912=15 I.C. 161=159 P.W.R. 1912 (F.B.)

———O. 32, R. 7 and Sch. II, Para. 1—*Reference to arbitration on behalf of minor when valid—Consent decree passed on appeal by father of minor parties—Leave of Court not obtained—Minor, whether entitled to avoid decree.*

The agreement to refer to arbitration in Sch. II, Para. 1 of the C. P. Code is an "agreement with reference to the suit" under O. 32, R. 7. Authorities reviewed. Where a Court simply records a compromise under O. 32. R. 7 and passes a decree in accordance therewith, this does not amount to sanction. The agreement to arbitration by the guardian without the permission of the Court is not valid. (*Ayling and Tyabji*, JJ.) DAVULURA VIJAYA RAMAYYA *v.* DAVULURA VENKATA SUBBA RAO.
39 Mad. 853=32 I.C. 881=30 M.L.J. 465.

———O. 32 R. 7—*Reference to arbitration.*

The guardian can withdraw his petition to enter into a compromise at any time before the leave is granted. (*Chamier* C.J. *and Kingsford*, J.) HANUMAN RAI *v.* JAGDIS KAI.
36 I.C. 678=(1917) Pat. 77.

———O. 32, R. 7—*Reference to arbitration—Minor—When void.*

Reference to arbitration on behalf of minor parties in the absence of Court's sanction is not void but voidable. Where a decree is given on award, there is neither an appeal nor a revision. (*Kennedy and Raymond*, JJ.) EMNABAI *v.* FAKIR MAHOMED.
15 S.L.R. 165=1922 S. 1.

Miscellaneous.

———O. 32, R. 7—*Compromise—Appeal pending before Privy Council—Minor parties—Application to withdraw.*

Applications to allow an appeal to be withdrawn on terms when there are parties concerned who are not *sui juris* are not granted without grave consideration. The Judicial Committee being assured by the counsel at the bar that the terms on which the appeal was proposed to be withdrawn were beneficial to a minor party thereto, and having before them the opinion of counsel who appeared in the High Court, to the same effect granted leave to withdraw the appeal on the proposed terms. (*Lord Shaw.*) SAKINBAI *v.* SHRINIBAI.
47 I.A. 88=38 M.L.J. 431=11 L.W. 486=(1920) M.W.N. 311=22 Bom. L.R. 552=33 I.C. 943=18 A.L.J. 499 (P.C.).

———O. 32, 7—*Applicability of—Proceedings under S. 35, U.P. Land Revenue Act.*

O. 32, R. 7, C. P. C., does not apply to proceedings under S. 35 of the U. P. Land Revenue Act and therefore a compromise entered into by the mother as guardian of her minor sons cannot be set aside merely on the ground that the Revenue Court did not give the mother and guardian leave to enter into so

C. P. CODE (V of 1908), O. 32, R. 7—Miscellaneous.

on behalf of her minor sons. (*Chamier, J.*) BHAROSA *v* SIKHDAR. 27 I.C. 97 = 12 A L.J. 998.

———O. 32, R. 7—*Confession of judgment—Compromise.*

The confessing of judgment when there is no defence is no compromise so as to affect the application of O. 32, R. 7. (*Sunder Lal, J.*) RAM NAIK SHUKUL *v.* GANGA SHUKUL. 26 I.C. 620.

———O. 32, R. 7—*Duty of Court—Wishes of guardian or next friend—Weight due to.*

Although the Court can and must approve of a compromise on behalf of infants it cannot and will not force one upon them against the opinion of their next friend or guardian *ad litem* in the action. No doubt if the Court found that a guardian or next friend was acting improperly and against the infant's interest in refusing to assent to an arrangement which appeared clearly beneficial to them, steps might be taken to remove him and substitute some other person. (*Ghose and Panton, JJ.*) HEMANGINI DASI *v.* BHAGWATI SUNDARI. 27 C.W.N. 792 = 1923 Cal. 685.

——O. 32, R. 7—*Compromise on behalf of minor.*

A minor cannot repudiate a compromise by his guardian if made for his benefit with the Court's sanction. (*Johnstone and Rattigan, JJ.*) AMIR *v.* FAKIRA. 252 P.L.R. 1914 = 26 I.C. 874 = 139 P.W.R, 1914.

——O 32, R. 7—*Compromise on behalf of minor—Surrender of all his rights—Validity.*

A compromise completely surrendering a minor's rights is not beneficial to him and cannot bind him. (*Rattigan and Shadi Lal, JJ.*) MUHAMMAD RASHID *v.* RAHAMATULLAH. 96 P.R. 1914 = 212 P.L.R. 1914 = 24 I.C. 680 = 134 P.W.R. 1914.

——O. 32, R. 7—*Partial setting aside, if allowed.*

Where a minor seeks to avoid a decree he can avoid it only *in toto*, and not only in part. (*Ayling and Tyabji, JJ.*) DAVULURU VIJAYA RAMAYYA *v.* DAVULURU VENKTTA SUBBA-RAO. 39 Mad. 853 = 32 I.C. 881 = 30 M.L.J. 465.

——O 32, R. 7—*Minor—Compromise decree—Consent of Court obtained—Decree how can be set aside.*

A decree based on a compromise entered into by a next friend on behalf of a minor, with the consent of Court can be set aside only on the ground of fraud in obtaining the consent or collusion or gross negligence on the part of the next friend. (*Kanhaiya Lal, A.J.C.*) AJUDHYA PERSHAD *v.* MAHABIR PRASAD. 22 I.C. 923.

——O. 32, R. 8—*Minor—Guardian* ad litem *—Appeal by another person as next friend—Maintainability.*

C P. CODE (V of 1908), O. 32, R 11.

Where a guardian *ad litem* to a minor defendant has once been appointed such appointment continues for the whole of the *lis* or until it is revoked by Court, and the guardian so appointed is the only person who can file an appeal on behalf of the minor. 41 A. 619 foll. (*Ryves and Daniels, JJ.*) BHAGELU *v.* DHARMA. 45 A 623 = 21 A.L J. 691 = L R. 4 A. 304 = 1924 A. 79.

——O. 32. Rr. 8 and 4—*Minor—Application for appointment of guardian—Absence of affidavit.*

The absence of an affidavit required by S. 456, C.P.C. of 1882 is not sufficient to render the proceedings illegal and void as against the minor on the ground that he was not properly represented. (*Scott-Smith, J.*) IMAM DIN *v.* PURAN CHAND. 84 P.L.R. 1920 = 87 P.W.R, 1920 = 55 I.C. 833 = 1 Lah. 27.

——O. 32, Rr. 8 and 9—*Pauper suit—Minor plaintiff—Costs to be paid by next friend.*

Where the next friend of a minor sues in *forma pauperis*, the Court can order the next friend to pay the costs of the defendant. (*Hallifax, A.J.C.*) MAROTI *v* BHAGI. 1923 Nag. 43.

——O. 32, R. 8—*Guardian* ad litem *discharged—Application by.*

An application on behalf of a minor, made by a guardian *ad litem* discharged long before the date of application, should not be entertained. (*Miller, C. J. and Adami, J.*) RAJ KISHORE DAS *v.* RAM GHULAM SHAU. 6 Pat L J. 171 = 62 I.C. 235 = (1921) Pat. 193.

——O. 32, Rr. 9 and 10—*Next friend—Interest adverse to the minor—Procedure.*

A Court should remove a next friend under O. 32, R. 9 if it thinks his interest is adverse to that of the minor and should stay proceedings under R. 10, until the appointment of another next friend. (*Das and Ross, JJ.*) KIRIT NARAYAN *v.* CHANCHAL DAS. 63 I.C. 736 = 6 Pat. L J. 317.

——O. 32, R. 10—*Minor—Suit on behalf of—Death of next friend—Suit dismissed—Effect—Estoppel.*

A suit does not abate by the next friend's death and the Court should either appoint a new next friend or keep the suit pending till the minor attains majority. A dismissal of the suit is a nullity, and a party misconceiving the effect of the order is not estopped from pleading that it need not have been set aside. (*Seshagiri Iyer, J.*) VENKATESWARA IYER *v.* CHERR-SERI MADATHIL RAVUNNI NAIR. 27 M.L J. 405 = 25 I.C. 597 = (1914) M.W.N. 740.

——O. 32, R. 11—*Applicability—Ex parte proceedings—Power to remove guardian.*

The power of the Court under O. 32, R. 11, C.P.C. to remove the guardian for the suit of a minor delt. and appoint a new guardian instead, may be exercised at any time during

the pendency of the suit and the same is not taken away by the fact that an order to try the suit *ex parte* has previously been passed. (*Krishnan*, J.) AYYA NADAN *v.* THANAMMAL.
27 M.L.T. 171=(1920)M W N. 241=
55 I C. 945=11 L.W. 289

——O. 32, R. 11 (1)—*Sufficient cause.*

Inability on the part of the guardian *ad litem* to provide funds is sufficient cause. (*Krisnaswami Aiyar and Ayling*, JJ.) LANK RAMASWAMI *v.* LANK LAKSHMANA.
(1911) 1 M.W.N. 98=9 I.C. 435=
9 M.L T. 333.

——O. 32, R. 14—*Next friend—Non-prosecution of suit—Dismissal—Defendant's costs—Liability of deceased next friend's estate.*

The next friend of a minor plff. died during the pendency of the suit. The suit was subsequently dismissed, owing to the indifference of the plff.'s relations, with costs to be paid out of the estate of the deceased next friend. *Held*, that the order as to costs was made without jurisdiction. (*Lindsay*, J.C.) BRIJ MOHAN DAYAL *v.* SARUP NARAIN. 20 O C. 300=
43 I.C. 257=5 O.L J. 106.

——O 32, R. 15—*Notice of unsoundness—Duty to appoint guardian—Decree.*

If a decree or order is sought to be set aside by suit on the ground of unsoundness of the party seeking to set aside, such disability must be brought to the Court's notice at or before the passing of such decree when the party was lawfully a party at the institution of the suit and insanity supervened *pendente lite*. (*Piggott and Walsh*, JJ.) SUNDER BAI *v.* BASDEO SINGH. 30 I.C 109=17 A.L J. 257.

——O 32, R. 15—*Suit for possession—Person not adjudged a lunatic—Decree—Subsequent suit—Bar.*

In a former suit for recovery of properties conveyed by plff. he pleaded that he was of weak intellect and that advantage had been taken of him and that he had not received the consideration. The Court found against the plaintiff and decreed the suit against him. The plaintiff then brought the present suit for a declaration that the decree in the former suit was not binding on him as he, being of unsound mind, had not been properly represented: *Held*, that the plaintiff, not having been adjudged a person of unsound mind at the time of the previous suit, was a party to that litigation, and was bound by the result. (*Richards*, C.J. *and Banerji*, J.) BISHRUP *v.* NIL KANTH.
29 I.C. 595=13 A.L.J. 562.

——O. 32, R. 15—*Defendant alleged to be of unsound mind by one party and denied by the opposite party — Judicial inquiry, is necessary.*

Where the plaintiff does not allege but denies that defendant is of unsound mind or mentally infirm to defend the suit, it is desirable that there should be a judicial inquiry in the matter and that both parties be allowed to adduce

evidence. (*Woodroffe and Ghose*, JJ.) RAM SUNDAR SAHA *v.* KALI NARAIN SEN CHOWDHRY. 1923 Cal. 86.

——O. 32, R 15—*Lunatic—Right to sue in his own name.*

There is no established rule of practice requiring that suits relating to a lunatic's property should be brought by the lunatic's manager and not by himself. On the contrary the C. P. Code contemplates suits by persons of unsound mind whether so adjudged or not. Though it is true that a person so incapacitated has to sue by a next friend, but a next friend is not a party and the absence of a next friend is immaterial. (*Jenkins*, C.J. *and N. R. Chatterjea*, J.) KASIM MAMOOJI *v.* K. B. DUTT. 27 I.C. 459=19 C.W.N. 45.

——O 32, R. 15—*Lunatic—Decree against—Sale in execution—Sale void or voidable.*

A sale in execution of a decree obtained against a lunatic who was not properly represented is of no effect at all and is not merely voidable. 33 Cal. 1094; 32 Cal. 296 Rel. (*Holmwood and Chapman*, JJ.) HAKIMULLAH *v* NOBIN CHANDRA BARNA.
18 C.W.N. 1329=24 I.C 177=20 C.L.J. 291.

——O 32, R. 15—*Lunatic not adjudged—Position of lunatic.*

S. 463 of the old C. P. C., 1882 applies to lunatics whether adjudged or not under Lunacy Act, (1858) 7 Cal. 242, 13 Bom. 656; 24 Mad. 504, Foll. The position of lunatic and minor is the same. Therefore a sale of a lunatic's property in execution of a decree passed against him in a suit in which he was not represented by a guardian *ad litem* is a nullity and the lunatic can resist an action for possession without setting aside the sale. 32 Cal. 296; 32 I. A. 23, (P. C.) 6 M. L. T. 279 (P.C.) 38 Mad. 1076; Dist. Even where no actual misconduct or mismanagement is proved against the trustees, a scheme may be framed if necessary in order to set at rest questions which might give rise to difficulties in future and to resume any uncertainty as to the right of management in the temple. (*Wallis*, C.J. *and Phillips*, J.) MUTHIAH CHETTY *v.* PERIANNAN CHETTY.
34 I.C. 551=4 L.W. 228.

——O. 32, R. 15—*Lunacy Act* (1858).

Whether the lunatic is adjudged or not, O 32, R 15 applies to his case. He is in the same position as a minor and therefore a sale of his properties in execution of a decree against him in a suit in which he was not properly represented by a guardian is void and he can resist granting possession to the purchaser without getting the sale set aside. (*Coutts Trotter and Seshagiri Iyer*, JJ.) MOOTHETUTH KANARI *v.* HARI SHENOY.
3 L.W. 301=19 M.L T. 245=
34 I.C. 428=(1916) 1 M W.N. 278.

——O. 32, R. 15—*Lunatic—Decree without proper representation.*

Where a decree is obtained against a lunatic on the refusal of the Court to appoint a

C. P. CODE (V of 1908), O. 32, R. 15.

guardian *ad litem* for him, the representative of the lunatic cannot after his death raise an objection in execution that the decree was null and void. (*Kanhaiya Lal*, A J.C.) DEBI BAKSH SINGH *v.* BED NATH. **45 I.C. 219 = 5 O.L.J. 90.**

——— **O. 32, R. 15**—*Lunacy—Adjudication—Procedure for cancelling—Right of manager to sue.*

Where a person has been adjudged to be a lunatic by a competent Court and a manager has been appointed for his estate, the vesting order remains in force until the adjudication of lunatic is cancelled by the Court, for the managership is determined by the death of the lunatic. The manager can sue on behalf of the lunatic so long as the order appointing him as manager subsists. (*Kanhaiya Lal*, A.J.C.) DEBI CHARAN *v.* RAGHUBER DAYAL. **16 I.C. 885.**

——— **O. 32, R. 15**—*Lunatic—Guardian* ad litem *not appointed—Effect.*

Omission to appoint a guardian *ad litem* for a man of unsound mind does not render the whole suit invalid *ab initio*. (*Robinson*, J.) SAW LAN *v.* MAUNG LUN. **22 I.C. 673.**

——— **O. 33, R. 1**—*Dismissal of suit as having been referred to arbitration—Second suit—Bar.*

Where a suit was dismissed on the joint application of both parties that the dispute had been referred to arbitration, without obtaining permission to bring a fresh suit if the arbitration failed a second suit is barred in respect of the same claim. (*Rafique*, J.) JADUNANDAN *v.* SHEOBALAK. **28 I.C. 601 = 13 A.L.J. 347.**

——— **O. 33, R. 1**—*Suit in* forma pauperis—*Admission of part of the claim by defendant cannot dispauper plaintiff.*

A Hindu widow applied for leave to sue *in forma pauperis* for the recovery of maintenance and her stridhanam jewels and cash withheld by defendant. The defendant admitted liability for the jewels and cash and produced them in court. It was found that the jewels and cash were more than sufficient to pay the Court-fee and the Court dispaupered her. *Held* on revision that the order of the Court was improper and it could not be said that owing to the defendant's offer the plaintiff was possessed of sufficient means to pay the prescribed Court fee. In a suit where no fee is prescribed by law for the plaint, no admission or even payment into Court by the defendant can be taken into consideration. The time when the application is made to institute a suit as a pauper is the point of time which the Court has to consider when the application comes to be dealt with, and the subject matter of the suit is in no case at the disposal of the applicant for payment of fees. (10 B. 207 diss. 34 638, foll.) (*Macleod*, C.J. *and Crump*, J.) BAI BALAGAVRI *v.* MOTILAL, **47 Bom. 523 = 25 Bom. L.R. 199 = 1923 Bom. 247.**

C. P. CODE (V of 1908), O. 33, R. 1.

——— **O. 33, R 1, and O. 25, R. 1**—*Order for security of costs—Leave to continue suit* in forma pauperis *granted before time for security has expired—Previous order ceases.*

An order for security of costs passed in an ordinary suit ceases to operate as regards the antecedent costs if leave is given to continue the suit as a pauper before the period for furnishing the security has expired. (*Macleod*, J.) BAI LAXMI *v.* HARJIVAN NATHU. **13 Bom. L.R. 956 = 12 I.C. 538 = 36 Bom. 415.**

——— **O. 33, R. 1**—*Right to sue as a pauper—Personal right.*

The privilege of maintaining a pauper suit, is personal granted to people who have no means of carrying on litigation and the representative of a pauper cannot continue the suit of his testator or testarix with the same privilege unless he himself is a pauper. 3 W. R. 20. Not foll; 3. Mad. 3 Dist; 18 Bom 237, Rel. (*Davar*, J.) MANAJI RAJUJI *v.* KHANDOO BALOO, **36 Bom. 279 = 11 I.C. 724 = 13 Bom. L.R. 677.**

——— **O 33, R. 1**—*Minor—Suit* in forma pauperis—*Status of next friend immaterial.*

A minor who is not possessed of sufficient means within the definition of pauperism for the purpose of O. 33, C. P. Code is entitled to be allowed to sue *in forma pauperis* by a next friend although the next friend is not a pauper. The law in India in this respect is very different from the law as prevailing in the court of chancery in England. 3 M. 3, foll. (*Rankin and Ghose*, JJ.) NANIBALA DASSYA *v.* JAMINI SUNDARI. **37 C.L.J. 394 = 1923 Cal. 656.**

——— **O. 33, R. 1—Expln. and R. 6**—*Pauper suit—Defendant entitled to disprove pauperism.*

A Court should not allow plff. to sue *in forma pauperis* without affording the deft. an opportunity to prove that the plff. is not a pauper. 10 Bom. 207; 30 Bom. 593, Rel. upon (*Mookerjee and Beachcroft* JJ.) ZILLAR RAHMAN *v.* GAZUNFFUR HOSSAIN. **28 I.C. 974.**

——— **O. 33, R. 1**—*Pauper—Suit by* shebait *—Alienation—Setting aside.*

A *shebait*, suing his *co-shebaits* and an alienee from them for recovery of endowed property may be allowed to sue *in forma pauperis* where he does not either in his personal capacity or as *shebait* possess sufficient means to pay the stamp for plaint,; the fact that his *co-shebaits* are possessed of means is perfectly immaterial. (*Jenkins*, C.J. *and Sharfuddin*, J.) NANDA LAL CHATTERJEE *v.* DWARKA NATH DAS. **11 I.C. 892.**

——— **O. 33, R. 1**—*Evidence as to pauperism—Report of Tahsildar.*

The Chief Court refused to interfere in revision with an order rejecting petition for permission to sue *in forma pauperis* on ground that the Tahsildar was acting as a commissary to the Court and his report was good evidence and that in the Chief Court the petitioner had

C. P. CODE (V of 1908), O. 33, R. 1.

briefed one of the leading counsel and paid him a fee of Rs. 100. (*Le Rossignol*, J.) GIRDHARI LAL *v.* ABDUL RAHAMAN.
226 P.W.R. 1915=28 I.C. 87=
39 P.L.R. 1916.

———O. 33, R. 1.—*Dismissal of pauper application—Court if can extend time for payment of Court-fee.*

Where pauper application is dismissed, the court can extend time for payment of Court fee. (*Krishnan*, J.) BALAGURU NAIDU *v.* MUTHU RATNAM IYER, 18 L W. 451=
33 M.L.T. 18=46 M.L.J. 284=
(1923) M.W.N. 720=1924 Mad. 118.

———O. 33, Rr. 1, 5 and 7—*Pauper application—Applicant subsequently ceasing to be pauper—Court cannot grant leave to sue as pauper.*

Where subsequent to an application to sue as a pauper, the applicant receives a sum of money, sufficient to defray the suit expenses the Court has no jurisdiction to grant leave to sue as a pauper. (*Napier*, J.) MUDDAPPA *v.* RUDRAMMA. 61 I.C. 958=18 L.W.76.

———O. 33, Rr. 1, 3 and 5—*Company—Suit in forma pauperis—Companies Act, S.* 179.

O. 33 of the Civ. Pro. Code, applies to suits by companies. The term "person" in the order includes companies also having regard to S. 3 of the General Clauses Act. O. 33 cannot be construed to apply only to persons who possess wearing apparel. Presentation by the official liquidator is valid presentation by the company under O. 33, R. 3, Civ. Pro. Code. The payment of commission does not disqualify the official liquidator and does not make him interested within the meaning of O. 33, R. 5. (*Bakewell and Kumaraswami Sastri*, JJ.) PERUMAL KOUNDEN *v.* VENKATASWAMI NAYUDU.
41 Mad. 625=45 I.C. 164=
34 M.L.J. 421.

———O. 33, R. 1—*Delay of five years in presenting petition.*

An application for leave to sue as a pauper presented five years after attaining majority is barred and cannot be allowed. (*Hannay*, J.) SUBRAMANIA CHETTY *v.* KULAYAPPAN.
26 I.C. 90=1 L.W. 668.

———O. 33, R. 1—*Suit to redeem—Equity of redemption—should be excluded in calculating means.*

In a suit for redemption of mortgage property of which plaintiff is not in possession, the value of the right to redeem which is the subject matter of the suit for the purposes of O. 33, R. 1, should be excluded in considering whether he is entitled to sue as a pauper. (*Baker*, O.J. C. *and Halifax*, A.J.C.) ACHALSINGH *v.* SETH JIVANDAS. 19 N L.R. 168=
1924 Nag. 45.

———O. 33, R. 1 and O. 22, R. 8—*Pauper suit—Legal representatives whether can continue.*

C. P. CODE (V of 1908), O. 33, R. 2.

The right to make an application to sue *in forma pauperis* is a personal right and cannot survive to an applicant's legal representatives, if he dies before leave is granted, though the representative may present a like application, fresh and independent. 33 Cal. 1163, Foll. (*Lindsay*, J.C. *and Stuart*, A.J.C.) FARZAND ALI KHAN *v.* AMIR HYDER. 1 O.L.J. 709=
26 I.C. 714=18 O.C. 64.

———O. 33, R. 1—*English law is different from Indian law.*

No court-fee is payable upon a bill or plaint of England and only the costs of conducting the litigation such as, payment of fees to lawyers etc., has to be incurred. This circumstance has been taken into consideration in the latter portion of explanation to R. 1 of O. 33, which says that where no such fee is prescribed the pauper must show that he is not entitled to property worth one hundred rupees. (*Jwala Prasad and Ross*, JJ.) SAVITRI THAKURAIN *v.* SECRETARY OF STATE. 2 Pat. 879=
4 Pat. L T. 338=1924 P. 27.

———O. 33, R 1—*Leave to sue* in forma pauperis—*Application by wife — Husband's property.*

The mere fact that applicant's husband has property, is not sufficient reason for disallowing her application for leave to sue *in forma pauperis*. (*Roe and Imam*, JJ.) SHAR FUNNESSA *v.* NAZNI KHANUM. 44 I C. 723=
3 Pat. L.J. 178.

———O. 33, R. 1—*Pauper—Woman suing—Security for costs.*

A woman who has been permitted to sue as pauper cannot be asked to furnish security for costs under O. 25, R. (1) as it would render nugatory the order permitting her to sue as pauper. (*Fox*, C.J. *and Twomey*, J.) MA GUM *v.* THA HIM. 8 L.B.R. 387=
36 I.C. 320=10 Bur. L.T. 106.

———O. 33, R. 2—*Right to apply to sue as pauper—Does not survive to heir of plaintiff—Survival of right.*

The right to apply to sue as a pauper is a personal right and does not survive to the heirs of the pauper. An application for substitution in the place of a deceased applicant for leave to sue as a pauper is not maintainable though there is nothing to prevent the heirs from making a fresh application for being allowed to sue as paupers. (*Chatterjea and Suhrawardy*, JJ.) JATINDRA NATH GHOSE *v.* SOURINDRA NATH MITRA. 64 I C. 63.

———O. 33, R. 2—*Pauper suit—Application to sue as a pauper.*

When allegations in plaint show *prima facie* cause of action the application to sue as a pauper should not be dismissed except on merits. (*Seshagiri Iyer*, J.) DEVUPALLI AMMANNA *v.* PEDIREDLA NARAYANASWAMI NAIDU.
30 I.C. 689.

C. P. CODE (V of 1908), O. 33, R. 2.

———**O. 33, R. 2**—*Presentation to Nazir—Whether sufficient.*

A petitioner need not present his petition for leave to sue *in forma pauperis* under the R. 2, of O. 33, actually in the hands of the Judge, as the presentation through the Nazir is sufficient and proper. (*Halifax and Kotwal*, A.J.C's.) JAYRAM *v.* MOTILAL. **58 I.C. 961 = 17 N.L.R. 22.**

———**O. 33, R. 2**—*Contents of application—Omission to state immoveable property—Effect of.*

Under O. 33, R. 2, of the C. P. Code an application for permission to sue as a pauper must contain a schedule of the moveable as well as immoveable property. Where therefore an applicant omits to mention his immoveable property and also fails to submit a list of such property when required, the application is not in proper form. (*Ashworth*, J.C.) SHEO NARAIN LAL *v.* MT. MUNAQQA.
9 O.L.J. 610 = 1923 Oudh 118.

———**O. 33, Rr. 2 and 5**—*Application to sue in forma pauperis—No schedule of properties given.*

A petition to sue *in forma pauperis* which fails to comply with the provisions of O. 33, R. 2 ought to be rejected under O. 33, R. 5, S. 141, C.P.C. does not apply to such a case in view of the express provisions of O. 33, R. 5. (*Hartnoll, Offg* C.J. *and Young*, J.) KALI KUMAR SEN *v.* BURJARJEE.
6 Bur. L T. 141 = 20 I.C. 640 = 7 L.B.R. 60.

———**O. 33, Rr. 3 and 5**—*Form of petition—Separate affidavit instead of verification is sufficient.*

Where the petitioner did not verify the contents of the petition at the foot of the petition, but he did so by a separate affidavit in which the statements contained in the several paragraphs of the petition were said to be true and no part of them was false and nothing had been concealed. *Held* this affidavit being annexed to the petition must be treated as a part of it. 16 I C. 83, Diss. (*Abdul Raoof*, J.) PIRJI ASHRAF ALI *v.* RAMESHWAR NATH.
1923 Lah. 684.

———**O. 33, R. 3**—*Leave to sue in forma pauperis—Authorised agent—General power of attorney.*

An authorised agent in O. 33, R. 3, C.P.C. does not include a recognised agent or a pleader as such. He must be specially authorised to present an application under the order and must fulfil the other conditions of R. 3. When therefore a pleader presented the application under an ordinary power of attorney: the application was held to be not duly presented within the rule, as the pleader had only an ordinary power of attorney and not specially authorised to present the application. (*Scott-Smith*, J.) SAKINA BIBI *v* CHARANJIT SINGH. **80 P.L.R. 1915 = 28 I.C. 448 = 217 P.W.R. 1915.**

C. P. CODE (V of 1908), O. 33 Rr. 3.

———**O. 33, Rr. 3 and 5**—*Petition to sue in forma pauperis—Amendment—Rejection by Court—Grounds—Revision—C. P. Code, S. 115.*

Leave to sue *in forma pauperis* ought not to be refused on insufficient grounds. If the Court does so, the High Court will interfere in revision. Though a pauper application does not become a "plaint" until admitted, the Court can under its general power under S. 141 of the C.P. Code direct an amendment of the plaint so as to avoid a misjoinder, etc. (*Sadasiva Aiyar*, J.) KANAKAMMAL *v.* PANCHAPEKASA ODAYAR. **26 M.L.J. 343 = 23 I.C. 82 = (1914) M.W.N. 327.**

———**O. 33, R. 3**—*Guardian ad litem not appointed—Interests represented by manager—Proceedings not ineffectual.*

Where the minors were sufficiently represented by the manager of the family the mere fact that there was no formal order appointing the manager-guardian *ad litem* will not enable them to escape the liability under the decree. 36 All. 383, Reld. to (*Kanyhaia Lal*, J.C.) SAT DEO *v.* JAI NATH. **9 O L J. 141 = 4 U.P.L.R. (O.C.) 43 = 1922 Oudh 75.**

———**O. 33, R. 4**—*Applicant to sue as pauper—Examination of—Cross-examination, right to.*

Where the applicant who seeks for permission to sue as pauper, is examined under R. 4, the opposite party has a right to cross-examine him to test the statements he makes in his application. (*Teunon and Newbould*, JJ.) RADHA RAMAN SAHA *v.* SITANATH.
60 I.C. 738.

———**O. 33, Rr. 4, 5 and 7**—*Leave to sue in forma pauperis—Scope of inquiry—Evidence of applicant only permissible.*

In an inquiry under O. 33 of the C. P. Code the Court cannot take evidence (except the evidence of the applicant himself) on the merits of the claim. The applicant himself can be examined not only with reference to the question of the pauperism but also with reference to the merits of his claim. It is open to the Court to consider not only the statement made in the plaint but also the statement made in his examination by the applicant before the Court, in determining whether his allegations disclose a cause of action. But the Court cannot examine the witness for deciding the question of limitation or any other question than the pauperism of the applicant. 20 All. 299; 13 Bom. 126 and 13 C. L. J. 598. Foll. (*Chatterjee and Newbould*, JJ.) JOGENDRA NARAYAN RAY *v.* DURGA CHARAN GUHA THAKURTA. **52 I C. 610 = 46 Cal. 651.**

———**O. 33, Rr. 4 and 7**—*Enquiry as to pauperism.*

On an enquiry under O. 33, Rr. 4 and 7, the Court can examine the applicant on the merits of the claim. (*Chatterjee and Newbould*, JJ.) SITA NATH SHAH *v.* RADHA RAMAN SHAH, **80 I.C. 676.**

C. P. CODE (V of 1908), O. 33, Rr. 4.

———**O. 33, Rr. 4, 5 and 7**—*Application for leave to sue* in forma pauperis—*Elements to be considered by Court—Plaintiff's allegations to disclose cause of action.*

In an application for leave to sue *in forma paupris*, the Court should satisfy itself that the allegations of the petitioner made both in the plaint and on his oral examination in Court, disclose a cause of action ; it is open to the High Court to determine at the preliminary stage whether the plff. is or is not entitled to succeed on the basis of the alleged cause of action. (*Mookerjee and Sharfuddin*, JJ.) NAWAB BAHADUR OF MURSHIDABAD *v.* HARISH CHANDRA.

11 I.C. 55=13 C.L.J. 593.

———**O. 33, R. 5**—*Procedure before granting leave.*

Before ganting leave, a Court must enquire into and decide the question of the plff.'s pauperism, unless it is satisfied that under O. 33, R. 5, his allegations do not raise any cause of action. (*Lord Macnaughten.*) JEOLAL MAHTEN *v.* LOKE NARAYAN MAHTON.

15 I.C. 184=16 C.W.N. 466 (P.C.)

———**O. 33, R 5**—*Order rejecting application—No revision.*

Order rejecting application for leave to sue *in forma pauperis* is not open to revision under S. 115, C. P. C. (*Piggott and Walsh*, JJ.) RAI MAHADEO SAHAI *v.* THE SECRETARY OF STATE IN COUNCIL. **20 A.L.J. 55= 44 A. 248= L.R. 3 A. 54=1922 A. 1.**

———**O. 33, Rr. 5 and 15**—*Refusal of leave to sue as pauper—Effect—Review.*

An order rejecting an application for leave to sue *in forma pauperis* is not appealable, but the order does not prevent the applicant to bring a suit in the ordinary way. (*Piggott and Walsh*, JJ.) INDRI *v.* BALKISHEN.

39 I.C. 942.

———**O. 33, R. 5**—*'Agreemsnt' and 'proposed' explained.*

In order to bar an application under O. 33, R. 5 (e), the agreement must be with reference to the subject-matter of the proposed suit; and the word "proposed" shows that it must have reference to the suit instituted and that the agreement referred to is a champertous one. (*Walsh and Sunder Lal*, JJ.) MANSA PURI *v.* HARBHAGAT PURI. **37 I.C. 172.**

———**O. 33, Rr. 5 and 6**—*Government pleader—Right to cross-examine.*

Under R. 6, O. 33, C. P. Code, the Government is supposed to be a party to the proceedings in which the pauperism of the applicant is decided. The Government pleader has a right to cross-examine the witnesses of the applicant and can also produce evidence to oppose the application. (*Chamier*, J.) SECRETARY OF STATE *v.* TAZIN-UN-NISSA.

12 I.C. 741=8 A.L.J. 1148

C. P. CODE (V of 1908), O. 33, Rr. 5.

———**O. 33, Rr. 5 and 6**—*Next friend suing on behalf of minor.*

In dealing with an application by a minor's next friend for permission to sue as a pauper, the Court must proceed under R. 6, of the O. 33. The father as next friend of a girl of about two years of age applied for leave to sue *in forma pauperis* for damages for serious bodily injuries. The Court rejected the application on the ground that the next friend was not a pauper. *Held* that the order should be set aside and the matter inquired into under R. 6, of O. 33. (*Walmsley and Huda*, JJ.) MUSSAMMAT AMIRMON *v.* SECRETARY OF STATE FOR INDIA. **58 I.C. 445= 23 C.W.N. 955.**

———**O. 33, R. 5**—*Application for leave to sue* in forma pauperis—*Dismissal of—Application for withdrawal of pauper application to sue* in forma pauperis *barred.*

The dismissal of an application to withdraw an application for leave to sue as a pauper and the subsequent dismissal of the pauper application operate to bar subsequent application for leave to sue as a pauper, though it was open to the applicant to file a suit in the usual way on payment of fees. (*Chitty and Walmsley*, JJ.) SRIMATYA BARODA DASI *v.* UPENDRANATH MANDAL. **52 I.C. 562.**

———**O. 33, Rr. 5 and 7**—*Application to sue* in forma pauperis *under R. 5—Whether includes R. 7.*

There is no distinction between an order of rejection under R. 5 and an order of refusal under R. 7. Both have the same effect and a judge refusing an application to sue *in forma pauperis* is competent to entertain a petition of review of his own order. (*Holmwood and Mullick*, JJ.) ATUL CHANDRA SEN *v.* PEARY MOHAN. **33 I.C. 812=20 C.W.N. 669.**

———**O. 33, Rr. 5 and 7**—*Scope of inquiry—Limitation Act, S. 7—Hindu law — Joint family.*

Manager's right to give discharge on behalf of minor member. In an inquiry on an application to sue *in forma pauperis* under O. 33 the primary question which the Court should consider itself is the fact of the petitioner's pauperism. The Court could not go into the merits of the petitioner's claim and determine a complicated question of law such as limitation. 41 Mad. 620 Foll. The question whether the senior members in a Hindu family can by their assent or inaction bind the junior members so as to give a valid discharge under S. 7 of the Lim. Act is not one free from doubt or difficulty. *Kumaraswami Sastri*, J.) KALIYANI AMMA *v.* MATATHIL VEETIL ACHUTAM NAIR. **10 L.W. 174=37 M.L.J. 309= 58 I.C. 239=(1919) M.W.N. 573.**

———**O. 33, Rr. 5 and 2**—*Application for leave to sue* in forma pauperis—*Rejection—Effect of.*

The word "framed" in O. 33, r. 5 (a) is intended to secure the inclusion in the petition of

C. P. CODE (V of 1908), O. 33, R. 5.

pauperism, the various requisites specified in R. 2 and not the correctness of the particular statements of facts involved to be punitive. The mere fact that the schedule omits one item of property, is not sufficient ground for dismissal and the High Court can interfere in revision. (*Oldfield and Tyabji, JJ.*) KUPPUSWAMI AIYAR *v.* MUTTHUSAWMI AIYAR.
(1913) M.W.N. 31=27 I.C. 891=1 L.W. 1068.

——O. 33, Rr. 5, 6 and 7—*Powers of Court.*

Where notice is issued under O. 33, R. 6, the Court is not, in an inquiry under R. 7 divested of its jurisdiction to decide if the applicant has a cause of action on the merits and so can decide question of Limitation arising from the allegations in the petition. (*Hannay, J.*) SUBRAMANIA CHETTY *v.* KULAYAPPAN. 26 I.C. 90=1 L.W. 668.

——O. 33, R. 5—*Leave to sue—Claim unsustainable as regard a portion.*

The fact that the claim for some of the properties is not sustainable, will not justify the Court in declining to grant leave to sue as pauper. (*Sankaran Nair, J.*) MANGLASHERI ILLATH KRISHNAN NAMBUDIRI *v.* KESHVAN NAMBUDIRI. 16 I.C. 612=(1912) M.W.N. 38.

——O. 33, R. 5—*Question of valuation—Court cannot go into.*

In an application *in forma pauperis* the Court cannot investigate the question whether the applicant has overvalued his claim in order to enable him to sue as pauper. (*Das and Ross, JJ.*) TULSHI MAHATANI *v.* GAJADHAR MARWARI. 51 I.C. 891.

——O. 33, R. 5—Benamidar—*Suit as pauper.*

The effect of allowing a *benamidar* to sue as pauper would be to give a non-pauper the right to evade the fiscal law, and to infringe the provisions of O. 33, R. 5 (*e*) by setting up a pauper nominee. (*Mullick and Jwala Prasad, JJ.*) CHARU SILA DASI *v.* HARAN CHANDRA. 50 I.C. 520=(1919) Pat. 232.

——O. 33, R. 5—*Application for leave to sue as pauper—Verification defective.*

Where the application does not show which facts are stated on knowledge and which on information. Besides the rules for rejecting a plaint differ from those for rejecting an application to sue a pauper. O. 33, R. 5 leaves the Court no discretion but must reject the application, (*Fox, C.J. and Hartnoll, J.*) NARASIAH *v.* VITHILINGAM THINGANDAS.
6 Bur. L.T. 128=16 I.C. 83=6 L.B.R. 117.

——O. 33, Rr. 5, 7 and 8—*Pauper application—Scope of inquiry.*

Under O. 33, C.P.C., the Court can go into the merits of a pauper suit only after it has passed an order under O. 33, R. 7 (3) allowing the application for leave to sue *in forma*

C. P. CODE (V of 1908), O. 33, R. 5.

pauperis. The Court has to see whether the allegations in the plaint disclose a good cause of action, as they stand. (*Twomey, J.*) SEIN TUN U *v.* AUNG ZAN U. 11 I.C. 857=41 Bur. L.T. 191.

——O. 33, Rr. 5 (d) and 15—*Rejection of application to sue—Right to sue—Cause of action.*

R. 15 does not bar a second application to sue as pauper, even after rejection of first under R. 5 (*d*) if the second one disclose a cause of action. "A right to sue" in R 15 is the same thing as "a cause of action" in R. 5. (*Mookerjee and Panton, JJ.*) RATAMALA DASI *v.* KARMAKSLYU NATH SEN.
57 I.C. 9=31 C.L J. 351.

——O. 33, R. 5 (d)—*Scope of inquiry—Dismissal on ground of limitation—Validity—Revision—Maintainability.*

A Court is competent to reject an application to sue *in forma pauperis* under O. 33, R. 5 (*d*) on the ground that the claim is barred by limitation. 7 All. 661 (F.B.); Foll. Where the lower Court had jurisdiction to deal with the matter, the decision of that Court, though erroneous, cannot be interfered with by the Chief Court in revision. (*Abdul Raoof, J.*) MUSSAMMAT HAUR KAUR *v.* MUNI LAL.
63 I.C. 441 (1)=134 P.R. 1919.

——O. 33, R. 5 (d)—*Cause of action—Statements in plaint.*

The applicant under O. 33, R. 5 (*d*) must make out a subsisting *prima facie* cause of action. The mere statements in the plaint are not the sole materials on which a decision as to the right to sue must depend. (*Reid, C.J.*) RUSTAMJI & CO. *v.* HUSSAIN KHAN.
29 P.W.R. 1913=18 I.C. 491=38 P.L.R. 1913.

——O. 33, R. 5 (d)—*Pauper application—Enquiry into the merits of the case is not proper.*

Where an application is made for leave to sue *in forma pauperis*, it is not open to the Court to dismiss the application on the ground that though the plaint discloses a cause of action, the plaintiff's case would fail on the merits. (*Krishnan, J.*) BOLIMATI MURIGADU *v.* NALLA BAPADU.
18 L.W. 53=(1923) M.W.N. 412=1924 Mad. 80.

——O. 33, R. 5 (d)—*Matters to be considered—Investigation of evidence.*

In an application to sue *in forma pauperis* evidence should be confined entirely to the question of applicant's pauperism. The question whether the allegations in the petition disclose a cause of action meaning thereby a subsisting cause of action, has to be decided on the allegations contained in the petition; and for this purpose the terms of the document filed along with the petition cannot be treated as part of the allegations in the petition. 13 M.L.J. 292 and 41 Mad. 620; Foll. Where the Court below rejected application to sue

C. P. CODE (V of 1908), O. 33, R. 5.

in forma pauperis on the construction of a settlement deed filed along with the petition the order was reversed in revision 2 C.W.N. 474, Rel. on. (*Krishnan*, J.) NATESA AIYER *v.* MANOGYA AYYAR. **54 I.C. 462 = 10 L.W. 589.**

——O. 33. R. 5 (d)—*Pauperism—Enquiry—Scope of—Merits of the claim.*

O. 33, R. 5 (*d*) applies only to a case where the allegations in the petition do not disclose a cause of action. An elaborate enquiry into doubtful and complicated questions of law cannot be gone into at this stage. The Court cannot under O 33, R. 5 (*d*) go into a question of limitation especially if its decision depends on the taking of evidence. (*Bakewell and Kumaraswami Sastri*, JJ.) GOVINDSAWMI PILLAI *v.* MUNICIPAL COUNCIL OF KUMBAKONAM. **41 Mad. 620 = 45 I.C. 93 = 31 M.L.J. 399.**

——O. 33, R. 5 (d)—*Cause of action time-barred.*

"Cause of action" means a subsisting cause of action which can be enforced. An application to sue *in forma pauperis* cannot be allowed where the cause of action is time-barred. (*Spencer*, J.) GOVINDASAWMI PILLAI *v.* MUNICIPAL COUNCIL, KUMBAKONAM. **(1917) M.W.N. 585 = 6 L.W. 401 = 42 I.C. 519 = 33 M.L.J. 577.**

——O. 33, R. 5 (d)—*Dismissal of application—Enquiry as to pauperism.*

An application for leave to sue *in forma pauperis* should be dismissed without inquiry as to the poverty of the applicant, if it does not disclose a cause of action. (*Young*, J.) MAUNG SANYA *v.* INDIAN TELEGRAPH ASSOCIATION CLUB. **38 I.C. 566 = 9 Bur. L.T. 228.**

——O. 33, R. 5 (c)—*Leave to sue as pauper.*

It is left to the Court's discretion to grant or reject an application for leave to sue as pauper. (*Walsh and Sunder Lal*, JJ.) MANAS PURI *v.* HARBHAGAT PURI. **37 I.C. 172.**

——O. 33, R. 6—*Evidence as to the plaintiff's title cannot be gone into.*

The only matter in regard to which evidence may be taken is the question of the pauperism or otherwise of the applicant. R. 6 does not empower the Court to try the question of the plff.'s title after taking evidence on that question and in fact to try the suit on the merits before the application for leave to sue is granted, 46 Cal. 651, Appl.; 50 I.C. 521, Not Appr.; 20 All. 299. Dist). (*Banerji and Gokul Prasad*, JJ.) MT. SHAURAN BIBI *v* ABDUS SAMAD. **45 A. 548 = L.R. 4 A. 252 = 21 A.L.J. 441 = 1923 All. 377.**

——O. 33, Rr. 6 and 7—*Application for leave—Scope of enquiry.*

It is fully competent to a Court to take evidence under Rr. 6 and 7 on any matters specified in R. 5 and to decide on those matters

C. P. CODE (V of 1908), O. 33, R. 5.

to the best of its ability. (*Mullick and Jwala Prasad*, JJ.) CHARU SILA DASI *v.* HARAN CHANDRA. **50 I.C. 520 = (1919) Pat. 232.**

——O. 33, R. 7—*Who can compromise.*

No person other than the guardian *ad-litem* can compromise a dispute between the minor and another. (*Macleod*, C.J. *and Heaton*, J.) GURMALAPPA MALLAPPA *v.* MALLAPPA MARTANDAPPA. **22 Bom. L.R. 725 = 57 I.C. 417 = 44 Bom. 574.**

——O. 33, R. 7—*Suit* in forma pauperis—*Subsequent payment of Court-fee—Institution deemed to have been made on the date of the original presentation.*

Where an application for leave to sue *in forma pauperis* is presented together with the plaint and subsequently the applicant pays the full Court-fee on the plaint the suit must be deemed to have been instituted on the day on the original presentation of the plaint and not on the date when the Court fee was paid. The payment was an admission on nothing more than that the applicant was at the time of the payment, in possession of means to make it and was no longer a pauper. The withdrawal of the application for leave to sue as a pauper must be deemed to be a submission to an order of dispauperisation and not to one of refusal of his original petition (*Hallifax*, A.J.C.) GOPIKISHAN *v* BULAKIDAS. **18 N.L.R. 44 = 1922 Nag. 160.**

——O. 33, Rr. 7 and 15—*Limitation—Pauper paying Court-fee pending inquiry into pauperism.*

Where a *bona fide* applicant for leave to sue as a pauper pays Court-fee pending inquiry into his pauperism, limitation runs against him only up to the date of his filing the pauper petition and not up to the date of paying the Court-fee. 2 All. 241; 28 Cal. 427, Foll.; 18 All. 206, Diss. (*Stuart and Muhammad Ali*, A.J.C.) WALI MUHAMMAD *v.* DAULAT-UN-NISSA. **37 I.C. 921 = 3 O.L.J. 657.**

——O. 33, R. 8 and O 7, R. 10—*Application for leave to sue* in forma pauperis—*Return for presentation to proper Court—Revision.*

An application for leave to sue as a pauper is not a plaint till leave is granted, and till then it cannot be returned under O. 7, R. 10, C.P.C. If so returned the High Court will interfere in revision. (*Banerjee and Piggott* JJ.) NUR MUHAMMAD *v.* FIRM MAULVI JAMIL AHMAD. **52 I.C. 668.**

——O. 33, R. 8, and O. 38, Rr. 5 and 6.

There is no suit before the Court until the application to sue *in forma pauperis* has been granted, consequently the Court has no jurisdiction under O. 38, C.P.C., to attach before judgment deft.'s property. (*Fletcher and Newbould*, JJ.) POORNA CHANDRA CHABRI *v.* TARA PROSAD MAITY. **28 C.L.J. 169 = 38 I.C. 600 = 21 C.W.N. 870.**

C. P. CODE (V of 1908), O. 33, R. 9.

———O. 33, R. 9—*Concealment of property—Asset of doubtful value—Insurance policy.*

A plff. was given leave to sue *in forma pauperis* in a case where otherwise he would have had to pay a Court-fee of over Rs. 500. Subsequently pending the suit the Court found that he had omitted to state in his list of assets an insurance policy whose then value was Rs. 245. Thereupon the Court dispaupered the plff, asked him to pay the full Court-fee and on his failure to do so, dismissed the suit. *Held*, in revision that even assuming that concealment of property in a particular case might amount to improper conduct, which by itself, would entitle the Court to dispauper a plff. under O. 33, R 9, the facts which came to light in this case only demanded a further scrutiny by the Court to ascertain whether the plff. had means, so that he ought not to be allowed to continue the suit as a pauper. If that scrutiny had been made, it would have been discovered that plff was still unable to pay the Court-fees. (*Macleod* C.J. and *Coyajee*, J.) SHANKARABHAT *v.* SHANKARABHAT. 24 Bom. L R. 734= 46 B. 1017=1922 Bom. 215.

———O. 33, R. 9 (b)—*Dispaupering—Grounds for — Getting* ad interim *allowance barely sufficient for maintenance, having a rich relation or appearing through eminent pleader are not sufficient to dispauper.*

After the plff. was allowed to sue as pauper she applied in the Court for *ad interim* maintenance at the rate of Rs. 3,000 per month. The Court allowed her a maintenance of Rs. 200 a month during the pendency of the litigation, a petition was then filed on behalf of Government under O. 33, R 9 (*b*) to dispauper the plff. upon the ground that by reason of her having received the sum of Rs. 5, 538 as arrears and of her being allowed to receive in future Rs. 200 per month as her maintenance allowance, she had ceased to be a pauper and consequently she ought not to be allowed to continue the prosecution of her suit as a pauper. *Held*, that she was not liable to be dispaupered. The fact that she was living with her cousin a Vakil who probably was supporting her and carrying on the litigation on her behalf and also that she had appeared before the Court through eminent counsel are immaterial especially when there is nothing to show under what arrangement the learned Counsel appeared for her in the Court and there is no affidavit to show that she had incurred an expense on account of the aforesaid counsel, or that her cousin was financing her, either in supporting her or in defraying the cost of the litigation. The word 'means' in cl. (*b*) of R. 9 is to be interpreted with the help of the definition of pauper referred to above in R. 1. 61 I.C. 958, Dist.; 1 Ch. D. 471, Not foll. (*Jwala Prasad and Ross*, JJ.) SAVITRI THAKURAIN *v.* SECRETARY OF STATE. 2 Pat 879= 4 Pat. L.T. 538=1924 Pat. 27

———O. 33, R. 9. Cl. (c)—*Pauper entering into agreement with third party with reference to subject matter of suit.*

C. P. CODE (V of 1908), O. 33, R. 10.

The expression "agreement with reference to subject-matter of suit" in O. 33, R. 9 (*c*) is not limited to champerty and maintenance only but is intended to prevent the pauper continuing his suit when a third party has obtained an interest in the property and hence able to pay the Court-fee. (*Hayward*, A.J.C.) EDULJI COWASJI *v.* DADABHOY.. 21 I.C. 536=7 S L.R. 52.

——O. 33, R. 10—*Pauper suit—Decree for costs against plaintiff's mortgage--Execution sale of defendants property—Crown debts—Priority.*

A suit *in forma pauperis* by a wife for her dower was decreed with costs against her husband but dismissed as against his co-deft. and mortgagee, in so far as the wife claimed a prior charge for dower over the mortgage. The Court-fee payable to Government was declared a first charge on the amount decreed to plff. The Government purported to attach and sell the property in execution of the decree for pauper fees. *Held*, that the attachment and sale of the deft.'s property in execution of the decree against plff. was without jurisdiction and passed no title to the purchaser. No question of priority of Crown debts arose in this case. (*Lord Macnaughten.*) RAGHO PRASAD *v.* MEWALAL. 34 All 223=39 I.A. 62= 11 M L T. 193=(1912) M W.N. 311= 14 Bom L.R 212=16 C.W.N 433= 15 C.L.J. 327=9 A. L J. 401= 15 I.C. 177=22 M.L J. 457 (P.C.).

———O. 33, Rr. 10 and 11—*Pauper suit—Costs.*

A pauper succeeding partly in his case should be given the costs proportionate to his success. A pauper plff. should not be allowed to penalize the deft. by exaggerating his claim. (*Piggot, and Lindsay*, JJ.) GANGA DAHEL RAI *v.* GAURA. 14 A.L J. 657=35 I C. 46= 38 All. 469.

———O. 33, R. 10—*Suit* in forma pauperis *—Amendment of plaint—Costs of application.*

Where a plff. has obtained leave to sue *in forma pauperis* and there after applies for amendment of the plaint it is not competent to the Court to direct the plff. to pay costs of the amendment then and there and on default dismiss the suit. (*Shah*, O.J. *and Crump*, J.) AMBAJI BALWANT RAO MANE *v.* HANMANT RAO BAJIRAO DESHMUKH. 25 Bom. L.R. 924= 47 B. 104=1922 Bom. 335.

———O 33, Rr. 10 and 11 and O. 21. R. 19—*Suit* in forma pauperis—*Costs decreed to defendant exceeding claim decreed to plaintiff — Government, can claim no charge.*

Where in a suit *in forma pauperis* the plffs. was given a decree for Rs. 88 but was made liable to pay Rs. 191 for plaintiff's costs, *held*, that as the plaintiff was precluded under O. 21, R. 19 from taking out execution for the amount decreed to him he cannot be held to have succeeded in the suit within O. 33, R. 10 and the

C. P. CODE (V of 1908), O. 33, R. 10.

Government can claim no charge as the case falls under R. 11. (*Ayling*, O.C.J. *and Odgers*, J.) CHAKRAPANI IYENGAR *v.* THE GOVERMENT OF INDIA. **14 L.W. 529= (1921) M.W.N. 805=42 M.L.J. 191= 31 M.L.T. 38=1922 Mad. 125.**

——— **O. 33, Rr. 10 and 13**—*Rights of the Crown.*

O. 33, R. 10 creates two distinct and separate rights in the Crown, one right *in rem* against the property recovered in the suit and the other right *in personam* against the pauper ordered to pay by the decree. The Crown can recover Court-fee without a separate suit. (*Atkinson and Manuk*, JJ.) BABUI GIRIJA KUER *v.* SECRETARY OF STATE FOR INDIA. **50 I.C. 315=4 P.L.J. 166.**

——— **O. 33, Rr. 11 and 12**—*Pauper suit—Compromise—Court-fee.*

A suit instituted *in forma pauperis* being settled out of Court was dismissed in consequence without providing for Court-fees. Before the expiry of 90 days, the New Code came into force which gave a specific remedy under R. 12 but the lower Court held that there was no jurisdiction to pass a fresh order. The order of the Judge was appealable under S. 47 (2); it was open to the Government to make an application and ask the Judge to pass a proper order according to law. Whenever a suit is dismissed whether at the request of parties or not, the plff. is the party defeated and must pay the Court-fee to Government. (*Chandavarkar and Hayward*, JJ.) SECRETARY OF STATE *v.* NARAYAN KASHIRAM. **35 Bom. 448=12 I C. 29= 13 Bom. L.R. 686.**

——— **O. 33, R. 15**—*Application dismissed—Fresh cause of action.*

The applicant, wife of the opposite party applied for leave to sue *in forma pauperis* for maintenance. The application was dismissed on the ground that the allegations in the plaint did not show a cause of action. More than two years afterwards, the applicant made the present application on the 5th of August, 1918 for leave to sue as pauper to recover maintenance for a period of more than two years subsequent to the date of the previous application. *Held*, that the subsequent application to sue *in forma pauperis* was not barred under O. 33, R. 15, C.P.C. (*Mookerji and Panton*, JJ.) RATNAMALA DASI *v.* KAMAKSYA NATH SEN. **57 I.C. 9=31 C.L.J. 351.**

——— **O. 33, Rr. 15, 5, 6 and 7**—*Mutual relation.*

O. 33, R. 15, C. P. C., should be read along with Rr. 5, 6 and 7. R 5 contemplates a summary rejection by the Court at the earliest stage of the proceedings, R. 7 a refusal of the application to sue as a pauper on the ground that the allegations of the petitioner do not show a cause of action and R. 15 contemplates the refusal of a second application when it is in respect of the same right to sue. (*Mookerjee and Panton*, JJ.) RATNAMALA DASI *v.* KAMAKSYA NATH SEN. **57 I.C. 9= 31 C.L.J. 351.**

C. P. CODE (V of 1908), O. 33, R. 15.

——— **O. 33, Rr. 15, 5 and 7**—*Orders under R. 5 or 7—Whether bar fresh proceedings.*

Orders under R. 5 or R. 7 alike bar the institution of fresh proceedings *in forma pauperis* under R. 15. (*Holmwood and Mullick*, JJ.) ATUL CHANDRA SEN *v.* PEARY MOHAN. **33 I.C. 812=20 C.W.N. 669.**

——— **O. 33, R. 15**—*Application to sue* in forma pauperis—*Rejection—Application registered as plaint.*

A petition to sue *in forma pauperis* can be registered as plaint in the suit, if full Court-fees is paid. 24 Cal. 889, Foll. R. 15 makes it a condition precedent for a petitioner, whose application to sue *in forma pauperis* has been rejected, to pay the costs of Government in opposing the application before a regular suit can be entertained but there should be a demand for it either before registering it or after, and where there has been no such demand a Court would not be justified in dismissing a suit merely on account of non-payment of costs to Government. (*Chitty and Teunon*, JJ.) MRINALINI DEBI *v.* TINKORI DEBI. **14 I.C. 297=16 C.W.N. 641.**

——— **O. 33, R. 15**—*Application* in forma pauperis *dismissed as not pressed—Bars fresh application.*

Where an application for leave to sue *in forma pauperis* is dismissed as not passed, it bars a fresh application in respect of the same right. 20 Bom. 86, Fll. (*Abdul Raoof*, J.) MT BEGUM *v.* JAFAR HASSAN. **1924 Lah. 312.**

——— **O. 33, Rr. 15 and 5**—*Pauper suit—Leave refused owing to failure to insert schedule of property—Second application.*

O. 33, R. 15, C.P.C. does not bar a second application where the first application was rejected under R. 5 (*a*) as not having been accompanied by a schedule of moveable and immoveable property. 42 I. C. 803 (F. B.), Ref. (*Abdul Raoof*, J.) MUSSAMMAT BAL KAUR *v.* SHIB DAS. **56 I.C. 207= 1 Lah. 151.**

——— **O. 33, R. 15**—*Conversion of pauper suit into ordinary suit.*

Limitation is computed from the date when the pauper petition is filed, a pauper suit being converted into a regular suit. (*Spencer and Seshagiri Iyer*, JJ.) MARIA THANGATHAMMAL *v.* IRAVATHESWARA IYER. **28 I.C. 504=(1915) M.W.N. 228.**

——— **O. 33, R. 15**—*Bar—Dismissal for default.*

Fresh application can be made if the application to sue *in forma papuris* is dismissed. (*Po Han*, J.) MAUNG AUNG TUN *v.* MA E KIN. **2 Bur. L.J. 217=1924 Rang. 161.**

C. P. CODE (V of 1908), O. 33, R. 15.

———**O. 33, Rr. 15, 2, 3 and 6**—*Second application—If maintainable.*

Rejection of an application to sue as a pauper not being in accordance with Ss. 2 and 3 even after hearing the other side, is no bar to a fresh application. (*Ormond, Offg.*, C. J., *Young, Parlett and Maung Kin*, JJ.) HOWA *v.* SIT SHEIN. 9 L.B.R. 93=42 I C. 803=11 Bur. L.T. 77 (F.B.).

———**O. 33, R. 15**—*Appeal in forma pauperis—Application for leave rejected—Right of applicant to file regular appeal—Fresh memorandum of appeal necessary.*

Where an application for leave to appeal *in forma pauperis* is rejected, the only course open to the party is to file appeal in the regular manner with a fresh memorandum of appeal properly stamped; the memorandum accompanying the rejected application cannot be retained as it is, and Court-fees ordered to be paid thereon. (*Hayward*, A. J. C.) ALLAH BUX *v.* MORDAR. 4 S.L.R. 263=11 I.C. 160.

———**O. 34**—*Suit on mortgage—Decree—Enquiry into title of mortgagor.*

Where in a suit on the Original Side of the High Court, on a mortgage of properties situate without and within Madras, the plff. got a decree and a direction to enquire into the title of the mortgagor for the lands mortgaged, *held*, that for the purpose of granting leave to sue such an enquiry was unnecessary. Nor was it necessary to enable the mortgagee-decree-holder to execute the decree. (*Wallis*, C.J. *and Seshagiri Iyer*, J.) NAMBERUMAL CHETTY *v.* RAGHAVACHARIAR. 71 I.C. 390 (2)=14 L.W. 563.

———**O. 34**—*Old mortgage—Decree dismissing a suit for redemption—Subsequent suit for redemption, maintainability of (Act I of 1869), S. 6—Meaning of the phrase "the said orders."*

S. 6 of Act, (I of 1969) protects the interests of those mortgagors whose rights it was deemed expedient to keep alive by laying down that neither Ss. 3 to 6 of the Act, nor the terms of the *sanad* should be a bar to a suit for redemption by them. The phrase 'the said orders' used in the section refers only to the orders passed by the Governor-General and mentioned in the three preceding sections and cannot include a decree dismissing a previous redemption suit. (*Daniels*, A. J.C.) BRIJ KISHORE *v.* BAJRANG BAHADUR SINGH 64 I.C. 271=24 O C. 289.

———**O. 34, R. 1.**

ATTACHING CREDITOR.
CO-HEIRS.
CO-MORTGAGEES
EQUITY OF REDEMPTION.
JOINT HINDU FAMILY.
LANDLORD.
MORTGAGEE.
MORTGAGOR.
NECESSARY PARTY.

C. P. CODE (V of 1908), O. 34, R. 1—Co-heirs.

NON-JOINDER.
PARAMOUNT TITLE.
PRIOR MORTGAGEE.
PUISNE MORTGAGEE.
SCOPE OF.
SIMULTANEOUS MORTGAGES.
SUB-MORTGAGE.
TENANT.

———**O. 34, R. 1.**

See also (1) MORTGAGE
(2) T. P. ACT, Ss. 74, 75 and 91.

Attaching Creditor.

———**O. 34, R. 1**—*Attaching creditor—Party having right to redeem.*

A creditor attaching the property of the mortgagor does not obtain any charge on the mortgaged property. He has only the right to redeem. So he is a necessary party on a suit on the mortgage brought under the New Code. (*Holmwood and Chapman*, JJ.) SHAVANDA CHANDRA PAL *v.* SRI NATH ROY CHOWDHURY. 17 I.C. 432=17 C.W.N. 871.

———**O. 34, R. 1**—*Attaching creditor—Interest in the right of redemption—T.P. Act, S. 91 (f).*

The conflict on the question whether an attaching creditor who is given a right to redeem by cl. (*f*) of S. 91 of T. P. Act has any interest in the mortgage property and and is thereby entitled under S. 85 of the T.P. Act to be joined as a defendant in a suit on the mortgage appears to have been completely set at rest by the amendment of S. 85 of T.P. Act by the substitution for it of R. 1 of O. 34 of the C. P. Code, whereby the interest of those to be joined in a mortgage suit is no longer restricted to an interest in the property but is stated to be an interset either in the mortgage security or in the right of redemption. These words cannot possibly exclude any person of any of the classes mentioned in S. 91 of the Transfer of Property Act whether the words of S. 85 of the T.P. Act did so or not and therefore every attaching creditor under a money decree against mortgagor is entitled to redeem the mortgage. (*Hallifax*, A. J. C.) MEGHRAJ MARWARI *v.* KESHEO GOPAL BUTI. 6 N.L.J. 181=1923 Nag. 311.

Co-heirs.

———**O. 34, R. 1**—*Co-heirs—Non-joinder one of two divided heirs of mortgagor.*

A suit on a mortgage against one alone, of the two divided sons of the deceased mortgagor enjoying the property in separate shares is not bad for non-joinder of the other son, and the mortgagor is entitled to recover the whole sum from the impleaded son's share in the mortgaged property. 33 Cal. 613, not foll. (*Ryves and Lyle*, JJ.) SANWALE SINGH *v.* GANESHI LAL. 35 All. 451=20 I.C. 41=11 A.L.J. 680.

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——**O. 34, R. 1**—*Co-heirs—Some of the hiers impleaded — Non-joinder —Lim. Act, S. 22.*

A suit to recover mortgage debt by sale of the mortgaged properties against some of the heirs of the mortgagor was held to be properly constituted when the plaint was filed, for the Court could award relief against the interests of the party defendants. Per *Pratt*, J. :— The test both under O. 34, R. 1 and S. 22 of the Lim. Act is the same. Was the suit property constituted at the date of the plaint so as to enable the Court to adjudicate as between the parties impleaded. (*Heaton and Pratt, JJ.*) SABDURALLI *v.* SADASHIV SUPDE. **43 Bom 575=51 I.C. 228= 21 Bom. L.R. 369.**

——— **O. 34, R. 1**—*Co heirs—All the heirs of mortgagor not parties to suit—Effect.*

A mortgage suit in which all the heirs of the mortgagor were not made parties cannot be totally dismissed for non-joinder. A decree for the proportionate share of the mortgage money as against the heirs on record, should be passed. Even if the heirs left out could have successfully pleaded limitation that could not afford a defence in favour of persons who were joined as parties within limitation. (*Mockerjee and Fletcher, JJ.*) HARCHANDRA ROY *v.* MAHOMED HASIM. **66 I.C. 342= 25 C.W.N. 594.**

———**O. 34, R. 1**—*Co-heirs—Mortgage suit —Suit by only one of several heirs of mortgagee —Not maintainable.*

One of the several heirs of a mortgagee cannot claim the mortgage-debt without joining all heirs as parties as the mortgagee's death vests his right jointly in his several heirs. (*Atkinson and Jwala Prasad, JJ.*) MT. BHAGELA KOER *v.* ABDUL RAHMAN. **36 I.C. 77.**

Co-mortgagees.

———**O. 34, R. 1**—*Co-mortgagors—Holding distinct shares not made parties—Decree.*

Where in a mortgage suit, the plff. has omitted by oversight to implead some of the mortgagors owning distinct shares, a decree for the sum proportionate to the interest of the parties impleaded should be given. (*Griffin and Chamier, JJ.*) GANESHI LAL *v.* CHARAN SINGH. **35 All 257=19 I C. 614= 11 A.L J. 280.**

———**O. 34, R. 1**—*Co-mortgagees—Suit to enforce mortgage by one.*

One of several mortgagees can sue to fore close the mortgage impleading the others as co-defts., if they are unwilling to join as plffs. or if they have done some act precluding them from being plffs. 35 Cal. 331 (P.C.), Rel. upon. (*Coxe and Ray, JJ*). BHUBAN MOHAN SIKDER *v.* DHARNARAJ OSWAL. **20 I.C. 329.**

C. P. CODE (V of 1908), O. 34, R. 1—Equity of Redemption.

——**O. 34, R. 1**—*Co-mortgagors—Suit for redemption by one of many Uralans of a temple —If lies.*

A suit for redemption of a Kanom by one of the three *Uralans* of temple is not maintainable without adding the other two also as parties to the suit. (*Benson and Sundara Aiyar, JJ.*) MALAPPURATH PARMADHATHIL *v.* CHANNAZHI KRISHNAN MOSSAD. **13 I.C. 234=(1911) 2 M.W.N. 537.**

———**O. 34, R. 1**—*Co-mortgagees—Redemption suit—Withdrawal against one mortgagee.*

Where in a suit for redemption the plff. withdraws his claim against one of the mortgagees the suit should be dismissed for non-joinder of parties. (*Imam, J.*) DHURI PATAK *v.* TIMAL SING. **45 I.C. 650= 4 Pat. L.W. 391.**

Equity of Redemption.

——**O. 34, R. 1**—*Equity of redemption—Purchaser—Suit for sale on mortgage without impleading auction purchaser—Effect.*

The mortgagee purchaser in an auction in a suit against the mortgagor without impleading the Court auction-purchaser of the mortgagor's right, is not entitled to eject the latter in a suit for possession. 19 All. 541; 21 All. 235, Foll. (*Piggott, J.*) BHABHUTI RAI *v.* HARBANS RAI. **25 I.C. 1.**

———**O. 34, R. 1**—*Equity of redemption—Purchaser — Non-joinder —Suit by auction-purchaser for possession—Redemption.*

Where a subsequent purchaser of a portion of the mortgaged property is not made a party to a suit for sale on the mortgage, the auction-purchaser is not debarred from bringing a suit for possession against the former giving him an opportunity to redeem his share which he is entitled to do on payment of that portion of the mortgage money which is attributable to the portion purchased by him. (*Banerji and Ryves, JJ.*) HAJRABIBI *v.* SHIAM NARAIN. **20 I.C. 184=11 A.L J. 362.**

———**O. 34, R. 1**—*Equity of Redemption—Owner of, not impleaded—Effect of—Execution sale — Purchase by mortgagee — Rights of purchaser.*

The possession of the purchaser at a sale by a mortgagee in execution of the decree in a suit brought by him on his mortgage, the owner of the equity of redemption not being a party to the proceedings, is not the possession of an owner of all the interests in the property. He buys subject to the equity of redemption, and therefore by virtue of his purchase, only steps into the shoes of the mortgagee. Where the mortgagee would be barred by limitation from bringing a suit to obtain possession or to have the property sold to realise the mortgage amount the purchaser would be equally barred. If the auction-purchaser did not get possession he was bound to take proceedings to obtain the

C. P. CODE (V of 1908), O. 34, R. 1—Equity of Redemption.

benefit of his purchase and he could not get possession unless he had that right as a successor to the original mortgagee. (*Macleod*, C.J. *and Coyajee*, J.) DATTATRAYA MANGESHAYA *v.* VENKATESH VASUDEO.
24 Bom. L.R. 741 = 1922 Bom. 384.

———**O. 34, R. 1**—*Equity of Redemption—Transferee of—Failure to implead—Effect of—Rights of purchaser at execution sale.*

Where a mortgagee brings a suit for sale upon his mortgage without impleading as party to the suit a purchaser of a portion of the equity of redemption he cannot by purchasing the property in execution claim possession as against the purchaser of the equity of redemption. 11 C.W.N. 314; 19 A. 541, followed. (*Walmsley and Suhrawardy*, JJ.) KRISTOPADA ROY *v.* CHAITANYA CHARAN MANDAL.
49 Cal. 1048 = 28 C.W.N. 92 = 1923 Cal. 274.

———**O. 34, R. 1**—*Equity of redemption—Purchaser—Mortgage suit—Not made a party to suit on mortgage—Redemption not lost—Mortgage suit—Plaintiff objecting to purchaser of property under mortgage in execution of money decree to be made party defendant—Decree on mortgage subsequent suit to recover possession from purchaser—Right of purchasers to set up right to redemption—No bar.*

Deft. in execution of a money decree obtained by him against the mortgagor, purchased the property and obtained possession. Plff. afterwards brought a suit upon his mortgage against the heirs of the mortgagor. To that suit he did not make deft. a party. Deft. then applied by a petition to be joined as a party deft. On plff.'s opposing the application was rejected by the Court. The mortgage suit proceeded and plff. obtained a mortgage decree and in execution purchased the property himself and obtained symbolical possession from Court. The plff. then sued for ejectment. *Held*, that the deft. was not debarred from setting up a right of redemption. (*Richardson and Beachcroft*, JJ.) REBATI MOHAN DAS *v.* NADIABASHI DEV.
22 C.W.N. 543 = 44 I.C. 521 = 28 C.L.J. 256.

———**O. 34, R. 1**—*Equity of redemption—Person interested not made a party—Decree.*

In a suit for recovery of possession by the plaintiffs who were interested in the equity of redemption in the property but were omitted from a previous suit by the defendants to enforce their mortgage. *Held* that the plaintiffs could not get a decree for possession without any provision as to payment of what may be due under the mortgage to defendants. (*Jenkins*, CJ. *and N.R. Chatterjee*, J.) MOHESH CHANDRA MOOKERJEE *v.* UMESH CHANDRA GHOSAL. **29 I.C. 742.**

———**O. 34, R. 1**—*Equity of redemption—Purchaser not impleaded—Purchase by mortgagee in execution sale—Obstruction in taking possession by alleged purchaser from mortgagor—Remedy of mortgagee.*

C. P. CODE (V of 1908), O. 34, R. 1—Equity of Redemption.

Where a mortgagee purchases a mortgaged property in execution of the mortgage decree in his favour and is resisted by an alleged purchaser from the mortgagor in getting possession his remedy lies in a suit for possession against the purchaser giving him an opportunity to redeem his mortgage. He can sue the purchaser on the mortgage if he is in time. (*Holmwood and Teunon*, JJ.) BADAM KUMARI DASI *v.* HARI DASI. **11 I.C. 74 = 16 C.L.J. 38.**

———**O. 34, Rr. 1**—*Equity of redemption—Purchaser—Effect of not joining the subsequent purchaser as a party.*

If a mortgagee obtains a decree against the mortgagor to which the subsequent purchaser of the equity of redemption is not a party he must again prove the validity of his mortgage and offer the purchaser an opportunity of redeeming the property. (*Coxe*, J.) JOTE KUMAR *v.* INDRA NARAIN. **10 I.C. 137.**

———**O. 34, R. 1**—*Equity of redemption—Auction-purchaser of—Original mortgagor if a necessary party.*

Where the auction-purchaser of the interests of the original mortgagor effectively represents him in the mortgage suit, the mortgagor is not a necessary party when his absence is not shown to have prejudiced him. (*Oldfield and Tyabi*, JJ.) MULLA VETTIL SHEELHIKUTTI *v.* KOURTHI KOYAMUTTI NAHA. **28 I.C. 386.**

———**O. 34, R. 1**—*Equity of redemption—Transferees of.*

O. 34, R. 1, C.P.C., does not prohibit the joinder of any person as a party but merely lays down that all persons having an interest either in the mortgage security or in the right of redemption shall be joined as parties. The transferee of mortgaged property in breach of a covenant against alienation may be made a party to a foreclosure suit. (*Drake-Brockman*, J.C.) TEJ SINGH *v.* PATIRAM. **33 I.C. 433.**

———**O. 34, R. 1**—*Equity of redemption—Suit not founded on mortgage by conditional sale.*

The order does not contemplate an order by the Court to extinguish the right to redeem, where the mortgage suit by either party is not based on a mortgage by conditional sale. (*Daniels and Wazir Hassan*, A.J.Cs.) JAI KISHORI *v.* MUHAMMAD KHAN.
60 I.C. 360 = 7 O.L.J. 620.

———**O. 34, R. 1**—*Equity of redemption—Transferee.*

A mortgage decree obtained against the mortgagor after he had transferred the equity of redemption does not bind the transferee. (*Lindsay*, J.C.) SYED TASADDUQ HUSSAIN *v.* ASHGAR HUSSAIN. **46 I.C. 606 = 21 O.C. 70.**

———**O. 34, R. 1**—*Equity of redemption—Transferee of, not made party—Right to redeem.*

Where a mortgagor redeems the property in respect of which a foreclosure decree has been

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passed persons who are in possession of parcels of the property as alleged transferees thereof, and who were not parties to the suit are not bound by a decree foreclosure; their right to redemption in respect of their parcels remains intact. (*Lindsay*, J.C.) SURAJ DIN *v.* WAJID ALI. **34 I.C. 367=3 O.L.J. 494.**

——O. 34, R. 1—*Equity of redemption—Owner not made a party—Dispossession—Right to sue for possession and redemption.*

An owner of the equity of redemption, not joined as a deft. in a suit on the mortgages and wrongfully dispossessed by the mortgagee decree-holder in execution of his decree is entitled to sue for *khas* possession and mesne profits and need not sue for redemption only. 7 C.W.N. 11, Ref. (*Mullick* J.) GOPAL RAM MARWARI *v.* NARSINGH PRASAD.
36 I.C. 744.

——O. 34, R. 1—*Equity of redemption—Transferee of—Vendee not a party—Decree not binding on him.*

A decree for sale in a mortgage suit and proceedings in execution of that decree do not bind a prior vendee of the property who was not made a party under O. 34, R. 1. (*Parlett*, J.) MAUNG PE *v.* PARMAYSAM PILLAY.
33 I.C. 760.

——O. 34, R. 1—*Equity of redemption—Purchaser—Not impleaded—Mortgage decree if can bind purchaser—Presence of purchaser as witness if condonation.*

Where in a mortgage suit, the mortgagee knowing or having reason to believe that the property had been sold to another person, fails to implead the purchaser, the latter cannot be bound by any decree thay may be passed in the suit and he is also entitled to a declaration to that effect. The mere fact that he appeared as a witness in the suit in the absence of proof of knowledge on his part of the nature of the suit, will not amount to condonation of the omission to implead him. (*Eales*, J.C.) NGA PAWE *v.* NGA SIN. **13 I.C. 874=(1911) 1 U.B.R. 92.**

Joint Hindu Family.

——O. 34, R. 1—*Joint Hindu family—Manager—Foreclosure suit — Other members bound.*

A foreclosure decree against a manager of a Hindu family will be binding upon the members of the family where the manager effectively represents all the other members. (*Lord Moulton*). SHEO SHANKARA RAM *v.* JADDO KUNWAR.
36 All. 383=18 C.W.N. 968=16 M.L.T. 175=(1914) M.W.N. 593=1 L.W. 645=20 C.L.J. 282=12 A.L.J. 1173=16 Bom. L.R. 810=24 I.C. 504=41 I.A. 216 (P.C.)
[Affirming 33 All. 71=7 I.C. 902=7 A.L.J. 945.]

——O. 34, R. 1—*Joint Hindu family—Manager—Parties.*

C. P. CODE (V of 1908), O. 34, R. 1—Joint Hindu Family.

If a mortgagee brings a suit against the manager of the joint Hindu family on a mortgage and the mortgagee is not aware of the existence or rights of junior members of the family the mere non-inclusion of the junior members as parties to the suit for foreclosure is not fatal to the suit. The decree is binding on the whole family nevertheless. (*Lord Moulton*) SHEO SHANKER RAM *v.* JADDO KUNWAR.
36 All. 383=18 C.W.N. 968=16 M.L.T. 175=(1914) M.W.N. 593=1 L.W. 645=20 C.L.J. 282=12 .L.J. 1173=16 Bom. L.R. 810=24 I.C. 504=41 I.A. 216 (P.C.)
[Affirming 33 All. 71=7 I.C. 902=7 A.L.J. 945.]

——O. 34, R. 1—*Joint Hindu family—Parties.*

All the members of a joint Hindu family are necessary parties to a suit for sale on a mortgage of joint family property and non-joinder of them is fatal defect to the suit. (*Banerji and Chamier*, JJ.) SHIAM SUNDAR LAL *v.* BUDDHU LAL. **24 I.C. 252=12 A.L.J. 794.**

——O. 34, R. 1—*Joint Hindu family—Suit on mortgage—Parties.*

All members of a joint Hindu family are necessary parties to a mortgage suit which is not instituted against the managing member. 34 All. 549, Dist. (*Richards* C.J. *and Banerji*, J.) JUGAL KISHORE *v.* GANGA SINGH.
21 I.C. 712.

——O. 34, R. 1—*Joint Hindu family—Manager—Representation of minor members—Decree binding.*

Where a mortgage brings a suit on a mortgage against the two sons of the deceased mortgagor, of whom the eldest was a major and represented his minor brother the decree is binding on the minor also in the absence of fraud. (*Banerjee and Rufique*, JJ.) LACHMI SHANKER *v.* RAM AGYAN MISSIR.
21 I.C. 192.

——O. 34, R. 1—*Joint Hindu family—Manager—Suit by.*

A suit on a mortgage brought by some of the members of joint Hindu family in their capacity as managers, does not fail because the other members of the family are not impleaded as parties. 15 I.C. 138, Foll. (*Karamat Hussain and Tudball*, JJ.) CHAJJU MAL *v.* NATHAN.
15 I.C. 876.

——O. 34, R. 1—*Joint Hindu family—Manager.*

A manager alone can be sued on a mortgage of a Hindu joint family's property as the whole family in sufficiently represented by him in the suit. The essential point in such family suits by or against a manager is not the distinct description of him as a manager but that he is sued or sues in respect of a family debt. (*Richards*, C.J., *Banerji*, *Tudball and Chamier*, JJ.) HARILAL *v.* NIMMAN KUNWAR.
34 All. 549=15 I.C. 126=9 A.L.J. 819 (F.B.).

C. P. CODE (V of 1908), O. 34, R. 1—Joint Hindu Family.

———O. 34, R. 1—*Joint Hindu family—Joinder of some members as defendants.*

Where some of the members of a joint Hindu family refused to join in a mortgage suit as co-plffs. they can be added as defts. They are necessary parties and might be added within the period of limitation. (*Griffin and Chamier*, JJ.) NATHI LAL *v.* LALA.
14 I.C. 35=9 A L.J. 410.

———O. 34, R. 1—*Joint Hindu family—Father—Sons not made parties in time—Effect.*

A suit against the mortgagor cannot be dismissed simply because the sons of the mortgagor had not been impleaded in time. (*Karamat Hussain and Chamier*, JJ.) BALA PRASAD *v.* PARTAB SINGH. 13 I.C. 38.

———O. 34, R. 1—*Joint Hindu family—Manager — Redemption—Not in representative capacity—Right of co-parceners to redeem.*

No legal proceeding in a mortgage suit not filed by the manager of a joint Hindu family expressly in his capacity as manager, short of actual redemption will deprive his co-parceners of their right to redeem. (*Scott*, C.J. *and Shah*, J.) RAMACHANDRA NARAIN *v.* SHRIPATH RAO TUKOJIRAO. 40 Bom. 248=
33 I C. 771=18 Bom. L.R. 33.

———O. 34, R. 1—*Joint Hindu family—Member having interest in equity of redemption not made a party—Effect of.*

Where the mortgagee is not aware of the existence of a minor member of a Mitakshara family where he has joined all other members, no question arises as to the applicability of O. 34, R. 1, C.P.C. The case is governed by the Privy Council decision in 36 All. 383 and the minor member is bound by the decision. (*Mookerjee and Beachcroft*, JJ.) RAGHO RAM SINGH *v.* RAJANI KANTA BANERJEE.
29 I.C. 752=21 C.L.J. 452.

———O. 34, R. 1—*Joint Hindu family—Mortgage by father—Sons, if necessary parties.*

The decision of the Full Bench in 5 Cal. 855 has not been overruled by the Privy Council, nor has it been superseded by subsequent legislation inasmuch as where the mortgage is not operative as such against the sons, no question can arise as to the effect of S. 85 of T.P. Act. (O. 34, R. 1, C.P.C.) (*Jenkins*, C. J., *Woodroffe, Asutosh Mukerjee, Holmwood and D. Chatterjee*, JJ.) BIDYA PROSAD SINGH *v.* BHUPNARAIN SINGH. 42 Cal. 1066=
19 C.W.N. 849=29 I C. 629=
21 C.L.J. 543 (F. B.).

———O. 34, R. 1—*Joint Hindu family—Manager—Benefit of family——Suit by manager alone.*

A suit by manager of a joint Hindu family alone on a mortgage executed n his favour without joining the other members of the family is against O. 34, R. 1 which refers not merely to defts. but to plffs. also. (*Coxe and Chatterjee*, JJ.) SIDHESHURI PERSHAD NARAIN SINGH *v.* DHARAMJIT NARAIN SINGH. 41 Cal. 727=22 I C. 570=
19 C.L.J. 437.

———O. 34, R. 1—*Joint Hindu family—Father—Foreclosure suit—Sons not impleaded.*

Where a mortgagee obtains a foreclosure decree against the manager of a joint Hindu family on a mortgage by conditional sale executed by the manager, the junior member or sons cannot sue to redeem unless they show that the mortgagee was aware of their interest and yet omitted to implead them. (*Coxe and Imam*, JJ.) BALKI MOHAPATRA *v.* BROJHASI PANDA. 14 I.C. 333=16 C.W.N. 1019.

———O, 34, R. 1—*Joint Hindu family—Minor members—If necessary parties.*

To a suit to enforce a mortgage executed by the adult members of a joint Hindu family, their minor sons are not necessary parties they being represented by their fathers. 36 All 383; 34 All. 549. Foll. (*Bosanquet*, J.) GANGA SAHAI *v.* AGENT, BOMBAY, BARODA AND C.I. RAILWAY. 50 I.C. 243.

———O. 34, R. 1—*Joint Hindu family—Father—Son, if necessary party.*

Under the Customary Law a son has not such an interest in his father's property as to give him a claim under O. 34, R. 1, C.P.C., to be made a party to a suit against his father for sale of property mortgaged by him. (*Martineau*, J.) SHIV DEV SINGH *v.* JAI RAM.
53 I.C. 411=125 P.R. 1919.

———O. 34, R. 1—*Joint Hindu family—Minor members, if necessary parties.*

In a suit on a mortgage effected for family purposes by the manager it is not necessary to implead the minor members of the family as parties to the suit. 36 All. 383, Foll. (*Oldfield and Krishnan*, JJ.) PATTABIRAMA NAIDU *v.* SUBRAMANIA CHETTI. 45 I.C. 76=
7 L.W. 438.

———O. 34, R. 1—*Joint Hindu family—Manager—If other members necessary parties.*

The principle of representation of the manager of a joint Hindu family is applicable to a suit on a mortgage, which can therefore be brought in the name of the manager alone without making the other members parties to it. 3 I. C. 570, Dist. (*Drake Brockman*, J.C.) DAMODAR NAMDEO *v.* KESHEO GOVIND.
46 I.C. 727.

———O. 34, R. 1—*Joint Hindu family—Mortgage—Redemption—Change in the New Code—T. P. Act, S. 60 how affects the rule re, indivisibility of mortgage etc.*

The New Code does not affect the rule regarding the indivisibility of a mortgage nor the Mitakshara Rule that no co-parcener has a definite share till partition is made. (*Mitra, Offg.* A.J.C.) NAGO RAO *v.* NAGO.
24 I. C. 831=10 N.L.R. 72.

C. P. CODE (V of 1908), O. 34, R. 1—Joint Hindu Family.

———O. 34, R. 1—*Joint Hindu family—Father—Mortgage suit against sons not made parties—Right to redeem—T.P. Act, S.* 85.

O. 34, R. 1 does not affect the rule of the Hindu Law as to the constructive representation of the son, major or minor, by the father and the son cannot recover the property passed under a mortgage decree against his father though he was not made party to the suit but he can do so if the debt due under the mortgage is not binding on him being one for immoral purposes or the like. (*Batten*, A.J.C.) GORE *v.* KASHIRAM. **18 I.C. 848=9 N.L R. 1.**

———O. 34, R. 1—*Joint Hindu family—Mortgagor—Sons and grandsons of.*

The rule that a plff. mortgagee cannot draw into controversy the title of a third party who sets up a title paramount to that of the mortgagor and the mortgagee, does not apply where parties who are seeking to be made defts. in the suit for foreclosure, are alleged to be members of a joint Hindu family along with the mortgagor. 33 Cal. 425; 14 C.L J. 103, Ref. In all such suits, notwithstanding that a manager is a party the Court should add as a party any member of the family who applies to be made a party, so as to enable him to put forward any defence challenging the mortgage as not having been made for family necessity and family purposes. 34 All. 549, Foll. (*Lindsay*, J.C.) DEBI BAKSH SINGH *v.* PARSHOTTAM DAS. **19 O.C. 58=36 I.C. 64=3 O L J. 322.**

———O. 34, R, 1—*Joint Hindu family—Manager—Suit against—Junior member not necessary party.*

The omission to implead a Mitakhara son is not fatal to a mortgage suit and the father sufficiently represents the sons. (*Das and Kulwant Sahay*, JJ.) BABU LAL BEHARI SINGH *v.* BABUGUR PRASAD SINGH. **4 Pat. L.T. 108=1 P.L R. 238= 2 Pat. 435=1923 Pat. 118=1923 P. 290.**

———O. 34, R. 1—*Joint Hindu family—Mortgage suit — Parties — Manager of joint family—Representative capacity.*

The *karta* of a joint family can sue on a mortgage on behalf of all the members of the family. If the fact of his suing as *karta* appears from the pleadings in the case an express mention to that effect is unnecessary. 36 I.C. 542, dist. (*Jwala Prasad*, A.C.J. *and Das*, J.) JAG SAH *v.* RAM CHANDRA. **2 Pat. L.T, 553=63 I.C. 564= (1921) Pat. 289.**

———O. 34, R. 1—*Joint Hindu family—Manager—Junior member.*

The manager or karta of a joint family effectively represents the interests of the members of the family and the *karta* of a joint Hindu family need not join as parties all of them who were jointly interested with him in the mortgage in a mortgage suit. 36 All. 383 (P.C.), Rel. The only result of not bringing the sons

C. P. CODE (V of 1908), O. 34, R. 1—Landlord.

of the defendants who have got an interest in the right of redemption on the record as parties defts. in a mortgage suit is to leave their interest unaffected by the decree which is passed in the case. The question whether they have been substantially and virtually represented in the action by their father cannot arise in the action in their absence. (*Coutts and Das*, JJ.) BAIJ NATH GOENKA *v.* DALUP NARAIN SINGH. **1 Pat, L.T. 582= 38 I.C. 489=(1920) Pat. 261.**

———O. 34, R. 1—*Joint Hindu family—Son not in existence at date of decree.*

A son not born at the date of the mortgage decree and sale cannot bring a suit for redemption. 37 I.C. 833, Foll. Even if the mortgagee has notice of the existence of the son the son has no right to redeem merely on the ground that he was not a party to the mortgage suit unless the mortgagee had purposely omitted him to defeat his right to redeem. (*Chapman and Jwala Prasad*, JJ.) SUBALAL SINGH *v.* RAMESHWAR SINGH. **40 I.C. 525= 1 Pat. L.W. 786.**

———O. 34, R. 1—*Joint Hindu family—Father—Sons, if parties.*

If in a suit on a mortgage executed by a Hindu father, the mortgagor alone is made a party but his minor sons are not intentionally omitted from the suit for the purpose of defeating their right to redeem, the terms of O. 34, R. 1, C. P. C. are sufficiently complied with and the sons must be deemed to have been represented by the father. Per *Roe*, J.—In a suit on a mortgage executed for family necessity the whole family is deemed to be on the record through the head of the family. (*Chapman and Roe*, JJ.) RAGHUNANDAN SINGH *v.* PARMESHWAR DAYAL SINGH. **2 Pat. L.J. 306=1 Pat L.W. 636= 39 I.C. 779=(1917) Pat. 137.**

———O. 34, R. 1—*Joint Hindu family—Representation of all members—Subsequent suit by one of them.*

Where all the members of a joint Hindu family are effectively represented in a prior mortgage suit resulting in the sale of the family property, the decree and sale will bar a subsequent redemption suit by one of those members based on the ground of his not being a party to the prior mortgage suit. (*Chamier*, C.J. *and Sharfuddin*, J.) RANJIT PRASAD TEWARI *v.* RAM JATAN PANDEY. **1 Pat. L.W. 197=37 I C. 823= (1917) Pat. 113.**

Landlord.

———O. 34, R. 1—*Landlord—Mortgage of non-transferable occupancy holding—Suit on.*

To a suit to enforce a mortgage of a non-transferable occupancy holding the landlord is a proper but not a necessary party. (*Walmsley and Greaves*, JJ.) PRAN KRISHNA PAN *v.* ATUL KRISHNA. **46 I.C. 176=22 C.W.N. 662.**

C. P. CODE (V of 1908), O. 34, R. 1—Mortgagee.

Mortgagee.

———O. 34, R. 1—*Mortgagee—All persons interested in mortgagee's interest to be added—C.P. Code, O. 1, R. 9—Party added after limitation—Effect.*

R. 9 of O. 1 is subordinate to R. 1, O. 34. A mortgage is indivisible and if all the parties entitled to a share in the money due on the mortgage are not joined the suit is liable to be entirely dismissed. When a necessary party is impleaded not at the time of the suit but after the pericd of limitation the whole suit must be dismissed. (*Roe and Jwala Prasad, JJ.*) GIRWAR NARAIN MAHTON *v.* MT. MAKBULUNISSA. **36 I.C. 542=1 Pat. L.J. 468.**

Mortgagor.

———O. 34, R. 1—*Mortgagor—Suit by first mortgagee to establish his right.*

The mortgagor is a necessary party in a suit by a puisne mortgagee to establish his mortgage and to set aside the order passed against him in claim proceedings in a suit brought by the first mortgagee. (*Chandavarkar, A.C.J and Batchelor, J.*) EKNATH PANDOBA KOSTI *v.* DAGDURAM. **36 Bom. 624=17 I.C. 87=14 Bom. L.R. 750.**

——O. 34, R. 1—*Mortgagor — Necessary party.*

The mortgagor is a necessary party to an appeal by the first mortgagee (*Kanomdar*) claiming a large amount for improvements from a decree for redemption in a suit instituted by the second mortgagee (*Melcharathdar*) along with the mortgagor. So if during the pendency of the appeal he dies and his legal representatives are not brought on record the appeal abates. (*Krishnaswami Aiyar and Ayling, JJ.*) SESHAN PATTAR *v.* YAKKANATH. **(1911) 1 M.W.N. 148=9 I.C. 940=9 M L.T. 356.**

Necessary Party.

———O. 34, R. 1—*Necessary parties—Omission to implead—Sale in execution—Suit for redemption.*

In a suit for sale under a mortgage the mortgagee did not implead certain persons interested in the mortgaged property. A decree was passed and under it the property was purchased by the mortgagee. In a suit for declaration by persons who should have been impleaded that their right to redeem was not extinguished. *Held*, that after the sale the mortgagee held as purchaser and was entitled to raise all the defences that belong to him as such, that unless the claim to set aside the sale were made in a properly constituted suit and properly raised, the Court could not interfere with the possession which had vested in him by the purchase. (*Lord Moulton.*) GANPAT LAL *v.* BINDBASINI PRASAD NARAYAN SINGH. **47 Cal. 924=47 I.A 91=39 M.L.J. 108=24 C.W.N. 954=18 A.L.J. 556=(1920) M.W.N. 382=12 L.W. 59=2 U.P.L.R. (P.C.) 103=56 I.C. 274=28 M.L.T. 330 (P.C.).**

C. P. CODE (V of 1908), O. 34, R. 1—Necessary Party.

———O. 34, R. 1—*Necessary party—Non-joinder of- Powers of Court.*

The object of O. 34, R. 1, C.P. Code is to prevent multiplicity of suits and to secure that no injury is done, to the rights of any party through his not being impleaded. The provision is expressly made subject to other provisions of the Code which include O. 1, R. 9 and it has been held that where it is possible for the Court to do justice as between the parties before it, it should do so and should not make O. 34, R. 1 a ground for dismissing the entire suit. (*Daniels, J.*) PARSADI LAL *v.* LAIQ SINGH. **L.R. 3 All. 31=21 A L.J. 701=1924 A. 107.**

———O. 34, R. 1—*Necessary party—Omission to implead person entitled to equity of redemption—Subsequent suit on mortgage.*

Where a mortgagee brings a suit on his mortgage and obtains a decree thereon without impleading a person in whom the equity of redemption vested by transfer, it is open to him to sue again on the mortgage impleading the latter as a party and thus giving him an opportunity to redeem. (*Gokul Prasad and Stuart, JJ.*) RAMPIA *v.* HAZARI LAL. **1923 All. 232.**

———O. 34, R. 1—*Necessary parties—Mortgage suit.*

All owners of the mortgagee's rights are necessary parties to a mortgage suit while the integrity of the mortgage is not split up. (*Richard C. J. and Bannerjee, J.*) MUSTAQ ALI KHAN *v.* BEHARI LAL. **25 I.C. 508.**

———O 34, R. 1—*Necessary parties--Non-joinder—Effect of.*

In a redemption suit all the mortgagees or their representatives are necessary parties and if any one of them is not made a party the suit should be dismissed. 35 All. 484, Dist. (*Banerjee, J.*) SAEED-UD-DIN KHAN *v.* HIRA LAL. **24 I.C. 25=12 A.L.J. 619.**

———O. 34, R. 1—*Necessary parties—Mortgage of holding—Landlord, if necessary party.*

The mortgagee of a holding instituted a suit on his mortgage. *Held*, that the landlord not being in possession by virtue of a supreme title but by virtue of title improperly and collusively obtained from the tenant under a decree for ejectment was a necessary party to the suit. 33 Cal. 425, Dist. (*Jenkins, C.J. and Chatterjee, J.*) PANCHANAN GHOSH *v.* ABDUL MOLIK. **16 I.C. 703=16 C.W N. 920.**

———O. 34, R. 1—*Necessary party.*

If a mortgagee plff. has omitted to join a person interested in the equity of a redemption as a party deft. with or without notice of his right, the person omitted can in spite of a decree, sale and purchase, otherwise regular, exercise his right of redemption. (*Mookerjea and Carnduff, JJ.*) BANGSER DAS *v.* GENA LAL JHA. **12 I.C. 185=14 C.L.J. 380.**

C. P. CODE (V of 1908), O. 34, R. 1—Necessary Party.

——O. 34, R. 1—*Necessary party—Mortgagors, if necessary parties to suit by mortgagee of the property mortgaged by the mortgagee.*

A mortgagee by deposit of title deeds can proceed against properties mortgaged to the mortgagor though the original mortgagor is not impleaded. 27 All 511, Diss.; 29 All. 385 (F.B.), Foll (*Leslie Jones and Broadway*, JJ.) MOTI RAM *v.* THE BHARAT NATIONAL BANK, LTD. **67 I.C. 421=3 Lah. L.J. 378.**

——O. 34, R. 1—*Necessary party—Puisne mortgagee—Suit by prior mortgagee—Whether subsequent mortgagee a necessary party.*

A subsequent mortgagee is interested in equity of redemption and is a neceessary party to a suit brought by the prior mortgagee. (*Shadi Lal and Jones*, JJ.) KISHEN CHAND *v.* RAMSUKH DAS. **81 P.W.R. 1916=33 I.C. 815=86 P.R. 1916.**

——O. 34, R. 1—*Necessary party—Prior mortgagee—Suit by puisne mortgagee.*

In a suit by a puisne mortgagee, it is not necessary to add prior mortgagees as parties and have their rights determined. (*Benson and Abdur Rahim*, JJ.) KATCHALAI MUDALI *v* KUPPANNA MUDALI. **18 I.C. 182=(1912) M.W.N. 41.**

——O. 34, R. 1—*Necessary parties not on record—Procedure.*

Where a mortgagee sues for the recovery of the full amount of the mortgage-debt by sale of the mortgaged property but omits to implead certain persons who had acquired a share in the property subsequent to the mortgage in suit so much only of the claim should be decreed as is proportionate to the interests of the persons who are before the Court. (*Batten*, J.) HIRASA *v.* ONKER. **1923 Nag. 284.**

——O. 34, R. 1—*Necessary party—Non-joinder without fact is not sufficient to penalize.*

Where mortgagee omitted to join necessary parties owing to want of notice his rights as mortgagee are not affected. (*Hallifax, Kotwal and Dhoble*, A.J.C's) JOGESHWAR *v.* MOTI. **66 I.C. 631 (F.B.).**

——O. 34, R. 1—*Necessary party—Person claiming title under mortgage—Omission to implead—Effect of.*

Where a mortgagee or a person claiming title under him forecloses the mortgage in a suit without impleading a person claiming title under the mortgagor subsequent to the mortgage, the latter is not affected by the decree in the foreclosure suit and the remedy of the mortgagee or his representative is to bring a fresh suit for foreclosure against the person deriving title from the mortgagor thus giving him an opportunity to redeem. (*Macnair*, A.J.C.) SHEORAM *v.* JAMNABHAI. **65 I.C. 503.**

——O. 34, R. 1—*Necessary party—Foreclosure suit—Mortgage by conditional sale—Trespasser, is not.*

C. P. CODE (V of 1908), O. 34, R. 1—Non-joinder

A trespasser who is in possession of a portion of the mortgaged property is not a necessary party to the mortgage suit. A mortgagee cannot get a decree for foreclosure against such trespasser, nor can he obtain a decree for possession against him in a suit for foreclosure. (*Mittra*, A.J.C.) ADAM KHAN *v.* DATTARAM. **47 I.C. 836.**

——O 34, R. 1—*Necessary party—Puisne mortgagee—Omission to implead—Property purchased by decree-holder in Court-auction—Subsequent suit for possession—Decree, form of.*

Where without impleading a puisne simple mortgagee, the prior simple mortgagee brought a suit on his mortgage, purchased the property at Court sale in execution of his decree, and subsequently brought a subsequent suit for possession against the mortgagor and the puisne mortgagee, *held*, that by his purchase the plff. obtained a right to possession and that the puisne mortgagee must be given an opportunity to redeem him, but that if he fails a decree for possession and not for sale of the property should be passed. (*Coutts and Sultan Ahmed*, JJ.) TILAKDHARI SINGH *v.* GOUR NARAIN. **5 Pat. L J. 715=2 Pat. L T. 95=(1921) Pat. 122.**

——O. 34, R. 1—*Necessary party—Persons in possession of mortgaged property as transferees from mortgagor not impleaded as parties—Decree—Execution—Rights of purchaser.*

Subsequent to the execution of a simple mortgage the mortgagor sold the property to defts. who remained in possession. Thereafter the mortgagee brought a suit on the mortgage without impleading the defts and in execution of the decree purchased the property. *Held*, that the mortgagee purchaser was not entitled to possession of the property against the defts. 21 M.L J. 213; 8 L.B.R. 266; 23 I.C. 791, Foll. (*Robinson*, C.J. *and Duckworth*, J.) S.P.S. CHETTY FIRM *v.* MAUNG PYAN GYI. **66 I.C. 562=11 L.B R. 119.**

——O. 34, R. 1—*Necessary party—Non-joinder—Effect of.*

A decree obtained by a mortgagee without joining a necessary party in the suit, is inoperative against the party. (*Twomey*, J.) MA SEIN *v.* MUTHUKARUPPAN CHETTY. **28 I.C. 931=7 L.B.R. 135.**

Non-joinder.

——O. 34, R. 1—*Non-joinder—Effect of.*

The appellate Court should not reverse the decision of the lower Court on the ground of the misjoinder alone, unless such misjoinder has affected the merits of the case or the jurisdiction of the Court points which depend upon the facts and evidence in each case. (*Sadasiva Aiyar and Spencer*, JJ.) PUMULLI MANAKAL NARAYANAN *v.* VENKITACELLA AIYAR. **5 L.W. 615=40 I.C. 415=(1917) M.W.N. 417.**

C. P. CODE (V of 1908), O. 34, R. 1—Paramount Title.

Paramount Title.

———O. 34, R. 1—*Paramount title—Not to be impleaded.*

The joinder of parties claiming a title paramount to the mortgaged property is wholly irregular. (*Lord Chancellor*). RADHA KUNWAR *v.* REOTI SINGH. **38 All. 488=43 I.A. 187=14 A.L.J. 1002=20 C.W.N. 1279=20 M L.T. 211=(1916) 2 M.W.N. 200=31 M.L.J. 571=18 Bom. L.R. 850=24 C.L.J. 303=35 I.C. 959=5 L.W. 456 (P.C.).**

———O. 34, R. 1—*Paramount title—If necessary party.*

In a suit on a mortgage a person claiming a title paramount to the mortgagor and the mortgagee is not a necessary party and the question of paramount title cannot be litigated in such a suit. (*Banerjee and A. Raoof*, JJ.) GOBARDHAN *v.* MANNA LAL. **40 All. 384=46 I.C. 559=16 A.L.J. 639.**

———O. 34, R. 1—*Paramount title—Necessary party.*

A person who sets up a paramount title is not a necessary party to a mortgage suit. (*Sunder Lal*, J.) SUKH KUNWAR CHANDAR *v.* BHAGWANI. **25 I.C. 233=12 A.L.J. 1088.**

———O. 34, R. 1—*Paramount title—Redemption suit—Persons claiming independently of mortgage.*

Under O. 34, R. 1 only those parties should be joined in a suit for redemption who claim an interest in the mortgage security or in the right to redeem. Outsiders who claim a title to the property independently of the rights of the mortgagor or the mortgagee need not be joined. (*Macleod*, C.J.) SATAGAUDA APPANNA *v.* SATAPA DARI GAUDA. **44 Bom. 698=57 I.C. 577=22 Bom. L.R. 815.**

———O. 34, R. 1—*Paramount title—Suit to enforce mortgage.*

In a suit to enforce a mortgage against the mortgagor and the vendee of the equity of redemption the question whether the mortgagor had a transferable interest ought not to be gone into. The sole question is whether the Court should enforce the security as regards the right, title and interest of the mortgagor. (*Fletcher and Cuming*, JJ.) DUDALI UAYAL *v.* BELO BIBI. **54 I.C. 806.**

———O. 34, R. 1—*Paramount title.*

Prrsons claiming a paramount title ought not to be impleaded as parties to a suit on the mortgage. (*Chatterjea and Newbould*, JJ.) SYAM PEARY DASSYA *v.* EASTERN MORTGAGE AND AGENCY CO., LTD. **40 I.C. 865.**

———O. 34, R. 1—*Paramount title—If can be gone into.*

The only proper parties to a mortgage suit are the mortgagor, the mortgagee and those who have acquired an interest therein subsequent to the mortgage. A person claiming a

C. P. CODE (V of 1908), O. 34, R. 1—Paramount Title.

title paramount to both the mortgagor and the mortgagee is not a proper party and such a claim cannot be litigated in a mortgage suit. 33 Cal. 425; 11 C.W.N. 284, Foll. (*Sanderson*, C.J. *and Mookerjee*, J.) PRIJ SAKHI *v.* BERESHWAR SAMANT. **44 Cal. 425=21 C.W.N. 177=37 I.C. 277=27 C.L.J. 212.**

———O. 34, R. 1—*Paramount title—Parties—Cost against defendant contesting mortgage suit on title paramount.*

A deft. cannot in appeal after the suit has been decreed with costs against him, ask for setting aside the order on the grounds that the suit as against him should have been dismissed. (*Sharfuddin and Chapman*, JJ.) BASDEO NARAIN *v.* BACHIN CHOWDHURANI. **32 I.C. 368.**

———O. 34, R. 1—*Paramount title—Rule—Mortgage by executrix of deceased—Adopted son of the deceased, if a necessary party.*

The rule that in a mortgage suit persons claiming under a paramount title are not proper parties is not inflexible. 33 Cal. 425, Ref. As a general rule all persons interested in the mortgage security are necessary parties to a suit on the mortgage. An adopted son is a necessary party to a suit on a mortgage executed by the executrix of the estate of his deceased adoptive father as he is interested in the right of redemption. (*Mookerjee and Teunon*, JJ.) GOKUL CHANDRA ROY *v.* RASHESWARI CHOWDHURANI. **11 I.C. 826=14 C.L.J. 108.**

———O. 34, R. 1—*Paramount title—Adverse claimants—Joinder—Effect.*

In a suit for redemption of a mortgage the joining of persons claiming title to the mortgaged property adversely to the mortgagor does not make the proceedings irregular. 9 M.L.T. 173, Foll; 38 All. 488 (P.C.) Dist. (*Sadasiva Aiyar and Spencer*, JJ.) PUMMULLI MANAKAL NABAIN *v.* VENKATAJELLA AIYAR. **5 L.W. 615=10 I.C. 414=(1917) M.W.N. 417.**

———O. 34, R. 1—*Paramount title—Whether can be made a party to a mortgage suit—T. P. Act, S. 85—Effect.*

Notwithstanding the provisions of S. 85 of the T. P. Act, there is no prohibition under O. 34, R. 1 of the C. P. Code against a person asserting a title paramount or opposed to that of a mortgagor being made a party to a mortgage suit. (*Sadasiva Aiyar*, J.) *In re* REOBALAMPALLI RAMALAKSHMANNA. **22 I.C. 976=(1914) M.W.N. 628.**

———O. 34, R. 1—*Paramount title—Title if can be gone into.*

A plff. mortgagee cannot be allowed so to frame his suit as to draw into controversy the title of a third party who is not in any way connected with the mortgage and who has set up a title paramount to that of a mortgagor and mortgagee. 33 Cal. 425, Foll. But where

C. P. CODE (V of 1908), O. 34, R. 1—Paramount Title.

such a person is impleaded and allows the trial to go on, including the question of his title he cannot ask for a reversal as the ground of his title was not triable. (*Simpson*, J. C. *and Dalal*, A.J.C.) GALSTAUN *v.* MIRZA ABID HUSAIN. **10 O.L J. 263 = 9 O. & A L.R. 282 = 1924 Oudh 19.**

———**O. 34, R. 1**—*Paramount title—Stranger to mortgage.*

In a suit by a prior mortgagee of an entire property persons alleging that they are the owners of the whole property and that they are executants of the subsequent mortgage the mortgagee in which was impleaded by plff. as such, are proper parties to the suit. (*Lindsay*, J.C.) NAGESHWAR SHUKAL *v.* JASHODRA. **40 I.C. 288 = 4 O.L J. 352.**

———**O. 34, R. 1**—*Paramount title—Order of Court impleading a stranger as a party.*

In a mortgage suit, the lower Court ordered a stranger claiming to be the owner of the property to be made a party, *held*, that the order was bad and was liable to be set aside in revision by the High Court. (*Lindsay*, J.C.) MAHARAJ SINGH *v.* LACHMAN DAS. **24 I.C. 871 = 1 O.L J. 261.**

———**O 34, R. 1**—*Paramount title.*

In mortgage suits parties having paramount title to the property cannot have their claims adjudicated upon. (*Roe and Coutts*, JJ.) KESHOBATI KUMARI *v.* SATYANIRANJAN CHAKRABARTY. **1918 Pat. 305.**

———**O. 34, R. 1**—*Paramount title—Adjudication on—Propriety of.*

In an ordinary mortgage suit a title paramount to that of the mortgagor should as far as possible be excluded from the scope of the trial. But this is not an absolute rule and where the leaving of such an issue undermined leads to inconvenience or hardship it must be tried in the suit itself. (*Miller* C.J. *and Jwala Prasad*, J.) ZAKIR RAZA *v.* MADUSUDAN DAS. **48 I.C. 691 = 4 Pat. L.W. 417.**

Prior Mortgagee.

———**O. 34. R. 1**—*Prior mortgagee—Non-joinder of puisne mortgagee—Effect.*

A mortgagee who has obtained a decree in his mortgage without impleading the puisne mortgagee as a party to the suit is entitled, when afterwards sued by the puisne mortgagee on his mortgage, to use his prior mortgage as a shield in all cases in which he could have done so before the Act of 1882. T. P. A., S. 89 compared with O 34. R. 1. 40 All. 407, Dist. (*Lord Dunedin.*) SUKHI *v.* GHULAM SAFDAR KHAN. **43 All. 469 = 48 I.A 465 = (1921) M.W.N. 445 = 42 M.L.J. 15 = 14 L W. 162 = 26 C.W.N. 279 = L.R. 8 P.C. 1 = 30 M.L.T. 178 = 25 Bom. L.R. 590 = 1922 P.C. 11 (P.C.).**

C. P. CODE (V of 1908), O. 34, R. 1—Prior Mortgagee.

———**O. 34, Rr. 1 and 5**—*Prior mortgages—Order for sale—Effect of—Non-joinder of puisne mortgagee in suit on prior mortgage—Effect.*

An order for sale under S. 89 of the T.P. Act, has the effect of substituting the right of sale thereby conferred for the rights under the mortgage and the latter rights are extinguished. Where a puisne mortgagee is not made a party to a suit on a prior mortgage and a decree is passed therein and the second mortgagee subsequently sues on his mortgage *held*, that the first mortgagee purchaser cannot set up any higher rights than any stranger-purchaser, but can set up only the amount of the decree made in his suit. (*Sir John Edge.*) LALA MATHU MAL *v.* DURGA KUNWAR. **42 All. 364 = 47 I.A. 71 = (1920) M.W.N. 338 = 26 C.W.N 397 = 32 C.L.J. 121 = 38 M L.J. 419 = 18 A.L.J. 396 = 11 L.W. 529 = 22 Bom. L.R. 553 = 55 I C. 969 = 2 U P.L.R. (P.C.) 75 (P.C.).**

———**O. 34, R 1**—*Prior mortgagee—Not impleaded—Suit on puisne mortgage—Decree—Effect.*

Where in a suit on a puisne mortgage impleading the prior mortgagee as party, the validity and priority of the latter's mortgage is not attacked, the decree on the puisne mortgagee's suit is not a bar to a suit by the prior mortgagee on his own mortgage. (*Sir Lawrence Jenkins.*) RADHA KISHUN *v.* KHURSHED. **47 Cal. 662 = 47 I.A. 11 = 38 M.L J. 424 = (1920) M W.N. 308 = 18 A L.J. 401 = 11 L.W. 518 = 55 I.C. 939 = 22 Bom. L.R. 557 (P.C.).**

———**O 34, R. 1**—*Prior mortgagee suit by, without impleading puisne mortgagee—Decree—Rights of prior mortgagee.*

Where a prior mortgagee obtained a final decree for foreclosure in a suit on his own mortgage without impleading the puisne mortgagee as a party to the suit, it is open to the prior mortgagee who, after the foreclosure decree, represents the interest of the mortgagor to deposit in Court the money due on the puisne mortgage under S. 83 of the T. P. Act and claim to redeem the puisne mortgagee. The puisne mortgagees were entitled in equity only to the payment of their mortgage money. 28 B. 153 Foll., 29 I.C. 794; 8 C.L.J. 173 Dist. (*Ryves and Gokul Prasad*, JJ.) PARASRAM SINGH *v.* PANDOHI. **20 A.L.J. 401 = L R 3 A. 217 = 4 U.P.L.R (A.) 145 = 44 A. 462 = 1922 All. 135.**

———**O. 34, R. 1**—*Prior mortgagees—Suit on puisne mortgage.*

Where there are several mortgages upon the same property, any mortgagee suing upon his mortgage must take all the other mortgagees as well as the mortgagor parties to the suit, except in the case provided by Explo. to O. 34, R. 1. (*Beaman and Hayward*, JJ.) DHONDO RAMACHANDRA KULKARNI *v.* BHIKOJI GOPAL. **39 Bom. 138 = 27 I.C. 1005 = 17 Bom. L.R. 151.**

C. P. CODE (V of 1908) O. 34, R. 1—Prior Mortgagee.

——**O. 34, R. 1**—*Prior mortgagee—Suit by puisne mortgagee—Prior mortgagee not impleaded.*

If a puisne mortgagee obtains a decree without impleading the prior mortgagee and purchases the property he becomes entitled to all the rights of the mortgagor as existing at the date of the mortgage and can redeem the prior mortgage. If he purchases with the leave of the Court his rights as second mortgagee are not extinguished. (*Batchelor and Shah*, JJ.) SHANKAR VENKATESH KARGUPPI *v.* SADASHIV MAHADJI KULKARNI.
38 Bom. 24=21 I C. 39=16 Bom. L.R. 817.

——**O 34, R. 1**—*Prior mortgagee—Suit without impleading second mortgagee — Suit against him.*

A first mortgagee who obtains a decree on his mortgage without impleading second mortgagee even though he had knowledge of it, which is presumed when the second mortgage is registered, cannot be allowed to bring a second suit against the second mortgagee on finding difficulty in executing the first decree owing to the claims put forth by the second mortgagee. If the first and second mortgagee is the same person this rule does not apply. (*Sadasiva Aiyar and Burn*, JJ.) LAKSHMANAN CHETTY *v.* MUTHAYA CHETTY.
40 M.L J. 126=62 I.C. 833=29 M.L.T. 189.

——**O. 34, Rr. 1 and 12**—*Prior mortgagee—Impleaded in suit on puisne mortgage—Decree—No reservation of rights of first mortgagee—Effect of—If a bar to a second suit by prior mortgagee.*

A prior mortgagee does not lose his rights in the mortgaged property simply because there is no reservation of his rights in a decree passed in favour of a subsequent mortgagee though he was made a party to that proceeding because the decree is not a defeasance of his rights. 24 All. 429, Dist. (*Benson and Abdur Rahim*, JJ.) KATCHALAI MUDALI *v.* KUPPANNA MUDALI. **13 I.C. 182=(1912) M.W.N. 41.**

——**O. 34, R. 1**—*Prior mortgagee—Not impleaded.*

A mortgagee's right to possession can only accrue upon a foreclosure of the persons legally entitled to possession at the date of the suit for foreclosure. Therefore where a puisne mortgagee brought a suit on his mortgage and foreclosed the mortgaged property without making the prior mortgagee a party to suit and subsequently the prior mortgagee brought a suit on the mortgage and foreclosed without making the puisne mortgagee a party. *Held*, that the prior mortgagee obtained nothing by foreclosing the representatives of the original mortgagor who had already lost all interest in the property. (*Mitra*, A.J.C.) RAGHUNATH *v.* SHEO LAL. **39 I.C. 849=13 N.L.R. 69.**

C. P. CODE (V of 1908), O. 34, R. 1—Prior Mortgagee.

——**O. 34, R. 1**—*Prior mortgagee—Omission to set up priority on the footing of subrogation—Effect of.*

Where a prior mortgagee is impleaded as a defendant in a suit brought by a subsequent mortgagee, who however, claims priority on the footing of subrogation, the prior mortgagee is bound to defend the suit and get an adjudication as to his priority. The mere filing of a written statement is not sufficient. Where the decree in the suit by the subsequent mortgagee declared his priority over the prior mortgagee, who was directed to redeem the plaintiff, the suit by the prior mortgagee, in so far as it relates to the properties covered by the adjudication in the previous suit, will be barred by res-judicata. 1 P. L. T. 629; 47 Cal. 662; 39 Cal, 547; 24 A. 429 discussed. (*Das and Kulwant Sahay*, JJ.) BABU LAL BIHARI SINGH *v.* BABU GUR PRASAD SINGH.
4 Pat. L.T. 108=(1923) Pat. 118=1 P L.R. 238=2 Pat. 435=1923 P. 290.

——**O. 34, R. 1, and Expln.**—*Prior mortgagee—Impleaded as a party—Mortgage not set up—Effect of.*

Under O. 34, R. 1 a paramount title cannot be drawn into controversy in an action for foreclosure or sale and a prior mortgagee is not at all a necessary party to a suit on a puisne mortgage. If, however, he is impleaded, the purpose of making him a party should be clearly stated and if it is not so done the prior mortgagee will not be affected by the judgment in the suit and no investigation as to the validity of his mortgage can be made. (*Coutts and Sultan Ahmad*, JJ.) LACHMI NARAIN MARWARI *v.* CHAUDHURI BHAGWAT SINGH.
58 I.C. 33=1 Pat. L T. 629.

——**O. 34, R. 1**—*Prior mortgagee in possession—Defective right.*

A first mortgagee in possession under a prior sale may always shield himself under his mortgagee and purchase though his right to possession may be defective. (*Pratt and Duckworth*, JJ.) N. N. V. CHETTY FIRM *v.* K. A. P. L. CHETTY FIRM. **1 Bur L J. 217=1923 Rang. 107.**

——**O. 34, R. 1**—*Prior mortgagee—Several mortgages on same property—Sale in execution—Priority—Present right of possession—Prior and puisne mortgages.*

Per *Crouch*, A. J. C.—Where separate suits are filed by the 1st and 2nd mortgagees respectively neither impleading the other and each brings the property mortgaged to him to sale, the present right of possession and enjoyment passes to the purchaser and the right cannot be sold again. If a puisne mortgagee impleads the prior mortgagee the Court should not ordinarily permit a sale subject to the first mortgage for it is the duty of the Court to make a decree which shall deal finally with the question between the parties. If the sale under the second mortgage is made subject to the

C. P. CODE (V of 1908), O. 34, R. 1—Puisne mortgagee.

decree for sale obtained under the first mortgage the first mortgagees have a right to bring the property mortgaged to them to sale free of all encumbrances. If the equity of redemption only has been sold the purchaser must to prevent a further sale redeem the first mortgage. (*Hayward and Crouch*, A. J. Cs.) BAMANDAS *v.* HIRACHAND. **47 I.C. 792 = 12 S.L.R. 1.**

Puisne-mortgagee.

———O. 34, R. 1—*Puisne mortgagee—Not impleaded—Effect of.*

A first mortgagee sued on his mortgage without impleading the second mortgagee and obtained a decree for sale and purchased the property himself. In a subsequent suit for sale by the second mortgagee on his mortgage *held*, that the first mortgagee was entitled only to the decree amount and not to the amount of his mortgage and interest thereon at the original contract rate. (*Sir John Edge.*) MATRU MAL *v.* DURGA KUNWAR.
42 All. 364 = 47 I.A. 71 = 25 C.W.N. 397 = 38 M.L.J. 419 = 11 L.W. 529 = 22 Bom. L.R. 553 = (1920) M.W.N. 338 = 18 A.L.J. 396 = 2 U.P.L.R. (P.C.) 75 = 55 I.C. 969 = 32 C.L.J. 121 (P.C.).

———O. 34, R. 1—*Puisne mortgagee—Omission to implead—Effect of.*

Under S. 85 of the T. P. Act (O. 34, R. 1, C.P.C.) a first mortgagee is bound to make a second mortgagee a party to his suit for sale, and if he does not do so, the second mortgagee is not bound by any order for sale obtained in such a suit. The second mortgagee is not bound to pay off the decree on the first mortgage if at the time of his own suit for sale, the execution of the decree had become barred. (*Vicount Haldane.*) HET RAM *v.* SHADI RAM. **40 All. 407 = 45 I.A. 130 = 5 Pat. L.W. 88 = 16 A.L.J. 607 = 35 M.L.J. 1 = 24 M.L.T. 92 = 28 C.L.J. 188 = (1918) M.W.N. 518 = 20 Bom. L.R. 798 = 22 C.W.N. 1033 = 9 L.W. 550 = 45 I.C. 798 = 12 Bur. L.T. 73 (P.C.) [Affirming 11 A.L.J. 634 = 20 I.C. 59.]**

———O. 34, R. 1—*Puisne mortgagee—Omission to implead—Effect of.*

In a suit on a mortgage, a puisne mortgagee of whose interests the plff. has notice, is a necessary party under S. 85 of the T. P. Act. (O. 34, R. 1, C.P.C.) and a sale of the property at the instance of the prior mortgagee in such a suit without impleading the puisne mortgagee as party, does not affect the puisne mortgagee's right to redeem or sue on his own mortgage. (*Sir John Edge*) MAHOMED IBRAHIM HOSSEIN KHAN *v.* AMBIKA PERSHAD SINGH. **39 Cal. 527 = 39 I.A. 68 = 11 M.L.T. 265 = (1912) M.W.N. 367 = 9 A.L.J. 382 = 14 Bom. L.R. 280 = 16 C.W.N. 505 = 15 C.L.J. 411 = 14 I.C. 496 = 22 M.L.J. 468 (P.C.)**

C. P. CODE (V of 1908), O. 34, R. 1—Puisne mortgagee.

———O. 34, R. 1—*Puisne mortgagees—Omission of—Equities—Relief.*

Prior and puisne incumbrancers and all necessary parties should be included in a suit to enforce a mortgage, but when the prior and puisne incumbrancers bring separate suits without impleading each other and property is bought by different persons at execution sales, it is incumbent on the Court in a suit for establishing a priority of claim as between the purchasers, impleading judgment-debtors and decree-holders, to grant relief according to the equities on the basis of the exact position of the parties. (*Piggott and Lindsay*, JJ.) BABU LAL *v.* JALAKIA. **37 I.C. 343 = 14 A.L.J. 1146.**

———O. 34, R. 1—*Puisne mortgagee—Not impleaded—Redemption—Suit by puisne mortgagee—Prior mortgagee purchasing property in execution of decree on his mortgage.*

A puisne mortgagee intending to redeem property purchased by a prior mortgagee in execution of a decree passed in a suit on the prior mortgage to which the former was no party can do so only upon the basis of accounts being taken on that mortgage, taking into consideration the rate of interest fixed in the prior mortgage-deed. 19 All. 527, Foll. (*Banerjee and Tudball*, JJ.) PHUL CHAND *v.* ROSHAN LAL. **36 I.C. 703 = 14 A.L.J. 837.**

———O. 34, R. 1—*Puisne mortgagee—Not joined—Prior mortgagee getting money decree—Rights of.*

Where a prior mortgagee gets a money decree on his mortgage without impleading a puisne mortgagee and purchases the property in execution, he could not claim the property free of the puisne mortgagee. (*Piggott*, J.) KAZMI JAN *v.* SHIB CHARAN. **29 I.C. 757.**

———O. 34, Rr. 1, 7 and 8—*Puisne mortgagee—Not made a party—Property sold by auction—Subsequent suit by puisne mortgagee for redemption—Form of decree.*

Where a prior mortgagee sued on his mortgage without impleading the puisne mortgagee as a party and obtained a decree in execution of which the property was sold and purchased by a third person, and subsequently the puisne mortgagee sued to redeem the prior incumbrance the decree should be one declaring that the puisne incumbrancer should be entitled to redeem upon payment of the amount ascertained due upon the prior incumbrance up to the date of sale. (*Richards*, C. J. *and Banerji*, J.) RAGHUNATH KUNWAR *v.* SHANKAR SINGH. **36 All. 123 = 22 I.C. 387 = 12 A.L.J. 41.**

———O. 34, R. 1—*Puisne mortgagee—Non-joinder—Effect of.*

The effect of the omission of a puisne mortgagee of a portion of the property from the array of parties is not the dismissal of the suit totally but only of so much as related to the portion which the parts omitted was puisne

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mortgagee. (*Banerjee and Tudball*, JJ.) ALAM SINGH *v.* GOKUL SINGH. **38 All. 484 = 21 I.C. 271 = 11 A.L.J. 749.**

——O. 34, R. 1—*Puisne mortgagee—If necessary party.*

Under O. 34, R. 1 of the Code of Civil Procedure a puisne incumbrancer is not a necessary party to the suit. (*Richards*, C.J. *and Banerji*, J.) MANOHAR LAL *v.* BABU. **9 A.L.J. 323 = 14 I.C. 675 (2) = 34 A. 328.**

——O. 34, R. 1—*Puisne mortgagee—Rights of—Suit by subsequent mortgagee against prior mortgagee for mortgage money, if maintainable—Plaint—Amendment of.*

Where a subsequent mortgagee having obtained a decree on his mortgage without impleading the prior mortgagee, brought a suit against the transferees of the prior mortgagee purchaser, praying that the transferees may be ordered to pay the amount of his mortgage or that the properties may be sold on the ground that the prior mortgagee purchaser had abandoned his mortgage rights, *held*, that the proper relief the puisne mortgagee could ask for was redemption or sale of the properties subject to the prior mortgage and that his suit for a mortgage decree pure and simple was not maintainable and that an amendment of the plaint could not be allowed because the suit was to disturb a possession which the transferees had enjoyed for over 40 years. 29 All. 385, *Ref.* (*Richards*, C.J. *and Banerjee*, J.) JUGAL KISHORE *v.* SHAFFI UD-DIN. **14 I.C. 537.**

——O. 34, R. 1—*Puisne mortgagee—Not made party—Redemption.*

A subsequent mortgagee not made party to a suit on a prior mortgage is not entitled to redeem by simply paying the price for which the property was sold must pay the full amount due on the prior mortgage. 19 All. 527, Ref. (*Richards and Tudball*, JJ.) PHULMANI CHAUDHRIAN *v.* NAGESHAR PRASAD. **38 All 370 = 9 I.C. 670 = 8 A.L.J. 155.**

——O. 34, R. 1—*Puisne mortgagee—Not a party—Right to redeem.*

A second mortgagee should be made a party to a suit on a prior mortgage ; if not, he is not bound by the decree and he would be entitled to redeem the prior mortgagee on determining the amount afresh, as between himself and the prior mortgagee. (*Batchelor and Shah*, JJ.) SHANKAR VENKATESH KARGUPPI *v.* SADASHIV MAHADJI KULKARNI. **38 Bom. 24 = 21 I.C. 39 = 15 Bom. L.R. 817.**

——O. 34, R. 1—*Puisne mortgagee—Impleaded in suit on prior mortgage—Duty of.*

A subsequent mortgagee made a party to a suit on a prior mortgage, but who has failed to appear is estopped from pleading payment of prior lien and therefore that he was in the position of a prior mortgagee. If the deft. was impleaded as a puisne mortgagee he is barred to

C. P. CODE (V of 1908), O. 34, R. 1—Puisne mortgagee.

set up his prior and subsequent mortgage. (*Holmwood and Walmsley*, JJ.) HANKAR RAI *v.* KAMTA PROSHAD SAHU. **29 I.C. 873 = 19 C.W.N. 947.**

——O. 34, R. 1—*Puisne mortgagee—When can redeem prior mortgage.*

A puisne mortgagee who is not joined as a party to the suit of the prior mortgagee has a right to redeem the prior mortgage with a view to enforcing his own mortgage, upon paying such sum as may be found due. (*Shadi Lal and Jones*, JJ.) KISHAN CHAND *v.* RAM SUKH DAS. **81 P.W.R. 1916 = 33 I.C. 815 = 86 P.R. 1916.**

——O. 34, R. 1, O. 21—*Puisne mortgagee—Compromise without reference to puisne mortgage.*

Where in a suit on a prior mortgage impleading the puisne mortgagee as a party, a compromise was effected between some of the parties without reference to the puisne mortgagee and the properties were sold in execution of the compromise decree without impleading the representatives of the puisne mortgagee who had by that time died, *held*, (1) that the compromise decree was one affecting the puisne mortgagee and hence the laster must be held to be a judgment debtor in the suit ; (2) that the proceedings in execution without impleading the representatives of the puisne mortgagee are void and a nullity and the latter's interests are not extinguished by the execution sale. (*Oldfield and Ramesam*, JJ.) RAGHUNATHASWAMY *v.* GOPAUL. **41 M.L.J. 547 = (1921) M.W.N. 732 = 15 L.W. 123 = 1922 Mad. 307.**

——O. 34, R. 1—*Puisne mortgagee—Sale in suit by a prior mortgagee—Puisne mortgagee not impleaded—Redemption by puisne mortgagee—Interest on prior mortgage—Purchaser—Rights of.*

A mortgagee who sues for foreclosure of the equity of redemption or for sale of the secured properties, if he succeeds, gets that title of the mortgagor as it stood at the date of the mortgage, or transfers the title to the purchaser free from all interests or liens subsequently created by the mortgagor, provided he makes the owners of such interests or liens parties to the suit. But if he omits to make any of them parties their rights or liabilities are not affected but the purchaser would acquire the rights in the mortgaged property of all the persons who were parties just as if he had obtained an assignment from all of them without however a merger of the interest or the extinction of the lien. Hence if the owner of the equity of redemption is a party to the suit but a puisne incumbrancer is not the purchaser becomes the assignee of the mortgage sued on as well as the transferee of the equity of redemption subject to the mesne mortgage, and if the purchaser obtains possession on sale from the owner, he must account for profits at least in cases where the price he pays is not more than sufficient to

C. P. CODE (V of 1908), O. 34, R. 1—Puisne mortgagee.

pay the mortgages sued on. *Quære.*—If the purchaser pays a price for the equity of redemption beyond the value of the mortgages and he gets possession, whether he will still be bound to account for the profits. (*Abdur Rahim, Oldfield and Srinivasa Aiyangar*, JJ.) MUTHAMMAL *v.* RAZA PILLAI. **23 M.L.T. 106 = 44 I.C. 783 = (1918) M.W.N. 251 = 7 L.W. 420.**

——O. 34, R. 1—*Puisne mortgagee—Not made a party—Effect.*

Where in execution of a decree to which the puisne mortgagee was not made a party the prior mortgagee purchased the property himself, the puisne mortgagee in redeeming him is bound to pay interest at the mortgage rate and not at the decree rate. 31 Mad. 258 ; 18 Cal. 164, Foll. ; 39 Cal. 257, Expl. (*Benson*, O.C.J. *and Napier*, J.) PONNAMBALA CHETTI *v.* MUTHUSAMI PILLAI. **23 M.L.J. 284 = 17 I.C. 291 = (1912) M.W.N. 1119.**

[This is wrong in view of, 40 All. 407 = 46 I.C. 798 (P. C.) = 55 I.C. 969 = 42 All. 364 (P.C.)]

——O. 34, R. 1—*Puisne mortgagee—Prior mortgagee not impleaded—Decree for sale—Purchase of properties by prior mortgagee from mortgagor after Court sale—Rights of mortgagee purchaser at Court sale*—Lis pendens—*Equities.*

A puisne mortgagee sued for sale without impleading the prior mortgagee and obtained a decree, and in execution, a portion of the properties was purchased by A. Subsequently the prior mortgagee purchased the mortgaged property from the mortgage in satisfaction of his debt. He then filed a suit on his mortgagee. *Held*, that the plaintiff's rights under his purchase were put an end to by the purchase of A at Court sale either on the ground of the priority of the latter sale in point of time, or by the doctrine of *lis pendens*. The plaintiff was therefore, entitled to rely on his mortgage and enforce his right of sale thereunder. 1 C.L.J 337, *Rel.* As a matter of equity, plaintiff should first be directed to proceed against the properties other than those included in the prior sale to A. (*Sundara Iyer and Sadasiva Iyer*, JJ.) ENTURI GURUVAYYA *v.* MUPPULANENI BUTCHAYYA. **16 I.C. 779.**

——O. 34, R. 1—*Puisne mortgagee—Not impleaded—Effect.*

The rights of a mesne mortgagee are unaffected by a suit on the first mortgage to which he is not made a party and the sale held, in pursuance thereof. A purchaser at such sale therefore acquires only the rights of the mortgagor subsisting in him at the date of the suit. The purchaser is not entitled to a decree for possession but he is subject to redemption by a mesne mortgagee in possession. (*White*, C.J., *Krishnaswami Aiyar and Ayling*, JJ.) MULLA VEETIL *v.* ACHUTHAN NAIR. **(1911) 1 M.W.N. 165 = 21 M.L.J. 213 = 9 I.C. 513 = 9 M.L.T. 431.**

C. P. CODE (V of 1908), O. 34, R. 1—Puisne mortgagee.

——O. 34, R. 1—*Puisne mortgagee—Mortgage—Prior and subsequent omission to implead puisne mortgagee—Effect of.*

Where a prior mortgagee sues his mortgagor for sale without making a puisne mortgagee a party the latter is in no way affected by the suit or its results. (31 Bom. 112 ; 4 N.L.R. 168 and 40 All. 407, Ref. Where a prior mortgagee obtained a decree for sale on his mortgage without making the puisne mortgagee a party and the mortgaged property was sold in execution thereof to a third person G and the puisne mortgagee sues for sale on his mortgage making G a party, after a suit to enforce the prior mortgage is time barred, G occupies a dual position as holder of the equity of redemption and as representative of the prior mortgagee's rights as against the puisne mortgagee and since G is not suing to enforce the prior mortgage as against the puisne mortgagee, the puisne mortgagee is entitled only to a decree for sale subject to G's right to redeem. 31 Bom. 112 ; 31 Cal. 727 ; 39 Cal. 527 ; 34 All. 323 ; 39 Mad. 882, Ref. (*Drake Brockman*, J.C.) GANGADAS *v.* BHIKAJI. **58 I.C. 295 = 16 N.L.R 215.**

——O. 34, R. 1—*Puisne mortgagee—Suit on prior mortgage—Subsequent suit on former.*

A person holding two mortgages on the same property and suing on the first mortgage alone is, in respect of the second mortgage, a party to the suit and if he omits to mention his second mortgage in that suit and obtains a decree on the basis of his first mortgage, he cannot afterwards sue to enforce his second mortgage against such property. 40 All. 407 (P. C.), Rel.; 20 All. 322 (F.B.) ; 2 P. L. J. 118 and (1917) Pat. 194, Dist. from ; 25 Mad. 108 ; 30 Mad. 353 ; 30 Bom. 156 ; 39 Bom. 139, Foll. (*Lyle*, A.J.C.) GUR PRASAD *v.* CHHUTKU LAL. **53 I.C. 753 = 6 O.L.J. 482.**

——O. 34, R. 1—*Puisne mortgagee—Non-joinder—Effect—Purchaser of mortgaged property—Simple mortgage.*

An auction-purchaser of the interest of a simple mortgagee in a suit in which a puisne usufructuary mortgagee is not a party cannot claim possession as his right are higher than those of the plff. mortgagee. (*Stuart and Kanhaiya Lal*, A.J.Cs.) SHEO INDAR BAHADUR SINGH *v.* GHAZI-UD DIN. **33 I.C. 243 = 18 O.C. 347.**

——O. 34, R. 1—*Puisne mortgagee—Not impleaded.*

A puisne mortgagee has a right of suit on his own mortgage, when he was not made a party to the suit on prior or subsequent mortgages. (*Piggott*, A.J.C.) SAYED ZAHIB ALI *v.* BUDH SEN. **21 I.C. 655.**

——O. 34, R 1—*Puisne mortgagee—Same person holding two mortgages.*

Under the present law, partioularly under the explanation to O. 34, R. 1, C. P. Code, a puisne mortgagee is not required to implead

C. P. CODE (V of 1908), O. 34, R. 1—Puisne mortgagee.

the prior mortgagee as a party in a suit for foreclosure or sale. The principle will be the same if the subsequent mortgagee and the prior mortgagee happen to be one and the same person. There is nothing in law to prevent the prior mortgagee from bringing a suit to enforce his mortgage without impleading the subsequent mortgagee. There is, however, some risk, and probably the curtailment of some of the rights of the mortgagee who chooses to sue separately upon his mortgages; he may not be allowed to sell the properties in the subsequent decree when they were already sold in prior decree. (*Jwala Prasad and Ross, JJ.*) NAWABA WAZIRI BEGAM *v.* BABU SHASHI BHUSHAN ROY. **4 Pat. L.T. 546 = 2 Pat. 874 = (1923) Pat. 293 = 1924 P. 77.**

———**O. 34, R. 1**—*Puisne mortgagee—Suit on prior mortgage—Addition of puisne mortgagee—Limitation—C.P. Code, O. 1, R. 9.*

O. 34, R. 1, C.P. Code is subject to the provisions of O. 1, R. 9, C.P. Code and the combined effect of these rules as regards mortgages is that all persons whose rights may be adjudicated upon and determined in the suit ought to be added as parties but that failure to add one or more such persons should not have the effect of defeating the suit. The Court in their absence can deal with the matters in controversy so far as regards the rights and interests of the parties actually before it. A suit by a prior mortgagee without impleading the puisne mortgagee is not unsustainable though the puisne mortgagee is a proper party. The omission to implead the puisne mortgagee as a party to the suit within limitation does not involve a dismissal of the suit. 13 A. 432; 18 C. 164, Ref. (*Miller*, C.J. *and Mullick*, J.) SITAL PRASAD RAY *v.* ASHO SINGH. **(1922) Pat. 326 = 2 Pat. 175 = 4 Pat. L.T. 698 = 1922 P. 331.**

———**O. 34, R. 1**—*Puisne mortgagee—Reservation of right under prior usufructuary mortgage.*

A suit for sale of property on a subsequent simple mortgage, can be maintained, subject to the prior usufructuary mortgage, though the mortgagee in both cases is the same. 31 Mad. 530, Foll. (*Atkinson and Das*, JJ.) UDAICHAND *v.* NAGINA SINGH. **50 I.C. 40.**

———**O. 34, Rr. 1 and 12**—*Puisne mortgagee—Rights of.*

It is clear from O. 34, R. 1 that a puisne mortgagee is not bound to make a prior mortgagee a party to his suit and can sue for sale of the mortgaged property without redeeming the prior mortgage. He is also entitled to bring the mortgaged property to sale subject to prior mortgage of another person or of himself at all events where he is unable to sue on the prior mortgage. 31 Mad. 530; 30 Mad. 408, Ref. (*Chamier*, C.J. *and Roe*, J.) JAGARANATH SINGH *v.* MOHRA KUVAR. **2 Pat. L.J 118 = 1 Pat. L.W. 653 = (1917) Pat 194.**

C. P. CODE (V of 1908), O. 34, R. 1—Scope of.

———**O. 34, R. 1, Expln.**—*Puisne mortgagee—Omission to implead—Equity of redemption sold to prior mortgagee—Redemption sale.*

A prior mortgagee purchased the equity of redemption of the mortgagor and obtained possession. In a suit by the subsequent mortgagee joining the former, for the sale of property, he could get the property sold subject to the prior mortgagee. The purchaser in execution of the decree is not entitled to dispossess the prior mortgage without redeeming his mortgage. (*Roe and Jwala Prasad*, JJ.) MAHADEO RAI *v.* ADYA PRASAD. **38 I C. 179 = 1 Pat L.W. 269.**

———**O. 34, R. 1**—*Puisne mortgagee—Not impleaded — Stranger purchaser—Declaratory suit by second mortgagee.*

A second mortgagee in possession under a mortgage which entitled him to possession cannot be lawfully ousted by his mortgagor or by the first mortgagee or by a purchaser at a sale under a decree in a suit of the first mortgagee to which he was not party. The purchaser in such a suit, whether he is a first mortgagee or a stranger, does not get the rights of the mortgagor as at the date of the first mortgage but only those that subsist in him at the date of suit. Therefore, a puisne mortgagee's suit for a declaration that the purchaser in the first mortgagee's suit is not entitled to disturb his possession, without asking for further relie is maintainable. 21 M.L.J. 213; 26 Mad. 537, Ref. (*Fox*, C.J.) MR. SAN BWIN *v.* NAGAMUTU. **8 L B.R. 266 = 30 I C. 710 = 8 Bur. L.T. 261.**

———**O. 34, R. 1**—*Puisne mortgagee—Prior mortgagee—Suit by each without the other—Purchaser's possession.*

Where both the prior and puisne mortgagees, who were mortgagees without possession obtained decrees without impleading one another and became purchasers, the purchaser first in time is entitled to retain possession irrespective of the fact whether he was the prior or puisne mortgagee. A puisne mortgagee who is a party to a suit by the first mortgagee has a right to redeem the first mortgagee and the fact that he is not made a party does not add to or subtract from the right. Where the puisne mortgagee purchaser has obtained possession the prior mortgagee purchaser can obtain a foreclosure decree against him. 26 All. 464, Foll. (*Pratt*, J.C. *and Crouch*, A.J.C.) CHANDUL BAI *v.* BASARMAL. **28 I.C. 67 = 8 S.L.R. 264.**

Scope of.

———**O. 34, R. 1**—*Scope of—Suit on mortgage—Non-production of deed—Dismissal of suit.*

The mere non-production in a suit on a mortgage of the original mortgage deed the terms of which are not disputed is no sufficient ground for dismissing the suit. (*Banerji and Gokul Prasad*, JJ.) HIKMATULLAH KHAN *v.* ABDUL AZIM KHAN. **61 I.C. 412 = 19 A.L J. 185.**

C. P. CODE (V of 1908), O. 34, R. 1—Scope of.

———O. 34, R. 1 and O. 1, R. 9—*Scope of—Parties—Mortgage suit.*

O. 34, R. 1, C. P. C., is subject to the provisions of O. 1, R. 10. The Court must always add the necessary parties. A prior mortgagee is not disentitled to a decree if he has not impleaded subsequent incumbrances On principle it is better that all the necessary parties in a mortgage suit should be before the Court in as much as all the rights and interests in the property may be settled once for all. (*Karamat Hussain and Tudball*, JJ.) RAM CHARAN LAL *v.* MUHAMMAD RASHID UDDIN. **16 I.C. 674=10 A.L.J. 134.**

———O. 34, R. 1—*Scope of.*

Procedure under O. 34 is essentially different from that under T. P. Act and method of payment to mortgagee authorised by T. P. Act is abolished. The scope of the provisions o O. 34 pointed out. (*Fletcher and Smither*, JJ.) PIRAN BIBI *v.* JITENDRA MOHAN. **25 C.L.J. 553=40 I C. 845=21 C.W.N. 920.**

———O. 34, R. 1—*Scope of—Title of mortgagor—Whether can be investigated in suit on mortgage.*

It is not incompetent to a Court in a mortgage suit to investigate the mortgagor's title nor is it open to the mortgagor to deny his own title. (*Stephen*, J.) GOPAL CHUNDER SHAW *v.* JADU MONI DASSI. **11 I.C. 201=15 C.W.N. 915.**

———O. 34, R. 1—*Scope of—Parties to suit.*

Where a person who has already been made a party to a mortgage suit as a mortgagee claims priority in a different capacity as assignee of a previous mortgage it is not necessary that he should be made party expressly as such assignee and the question of priority should be decided. (*Munro and Sankaran Nair*, JJ.) SAMINATH AIYER *v* ADINARAYANA SANIER. **9 I.C. 643=9 M.L.T. 410.**

———O. 34, R. 1—*Scope of—Rule is not intended to penalise.*

Where a prior mortgagee sues the mortgagor for foreclosure without impleading the puisne mortgagee and after the suit is barred as against the puisne mortgagee the latter sues mortgagor for foreclosure without impleading the prior mortgagee and gets decree before the prior and gets possession, the prior mortgagee is entitled to a decree for possession subject to puisne mortgagee's right to redeem him because the puisne mortgagee's suit is affected by the principle of *lis pendens*. Per *Dhobby*, A J.C. Out of two interpretations of law the one that will avoid injust results should be avoided. O. 34, R. 1, C.P.C , is not intended to penalize failure to join parties whose existence or title deeds are not known to plff. (*Hallifax, Kotval and Dhobby*, A. J. Cs.) JOGESWAR *v.* MOTI. **5 N.L.J. 187=1922 Nag. 89 (F.B.)**

———O. 34, R. 1—*Scope of—Suit to redeem—Persons claiming as heirs of mortgagor—Title disputed by others claiming as heirs—If to be gone into.*

Where in a suit to redeem by persons who claimed as heirs of the mortgagor, the mortgagees put in a statement that the plaintiffs had no right to redeem but took no further steps in the case, but other defendants claiming to be heirs of the mortgagor also disputed the title of plaintiffs, the Court ought to go into the question of right to redeem and decide the same. (*Miller*, C. J. *and Kulwant Sahay*, J.) BASDEO PRASAD *v.* DWARIKA PANDEY. **2 Pat. 805=1924 P. 234.**

———O. 34, R. 1—*Scope of—Two mortgages—Suit on later one does bars suit on prior mortgage.*

Where a person holds two mortgages over the same property, there is nothing in the C. P. Code compelling him to sue on both at the same time. A suit on the latter one will not bar a subsequent suit on the other. (*Maung Kin*, C.J.) MA MYIT *v.* S.C. SARMA. **69 I.C. 897=10 L B.R. 360.**

Simultaneous mortgages.

———O. 34, R. 1—*Simultaneous mortgages—Sale by one only—Effect of non-joinder—Suit.*

A executed two mortgages to C and D the ancestors of M and N simultaneously. M and N were allotted one mortgage each. M brought a suit on his mortgage and obtained a decree without joining N and purchased a part of the property himself. *Held*, that the whole property was liable to sale and M only got a right of redemption. (*Banerji and Griffin*, JJ.) MAGANLAL *v.* ANAND SINGH. **10 I.C. 422.**

Sub-mortgage.

———O. 34, R. 1—*Sub-mortgage—Redemption—Parties to suit.*

In a suit by a mortgagee to redeem his sub-mortgage the original mortgagor is not a necessary party, though there is no impropriety in impleading him. (*Shah*, A. C. J. *and Crump* J.) GANESH MORESHWAR JOSHI *v.* VASUDEO VITHAL PARANJPE. **24 Bom. L.R. 911=1922 Bom. 425.**

———O. 34, R. 1—*Sub-mortgagee—Suit by—Mortgagor not a party.*

A sub-mortgagee can sue the original mortgagee without making the mortgagor a party. The mortgagor is not affected by such a decree. Even if the decree orders a sale of the 'mortgaged property' it does not include the interest of the mortgagor. (*Jenkins*, C.J. *and Beaman*, J.) AMRATLAL *v.* NARANBHAI. **9 I.C. 765=13 Bom. L.R. 90.**

Tenant.

———O. 34, R. 1—*Tenant—Rights of—Foreclosure of mortgage—Effect of.*

The representatives of a lessor, whose rights have been foreclosed has, on the expiry of the lease, no right to eject or redeem the lessee

C. P. CODE (V of 1908), O. 34, R. 1—Tenant.

who has redeemed the mortgagee from the lessor for his own benefit. (*Mittra*, A. J. C.) GULAM NABI *v* KANHAI SINGH.
59 I.C. 511=16 N.L.R. 180.

———**O. 34, R. 1**—*Tenant on land—Tenant of mortgagee—Redemption suit.*

Every interest created by a mortgagee sought to be redeemed puisne to his own is an interest which in a redemption suit should be represented before the Court so that it may effectively give relief between the parties to the mortgage-deed. Thus a tenant placed by the mortgagee upon the mortgaged land subsequent to his mortgage is a necessary party to a suit for redemption of the mortgage. Even if not necessary, he is a proper party. (*Atkinson*, J.) ASAN PANDEY *v.* RAJMON MISSER.
52 I.C. 105.

———**O. 34, R. 2.**—

ACCOUNTS.
COSTS.
DATE OF PAYMENT.
EXTENSION OF TIME.
FINAL DECREE.
FORM OF DECREE.
FRESH SUIT.
INTEREST.
PAYMENT INTO COURT.
SCOPE OF.
SIX MONTHS—MODE OF CALCULATION.

See also (1) C.P. CODE, SS. 34 AND 35.
(2) C.P. CODE, O. 34, RR. 4 AND 7.

Accounts.

———**O. 34, Rr. 2 and 3**—*Accounts—Money paid after preliminary decree—Relationship of mortgagor and mortgagee—Payment by mortgagee under O. 21, R. 89, C.P.C.*

A decree obtained on a mortgage does not put an end to the relationship of mortgagor and mortgagee. 2 C.L.J. 202, Ref. A mortgagee is entitled to add the amount of deposit made to avert a sale in execution of a decree under S. 310 (*a*) of the C.P. Code, 1882. By making the deposit, he acquires a lien from which the mortgaged property is not discharged by the mere payment of the sum due under the preliminary decree. Such a payment, though it satisfies the mortgage decree, leaves the lien acquired subsequent to the decree outstanding. 31 Cal. 975. Ref. (*Jenkins*, C.J. *and Mukerjee*, J.) AMBICA CHARAN DUTT *v.* RAMGATI GUHA. **28 I.C. 571=21 C.L.J. 284.**

———**O. 34, Rr. 2 and 3**—*Accounts—Suit for mesne profits from date of payment of money under preliminary decree—Maintainability of.*

In a suit for redemption the mortgagor paid into Court the amount mentioned in the preliminary decree within the time prescribed and a final decree was passed subsequently. *Held*, that a suit by the mortgagor for mesne profits between the date of the payment and the date of the suit is maintainable and is not barred by *res judicata*. The mortgagor is not bound

C. P. CODE (V of 1908), O. 34, R. 2—Costs.

to claim a settlement of the accounts in the passing of the final decree. 14 C.W.N. 1001, Foll.; 42 I.C. 230; 31 Bom. 527, Dist. (*Seshagiri Iyer and Kumaraswami Sastri*, JJ.) VAIRAPPA THEVAN *v.* SUBBIAH THEVAN.
23 M.L.T. 158=(1918) M.W.N. 207=44 I.C. 231=7 L.W. 269.

———**O. 34, Rr. 2 and 3**—*Accounts—Final decree.*

Accounts between a mortgagor and mortgagee should be taken by the Court before passing a final decree. A provision in the judgment for taking accounts between the parties in execution is not in accordance with law. (*Sundara Aiyar and Ayling*, JJ.) VARIDSHAYAM FERNANDEZ *v.* RANCHORDIN KHEKI.
15 I.C. 362=(1912) M.W.N. 400.

———**O. 34, Rr. 2, 3, 4 and 5**—*Accounts—Amount accruing due after due date.*

A suit lies to recover the amount accruing due to mortgagor after the due date as fixed by the preliminary decree. In a suit on a mortgage the amount due is calculated only up till due date fixed in the preliminary decree. (*Coutts and Sultan Ahmed*, JJ.) TARACHAND MARWARI *v.* BROJO GOPAL MUKHERJEE.
6 Pat. L.J. 593=88 I.C. 180=1 Pat. L.T. 614.

———**O. 34, Rr. 2 and 3**—*Accounts—T.P. Act, S. 72—Preliminary decree—Payment by mortgagee of subsequent arrears of a revenue to sale property from sale—Right to a charge.*

Where a mortgagee who has obtained a preliminary decree in a mortgage suit, pays arrears of revenue to save the property from being sold under S. 48 of the Lower Burma Land and Revenue Act, he gets a charge and lien over the mortgaged property for the amount so paid. (*Maung Kin*, J.) MA PWA KIN *v.* K.P.S A.R.P. FIRM. **43 I.C. 190=12 Bur. L.T. 36.**

Costs.

———**O. 34, Rr. 2 and 4**—*Costs—Mortgage decree—Personal liability.*

In a mortgage suit it is open to a Court of appeal to direct that such costs as it may award against the unsuccessful appellant may be recoverable from him personally, but if there is no such express direction the costs are, as a matter of ordinary practice sanctioned by O. 34, Rr. 2, 4 and 10 of the Code of Civil Procedure added to the mortgage money and are in the first instance recoverable from the mortgaged property after the decree is made final. (*Walsh and Kanhaiya Lal*, JJ.) MAHOMED IFTIKHAR ULLAH *v* BANKE LAL. **46 A. 630=L.R. 4 A. 301=21 A.L.J. 617=1924 All. 104.**

———**O. 34, R. 2**—*Costs—Security.*

The mortgagee has a right to add the costs given to him on an unsuccessful appeal by the mortgagor to the mortgage security. (*Piggott and Walsh*, JJ.) AMINA BIBI *v.* RAMA SHANKAR AND MISAR. **41 All. 473=50 I.C. 730=17 A.L.J. 582.**

C. P. CODE (V of 1908), O. 34, R. 2—Costs.

——— O. 34, R. 2—*Costs—Personal liability—Appeal.*

An appeal lies from a preliminary decree for foreclosure directing the recovery of the costs of the suit from the mortgagor. In a suit for foreclosure a Court may pass a decree directing that the costs of the suit should be recovered personally from the mortgagor, if there is a condition to that effect in the mortgage deed. (*Prideaux*, A.J.C.) SHRI RAM *v.* RAGHU RAM. **47 I.C. 542.**

Date of Payment.

——— **O. 34, R. 2**—*Date of payment—Decree allowing time for redemption—Whether fresh mortgage.*

Where in a suit for foreclosure, the parties compromise and a decree is passed putting the mortgagee in possession of the property but allowing the mortgagor one year's time to redeem part or whole of the property and he fails so to do, the effect of the decree is not to create a fresh mortgage by the decree and give a right of redemption to the mortgagor after one year but to give ownership to the mortgagee. (*Le-Rossignol, Broadway and Wilberforce*, JJ.) KARORIMAL *v.* RAMJI LAL, **2 Lah. 53=3 Lah. L.J. 68=59 I.C. 812=41 P.W.R. 1921.**

Extension of Time.

——— **O. 34, Rr. 2 and 3**—*Extension of time—Mortgage decree for payment by instalments and not fixing a date—Whether decree-holder required to apply for a final decree—Court's power to enlarge time.*

When a preliminary decree for payment by instalments whether extending over 6 months or not is passed by consent of the parties in a mortgage suit, the plaintiff is not only entitled but is bound to apply for a final decree before proceeding to execution and the Court has the same powers in regard to enlargement of time for payment allowed by such a decree as it has with any other mortgage decree. (10 C.L.J. 19 and 14 C.L.J. 648), Not foll. (*Hallifax*, A.J.C.) NALAYAN *v.* DAULAT, **1922 Nag. 182.**

——— **O. 34, Rr. 2 and 3**—*Extension of time—Sufficient cause.*

The time fixed by a preliminary decree for foreclosure may be extended even after the expiration of the time fixed for sufficient cause. (*Kotwal*, A.J.C.) KANHAIYA SINGH *v.* KARU, **54 I.C. 850.**

——— **O. 34, Rr. 2 and 5**—*Extension of time—Power of Court.*

The Court has no power to extend the time fixed by it for paying into Court the amount due under the decree. (*Parlett*, J.) CHENIAH CHETTY *v.* MA MI. **91 C. 771=4 Bur. L.T. 43.**

Final Decree.

——— **O. 34, R. 2**—*Final decree—Appeal against preliminary decree after passing of, if maintainable—Amendment.*

C. P. CODE (V of 1908), O. 34, R. 2—Interest.

An appeal against a preliminary decree in a mortgage suit filed subsequent to the date of the final decree is not maintainable. But where the appellant was not aware of the passing of the final decree, he may be allowed to amend his appeal so as to turn it into an appeal against the final decree. (*Mukerjee and Buckland*, JJ.) BAIKUNTHA NATH *v.* RAMANAND. **33 C.L.J. 414=61 I.C. 923=26 C.W.N. 776.**

——— **O. 34, Rr. 2 and 3**—*Final decree—Payment by some of the defendants—Effect of—Puisne mortgagee—Rights of.*

The first mortgagee brought a foreclosure suit on his mortgage joining the mortgagors and the puisne mortgagee as defts. and obtained a preliminary decree. He then applied for a decree absolute, but did not join the puisne mortgagee to the proceedings and obtained a decree absolute against the mortgagors. The puisne mortgagee objected and was allowed to deposit the decretal amount. The first mortgagee then tried to redeem the puisne mortgagee on the strength of his decree absolute against the mortgagors. The decree being joint and indivisible the first mortgagee's claim was held to be fully satisfied by the puisne mortgagee's deposit and the puisne mortgagees got all the rights of the first mortgagee. (*Sundar Lal*, J.C.) RAM PRATAP *v.* BAKHU MISRA. **10 I.C. 174.**

Form of Decree.

——— **O. 34, R. 2**—*Form of decree—Partition.*

In a suit by one co-owner for redemption of the whole mortgage the Court can, if there is not much difficulty in ascertaining the plff.'s share pass a decree for both the relief for partition and redemption. (*Oldfield and Phillips*, JJ.) PUTHISSERI MANIANOOR *v.* THOZUKKAT PULLANIYAL. **32 M.L.J. 489=(1917) M.W.N. 222=39 I.C. 46=21 M.L.T. 299.**

Fresh Suit.

——— **O. 34, R. 2**—*Final suit—Foreclosure decree—Provision for payment within a fixed time.*

No new mortgage is created between the mortgagor and the mortgagee, where in foreclosure suit, a decree for possession as full owner contained a proviso, that if a certain sum was paid within 15 days the decree would not be executed, and redemption could not be allowed on default. (*Scott-Smith*, J.) LUCHMAN *v.* JUG LAL. **88 P.L.R. 1919.**

Interest.

——— **O. 34, Rr. 2 and 3**—*Interest—Interest after date of suit.*

Where interest on a mortgage after the institution of the suit is not provided for by the trial Judge it must be deemed to have been

C. P. CODE (V of 1908), O. 34, R. 2—Interest.

refused in the exercise of his discretion. (*Lord Moulton.*) HIRALAL ICHHALAL MAJUMDAR *v.* DESAI NARSILAL CHATURBHUJDAS.
37 Bom 326=40 I.A. 68=
17 C.W.N. 573=13 M L T. 415=
(1913) M W N 428=11 A.L J. 433=
17 C L.J 474=15 Bom. L.R 483=
18 I.C. 909=25 M L J. 101 (P C.).
[Affirming 2 I C. 469=11 Bom. L.R. 318].

——O. 34, Rr. 2 and 4—*Interest—Contractual rate—Court's discretion in awarding.*

The Court's discretion in awarding interest under S. 34 is limited to monies due under decrees and it cannot therefore reduce the interest below the contracted rate when taking accounts under O. 34, C. P. Code. Interest at the contract rate must ordinarily be allowed till the date fixed for payment in the decree. (*Richards*, C.J. *and Banerjee*, J.) RAJWANTA KAUR *v.* SHAM NARAIN SINGH.
36 All. 220=23 I.C. 88=12 A.L J. 283.

——O. 34, Rr. 2 and 4—*Interest—Contract rate.*

S. 34, C. P. C., does not control O. 34, Rr. 2 and 4 and the Court is bound to award the mortgagee interest up to the date fixed for redemption at the contract rate. After that date it may award such interest as it thinks proper. 34 Cal. 150. Rel. (*Mookerjee and Beachcroft*, JJ.) KALI PROSONNO BHATTACHARYYA *v.* PROTAB SINGH PATTAR
18 I C. 965=17 C.L.J. 221.

——O. 34, Rr. 2 and 3—*Interest—Contract rate—Appeal.*

A mortgagee is entitled to interest on the principal amount at contract rate up to the date fixed for payment in the preliminary decree. The period cannot be enlarged by an unsuccessful appeal by the mortgagor or mortgagee. (*Mookerjee and Holmwood*, JJ.) TARACHAND MARWARI *v.* BROJO GOPAL MUKERJI.
17 C.W.N. 457=18 I C. 747=
17 C L J. 120.

——O. 34, Rr. 2 and 3—*Interest—Mortgage—Contract rate.*

Although the judgment of the previous case stated that no future interest was to be allowed on the amount decreed in a redemption suit the lower Courts were right in the present suit to allow the amount due on the basis of the mortgage-deeds, the previous decree having become inoperative. (*Johnstone and Shah Din*, JJ.) CHUNI LAL *v.* BELI RAM.
58 P.R. 1915=166 P.W.R. 1915=
30 I C. 104=58 P L R. 1916.

——O. 34, Rr. 2 and 3—*Interest—Mortgage decree.*

In a mortgage suit, a mortgagee can get a decree to recover interest on the amount decreed from the date of the suit up to the date of realization. (*Johnstone*, J.) PIRBU DIAL *v* RISAL SINGH. 37 P.W.R. 1911=
10 I.C. 846=111 P.L.R. 1911.

C. P. CODE (V of 1908), O. 34, R. 2—Interest.

——O. 34, Rr. 2 and 4—*Interest—Subsequent to date fixed for redemption—Rate of.*

The mortgagee decree-holder is entitled to subsequent interest (after the date fixed for redemption) on the aggregate amount consisting of the principal, interest and costs declared, or found to be payable on the date fixed for redemption. Such further interest is ordinarily to be calculated at 6 per cent, but the Court has a discretion in the matter. (*Abdur Rahim and Oldfield*, JJ.) VENKATACHALLAPATHI AIYAR *v.* THAHVASI SERVAI. 42 Mad. 465=
51 I.C. 67=36 M.L J. 288.

——O. 34, R. 2—*Interest—Decree amount.*

O. 34, R. 2, C. P. C., does not forbid a provision for interest on the total amount awarded in the own decree, though total includes interest on bond sued. (*Sadasiva Iyer and Tyabji*, JJ.) PUCHALAPALLI ADISESHADRI *v.* MUNGAMUR SIVRAMMAYYA.
31 I.C. 320.

——O. 34, R. 2—*Interest—Subsequent to date of redemption.*

Though a mortgage-deed is silent as to interest after the date fixed for redemption the Court will allow interest at the contract rate, as it is reasonable to ascribe to the parties an intention of making a complete contract. (*Ayling and Tyabji*, JJ.) MALLAYAPPA IYER *v.* PICHAL ACHARI (1915) M W.N. 208=
28 I.C. 195=2 L W. 236.

——O. 34, Rr. 2 and 3—*Interest—Contract rate.*

A mortgagee is entitled to the contract rate of interest till the date fixed in the decree for redemption. (*Sadasiva Iyer and Tyabji*, JJ.) MEDAN SUBBANNA *v.* YELKUR RAMACHANDRIAH. 20 I.C. 917=(1913) M.W.N. 649.

——O. 34, Rr. 3 and 2—*Interest—Rate of—Conditional mortgage decree.*

Interest for the period subsequent to the date fixed for payment of a conditional decree for sale or foreclosure should be allowed at the Court rate on the whole sum including costs and not at the contract rate. (*Skinner*, A.J.C.) PYARE LAL *v.* RAM RATAN.
10 I.C. 693=7 N.L.R. 14.

——O 34, Rr. 2 and 3—*Interest—Contract rate—Penalty.*

Where a Court relieves against a stipulation as a penalty and awards another rate as reasonable it must allow that rate up to the period fixed for redemption. (*Lyle*, A.J.C.) KALI PRASAD *v.* MUHAMMAD YASIN KHAN.
54 I.C. 833=6 O.L.J. 666.

——O 34, Rr. 2 and 3—*Interest — Mortgage—Redemption—Interest after the redemption period.*

Where a period is fixed for redemption or foreclosure but the mortgagor does not redeem and the mortgagee does not foreclose, interest continues to run after that period at the former

C. P. CODE (V of 1908), O. 34, R. 2—Interest.

rate until the mortgage is actually terminated. (*Staurt*, J.C.) JAGAT PAL SINGH *v.* HARNAM SINGH. **3 O L.J. 244=34 I.C. 745=19 O C. 166.**

——— **O. 34, Rr. 2 and 3**—*Interest — Mortgage decree.*

The Court has power under S. 34 of the C.P. Code to award interest at the contract rate even after the date fixed for payment to the date of realization, provided the rate is reasonable. 7½ per cent. was held to be reasonable in this case. (*Lindsay*, J.C.) ALLAHABAD BANK *v.* SURAJ KUAR. **26 I C. 177=1 O.L.J. 544.**

——— **O. 34, Rr. 2 and 3**—*Interest—Date of realization.*

In a preliminary decree payment of interest till realization means interest up to the days of grace. (*Coutts and Sultan Ahmed*, JJ.) TEKAIT KRISHNA PRASAD *v.* SURENDRA MOHAN KUNDU. **2 Pat. L T. 78=58 I.C. 223=5 P.L J. 598.**

——— **O. 34, Rr. 2 and 3**—*Interest—Jurisdiction of Court to award interest in final decree—Appeal—Objection to validity of decree, if can be entertained in execution.*

The judgment-debtor cannot object in execution proceedings to the validity of the final decree in a suit for sale on mortgage on the ground that the direction in it to pay interest at 6 per cent. per annum from the date of the expiry of the day of grace till realization is in excess of the preliminary decree. He must appeal against the decree. If by any inadvertence, or by any erroneous view of the form of the preliminary decree, the Court omits to make the necessary direction regarding the future interest, there is no reason why it should not give in the final decree what is the just and equitable right of the decree-holder to get. (*Chapman and Jwala Prasad*, JJ.) RAJ BRIJ RAJ KISHUN *v.* MAHARAJA SIR RAMESWAR SINGH BAHADUR. **42 I C. 625=2 Pat. L.W. 208.**

——— **O. 34, Rr. 2 and 4**—*Interest up to date fixed—Right of mortgagor to redeem.*

Where a preliminary decree in a suit for sale of the mortgaged property is framed under O. 34, R. 4, the mortgagor cannot redeem before the day appointed in the decree on payment of the principal sum and interest up to the date of decree, with subsequent interest up to the date of payment only, but must pay interest up to the day appointed by the decree. (*Fawcett*, A.J.C.) VISHINDAS FATE CHAND *v.* NAGJI DEVCHAND. **49 I.C. 160=12 S L.R. 59.**

Payment into Court.

——— **O. 34, Rr. 2 and 3**—*Payment into Court—Adjustment outside.*

No cognizance will be taken of payment of the amount if the preliminary decree, out of Court, unless certified to the Court under O. 21, R. 2, C.P.C. The mode of payment authorised by Transfer of Property Act has been abolished by the C.P. Code. (*Fletcher and Smither*, JJ.) PIRAN BIBI *v.* JITENDRA MOHAN. **25 C L.J. 553=40 I.C. 845=21 C.W.N. 920.**

C. P. CODE (V of 1908), O. 34, R. 2—Payment into Court.

——— **O. 34, Rr. 2 and 5**—*Payment into Court—Settlement out of Court—Final decree.*

O. 34, R. 5 recognises no settlement, save by payment into Court. Where such payment is not made on or before the fixed date the Court has not any option in the matter and is bound to pass a final decree for sale of the property. (*Robertson and Beadon*, JJ.) BANARSI DAS *v.* NATHU MAL. **12 P R. 1913=276 P.L.R. 1914=16 I C. 987=281 P.W.R. 1912.**

——— **O 34, Rr. 2 and 3**—*Payment into Court—Adjustment out of Court—Final decree.*

An uncertified adjustment of the preliminary decree in a mortgage suit cannot be pleaded as a bar to the execution of the final decree though the adjustment took place in pursuance of an arrangement entered into before the passing of the preliminary decree. 25 C.L.J. 553 ; 35 M. L.J. 572, Rel ; 40 Mad. 283 ; 32 M.L J. 13, Ref. (*Ayling and Krishnan*, JJ.) SAMBASIVA IYER *v.* THIRUMALAIRAMANUJA THATHACHARIAR. **34 I C. 137=37 M L.J. 356.**

——— **O 34, Rr. 2 and 5**—*Payment into Court—Adjustment out of Court—Power of Court to recognise.*

The Court is bound to pass a decree for sale for the whole of the amount fixed by the preliminary decree in cases in which that amount or a portion thereof has not been paid into Court within the time limited. The Court has no power to inquire into and recognise an alleged adjustment of the decree out of Court. *Obiter.*—If between the passing of the preliminary decree and passing of the decree for sale the mortgagor obtains a certificate under O. 21, R. 2, C.P.C., he can take advantage of that to reduce the amount for which the property is to be sold. 25 C.L J. 553, Foll. (*Wallis* C.J. *and Seshagiri Aiyar*, J.) SINGH RAJA *v.* PETHU RAJA. **42 Mad. 61=35 M L J. 579=8 L.W. 497=24 M L T. 501=48 I C. 196=(1918) M.W.N. 809.**

——— **O. 34, Rr. 2 and 5**—*Payment into Court—Private adjustment.*

Where an application is made to Court in time to compel the decree-holder to certify the payment made out of Court in satisfaction of a mortgage-decree, the payment if proved, must be recorded and then, in law, it will be treated as a payment into Court. (*Mittra*, A.J.C.) BAYABAI *v.* PURSHOTTAM. **27 I.C. 919=11 N.L.R. 16.**

——— **O. 34, Rr. 2 and 3**—*Payment into Court — Adjustment outside Court—Consent decree.*

A consent decree may be passed in a mortgage suit and the parties are bound by the terms of the decree unless they are opposed to

C. P. CODE (V of 1908), O. 34, R. 2—Scope of.

public policy and a payment made out of Court may be proved by the deft. in order to obtain a set off. O. 21, R. 2 applies to all decrees and therefore, a holder of a mortgage decree can always certify payment made out of Court. Such payment can be recognised in proceedings for making an order absolute or passing a final decree. (*Jwala Prasad and Adami, JJ.*) MANGAR SAHU *v.* BHATOO SINGH.

1 Pat L T. 416=67 I.C. 473=5 P.L.J. 672.

Scope of.

——— O. 34, Rr. 2 and 4—*Scope of—Successive suits.*

Two successive suits for sale on one and the same mortgage are not contemplated. (*Piggott and Walsh, JJ.*) MUHAMMAD ZAKERIAYA *v.* MUHAMMAD HAFIZ.

39 All. 506=41 I.C. 232=15 A.L J. 557.

Six Months—Mode of Calculation.

——— O. 34, R. 2 (c)—*Six months—Mode of calculation—Time fixed by original decree—Dismissal of appeal.*

Where the preliminary decree in a mortgage suit fixes a period of six months for redemption and an appeal from that decree is dismissed without extension of time by the appellate Court, the period of six months runs from the date of the first Court's decree and not from that of the appellate decree. (*Newbould and Cuming, JJ.*) BASANTA KUMAR ADAK *v.* SM. RADHA RANI DASI. **26 C W N. 440= 36 C.L J. 159=1922 Cal. 329.**

———O 34, Rr. 2 and 3—*Six months—Calculation of redemption time in a foreclosure decree.*

In a foreclosure decree the time for redemption is calculated from the date of the first Court's decree in the absence of a direction of the appellate Court enlarging the time in an appeal from the decree. (*Chatterjee and Newbould, JJ.*) ALI MAMUD *v.* MIARISH. **37 I.C. 779.**

———O. 34, R. 2—*Six months—Mode of calculation.*

A decree *nisi* in a foreclosure suit on the basis of a conditional mortgage may direct an account to be taken of what will be due to the plaintiff and the day to be fixed by the Court under O 34, R. 2, C. P. C., is to be within six months not from the date of the order *nisi* but from the date of declaring in Court the amount due. (*Mookerjee and Beachcroft, JJ.*) KARTIK CHANDRA SARKAR *v.* HARA GOBIND GHOSE. **27 I.C. 813=21 C.L.J. 78.**

——— O. 34, R. 3.

CONSENT DECREE.
EXTENSION OF TIME.
FINAL DECREE.
LIMITATION.
MERGER.
ORDER ABSOLUTE.
RIGHT OF REDEMPTION.

See also O. 34, RR. 5 AND 8.

C.P. CODE (V of 1908), O. 34, R. 3—Extension of Time.

Consent Decree.

——— O. 34, R. 3—*Consent decree.*

A consent decree for instalments and execution in default was passed. On default the decree-holder sought execution but was met with a plea that there was no order absolute first obtained *held* that the instalment decree not being under S. 88. T.P. Act, S. 89 did not apply. (*Mookerji and Caspersz, JJ.*) BISWANATH *v.* BHAGWANDIN. **10 I C. 536= 14 C.L.J. 648.**

Extension of Time.

——— O. 34, R. 3 (2)—*Extension of time—Discretion of Court—Accepting payment after final decree.*

Payment after the passing of the final decree is not to be accepted by the trial Court in the exercise of the discretion under O. 34, R. 3 (2). (*Chatterjee and Newbould, JJ.*) ALI MAMUD *v.* MIARISH. **37 I.C. 779.**

——— O. 34, Rr. 3 and 8—*Extension of time—Reasons.*

Extension of time is not allowed as a matter of right to the mortgagor when a mortgagee sues for foreclosure, but is a matter of discretion for the Court which it will exercise in cases of accident or mistake. (*Srinivasa Aiyangar, J.*) MURUGESA MUDALY *v.* RAMASWAMI CHETTY. **39 Mad. 882=18 M.L T. 493= 31 I.C. 200=(1916) M.W.N. 126.**

——— O. 34, Rr. 3 and 8—*Extension of time—Time fixed by decree—Confirmation of decree by appellate Court—Appellate decree silent as to time for payment.*

The Court fixed a time for payment of the decretal amount and, on appeal, the appellate Court simply confirmed the decree without mentioning any time for payment. *Held*, the decree of the appellate Court cannot be regarded as substituting a corresponding date for the purpose to what was fixed by the lower Court in its decree nor to enlarge the time for payment. 31 Mad. 28, Appr ; 23 All. 152, Expl. and Dist. (*Benson, O.C.J. and Napier, J.*) THATHARA NANNABHA CHETTY *v.* KUPPAL KRISHNAMMAL. **16 I C. 799=14 M.L.T. 194.**

———O. 34, R. 3—*Extension of time—Good cause—Appeal.*

For each extension of time subsequent to the first a stronger case must be made out. The words "good cause" in O. 34, R. 3 must be literally interpreted and is not to be assumed either from non-payment or delayed payment but should be shown to the satisfaction of the Court. No appeal lies against an order of Court enlarging the time for payment of mortgage money but where such an order is incorporated in a decree, it becomes appealable under S. 105, Cl. (1) of the Code. (*Stanyon, A.J.C.*) BALKISHEN *v.* ATMARAM. **26 I C. 701= 10 N.L R. 160.**

C. P. CODE (V of 1908), O. 34, R. 3—Extension of Time.

———— **O. 34, Rr. 3 and 5**—*Extension of time—Mortgage decree—Confirmation on appeal.*

Where the decree of an appellate Court confirming the lower Court's final decree for foreclosure allowed the judgment-debtors two weeks for paying the balance of the decretal money and directed that if they made the said payment, they would be put back in possession of the mortgaged property, but if they failed to do so their rights in it would be extinguished, *Held*, the effect of the decree of the appellate Court was merely to grant an extension of time for payment of the decree amount and therefore the judgment-debtors were entitled to pay the decretal amount before the passing of the order absolute. (*Kanhaiya Lal*, J C.) GOKARAN SINGH *v.* MANGLI. **66 I.C 673=8 O L.J. 407.**

———— **O 34, R. 3 (2)**—*Extension of time—Defendant, if entitled to pay before passing of final decree.*

The proviso to O. 34, R. 3 (2) gives the Court a discretionary power to extend the time for the payment of the decretal amount. But a mortgagor has no absolute right to pay the money after the expiry of the specified period even though no final decree has up to the time of such payment been made. (*Miller*, C.J. *and Roe*, J.) RATNAKAR GAUNTIA *v.* CHAMRA SATPASTY. **51 I C. 881=4 Pat. L J. 347**

———— **O. 34, R. 3 (2)**—*Extension of time—Appellate decree does not operates to extend time for payment of mortgage money.*

An appellate decree does not *ipso facto* operate to extend the time for payment allowed by the lower Court. If further time is required an application must be made to the appellate Court. (*Saunders*, J. C.) MAUNG YANGIN *v.* KATHARASAN CHETTY. **63 I.C. 799= (1921) 4 U.B.R. 1.**

Final Decree.

———— **O. 34, Rr. 3 and 6**—*Final decree—Revival of the right of redemption after foreclosure.*

The right to redeem revives even after foreclosure, if the mortgagee pursues his remedy on the personal covenant. (*Beaman*, J.) HOPE MILLS, LTD. *v.* SIR KOVASJI JEHANGIR. **10 I C. 748=13 Bom. L R. 162.**

———— **O. 34, R. 3**—*Final decree.*

Notice must be issued under R. 3 on an application for a final decree as the proceeding is one in the suit and not in execution. (*Lindsay*, J.C.) BISHAMBHAR NATH *v.* UMED ALI. **42 I.C. 750=20 O C. 268.**

———— **O. 34. R. 3**—*Final decree.*

Application for, final decree for foreclosure is governed by Art. 181, Limitation Act. (*Das and Adami*, JJ.) CHHOTEY NARAIN SINGH *v.* KEDAR NATH SINGH: **3 Pat. L.T. 565=1 Pat. 435= (1922) Pat. 342=1922 P. 201.**

———— **O. 34,** —*Final decree—Application for.*

C. P. CODE (V of 1908), O. 34, R. 3—Limitation.

An application for a final decree in a foreclosure suit should ordinarily be made by the plff. But where such an application was made by a transferee from the defts. in the presence of the latter and a final decree is passed the defts are not entitled subsequently to challenge the final decree on the ground that it had not been applied for by the plff. (*Miller*, C. J. *and Roe*, J.) RATNAKAR GOUNTIA *v.* CHAMRA SATPASTY. **51 I C 881= 4 Pat. L.J. 347.**

———— **O. 34, Rr. 3 and 5**—*Final decree—Application.*

An application is expressly required to pass a final decree for foreclosure or sale. (*Chamier*, C. J. *and Sharfuddin*, J.) BALARAM NAIK *v.* KANHAI BHARAN. **1 Pat. L J 364= 38 I C. 885=3 Pat L.W. 74.**

Limitation.

———— **O 34, R. 3**—*Limitation—Decree before C.P.C.—Order absolute.*

Where a mortgage decree is passed before the C. P. C. an application for order absolute is governed by Art. 182 of the Limitation Act, since it is an application in execution. (*Lord Moulton.*) ABDUL MAJID *v.* JAWAHIR LAL. **36 All. 330=1 L.W. 488=12 A.L.J. 624= 16 Bom. L.R. 893=18 C.W N. 963= 19 C L.J 626=27 M L.J 17= 23 I.C. 649=(1914) M W N. 485= 16 M L.T. 44 (P. C.) [Reversing 33 All. 154=7 I C. 926= 7 A L J. 1001 (F.B.)]**

———— **O. 34, Rr. 3 and 6**—*Limitation—Application for final decree.*

Art. 181 of the Limitation Act does not apply either to R. 6 or to R. 3 of O. 34, C. P. C. (*Holmwood and Chapman*, JJ.) BISHWAMBHAR SAHA *v.* RAM SUNDER KAIBARTA DAS. **30 I C. 719=42 Cal. 294.**

———— **O. 34, R. 3**—*Limitation—Final decree—Continuation of suit.*

After the passing of the preliminary decree, the suit is continued until the stage of the final decree is reached. It is not by the process of execution that the final decree is obtained. This change in the prevailing view is due to the deliberate change made by the Legislature in enacting O. 34, Rr. 2 and 3 in the place of Ss. 88 and 89 of the T. P. Act. (*Seshagiri Aiyar and Napier*, JJ.) LAKSHMI ACHI *v.* SUBBARAMA AIYAR. **39 Mad 488=2 L.W. 403= 28 M L J. 491=(1915) M W.N. 327= 29 I C. 142=17 M.L.T. 385.**

———— **O. 34, R. 3 (2)**—*Limitation—Application to pay money into Court—No limitation—Limitation Act, Arts. 112, 182 and 183.*

A mortgagor's application to pay the amount under a preliminary decree is not one under Art. 181, 182 or 183, Limitation Act, as the right to apply is a continuing right and can be exercised at any time before final decree is passed. (*Stuart*, J. C. *and Kendall*, A. J. C.) VIDYASAGAR *v.* RATIPAL. **1 O.L J. 433= 28 I.C. 752=17 O.C. 347.**

C. P. CODE (V of 1908), O. 34, R. 3—Merger.

Merger.

———**O. 34, Rr. 3 (3) and 8 (3)**—*Merger—Decree for sale—Effect of—Extinguishment of mortgage—T. P. Act, S. 89—Rights of second mortgagee.*

A decree made under S. 89 of the T.P. Act (O. 34, R. 3 (3) of the C.P. Code) for the sale of the mortgaged property substitutes the rights under the decree for those under the mortgage. A first mortgagee sued for and obtained a decree for sale without impleading a puisne mortgagee and subsequently purchased the property himself in Court-auction. Long after, the puisne mortgagee sued on his mortgage for a decree for sale. *Held*, that the puisne mortgagee was entitled to a decree for sale subject to the payment to the first mortgagee of the amount due under his decree and not the amount which would have been due under his mortgage. 17 I.A. 201, Dist; 45 I.A. 130, Rel. on. (*Sir John Edge.*) MATHU MAL *v.* DURGA KUNWAR. **22 Bom. L.R. 563=42 All. 364=47 I.A. 71=38 M.L.J. 419=11 L.W. 529=25 C.W.N. 397=(1920) M.W.N. 338=18 A.L.J. 396=2 U.P.L.R. (P.C.) 76=55 I.C. 969=32 C.L.J. 121 (P.C.).**

———**O. 34, Rr. 3 (3) and 8 (3)**—*Merger—Mortgage—Final decree—Passing of—Extinguishment of debt—T. P. Act, S. 89.*

On the making of an order absolute for sale under S. 89 of the T.P. Act (C.P. Code, O. 34, R. 8 (3) : the mortgagee's security as well as the mortgagor's right to redeem are both extinguished and for the right of the mortgagee under his security there is substituted the right to a sale conferred by the decree. If execution of the decree is barred by limitation then a second mortgagee seeking to enforce his mortgage in a subsequent suit need not redeem the first mortgage on which the decree had been obtained. (*Viscount Haldane.*) HET RAM *v.* SHADI RAM. **40 All. 407=48 I.A. 130=8 P.L.W. 88=16 A.L.J. 607=36 M.L.J. 1=24 M.L.T. 92=28 C.L.J. 188=(1918) M.W.N. 518=20 Bom. L.R. 798=22 C.W.N. 1033=9 L.W. 550=46 I.C. 793=12 Bur. L.T. 73 (P.C.).**

[Affirming 20 I.C. 59=11 A.L.J. 634.]

———**O. 34, Rr. 3 (3) and 8 (3)**—*Merger—Mortgage decree—Prior mortgagee—Purchaser in possession—Interest.*

A prior mortgagee purchasing the mortgaged property in execution of his mortgage decree and obtaining possession, cannot demand interest on his money since the date of possession. (*Tudball and Rafique, JJ.*) JUGAL KISHORE *v.* BAHAL RAI. **21 I.C. 893.**

———**O. 34, R. 3 (3)**—*Merger—Mortgage decree.*

Where a mortgage decree is time-barred the mortgage itself having merged in the decree, it is not capable of execution. (*Richards and Banerji, JJ.*) PARSOTAM DAS *v.* PATESRI PARTAP NARAIN SINGH. **35 All. 280=18 I.C. 923=11 A.L.J. 241.**

C. P. CODE (V of 1908), O. 34, R. 3—Right of Redemption.

———**O. 34, R. 3 (3)**—*Merger—Mortgage decree on prior mortgage—Puisne mortgagee not made a party—Subsequent suit for redemption—Accounts.*

Where a decree on a prior mortgage has been passed without impleading a puisne encumbrancer as a party to the suit the latter brings a suit for redemption the prior mortgagee is entitled to interest at the contract rate and not at the rates provided in the decree. The prior mortgage subsists. 18 Cal. 164, Foll. (*Oldfield, Srinivasa Aiyangar and Abdur Rahim, JJ.*) MUTHAMMAL *v.* RAZU PILLAI. **23 M.L.T. 106=(1918) M.W.N. 261=44 I.C. 753=7 L.W. 420.**

[This view is no longer law. See 40 All. 107=45 I.C. 798=42 I.A. 130 (P.C.).]

———**O. 34, R. 3 (3)**—*Merger—Order absolute—Effect of, on mortgage.*

On the making of an order absolute the property as well as the mortgagor's right to redeem are both extinguished. For the right of the mortgagee under his security is substituted a right of sale conferred by the decree, and any payment made after this cannot be taken to be a payment by way of redemption because there is no mortgage subsisting and consequently no charge is created in favour of the person making the payment. 40 All. 407, Foll. (*Lindsay, J.C.*) RABNATH BAKSH *v.* GANESH PRASAD. **23 O.C. 334=60 I.C. 213=2 U.P.L.R. (J.C.) 196.**

———**O. 34, Rr. 3 (3) and 8 (3)**—*Merger—Decree—Effect on security.*

A decree obtained on a mortgage does not extinguish the security though the security may be merged in the decree and the judgment recovered in any form of action is still but a security for the original cause of action until it be made productive in satisfaction of the judgment creditor. (*Mookerjee and Beachcroft, JJ.*) DHAKESHWAR PRASAD SINGH *v.* HARBHAR PRASAD NARAIN SINGH. **27 I.C. 780=21 C.L.J. 104.**

Order Absolute.

———**O. 34, R. 3**—*T.P. Act, S. 88—Order absolute.*

Per *Sadasiva Iyer*, J.—A decree passed under S. 88 gives a vested right to the decree-holder to apply in execution for an order absolute. The repeal of the said section by O. 34, C.P.C., could take away this right. (*Sadasiva Iyer and Spencer, JJ.*) GANAPATHIA PILLAI *v.* GOPALA IYER. **36 I.C. 563.**

Right of Redemption.

———**O. 34, R. 3**—*Right of redemption—Preliminary decree for foreclosure — Final decree not passed.*

The passing of a preliminary decree for foreclosure does not extinguish the right of redemption of the mortgagor. Consequently it is open to him to redeem at any time before the passing of the final decree even though the six months' time allowed by the preliminary

C. P. CODE (V of 1908), O. 34, R. 3—Right of Redemption.

decree has passed. 16 Cal. 246; 3 C.L.J. 533, Foll. (*Chatterjee and Panton*, JJ.) YUSAF ALI *v.* KASIM ALI. **70 I.C. 152=26 C.W.N. 532.**

———**O. 34, Rr. 3 and 5**—*Right of redemption — Person having interest in mortgaged property—Not impleaded in mortgage suit—Basis of redemption—Interest—Mesne profits.*

Where a person who had an interest in the mortgaged property was not made a party in the suit brought by the mortgagee, his rights are not affected and he is still entitled to redeem. In allowing him to redeem, accounts must be taken on the footing of a mortgage which subsists and which it is sought to redeem and not merely on payment of the decree amount. 43 All. 469 (P. C.), followed. In calculating the amount payable, interest should be made payable at the mortgage rate up to the date fixed in the decree for redemption. Where the mortgagees had obtained possession, the amount of mesne profits should not be taken as an equivalent of interest due, except with the consent of parties. (*Woodroffe and Ghose*, JJ) JNANENDRA NATH SINGH ROY *v.* SHORASHI CHARAN MITRA.

49 Cal. 626=1922 Cal. 23.

———**O. 34, Rr. 3 (2) and 5 (2)**—*Right of redemption — Sale of mortgaged property—Redemption before order absolute—T.P. Act, Ss. 86, 87, 88 and 89.*

A mortgagor can stop the sale in execution of the mortgage decree by payment before the sale actually takes place. He has right to redeem until the order absolute is made under S. 87, T. P. Act. (*Carnduff and Chapman*, JJ.) SHASHTI DAS DUTT *v.* UJIR ALI KHAN.

18 I.C. 357

———**O 34, R. 4.**

ANOMALOUS MORTGAGE.
CONSENT DECREE.
EXTENSION OF TIME.
FINAL DECREE.
FORM OF DECREE.
FRESH SUIT.
LIMITATION.
NATURE OF PROCEEDINGS.
"PAYMENT INTO COURT."
See also C. P. CODE, O. 34, Rr. 2 and 7.

Anomalous Mortgage.

———**O. 34, R. 4 2)**—*Anomalous mortgage—Foreclosure and sale.*

There is nothing in O. 34, R 4 to override S. 98 of the T. P. Act and a decree for foreclosure and sale could be passed. (*Piggott and Stuart*, A. J. Cs) BAQUAR HUSSAIN *v.* BALAK RAM. **18 I.C. 24.**

Consent Decree.

———**O. 34, Rr. 4 and 5**—*Consent decree—Waiver of—Effect.*

It is open to the mortgagor to waive a final decree before execution can be levied. Where pending an appeal from the preliminary decree in a mortgage suit the parties compromised the suit and decree for a smaller amount payable in two years was passed with a provision that

C.P. CODE (V of 1908), O. 34, R. 4—Consent Decree.

the property was to be sold in default of payment. *Held* it was the intention of the parties that the mortgagee should realise the amount by sale of the property immediately on the expiry of the two years. (*Ghose and Panton*, JJ.) RAJA HEMENDRALAL SINGH DEO *v.* FAKIR CHAND DUTT. **27 C.W.N. 621: 50 Cal. 650=1923 Cal. 626.**

———**O. 34, Rr. 4 and 5**—*Consent decree—Instalments—Application for final decree.*

O. 34, R. 5, C. P. Code, applies to a decree prepared under O. 34, R. 4 when the decree directs the payment of the full amount due thereunder on a fixed date. O. 34, C. P. C., is not exhaustive and a compromise mortgage decree directing payment in instalments is enforceable according to its own terms, unless they are opposed to public policy. O. 34, R. 5 does not preclude the Court from investigating into the question of part-payment out of Court, as pleaded by the judgment-debtor, in the shape of a set-off towards the amount due under the decree; O. 34, R. 5 (1) is enacted for the benefit of the judgment-debtor and it does not declare that payments out of Court will under no circumstances be recognised. (*Jwala Prasad and Adami*, JJ.) MANGAR SAHU *v.* BHATOO SINGH. **1 Pat L. T. 416=57 I.C. 473=5 P.L.J. 672.**

———**O. 34, Rr. 4 and 5**—*Consent decree—Execution without final decree.*

A decree passed on compromise directed the judgment-debtor to pay the debt by certain specified instalments providing also that in case of default the property mortgaged to the decree-holder would be sold. Default having been made, the decree-holder applied for sale of the property, *Held*, that the decree having been passed in accordance with a compromise was not a preliminary decree within O. 34, R. 4, C. P. C., but was a final one and capable of execution. (*Shadi Lal*, J.) KORA LAL *v.* PUNJAB NATIONAL BANK, LTD.

2 U.P.L.R. Lah. 91=55 I.C. 816=5 L.L.J. 67=118 P.L.R. 1920.

———**O. 34, Rr. 4 and 5**—*Consent decree—Arbitration—Decree for money—Realization by sale—Final decree.*

Where a mortgage suit was referred to arbitration and a decree for money was passed on the basis of the award and the same was to be realised by the sale of the hypotheca, and it was objected in execution that the same could not be executed till a final decree was passed. *Held*, a final decree under O. 34, R. 5 cannot be asked for unless a preliminary decree under O. 34, R. 4 has been passed and the decree based on the award being of the same nature as a compromise decree was itself executable. (*Das and Ross*, JJ). NRIPENDRA NATH CHATTERJEE *v.* JHUMAK MANDAR.

4 Pat. L.T. 693: 2 Pat. L.R. 9=3 Pat. 221=1924 P. 263.

———**O. 34, Rr. 4 and 5**—*Consent decree—Decree payable in instalments—Final decree—Necessity for—Objection in execution.*

C. P. CODE (V of 1908), O. 34, R. 4—Extension of Time.

A consent decree directing payment by instalments is a perfectly valid mortgage decree but it is not covered by O. 34, R. 5, C.P. Code. Consequently it is not necessary to make a final decree under O. 34, R. 5, C.P. Code. 10 C.L.J. 91; 2 Pat. L T. 38, Foll. It is open to the parties to a litigation to waive a particular procedure and to agree to a final decree being passed without a preliminary decree in the first instance. An objection to the legality of a final decree on the ground that the objector was not properly represented in compromise on which the final decree was based cannot be allowed to be taken in execution his remedy being to get the decree set aside in proper proceedings. (*Mullick and Kulwant Sahay, JJ.*) ISHAN CHANDRA KUNDU *v.* NILRATAN ADHIKARI. **4 Pat. L.T. 311 = 1 Pat. L R. 217 = 2 Pat. 538 = 1923 Pat. 184 = 1923 P. 375.**

Extension of Time.

——— **O. 34, Rr. 4 and 5**—*Extension of time—Payment under preliminary decree for sale—Compromise extending such time—Validity.*

A compromise having the effect of extending time for payment fixed in a preliminary decree for sale cannot be accepted by Court as under O. 34, Rr. 4 and 5, C.P.C., the Court itself cannot extend such time for payment. (*Evans, J.C. and Piggott, A.J.C.*) DURGA BHARTHI *v.* ANDESH RAI. **11 I.C. 528 = 14 O C 147.**

Final Decree.

——— **O. 34, Rr. 4 and 5**—*Final decree—Application for—Plea of payment out of Court.*

Proceedings to get a final decree for sale in a mortgage suit are not proceedings by way of execution but are proceedings in the suit. 15 A.L.J. 448, Foll. Before a Court can pass a decree absolute for sale, it has to find out the amount due to the decree-holder for which the decree has to be passed and in the course of the enquiry the Court can recognise a payment made out of Court by the judgment-debtor even though the payment has not been certified. (*Gokul Prasad and Stuart, JJ.*) SITAL SINGH *v.* BAIJNATH PRASAD. **20 A.L.J. 602 = 44 All. 668 = L R. 3 A. 477 = 1922 All. 383.**

——— **O. 34, Rr. 4 and 5**—*Final decree—Powers of Court to rectify mistake.*

A Court dealing with an application for final decree can frame its final decree so as to put right any patent error or omission which may be discoverable in the preliminary decree as the Court is seized of the entire suit Where the plff. mortgagees were allowed to bring the mortgaged property to sale in the event of their paying off a prior mortgagee, the Court has jurisdiction to pass a final decree entitling them to bring to sale not only the property originally covered by their mortgage but also the additional property included in the mortgage of the prior mortgagee. (*Piggott and Walsh, JJ.*) UDHISTER SINGH *v.* KAUSILLA. **38 All. 398 = 84 I.C. 79 = 14 A.L.J. 502.**

C. P. CODE (V of 1908), O. 34, R 4—Form of Decree.

——— **O. 34, Rr. 4 and 5**—*Final decree—Application for an order absolute in 1913—Dismissal—Whether application can be received—No second application for final decree lies—Limitation Act. Art. 171 applies to an application for a final decree.*

Where an application purporting to be for an order absolute in a mortgage suit is made in 1913 and dismissed, the only remedy of the party aggrieved is to appeal against the order. 42 M 52 Foll. The application which has been so dismissed cannot be revived as revival implies the pendency of the prior petition. After the dismissal of the first application, there cannot be a second application for a final decree. An application for a final decree in a mortgage suit more than 3 years after the date for payment under the preliminary decree is barred by limitation under Art. 181 of the Limitation Act. 7 L W. 438 Foll. (*Krishnan and Ramesam, JJ.*) MUMMADI VENKATIAH *v.* BOGANATHAM VENKATA SUBBIAH. **42 M.L.J. 51 = (1922) M W.N. 11 = 30 M L.T. 228 = 16 L.W. 198 = 1922 Mad. 66.**

Form of decree.

——— **O. 34, R. 4**—*Form of decree—Inherent power to vary decree.*

O. 34, R. 4 contemplates a sale of the mortgaged properties. Where a sale of the mortgaged properties is impossible as where the mortgaged properties have been sold for arrears of revenue or of rent or in execution of some decree, the decree must be suitably modified. A Court is competent in the exercise of its inherent powers to give appropriate directions for disposal of the fund which represents the property. (*Mookerjee and Beachcroft, JJ.*) KISHNA CHANDRA MANDAL *v.* JOGENDRA NARAIN ROY. **20 C L J. 469 = 27 I.C. 139 = 19 C.W.N. 537.**

——— **O. 34, R. 4**—*Form of decree—Irregular decree—Sale not void.*

Where a decree is not in accordance with O. 34, R. 4, C.P.C., a sale in execution thereof by a Court having jurisdiction to sell is not void but merely irregular. (*Sir John Edge.*) GANPATI MUDALIAR *v.* KRISHNAMACHARIAR. **41 Mad. 403 = 23 M L.T. 198 = 27 C L J. 367 = 34 M L.J. 463 = 4 Pat. L.W. 310 = (1918) M.W.N. 310 = 22 C.W N. 653 = 16 A.L J. 383 = 20 Bom. L.R 580 = 44 I.C. 856 = 8 L W. 427 = 45 I.A. 54 (P.C.) = [Affirming 24 I.C. 187 = 27 M.L J. 213.]**

——— **O. 34, R. 4**—*Form of decree—Inherent power to vary decree.*

O. 34, R. 4 contemplates a sale of the mortgaged properties. Where a sale of the mortgaged properties is impossible as where the mortgaged properties have been sold for arrears of revenue or of rent or in execution of some decree, the decree must be suitably modified. A Court is competent in the exercise of its inherent powers to give appropriate directions for disposal of the fund which

C. P. CODE (V of 1908), O. 34, R. 4—Form of Decree.

represents the property. (*Mookerjee and Beachcroft*, JJ.) KRISHNA CHANDRA MANDAL *v.* JOGENDRA NARAIN ROY. **20 C.L.J. 469 = 27 I.C. 139 = 18 C.W.N. 537.**

——— **O. 34, R. 4**—*Form of decree—Irregular decree—Validity of.*

A mortgage decree providing for personal execution in case the decree is not satisfied by sale of the mortgaged properties is not in strict conformity with the provisions of C.P.C. and T. P. Act. 26 Cal. 166; 33 Cal. 990; 31 Bom. 244, 22 All. 404; 32 Mad. 531, Foll. Nevertheless such a decree is good as between the parties thereto. 10 C.L.J. 591, Foll. and so a decree-holder who has executed it cannot obtain a second personal decree. (*Mookerjee and Holmwood*, JJ.) DINABANDHU NANDI *v.* MASHUDA KHATUN. **17 I.C. 263 = 16 C.L.J. 318.**

——— **O. 34, R. 4**—*Form of decree.*

O. 34, R. 4 should not be overlooked in framing mortgage decrees. (*Rattigan and Scott-Smith*, JJ.) KISHEN CHAND *v.* SOHAN LAL. **20 P.L.R. 1915 = 26 I.C. 913 = 245 P.W.R. 1915.**

——— **O. 34, Rr. 4 and 5**—*Form of decree—Interest*—Damdupat.

Where in a mortgage suit interest is calculated at the contract rate up to the date of the *dies datus* the decree is subject to the rule of *damdupat* up to that date. (*Mittra*, A.J.C.) NARAYAN *v.* WAMAN. **59 I.C. 121.**

——— **O. 34, R. 4**—*Form of decree—Interest up to realization at court rate means an amount inclusive of interest at contractual rate.*

When under a decree the contractual rate of interest ceases to be payable at a given date and the court rate is substituted for it therefrom up to the date of realization the court rate will be chargeable on the whole amount due with interest at the contractual rate up to that given date. (*Ashworth*, J.C. *and Simpson*, A.J.C.) NAWAB MIRZA FAGHFUR MIRZA *v.* KHUSHAD CHAND. **26 O.C. 59 = 1923 Oudh 241.**

Fresh suit.

——— **O. 34, Rr. 4 and 5**—*Fresh suit—Bar—Failure to extinguish the right to redeem—Fresh suit for redemption.*

Where in a redemption suit, the decree was not properly passed in accordance with the terms of S. 92, *i.e.*, it fails to provide for the extinguishment of the right to redeem a fresh suit for redemption is not barred. (*Piggott*, J.) GANPAT SINGH *v.* TOHFA. **15 I.C. 16 = 10 A.L.J. 36.**

Limitation.

——— **O. 34, Rr. 4 and 5**—*Limitation—Application for final decree.*

A mortgage suit remains pending until a final decree is passed. An application for a final decree being governed by the C.P. Code is

C. P. CODE (V of 1908), O. 34, R. 4—Nature of Proceedings.

subject to the limitation prescribed by Art. 181 of the Lim. Act. (*Drake Brockman*, J.C.) VINAYAK RAO KRISHNA RAO *v.* BAIJNATH SAHLIGRAM. **48 I.C. 934 = 15 N.L.R. 36.**

——— **O. 34, Rr. 4 and 5**—*Limitation—Deposit of money due under preliminary decree.*

There is no period of limitation applicable to an application by the mortgagor to deposit the money directed to be paid into court by the preliminary decree. The right of the mortgagor to pay the amount due is a continuing right which can be exercised at any time until an order absolute is passed. 10 O.C. 30; 17 O.C. 347 Ref. 39 A. 641; 14 O.C. 10 Dist. (*Dalal*, A.J.C.) BANKE BIHARI LAL *v.* GHANI AHMAD. **9 O.L.J. 14 = 1922 Oudh 33.**

Nature of Proceedings.

——— **O. 34, Rr. 4 and 5**—*Nature of proceedings—Preliminary and final decree—Pending suit.*

A mortgage suit remains a pending suit even after the preliminary decree is passed till the passing of the final decree. If the legal representatives of the deceased plff. are not brought on record before the final decree, the suit will abate. (*Richards*, C. J. *and Banerji*, J.) NIZAMUDDIN SHAH *v.* BOHBA BHIM SEN. **40 All. 203 = 43 I.C. 870 = 16 A.L.J. 85.**

——— **O. 34, Rr. 4 and 5**—*Nature of proceedings—Preliminary and final decree in mortgage suit.*

A final decree in a mortgage suit is a decree in the suit itself and an application for a final decree cannot be deemed to be an application in execution. A second application, therefore, cannot be regarded as revival of an application which has been disposed of. (*Richards*, C. J. *and Banerjee*, J.) AHMAD KHAN *v.* GAURA. **43 I.C. 518 = 16 A.L.J. 153.**

——— **O. 34, R. 4**—*Nature of proceedings—Mortgage suit—Right to interest—Pendency of suit*—Ex parte *decree—Setting aside.*

Ordinarily the mortgagee in a mortgage suit should get interest at the contract rate during the pendency of the suit. Where an *ex parte* decree is set aside, the suit would be considered to be pending during the period when the proceedings to set aside the *ex parte* decree were pending. (*Chatterjee and Panton*, JJ.) SIBA PRASAD DAS CHAUDHURY *v.* KAZIMUDDIN SARKAR. **68 I.C. 709.**

——— **O. 34, Rr. 4 and 5**—*Nature of proceedings—Passing of final decree without notice to defendants-mortgagors*—Ex parte *decree—Setting aside.*

The preliminary decree in a mortgage suit must direct the payment of certain sum of money into court by a date to be fixed. The preliminary decree grants time to the defendant for the performance of an act necessary to the further progress of the suit. If the defendant fails to do the needful during the time thus granted, the court will pass final decree.

C. P. CODE (V of 1908), O. 34, R. 4—Nature of Proceedings.

When the plaintiff applies for the final decree the defendant will not be allowed to do what he has failed to do during the time granted by the preliminary decree unless he shows good cause. The section does not expressly provide for the issue of notice to the defendants' mortgagors, yet an *ex parte* decree in such a case is liable to be set aside. (*Hallifax*, A. J. C.) ANNAJI *v.* FAKIRA. **1922 Nag. 175.**

——O 34, Rr. 4 and 5—*Nature of proceedings—Preliminary decree—Proceeding subsequent, nature of.*

Proceedings following the preliminary decree in a mortgage suit are proceedings in the suit and not in execution and must be between the parties to the preliminary decree or their representatives in interest. (*Mitra*, A. J. C.) RAGHUNATH *v.* SHEO LAL. **39 I.C. 849 = 13 N.L.R. 69.**

——O. 34, Rr. 4 and 5—*Nature of proceedings—Mortgage suit pending.*

A mortgage suit is deemed to be pending at any time until a final decree is passed. (*Drake Brockman*, J. C.) DIGAMBARA *v.* GANPAT. **33 I.C. 496 = 12 N.L.R. 50.**

—— O. 34, Rr. 4 and 5—*Nature of proceedings—Proceedings for final decree—Nature of—Death of defendant.*

A final decree against a mortgagor dead at the time is void and incapable of execution. The stage of suit continues up to the final decree. (*Miller*, C.J., *Coutts and Manuk*, JJ.) JUNGLI LAL *v.* LADHU RAM MARWARI. **4 Pat. L.J. 240 = 50 I.C. 529 = (1919) Pat. 105 (F.B.).**

Payment into Court.

——O. 34, R. 4—*Payment into Court—Conditional decree—Money on prior mortgage to be paid before sale.*

When the decree in a mortgage suit provides for the payment of a prior mortgage before sale of the mortgaged property, but does not specify the date of payment, the payment should be made within six months of the date of the decree. (*Banerji and Gokul Prasad*, JJ.) GAYAN SINGH *v.* ATA HUSSAIN. **43 All. 320 = 60 I.C. 817 = 19 A.L.J. 83.**

——O. 34, Rr. 4 and 5—*Payment into Court—Partial payment—Preliminary and final decree—Deposit.*

The doctrine that a mortgagee is not bound to accept any sum in part of satisfaction of his decree and is entitled to an order absolute unless the entire amount specified payable to him, is not applicable where there is controversy as to what is due and the payment is made in accordance with the determination of the Court at the time as to the amount payable by the mortgagor to the mortgagee. 14 C.W.N. 617, Ref. If a mortgagor pays into Court the amount determined to be due, it is a good tender though it may be finally adjudged that a larger sum is due from the mortgagor to the mortgagee. (*Mookerjee and Carnduff*, JJ.) HARI KISHEN BHAGAT *v.* KAMLESHUR PRASAD SINGH. **16 I.C. 374.**

C. P. CODE (V of 1908), O 34, R. 5—Consent Decree.

——O. 34, Rr. 4 and 5—"*Payment into Court*"—*Mortgage—Compromise decree—Payment out of the Court—Final decree.*

It is open to the parties to a mortgage suit to arrange among themselves as to the terms and form of the mortgage decree and they will be bound by such terms unless they are opposed to public policy. Where after the passing of such a compromise decree the mortgagee decree-holder applies for a final decree on the allegation that the judgment-debtor had defaulted in the payment of two instalments under the decree, it is open to the judgment-debtor to show that the payment had been made out of the Court and a decree for the balance alone should be passed. Even if O. 34, R. 5 of the C. P. Code applied to the case, the Court could take into account payments by the judgment-debtor out of Court for the purpose of determining the amount to be entered in the final decree. (*Jwala Prasad and Adami*, JJ.) MANGAR SAHU *v.* BHATOO SINGH. **1 P L.T. 416 = 57 I.C. 473 = 5 Pat. L J. 672.**

——O. 34, R. 5—

CONSENT DECREE.
EXECUTION PROCEEDINGS.
FINAL DECREE.
FORM OF DECREE.
LIMITATION.
ORDER ABSOLUTE.
POWER OF COURT.
RIGHT AGAINST STRANGAR.
RIGHT OF REDEMPTION.
See also O. 34, RR. 3 AND 8.

Consent Decree.

——O. 34, R. 5—*Consent decree—Payment out of Court.*

O. 34, R. 5, C. P. Code, does not apply to mortgage decrees based on a compromise arrived at between the parties and there is nothing in law which prohibits the payment of a compromise decree out of Court. 57 I. C. 473, Foll. (*Gokul Prasad and Stuart*, JJ.) SITAL SINGH *v.* BAIJNATH PRASAD. **20 A L.J. 602 = 44 All. 668 = L.R. 3 A. 477 = 1922 All. 383.**

——O. 34, R. 5 (2)—*Consent decree—Contrary to law—Objection to final decree.*

A mortgage of an impartible estate contrary to S. 4 of the Mad. Act II of 1904 cannot be validated by the device of a consent decree in a suit against the mortgagor. He can resist an application for a final decree on the ground the mortgage was not binding. 22 C.W.N. 350; 27 M.L.J. 149, Expl. (*Abdur Rahim and Oldfield*, JJ.) RAMACHANDRA SURU *v* VENKATALAKSHMINARAYANA. **(1919) M.W.N. 332 = 50 I.C. 577 = 37 M.L.J. 65.**

P. CODE (V of 1908), O. 34, R. 6—Execution Proceedings.

Execution Proceedings.

——— **—O 34. R. 6**—*Execution proceedings—Decree on prior mortgagee without impleading subsequent mortgagee—Latter cannot resist execution.*

The failure of a prior mortgagee to implead a subsequent mortgagee does not destroy his right as mortgagee. The puisne mortgagee is merely entitled to a decree for sale subject to his paying the amount due to the prior mortgagee and he cannot restrain the prior mortgagee from executing his decree for sale. (*Tudball, Ryves and Gokul Prasad, JJ.*) HUKUM SINGH *v.* LALLUNJEE. **43 All. 204= 2 U.P.L.R. (A.) 363=61 I.C. 942= 18 A.L.J. 1105 (F.B.).**

——— **—O. 34, Rr. 5 and 6**—*Execution proceedings—Termination of.*

In the case of a mortgage decree for sale, the execution proceedings do not terminate with the sale. If the sale proceeds are insufficient the holder must take further steps to recover the balance. (*Scott, C.J. and Rao, J.*) SADASIV MAHADU *v.* NARAIN VITHAL. **38 Bom. 482= 11 I.C. 987=13 Bom. L.R. 661.**

——— **—O. 34, R. 5**—*Execution proceedings—Delivery of title deeds—Damages not provided for in decree in case of default—Execution.*

Where the preliminary and the final decree in a mortgage suit directed defendants to deliver up to plaintiffs all documents in their possession or power relating to the plaint property, but did not provide an alternative relief, *viz*, payment of damages, in the event of non-delivery, *held*, that the Court could not grant such alternative relief by way of execution. *Quaere.*—Whether the decree in the absence of specification of documents to be delivered was not too indefinite for execution. (*Ayling, O.C.J. and Odgers, J.*) MARATH SIVARAMAN NAIR *v.* SESHU PATTAR. **42 M.L.J. 356=16 L.W. 589= 1922 Mad. 299**

Final Decree.

——— **—O. 34, R. 5**—*Final decree—Appeal—Court-fee.*

The Court-fee for an appeal against an order rejecting an application for a final decree under O. 34, R. 5 is an *ad valorem* fee on the amount claimed. (*Tudball and Sulaiman, JJ.*) MUSSAMMAT MATHURA KUAR *v.* LAL SINGH. **37 I.C. 67=2 U.P.L.R. (All.) 169.**

——— **O. 34, R. 5**—*Final decree—Preliminary decree—Appeal.*

Where a preliminary decree is appealed from, it is the decree of the appellate Court that must be deemed to be the preliminary decree which must be made final under O. 34, R. 5, C.P.C. 38 All. 21, Disappr. (*Piggott, Banerjee and Tudball, JJ.*) GANGADHAR SINGH *v.* MUSHER JIWAN LAL. **39 All. 641=42 I.C. 93= 15 A.L.J. 734.**

C. P. CODE (V of 1908), O. 34, R. 5—Final Decree.

———**—O. 34, R. 5**—*Final decree—Appeal—Court-fee*—Ad valorem.

On an appeal from a final decree under O. 34, R. 5, C.P.C., an *ad valorem* Court-fee is required to be paid and stamping it on an appeal from an order is not sufficient. (*Knox, Tudball and Rafique, JJ.*) BAJRANGI LAL *v.* MAHABIR KUNWAR. **35 All. 476= 21 I.C. 498=11 A.L.J. 801.**

——— **—O. 34, R. 5**—*Final decree—Decree under Dekhan Agr. Relief Act, S. 15-B—If to be made final.*

A mortgage decree passed under S. 15-B of the Dekhan Agri. Relief Act need not be made final. (*Shah, A.C.J. and Crump, J.*) SUKLYA JAIRAM PATIL *v.* SUKLAL MOTICHAND VANI. **25 Bom. L.R. 1214=48 Bom 172= 1924 Bom. 169.**

——— **—O. 34, R. 5**—*Final decree—Right to apply for.*

Under O. 34, R. 5, C.P.C, the plff. must first obtain a final decree for sale before execution, and the right to apply therefor in respect of a preliminary decree passed before 1908 accrued on the coming into force of the C.P.C. of 1908. (*Batchelor, A.C.J. and Kemp, J.*) NARSINGRAO *v.* BANDU KRISHNA. **42 Bom. 309= 46 I.C. 107=20 Bom. L.R. 481.**

——— **O. 34, R. 5**—*Final decree—T. P. Act, S. 89—Order absolute—Effect.*

When once an order absolute for sale is made in a mortgage suit, the mortgage-deed as also the right to redeem are both extinguished so that the security cannot be the basis of a second suit. (*Sadasiva Aiyar and Burn, JJ.*) LAKSHMANAN CHETTY *v.* MUTHAYA CHETTY. **40 M.L.J. 126=62 I.C. 833=29 M.L.T. 189.**

——— **—O 34, R. 5**—*Final decree—Necessary before execution.*

An assignee is not entitled to execute a preliminary decree without obtaining final decree. (*Sadasiva Iyer and Moore, JJ.*) KANNIAH NAIDU *v.* CHENGAMMA NAIDU. **32 I.C 981.**

———**—O 34, R. 5**—*Final decree—Passing of—Notice to judgment-debtor if necessary.*

Notice to the judgment-debtor is not prescribed by law before making a decree final on the application of the decree-holder but in practice it is given on the principle that it is just and proper to hear the opposite party. But the principle of *audi alteram partem* does not require a notice of the second application where notice of the first application was duly served and the mortgagor failed to appear to show cause on the day fixed for the hearing. It may reasonably be inferred in such a case that he had nothing to say and there was nothing for the Court to hear from him. A second notice under such circumstances was not required, and the fact that the second notice was not duly served is not a ground for setting aside the *ex parte* final decree. (*Kotval, A.J.C.*) BABOOJI *v.* RAMGOPAL. **19 N.L.R. 124= 1923 Nag. 320.**

C. P. CODE (V of 1908), O. 34, R. 5—Final Decree.

———O. 34, R. 5—*Final decree—Mortgage suit—Effect of final decree—Charge not extinguished.*

It is settled law in equity that though a personal covenant is extinguished by a judgment a charge subsists notwithstanding the judgment which does not determine the security or put an end to the charge. 31 C 863, Rel. Mortgagor's right to redeem remains in force till the actual sale and distribution of proceeds. (*Das and Bucknill*, JJ.) MOULVI MAHOMED MUSA *v.* EDAL SINGH.
3 P.L.T. 282=1922 P. 92.

———O. 34, R. 5—*Final decree—Application for, necessary.*

An application for execution should not be treated as an application to make the decree final. (*Kennedy*, J.C. *and Madgaonkar*, A.J.C.) SAKER CHAND NARSIDAS *v.* YACOOB.
1923 S. 14.

Form of Decree.

———O. 34, R. 5—*Form of decree—Suit for sale on a mortgage.*

In a suit for sale on a mortgage only one decree for sale can be passed. 29 All. 623, Ref. (*Stanley* C.J. *and Banerji*, J.) RAM RATAN *v.* PRAG DUTT PANDE. 9 I.C. 835=8 A.L.J. 364.

———O. 34, R. 5—*Form of decree—Order absolute—Preliminary decree—Executed without objection by judgment-debtor—Subsequent objection whether open*—Res judicata.

Where a preliminary mortgage decree incapable of execution, is executed with the knowledge but without objection by the judgment-debtor, the objection cannot afterwards be raised, the Court's order executing the decree operating as *res judicata*. (*Sankaran Nair and Ayling*, JJ.) EPOOR RAMASWAMY REDDY *v.* KANDADAI RANGAMANNAR IYENGAR.
26 M.L.J. 285=15 M.L.T. 246=23 I.C. 390=(1914) M.W.N. 622.

Limitation.

———O. 34, R. 5—*Limitation—Final decree—Application for.*

In a suit on mortgage the deft. was required on a compromise to pay the money by certain instalments and in default of payment of any one instalment, the property was to be sold for the full amount of the claim. On default the decree-holder applied under O. 34, R. 5 for a final decree. *Held*, that Art. 181, Sch. I of the Limitation Act applied to the case and the time began to run from the date when the default was made. An application for a final decree is not one for execution. (*Richards*, C.J. *and Bannerji*, J.) RAMJI LAL *v.* KARAN SINGH. 39 All. 532=40 I.C. 424=16 A.L.J. 448.

———O. 34, R. 5 (2)—*Limitation—Suspension of right to apply.*

C. P. CODE (V of 1908), O. 34, R. 5—Limitation.

Plff., the third mortgagee, obtained on 31-1-'11 a preliminary decree under O. 34, R. 4 which fixed 31-7-'11 as the last date of payment by mortgagor. No payment was however made. On 10-3-'14 the second mortgagee got a decree on his mortgagee and the Court opinioned that the third mortgagee cannot sell the property without paying the second mortgage. Payment was made on 22-5-'15 and on 2-10-'15 applied under R. 5 (2) for a decree for sale and the second mortgagee objected that the application was barred. *Held*, that the application was not barred, as the third mortgagee's right was suspended from 10-3-'14 to 22-5-'15, *i.e.*, the date of decree in favour of the second mortgagee and the date of payment. (*Mookerjee*, A.C.J. *and Fletcher*, J.) HEMANDRA MOHAN *v.* NORESH CHANDRA. 26 C.W.N. 376=62 I.C. 418=33 C.L.J. 260.

———O. 34, R. 5—*Limitation—Order absolute.*

An application for order absolute for sale in a mortgage suit must be made within the time prescribed by Art. 182. (*Fletcher and Richardson*, JJ.) KRISHNABAR *v.* RANAMOYI DEBI.
29 I.C. 120=19 C.W.N. 470 and 649.

———O. 34, R. 5—*Limitation—Application.*

Applications under O. 34, R. 5 are governed by Art. 181 of the Limitation Act. (*Sharfuddin and Coxe*, JJ.) BENI SINGH *v.* BARHAMDEO SINGH. 22 C.L.J. 66=28 I.C. 211=19 C.W.N. 473.

———O. 34, R. 5—*Limitation—Mortgage-decree passed before the New Code—Nature—Limitation Act, Art.* 182.

O. 34, Rr. 4 and 5 do not expressly say that mortgage decrees passed before the New Code came into operation must be regarded as preliminary decrees and that a final decree must be passed before there can be any further execution. 17 M.L.T. 424, Foll. A decree-holder in such a case can get an order absolute for sale within a period of 12 years from the date of the decree. (*Abdur Rahim and Spencer*, JJ.) BALAJI RAO SAHIB *v.* HARIRAMA CHETTY.
32 I.C. 39.

———O. 34, R. 5 (2)—*Limitation—Application for order absolute barred under by Art.* 178 *of Limitation Act.*

When an application for order absolute under S. 89, P.T. Act, is barred under Art. 178 of the Limitation Act, before 1909, O. 34, R. 5 (2) of the C. P. Code does not entitle the decree-holder to apply for a second or final decree. (*Sadasiva Iyer and Spencer*, JJ.) VEMARAJU RAMAMMA *v.* MYGOPALA NARAYANASWAMI.
22 I.C. 40=(1914) M.W.N. 251.

———O. 34, R. 5—*Limitation—Preliminary decree for sale under T. P. Act—Expiry of the time fixed for payment after the New Code*

C. P. CODE (V of 1908), O. 34, R. 5—Limitation.

came into force—Application for order absolute—Limitation.

Where in a mortgagee's suit for sale, a preliminary decree was passed under T.P. Act but the new C. P. C. having come into force before the expiry of the time fixed for the payment of the mortgage money, the mortgagee applied for a final decree under O. 34, R. 5 of the Code. *Held*, that the remedy of the mortgagee was to apply for an order absolute and that the period of limitation for the mortgagee's application was fixed by Art. 182. (*Lindsay*, J.C., *and Kanhaiya Lal*, A.J.C.) MAHOMED SHERKHAN *v.* SWAMY DAYAL. **48 I.C. 32 = 5 O.L.J. 572.**

——O. 34, R. 5—*Limitation—Application for final decree.*

The period of limitation for an application for a final decree for sale under O. 34, R. 5 of the C.P.C. should be computed from the date of the decree of the Court of the final appeal. (*Kanhaiya Lal and Daniels*, A.J.Cs.) LALLU RAM *v.* JOT SINGH. **47 I.C. 206 = 21 O.C. 176.**

——O. 34, R. 5 (2)—*Limitation—Application for decree absolute.*

An application for a decree absolute under O. 34, R. 5 (2) is an application under the Code and is governed by Art. 181. Under the Rule the right to make an application begins as soon as the period limited in the decree expires and once time begins to run, it must continue running so that if an appeal is preferred against the decree limitation for making an application for a decree absolute is not thereby extended. 38 All. 21, Foll. (*Lindsay*, J.C.) JAGDISH SINGH *v.* RAM ADHIA SINGH. **41 I.C. 858 = 20 O.C. 205.**

——O. 34, R. 5—*Limitation.*

Where an appeal is preferred from a preliminary decree, the right to apply for final decree accrues from the date of appellate decree. (*Das and Adami*, JJ.) SAIYAD JOWAD HUSSAIN *v.* GENDA SINGH. **1 P. 444 = 3 P.L.T. 329 = (1922) Pat. 164 = 1922 P. 205.**

Order Absolute.

——O. 34, R. 5—*Order absolute—Effect of.*

As soon as an order absolute for sale is made the right of sale under a decree of Court substituted for the rights under the mortgage which are thereby extinguished. (*Viscount Haldane.*) HET RAM *v.* SHADI RAM.
40 All. 407 = 45 I A. 130 = 6 P.L.W. 88 = 16 A.L J. 607 = (1918) M.W.N. 518 = 20 Bom. L.R. 798 = 22 C.W.N. 1033 = 35 M.L J 1 = 25 M.L.T. 92 = 28 C.L J. 188 = 9 L.W. 850 = 46 I.C. 798 = 12 Bur. L.T. 78 (P.C.).
[Affirming 20 I.C. 59 = 11 A.L.J. 634.]
[Also 35 I.C. 969 = 42 All. 364 (P.C.)]

C. P. CODE (V of 1908), O. 34, R. 5—Power of Court.

——O. 34, R. 5—*Order absolute—Co-heirs—Order absolute against one heir does not bind others.*

An order absolute made against a widow as mortgagor and one of her heirs brought on record after her death does not bind the other heirs, whose interests could not be sold under the decree, 25 Bom. 337; 10 M.L.J. 368, Dist. (*Richards*, C.J. *and Rafique*, J.) KUNDAN SINGH *v.* SURJA KUAR. **39 All. 67 = 37 I.C. 100 = 14 A.L.J. 989.**

——O. 34, R. 5—*Order absolute—Nature of—Order in execution and not a decree.*

Obiter.—An application for an order absolute under S. 89 of the T. P. Act is really an application to execute the decree passed under S. 88, T. P. Act and the order will itself be an order in execution and not a decree. The decree under R. 4 is a preliminary decree (*Shah and Hayward*, JJ.) MURLIDHAR *v.* VISHNU DAS. **40 Bom. 321 = 33 I.C. 749 = 18 Bom. L.R. 38.**

——O. 34, R. 5—*Order absolute—Application for.*

Where under a mortgage decree, and application for execution by way of sale is made, the prayer for sale implies also a prayer for making the decree absolute. 31 I.C. 9; 29 I.C. 237; 32 I.C. 39, Foll. (*Oldfield and Sadasiva Aiyar*, JJ.) NATESA UDAYAN *v.* ANNASAMI UDAYAN. **34 I.C. 766 = 3 L.W. 468.**

——O. 34, R. 5—*Order absolute—Preliminary decree under S. 88, T.P. Act—Order absolute after the passing of the C.P. Code—Proceedings in execution—General Clauses Act, S. 6.*

Before the C.P. Code of 1908 came into force a preliminary decree in a mortgage suit had been passed under S. 88 of the T. P. Act and on default by the judgment-debtor in payment of the decretal amount an application for an order absolute under S. 89 of the T.P. Act was made. *Held*, that the proceedings for order absolute were pending proceedings and were not therefore under S. 6 of the General Clauses Act affected by the repeal of S. 89 of the T.P. Act. Therefore the decree to be executed was the preliminary decree made absolute by the order absolute and no final decree was necessary. (*Jwala Prasad and Coutts*, JJ.) KESHA WESARINDRA SAHI *v.* DEBENDRA BALA DASSI. **4 Pat. L.J. 213 = 48 I.C. 245 = (1919) Pat. 121.**

Power of Court.

——O. 34, R. 5—*Power of Court—Sale of property.*

Neither R. 4 nor R. 5 of O. 34, C.P.C. says anything about the specification of the mortgaged property; all that R. 5 says is that the mortgaged property which the plff. is entitled to bring to sale, shall be ordered to be sold. (*Piggott and Walsh*, JJ.) UDHISTER SINGH *v.* KAUSILLA. **38 All. 393 = 34 I.C. 79 = 15 A.L.J. 502.**

C. P. CODE (V of 1908), O. 34, R. 5—Power of Court.

———O. 34, R. 5—*Power of Court—Order for sale—Direction to sell property in order.*

If a son promises that on his father's interest in the family properties being put up for the sale, an amount sufficient to satisfy the claims of the mortgagees is not recovered from the bids his interest as well as that of his father shall be put up for sale, the Court may direct that the interest of the mortgagor alone shall be put up for sale in the first instance. (*Scott*, C.J. *and Batchelor*, J.) DATTATRAYA VISHNU *v.* VISHNU NARAYAN.
36 Bom. 68=12 I.C. 949=
13 Bom. L.R. 1161.

———O. 34, R. 5—*Power of Court—Mode of execution—Receiver.*

The rights of the mortgagee under a final decree for sale cannot be interfered with by the Court in any way either by intercepting the rents and profits or by restraining the sale of the property by the appointment of a Receiver. (*Fletcher and Chatterjee*, JJ.) SITA NATH SHAH *v.* MADAN MOHAN DAS. 43 I.C. 22.

———O. 34, R. 5—*Power of Court—Sale of properties in particular order.*

The Court can prescribe by its decree, at the instance of the mortgagee, the order in which the mortgaged properties should be sold. (*Ayling and Srinivasa Iyengar*, JJ.) ARUNACHALAM CHETTY *v.* MURUGAPPA CHETTY.
20 M.L.T. 233=36 I.C. 516=4 L.W 327.

———O. 34, R. 5—*Power of Court—Court cannot extend time after final decree.*

A Court has no power to extend the time after a final decree is passed in a suit for sale. (*Dalal*, A.J.C.) GANGA RATAN *v.* CHANDIKA PRASAD. 9 O. & A.L.R. 319=1924 Oudh 179.

———O. 34, R. 5—*Power of Court—Order in which properties to be sold—Right of mortgagee.*

The Court executing a mortgage decree ought not to fetter the discretion of the decree-holder to put up to sale whatever of the mortgaged properties he wishes to sell if he has not himself prejudiced the rights of persons having equities against the mortgagor. 8 W.R. 376; 34 Cal. 13; 23 C.W.N. 808 and 17 All. 434, Foll.; 15 C.W.N. 80; 29 Mad. 435 and 35 Bom. 395, Ref. Per *Jwala Prasad*, J.—If the mortgage deed specially provides that on default of payment of the mortgage money the properties are not to be sold in a particular order it is not open to the decree-holder to change the order in enforcing payment of his money. (*Mullick and Jwala Prasad*, JJ.) JATADHARI SINGH *v.* BALDEO LAL. 81 I.C. 444=
4 Pat. L.J. 207.

Right against Stranger.

———O. 34, R. 5—*Right against stranger—Mortgagee's rights.*

A mortgagee decree-holder need not sell properties belonging to a stranger vendee before he proceeds against the properties of judgment-debtor. (*Abdur Rahim and Ayling*, JJ.) KASI KRISHNAMACHARIAR *v.* BAGIAMMAL.
22 M.L.J. 125=10 M.L.T. 528=
=12 I.C. 439 (1911) 2 M.W.N. 385.

Right of Redemption.

———O. 34, R. 5—*Right of redemption—Sale not held—Right not extinguished.*

The mortgagor's right to redeem is not lost until a sale has actually taken place in pursuance of the final decree. (*Mears*, C.J. *and Banerji*, J.) SHAH MAHADI HASAN *v.* ISMAIL HASAN.
18 A.L.J. 622=
2 U.P.L.R. (All.) 218=36 I.C. 172=
42 A. 517.

———O. 34, R. 5—*Right of redemption—Extinction of.*

In a mortgage suit so long as the properties are not brought to sale the defendant's right to redeem is not extinguished. (*Stanley*, C.J. *and Banerji*, J.) SHIAM SUNDER LAL *v.* HAR NARAYAN.
9 I.C. 158.

———O. 34, R. 5—*Right of redemption—Decree absolute for sale.*

Under O. 34, R. 5, C.P. Code, a mortgagor has no right to redeem the mortgage after a decree absolute for sale. (*Mittra*, A.J.C.) DHARAM SINGH *v.* GANESH RAM. 43 I.C. 399.

———O. 34, R. 5—*Right of redemption—Sale in execution of decree on prior mortgage—Right of a subsequent mortgagee to redeem.*

The right of a subsequent mortgagee who is a party to a suit on a prior mortgage, to redeem the prior mortgage continues only up to the date of the confirmation of the sale in execution of the decree obtained in that suit. (*Mullick*, J.) MUHAMMAD RAFI *v.* MUHAMMAD ASKARI. 1 P.L.J. 261=37 I.C. 433=
3 P.L.W. 390.

———O. 34, R. 6—

APPEAL.
APPLICATION FOR.
COMBINED DECREE.
CONSTRUCTION OF DECREE.
COSTS.
FINAL DECREE.
FORUM.
LIMITATION.
NOTICE.
OBJECT OF.
PERSONAL LIABILITY.
RIGHT TO PERSONAL DECREE.

Appeal.

———O. 34, R. 6—*Appeal—Refusal of application.*

An order refusing to make a decree under O. 34, R. 6 is a decree within S. 2, C.P.C., and an appeal from it must bear *ad valorem* Court-fees calculated on the subject-matter of the

C. P. CODE (V of 1908), O. 34, R. 6—Appeal.

appeal. (*Richards*, C.J. *and Banerji*, J.) MUHAMMAD NIFAT HUSAIN *v.* ALLIMUNNISSA. 40 All. 583=47 I.C. 561=16 A.L.J. 438.

———O. 34, R. 6—*Appeal—Decree—Court-fee.*

A decree under O. 34, R. 6, C. P. Code, is a decree within S. 2 (2). *Ad valorem* court-fee must be paid in a memorandum of appeal against it. (*Tudball*, J.) TAJAMMAL HUSAIN KHAN *v.* MUHAMMAD HUSAIN KHAN.
38 I.C. 188=14 A.L.J. 328.

———O. 34, R. 6—*Appeal—Decree—Court-fee.*

An order under O. 34, R. 6 being a decree, an appeal from such an order is an appeal from a decree. On the memorandum of such an appeal *ad valorem* court-fee must be paid. (*Mookerjee and Beachcroft*, JJ.) LAKHI NARAIN JAGDEO *v.* KRITHIBAS DAS.
19 I.C. 971=18 C.L.J. 133.

———O. 34, R. 6—*Appeal—Court-fee.*

An *Ad valorem* fee is payable in appeals against decrees passed under O. 34, R. 6 of the C. P. C. (*Stuart*, A. J. C.) WASI ALI *v.* JANG BAHADUR SINGH. 30 I.C. 497=18 O.C. 121.

Application for.

———O. 34, R. 6—*Application for—Applications for execution.*

An application for attachment of property in no way resembles an application under S. 90, T. P. Act. (*Coxe and Ray*, JJ.) JNANENDRA NATH BOSE *v.* KHULNA LOAN CO., LTD.
24 I.C. 35=18 C.W.N. 492.

———O. 34, R. 6—*Application for—If mortgagor can raise objection not adjudicated in suit.*

Where a mortgage decree made no mention of the plff.'s right to proceed under O. 34, R. 6, *held*, that in an application under O. 34, R. 6, the deft. was not estopped from objecting that part of the decree amount was barred at the time of the suit, inasmuch as it had not been adjudicated upon in the suit. (*Mullick and Thornhill*, JJ.) BAUKAI SAHU *v.* MOSAHEB ALI. 46 I.C. 892.

Combined Decree.

———O. 34, R. 6—*Combined decree—Validity of T. P. Act, S. 90—Mortgage—Decree for sale—Personal decree for balance if unrealised—Compromise decree, if can be passed.*

Under S. 90 of the T. P. Act it is not a condition precedent to the making of a personal decree for the balance of the mortgage money, that the mortgaged properties should have been sold and the proceeds found insufficient to satisfy the debt. It is open to the Court to provide in a decree for sale, that if the proceeds of sale are not sufficient to cover the amount

C.P. CODE (V of 1908), O. 34, R. 6—Combined Decree.

of the mortgage debt together with interest, the deft. shall pay the balance personally-(*Lord Buckmaster.*) JEUNA BAHA *v.* PAR, MESHWAR NARAYAN MAHTHA.
47 Cal. 870=36 M.L.J. 215=17 A.L.J. 207=23 C.W.N. 490=25 M.L.T. 278=29 C.L.J. 443=21 Bom. L.R. 589=10 L.W. 26=(1919) M.W.N. 347=12 Bur. L.T. 80=49 I.C. 620=46 I.A. 294 (P. C.)

——— O. 34, R. 6—*Combined decree—Personal decree against mortgagor—Form of.*

Where there is a personal covenant in a mortgage-deed, the proper form of the decree is to direct that if the net proceeds of the sale are insufficient to pay the amount due to the plaintiff, then the plaintiff to be at liberty to apply for a personal decree against the defendants for the amount of the deficit. It is not proper to direct that in default of payment of the decretal amount the plaintiff is to be at liberty to recover the same by applying for sale of the mortgaged property or sufficient portion thereof. (*Macleod*, C. J. *and Shah*, J.) KESHAV MANJA BHAT *v.* GOVIND NAGA BHAT. 24 Bom. L.R. 843=1923 Bom. 32.

———O. 34, R. 6—*Combined decree—Preliminary decree—Direction as to personal liability—No mention of personal liability in final decree—Effect of.*

The preliminary decree for sale of the mortgaged property contained a direction that if the whole amount was not realised by sale of the mortgaged properties, for the rest of the claim, if legally realisable, the mortgagor would be liable. In the final decree there was no provision for any personal decree. *Held*, that the preliminary decree was not a composite decree allowing the decree-holder to proceed against other properties of the judgment-debtor. It merely said that he might proceed if he was legally entitled to do so thus leaving it for future decision whether the decree-holder was legally entitled to obtain such a decree. (*Walmsley and Huda*, JJ.) SITANATH SHAH BANIK *v.* MADAN MOHANDAS. 33 I.C. 904=23 C.W.N. 924.

———O. 34, R. 6—*Combined decree—Execution.*

The executing Court cannot enter into the question whether the deft. is personally liable when the decree awards a personal remedy in case sale-proceeds of the mortgaged property do not suffice. (*Johnstone*, C.J.) MADHOO MAL *v.* MUHAMMAD ZAKARIA.
32 I.C. 820=75 P.W.R. 1916.

———O. 34, R. 6—*Combined decree—Legality of.*

A conditional decree under O. 34, R. 6 can be passed in the mortgage suit itself without waiting for the mortgaged property to be sold to ascertain if any balance would be left over.

C. P. CODE (V of 1908), O. 34, R. 6—Combined Decree.

23 C.W.N. 490 (P. C.), Foll. (*Oldfield and Krishnan, JJ.*) KANDASWAMI GOUNDEN *v.* KUPPA MOOPAN. **43 Mad. 421 = 38 M.L.J. 203 = 11 L.W. 221 = (1920) M.W.N. 181 = 55 I.C. 320 = 27 M.L.T. 96.**

———**O. 34. R. 6**—*Combined decree—Application for personal decree—T. P. Act, S. 90.*

A combined decree directing the mortgagors "do pay" any deficiency arising after the proceeds of sale are applied towards the mortgage amount, is irregular but not void. A fresh application under O. 34, R. 6, C. P. C. is unnecessary. 21 M.L.J. 1036; 32 Mad. 534; 16 C.L.J. 318, Ref. (*Abdur Rahim and Kumaraswami Sastri, JJ.*) NARAYANA IYER *v.* SINGARAVELU VANNIAN. **33 M.L.J. 543 = (1917) M.W.N. 845 = 42 I.C. 282 = 6 L.W. 675.**

———**O. 34, R. 6**—*Combined decree—Application unnecessary.*

Where a decree directs payment of the decree amount within a fixed time and orders the property to be sold in default, the decree is not merely a mortgage decree but also a money decree, and no further order under O. 34, R. 6 is necessary. (*Sankaran Nair and Ayling, JJ.*) CHARUVALATH KUNHANARI *v.* THEYYATATH KORAN. **25 I.C. 80 = (1914) M.W.N. 497.**

———**O. 34, R. 6**—*Combined decree—Mortgage decree not in accordance with S. 89, T. P. Act—Personal remedy before sale—Whether can be questioned in execution proceedings.*

A mortgage decree giving a personal remedy before the sale of the mortgaged property though irregular under S. 89, T. P. Act, cannot be questioned in execution proceedings. (*Wallis and Sadasiva Iyer, JJ.*) KUMARA VENKATA PERUMAL RAJA BAHADUR VARU *v.* VELAYUDA REDDI. **24 I.C. 195 = 27 M.L.J. 25.**

——**O. 34, R. 6**—*Combined decree—"Do pay"—Effect—Personal decree also.*

If the words "do pay" are used in a mortgage decree the decree-holder can proceed against the person of the deft. even before bringing the mortgaged property to sale. (*Sadasiva Aiyar and Spencer, JJ.*) MUTHUKARUPPAN CHETTIAR *v.* CHINNASWAMY PILLAI. **22 I.C. 293 = (1914) M.W.N. 152.**

——**O. 34, R. 6**—*Combined decree—Execution against other properties abandoning hypotheca.*

A combined decree cannot be construed as giving the decree-holder a right to abandon his claim against the hypotheca and proceed against the other property of the debtor in the first instance. 29 All. 369; 31 Bom. 244, Ref. *Sadasiva Aiyar and Spencer, JJ.*) VARADIAH *v.* KUMARA VENKATA PERUMAL. **14 M.L.T. 530 = 26 M.L.J. 83 = 21 I.C. 782 = (1914) M.W.N. 157.**

C.P. CODE (V of 1908), O. 34, R. 6—Costs.

——**O. 34, R. 6**—*Combined decree—Effect of—Fresh decree unnecessary.*

Where a Court for some reason or other passes a combined decree under O. 34, Rr. 4 and 6, C. P. C., a separate decree under R. 6 is not necessary. (*Stuart and Kanhaiya Lal, A.J. Cs.*) DEPUTY COMMISSIONER, FYZABAD, FOR AJODYA ESTATE *v.* SANT BAKHSH PATHAK. **1 O. L. J. 742 = 27 I. C. 72 = 18 O. C. 55.**

———**O. 34, R. 6**—*Combined decree—Decree for sale of mortgaged property and personal decree against the property.*

A fresh decree under O. 34, R. 6 is unnecessary if the decree passed is both a decree for sale of the mortgaged property and a personal decree against other property of the judgment-debtor. (*Stuart and Kanhaiya Lal, A.J. Cs.*) BISHESHAR BUKHSH SINGH *v.* DEBI BAKHSH SINGH. **25 I.C. 121 = 17 O.C. 153.**

——**O. 34, R. 6**—*Combined decree—Personal remedy—Remedy against property.*

There is no absolute rule preventing a mortgagee from obtaining a decree comprising both an independent personal remedy and remedies against the mortgaged property. And in such a case the decree-holder is entitled to enforce the personal remedy before applying for enforcement of the decree against the mortgaged properties. (*Hayward, J.C. and Waley Cohen, A.J.C.*) TOTAL DAS *v.* UTUMAL. **10 I.C. 975 = 4 S.L.R. 244.**

Construction of Decree.

——**O. 34, R. 6**—*Construction of decree—Mortgage—Suit for sale—No direction for sale—Decree giving only a charge.*

In a suit brought to enforce a mortgage and for sale the decree merely declared the amount due to be a charge on the mortgaged properties. *Held*, that the decree must be construed to be a mortgage decree directing the sale of the mortgaged properties and that O. 34, R. 6 was applicable thereto. 20 Mad. 78; 26 Cal. 166; 25 Cal. 580; 24 Cal. 473; 17 M.L.J. 201; 31 Cal. 95, Ref. (*Oldfield and Sadasiva Iyer, JJ.*) MUHAMMAD HUSSAIN *v.* MUTHU CHETTIAR. **30 I.C. 280 = 2 L.W. 689.**

Costs.

———**O. 34, R. 6**—*Costs—Personal decree—Mode of execution.*

A mortgage decree-holder can realize his decree for costs otherwise than by proceeding under S. 90, T. P. Act, if the Court has passed a personal decree for costs. 35 Cal. 431; 20 All. 523; (*Jenkins, C.J. and Chapman, J.*) MOHUNGA OJHA *v.* RAM BAHADUR SINGH. **15 I.C. 23 = 16 C.W.N. 731.**

———**O. 34, R. 6**—*Costs—Right of mortgagee to personal decree for costs.*

Under O. 34, R. 6, the successful mortgagee is entitled to have a personal decree for the

C. P. CODE (V of 1908), O. 34, R. 6—Costs.

amount of costs when the mortgaged property has been sold and found insufficient. 30 Mad. 461, Foll. (*Benson*, O.C.J. *and Napier*, J.) KOMANDUR KAMALAMMAL *v.* KOMANDUR NARASIMHACHARLU. 12 M.L.T. 312=17 I.C. 244=(1913) M.W.N. 139.

——O. 34, R. 6—*Costs—Personal liability.*

The costs under a decree for sale on foot of a mortgage are a part of the mortgage-debt and are recoverable from the mortgaged property and not personally from the debtor unless the decree so directs. If the property proves insufficient, the mortgagee may apply for a personal decree. (*Mullick and Atkinson*, JJ.) MATUKDHARI SINGH *v.* RAMDAS SINGH. 38 I.C. 214=2 P.L.J. 51.

Final Decree.

——O. 34. Rr. 6 and 8—*Final decree—Interest—Agreement to pay.*

A mortgage decree did not provide for interest after the period of grace. The decree-holder added interest after that in an execution application. The judgment-debtor applied for extension of time to pay the amount whereby he agreed to pay the interest. The agreement was held to be valid. (*Mookerjee and Beachcroft*, JJ.) GOKHAI PADHAN *v.* GONES LAL PANDIT. 17 C.W.N. 865=17 I.C. 936=16 C.L.J. 404.

Forum.

——O. 34, R. 6—*Forum—Supplementary decree.*

The Court to which a decree for the sale of immoveable property is transferred for execution cannot pass the supplementary decree. The Court in which the mortgage suit was originally instituted alone can pass it. (*Seshagiri Aiyar and Bakewell*, JJ.) THIRUMALAI *v.* EASTERN DEVELOPMENT CORPORATION. (1918) M.W.N. 4=33 M.L.J. 382=42 I.C. 953=22 M.L.T. 257.

Limitation.

——O. 34, R. 6—*Limitation—Personal decree.*

A personal decree under O. 34, R. 6 can be passed within 6 years of the date provided in the mortgage bond for payment. (*Rofique and Piggott*, JJ.) MAKRANSINGH *v.* KALLU SINGH. 17 A.L.J. 647=30 I.C. 640=1 U.P.L.R. (H.C.) 73.

——O. 34, R. 6—*Limitation.*

Art. 181 of the Limitation Act does not apply to an application either under R. 6 or to R. 2 of O. 34, C. P. C. (*Holmwood and Chapman*, JJ.) BISHWAMBHAR SAHA *v.* RAM SUNDAR KAIBARTA DAS. 30 I.C. 719=42 Cal. 294.

——O. 34, R. 6—*Limitation—Personal covenant—Decree on.*

Where there is a covenant to pay a mortgage debt on a particular date the mortgagee is entitled to a personal decree, even though the covenant for payment is followed by a direction that in default of payment the debt may be recovered from the hypothecated property. An application for a personal decree may be made even after 6 years from the date of bond provided the suit has been filed within six years from the date of the bond. (*Oldfield and Tyabji*, JJ.) ARASALWAR PERIA TIRUWADI AIYANGAR *v.* MUTHAMMAL JANAKI. 27 I.C. 770=2 L.W. 66.

——O. 34, R. 6—*Limitation—Limitation Act, Arts.* 181 *and* 182—*Application for personal decree.*

An application to make a personal decree against the mortgagor is not an application for execution of the decree. Art. 181 applies to such application and not Art. 182. (*Miller and Sankaran Nair*, JJ.) RAMA VENKATASUBBA IYER *v.* SHANMUKAM PILLAI. 21 I.C. 830=(1913) M.W.N. 867.

——O. 34, R. 6—*Limitation—Limitation Act, Art.* 181—*Decision binding.*

An application under O. 34, R. 6, C.P.C., is governed by Art. 181 of the Limitation Act. A Court cannot pass a decree under this rule without an application by the plff. and on such application being made, the Court has first to decide whether there is a personal covenant to pay and then whether the claim to enforce such covenant is within time. 42 Cal. 294, Diss. No application under S. 90, T.P. Act, can be made, after the parties have obtained a Court's decision as to whether a claim for personal decree is within time. In granting a supplementary decree the Court has to consider not whether the application under S. 90 is barred but whether the personal remedy was barred. The application under S. 90 of the T.P. Act is barred if brought 3 years after the sale is confirmed. (*Prideaux and Mittra*, A.J.Cs.) CHUNNI LAL *v.* TIKAM DAS. 39 I.C. 854=13 N.L.R. 76.

——O. 34, R. 6—*Limitation—Limitation Act, Art.* 181.

An application under O. 34, R. 6 is an application in execution and is governed by Art. 181 of the Limitation Act. (*Evans*, A.J.C.) AMIR CHAND *v.* NARSINGH NARAIN. 10 I.C. 21.

Notice.

——O. 34, R. 6—*Notice—Judgment-debtor.*

Before making a decree under the rule, it is right to issue notice to the judgment-debtor to show cause, except possibly in cases where the judgment and preliminary decree have expressly made him personally liable. (*Fox*, C.J.) BADIR RAHIMAN CHOWDRY *v.* M. N. R. R. M. M. CHETTY FIRM. 8 L.B.R. 460=35 I.C. 288=9 Bur. L.T. 255.

——O. 34, R. 6—*Notice—Decree remaining unsatisfied party—Notice to judgment-debtor, whether necessary.*

Where the Court has to decide whether the execution of the decree should proceed without-

C.P. CODE (V of 1908), O. 34, R. 6—Object of.

a supplemental decree under O. 34, R. 6 of C.P.C. the order without notice to judgment-debtor, directing the execution to issue cannot be supported. (*Mookerjee and Panton*, JJ.) ILIMMOLLA *v.* MANINDRA MOHAN.
56 I.C. 801=31 C.L.J. 382.

Object of.

———O. 34, R. 6—*Object of — Personal decree against mortgagor—Form of.*

Where there is a personal covenant in a mortgage-deed, the proper form of the decree is to direct that if the net proceeds of the sale are insufficient to pay the amount due to the plaintiff, then the plaintiff to be at liberty to apply for a personal decree against the defendants for the amount of the deficit. It is not proper to direct that in default of payment of the decretal amount the plaintiff is to be at liberty to recover the same by applying for sale of the mortgaged property or sufficient portion thereof. (*Macleod*, C.J. *and Shah*, J.) KESHAV MANJA BHAT *v.* GOVIND NAGA BHAT.
24 Bom. L.R. 843=1923 Bom. 32.

———O. 34, R. 6—*Object of.*

The object of O. 34, R. 6 is to benefit the mortgagor and if he waives his right by consenting to a money decree being passed he cannot subsequently object to the mortgage property being attached and sold in an execution of such decree. (*Abdur Rahim and Ayling*, JJ.) APPANDA MUDALY *v.* RAGHUTHAMBY AMMANI. **(1911) 1 M.W.N. 147=9 I.C. 939 =9 M.L.T. 261.**

Personal Liability.

———O. 34, R. 6—*Personal liability—Purchaser from mortgagor.*

The purchaser of an equity of redemption who, by agreement, with his vendor, (the mortgagor) retains the amount of the mortgage debt out of the price due, is not personally liable to the mortgagee in respect of the mortgage date. Consequently a personal decree under S. 90 of the T.P. Act (O. 34, R. 6) could not be passed against the purchaser. (*Lord Macnaughten.*) JAMNA DAS *v.* RAM AUTAR.
34 All. 63=39 I.A. 7=16 C.W.N. 97= 11 M.L.T 6=9 A.L.J. 87= (1912) M.W.N. 32=15 C.L.J. 68= 14 Bom. L.R. 1=13 I.C. 304= 21 M.L.J. 1158 (P.C.).
[Affirming 31 All. 352=2 I.C. 460=6 A.L.J. 427.]

———O. 34, R. 6—*Personal liability—Costs.*

An unsuccessful appellant mortgagor must in any event personally pay the costs of appeal, but the mortgagee can also add it to the security. (*Piggott and Walsh*, JJ.) AINA BIBI *v.* RAMA SHANKAR MISER. **41 All. 473= 20 I.C. 730=17 A.L.J. 582.**

———O. 34, R. 6—*Personal liability — Vendee—Sale—Free from encumbrance.*

C. P. CODE (V of 1908), O. 34, R. 6—Personal Liability.

Where money is left with the vendee of encumbered immoveable property for the purposes of discharging the encumbrance there is no trust created in favour of the mortgagee because his rights to proceed against the property are in no way affected by the sale. (*Richards*, C. J. *and Rafique*, J.) JAMNA DAS *v.* RAM AUTAR PANDE. **38 All. 209=38 I.C. 351= 14 A.L.J. 151.**

———O. 34, R. 6—*Personal liability.*

A decree-holder does not acquire any right over the other property of the judgment-debtor excepting the mortgaged one when in the decree on the mortgaged suit the direction of selling the property was held to cover only the dues after the default of payment of certain number of instalments was incurred. (*Macleod and Heaton*, JJ.) JANARDHAN SHANKAR BALKRISHNA BHALI *v.* KRISHNAJI.
58 I.C. 877=22 Bom. L.R. 988.

———O. 34, R. 6—*Personal liability—Scope of.*

The personal liability of a mortgagor arises only after first exhausting all remedies against the person of the mortgagor but this does not mean that in a case where a portion of the mortgaged property is destroyed there can be no personal liability. (*Mookerji and Rankin*, JJ.) CHAND MALL BABU *v.* BAN BEHARI BOSE. **50 Cal. 718=1924 Cal. 209.**

———O. 34, R. 6—*Personal liability—Transfer and redemption of mortgage—Covenants for payment of debt—Appellate Court—Power to pass decree.*

Where the mortgagor covenants to transfer the hypothecated properties indefeasibly to the mortgagee, with the usual clause for redemption, and further covenants to pay the mortgage-debt with interest to the mortgagee, his heirs and assigns, the latter clause is a personal covenant to pay out of properties other than the hypothecated properties, as the latter clause would be entirely superfluous, if the parties had no intention that the mortgagor should be personally liable to pay to the mortgagee the money due to him. Therefore in such cases the mortgagee is entitled to a decree for sale but also to a personal decree against the mortgagor. 10 Cal. 740; 16 Cal. 540, Dist. A personal decree can be made against the mortgagor at the appellate stage. 47 Cal. 370, Foll. (*Mookerjee and Buckland*, JJ.) ASKARAN BOID *v.* GOBORDHAN KOBRA.
26 C.W.N. 318=1922 Cal. 52.

———O. 34, R. 6—*Personal liability — Restriction on—Whether valid.*

A Court cannot direct in a mortgage decree that no property other than the mortgaged property shall be proceeded against. The question whether other property can be proceeded against should be left to be determined in an application if any made under O. 34, R. 6 of the C.P.C. (*Teunon*, J.) PITAMBAR *v.* CHANDICHARAN HALDAR. **28 I.C. 389.**

C. P. CODE (V of 1908), O. 34, R. 6—Personal Liability.

———O. 34, R. 6—*Personal liability—Purchasers of equity of redemption.*

A personal decree cannot be made against the purchasers of the equity of redemption. (*Mookerjee and Holmwood, JJ.*) TARACHAND MARWARI *v.* BROJO GOPAL MUKERJI.
17 C.W.N. 457=18 I.C. 747=17 C.L.J. 120.

———O. 34, R. 6—*Personal liability—Puisne mortgagee—Holder of equity of redemption.*

A puisne mortgagee as holder of the equity of redemption cannot be held to be personally liable for the re-payment of the mortgage-debt, which is primarily payable by the mortgagors. (*Mookerjee and Beachcroft, JJ.*) DALIP NARAYAN SINGH *v.* CHAIT NARAIN SINGH.
17 I.C. 927=16 C.L.J. 394.

———O. 34, R. 6—*Personal liability—Manager of joint family—Decree against assets—Form of.*

On a mortgage executed by the father and uncle in a joint Hindu family the mortgagee prayed for a decree against the deft. personally and the land mortgaged. There was no necessity for the mortgage. *Held*, that the mortgagee was not entitled to a decree personally against defts. who were liable only to the extent of assets of the mortgagors in their hands. In the absence of any necessity, the decretal amount could not be made an express charge on the land. (*Rattigan and Leslie Jones, JJ.*) ARURA *v.* BALAK RAM.
157 P.L.R. 1915=30 I.C. 528=147 P.W.R. 1915.

———O. 34, R. 6—*Personal liability—"Do pay."*

Where a mortgage decree directs that defts. "do pay" they are *prima facie* personally liable. (*Sadasiva Iyer and Phillips, JJ.*) ZAMINDAR OF KARVETNAGAR *v* SUBBARAYA PILLAI. (1918) M.W.N. 146=43 I.C. 871=7 L.W. 36.

———O. 34, R. 6—*Personal liability—Presumption—Decree—Form of.*

The personal liability of the mortgagor to pay the mortgage money is ordinarily presumed to exist in the absence of a contract to the contrary. 29 Mad. 491, Rel. A mortgage decree should conform to the form prescribed in Appendix D. The right to proceed against the person must be specifically reserved by the decree itself. (*Spencer and Seshagiri Aiyar, JJ.*) SURI MARKENDEYA SASTRI *v.* GOTTUMUKKULA SUBHA NANBRA CHARYALU.
42 I.C. 288=6 L.W. 692.

———O. 34, R. 6—*Personal liability—Purchaser of property.*

A purchaser is not personally liable for the deficiency when the sale proceeds do not cover the costs and mortgage money. "Deft." under

C. P. CODE (V of 1908), O. 34, R. 6—Right to Personal Decree.

the rule means only the mortgagor. (*Oldfield and Naiper, JJ.*) VENUGOPALA CHARIAR *v.* PADMANABHA ROW.
30 I.C. 188.
29 M.L.J. 120=

———O. 34, R. 6—*Personal liability—Mortgage decree against two defendants—Private sale by one defendant to decree-holder for part of decretal money—Whether application for personal decree against both competent.*

Where a mortgage decree is passed against two defts. one of whom sold the property to the decree-holder in private sale, in part adjustment of the decree, a decree under O. 34, R. 6 can be passed against that deft. but not against the other. 2 A.L.J. 353, Dist. (*Sankaran Nair and Ayling, JJ.*) SRINIVASA AIYANGAR *v.* KANDASWAMY NAICKER. 16 M.L.T. 235=1 L.W. 294=26 M.L.J. 375=23 I.C. 844=(1914) M.W.N. 316.

———O. 34, R. 6—*Personal liability—Extent of.*

A relief claimed, under O. 34, R. 6, C. P. C. against a defendant includes a relief against any property in his possession. (*Stuart and Kanhaiya Lal, A. J. Cs.*) DEPUTY COMMISSIONER, FYZABAD, FOR AJODHYA ESTATE *v.* SANT BAKSH PATHAK. 1 O.L.J. 742=27 I.C. 72=18 O.C. 55.

———O. 34, R. 6—*Personal liability—Ex parte decree on—Court can set aside.*

A Court can set aside an *ex parte* decree, passed by oversight under O. 34, R. 6, as against that person who is not the mortgagor. (*Jwala Prasad, J.*) HANUMALAL *v.* RAM PEARI KOER. 60 I.C. 368=2 Pat. L.T. 251.

———O. 34, R. 6—*Personal liability—Compromise decree—Making other properties liable—Effect of.*

A formal order under O. 34, R. 6 of the C.P. Code is a necessary preliminary to proceed against properties not covered by a mortgage even where the original decree is a compromise decree declaring that the judgment-debtor's other properties are to be liable in the event of the mortgaged properties not realizing sufficient to cover the decretal amount. (*Roe and Jwala Prasad, JJ.*) KARIMULLA SHAH *v.* MIZA MUHAMMAD RAZA. 48 I.C. 608=3 Pat. L.J. 649.

Right to Personal Decree.

———O. 34, R. 6—*Right to personal decree—Money decree—Effect of no challenging.*

Where a preliminary decree for sale obtained by a mortgagee was declared invalid on the ground that the mortgagor as a member of a joint family was not entitled to mortgage the properties in the absence of a legal necessity and thereupon the mortgagee obtained a decree under O. 34, R. 6 for the money due and this was not objected to or challenged in appeal by the mortgagee, the purchaser of the property

C. P. CODE (V of 1908), O. 34, R. 6—Right to Personal Decree.

in execution obtains a good title. (*Walsh and Ryves, JJ.*) TEJA *v.* TIKA RAM.
21 A.L.J. 784=L.R. 4 A. Civ. 522=46 All. 32=1924 All. 225 (2).

———O. 34, R. 6—*Right to personal decree—Decree for sale not executed.*

If a mortgagee obtains a decree for sale but fails to execute it, he cannot apply under O. 34, R. 6 to obtain a decree over, as the property under that rule should be put to sale in execution of the decree before an application under its provisions can be made. (*Tudball and Sulaiman, JJ.*) DARBARI LAL *v.* MULA SINGH. 42 All. 519=18 A.L.J. 628=66 I C. 139=2 U.P.L.R. (All.) 160.

———O. 34, R. 6—*Right to personal decree—Ex parte—Liability of.*

Personal decree under S. 90 of the T. P. Act obtained without informing Court of previous refusal to grant such decree cannot be set aside as fraudulent. (*Richards, C.J. and Rafique, J.*) RAM RATAN LAL *v.* BHURI BEGUM. 38 All. 7=30 I.C. 792=13 A.L.J. 901.

———O. 34, R. 6—*Right to personal decree—Laches.*

If a person entitled to bring the property to sale under a decree neglects and allows a third person having no such right to sell a portion of the property, he cannot be allowed to come in afterwards under O. 34, R. 6. 25 All. 79; 28 All. 19, Dist. (*Lyle, J.*) SHYAM LAL *v* SHEO BARAN SINGH. 20 I.C. 320.

———O. 34, R. 6—*Right to personal decree.*

A personal decree against the mortgagor can be granted only when the mortgaged property has been sold and the proceeds are found to be insufficient to cover the mortgage-debt and not in a case where the mortgagor is found to have no rights in the property even before sale. 9 I. C. 752, Diss.; 29 All. 260, Foll. (*Chamier, J.*) BEHARAY LAL *v.* BASHESHAR DAYAL.
14 I.C. 691=9 A.L.J. 869.

———O. 34, R. 6—*Right to personal decree—Amount realised in mortgage decree not sufficient—Decree against the heirs to the extent of assets.*

Where the amount realized under a mortgage decree was not sufficient to satisfy the decree and the decree-holders applied under O. 34, R. 6 for a decree against the assets of the deceased in the hands of the sons. *Held*, that they were entitled to such a decree. (*Karamat Husain and Tudball, JJ.*) BARU MAL *v.* SHER SINGH. 14 I.C. 55 (1).

———O. 34, R. 6—*Right to personal decree—Insolvency of mortgagor.*

Where during the pendency of an action by a secured creditor, the deft. is declared an insolvent, the creditor can still proceed against the security under S. 16 (5) of the Prov. Insol. Act, but if the security does not pay the amount due to him, he cannot obtain a decree

C. P. CODE (V of 1908), O. 34, R. 6—Right to Personal Decree.

for the balance under O. 34, R. 6, C.P.C. (*Karamat Hussain and Chamier, JJ.*) MAMRAJ *v.* BIR LAL. 34 All. 106=12 I C 587=8 A.L.J. 1241.

———O. 34, R. 6—*Right to personal decree barred—Rights of mortgagee.*

Where a mortgage decree gives the mortgagee a remedy against the mortgaged properties the personal remedy on the money claim against the mortgagor being barred, the only way in which the mortgagee can recover the money is by sale of the mortgaged property. (*Macleod, C. J. and Coyajee, J.*) HANMANT TIMAJ DESAI *v.* RAGAVENDRA RAO.
24 Bom. L.R. 410=46 Bom. 848=1922 Bom. 237.

———O. 34, R. 6—*Right to personal decree—Personal remedy, when enforceable.*

A personal decree can be obtained only after the mortgaged property is brought to sale under the final decree, but not before a final decree is passed. (*Graves, J.*) JOGEMAYA DASSI *v.* BAIDYANATH PRAMANICK. 50 I.C. 924=46 Cal. 245.

———O. 34, R. 6—*Right to personal decree—Omission to sell hypotheca.*

A Court had discretion to give or refuse the relief under O. 34, R. 6 to a person who is entitled to put the property to sale under a decree but who deliberately neglects to do so. The object of the rule requiring the mortgagee to completely sell the hypotheca before obtaining a personal decree is that the personal liability of the mortgagor should not be improperly increased. It is not, however, the law that a personal decree cannot be obtained in any case where the whole of the property directed to be sold has not been sold whatever the cause may be. If a portion of the hypotheca has since the date of the decree become destroyed or become not available for sale by the action of other claimants and not through the acts or default of the mortgagee, the latter can obtain a personal decree against the mortgagor. 33 Cal. 890; 22 All. 404, Ref. (*Sanderson, C.J. and Woodroffe, J.*) SATISH RANJAN DAS *v.* MERCANTILE BANK OF INDIA.
48 I C. 322=45 Cal. 702.

———O. 34, R. 6—*Right to personal decree—Hypotheca to be sold—Execution against other properties of mortgagor, when permissible.*

A mortgage decree-holder cannot be allowed to execute his decree against other properties of the mortgagor before exhausting the mortgaged properties and without obtaining an order under S. 90, T.P. Act. 27 Cal. 285; 10 All. 632; 33 Cal. 890, Rel. on. (*Chowdhuri, J.*) SURJO KUMAR KARFORMA *v.* PROMOD SUNDARI DABEE. 20 I.C. 829=17 C.W.N. 1039.

———O. 34, R. 6—*Right to personal decree—Second decree.*

A personal decree can be obtained only once against the mortgagor. 7 C.W.N, 744; 29 All

C. P. CODE (V of 1908), O. 34, R. 6—Right to Personal Decree.

12, Foll. The proceeds realised by the sale of mortgaged property in execution of a decree for sale should be insufficient. The balance should be legally recoverable from the mortgagor otherwise than from the property sold. A personal decree has not previously been made. These conditions must be satisfied before a decree under S. 90, T.P. Act can be passed. 33 Cal. 867, Foll. (*Mookerjee and Holmwood, JJ.*) DINABANDHU NANDI *v.* MASHUD KHATUN.
17 I.C. 263 = 16 C.L.J. 318.

——**O. 34, R. 6**—*Right to personal decree.*

A decree under O. 34, R. 6, C.P.C., can be made only when it is found that the sale of the hypothecated properties is insufficient to satisfy the judgment-debt. Till that stage is reached, no question of personal liability arises. At the preliminary stage of the suit no personal decree can be made in favour of the plff. in addition to the decree for sale of the hypothecated properties. (*Mookerjee and Carnduff, JJ.*) MAHAMAYA PROSAD SINGH *v.* RAM KHELWAN SINGH. **15 I.C. 911 = 15 C.L.J. 684.**

——**O. 34, R. 6**—*Right to personal decree—Omission to proceed against portion of mortgaged property—Effect.*

The mortgagee relinquishing a portion of the hypotheca is not entitled to a personal decree inasmuch as he has not exhausted his remedy in respect of all the items of the mortgaged property. Per *Seshagiri Aiyar, J.*—The personal remedy should be enforced only when there is a deficiency after the sale of all the mortgaged property available for sale. (*Oldfield and Seshagiri Aiyar, JJ.*) ARUNACHALA VELAN *v.* VENKATARAMA AIYAR. **38 M.L.J. 93 = 26 M.L.T 192 = 51 I.C. 34 = 9 L W. 538.**

——**O. 34, R. 6**—*Right to personal decree—Decree declaring right of prior and puisne mortgagees to apply for sale.*

Where in a suit for sale brought by a puisne mortgagee against the mortgagor and the prior mortgagee, a decree is passed by which both the prior and the puisne mortgagee are declared entitled to apply for the sale of the mortgaged properties, both can apply for a personal decree. *Seshagiri Aiyar and Bakewell, JJ.*) THIRU MALAI KONDAMAKONDALA *v.* EASTERN DEVELOPMENT CORPORATION.
33 M L.J. 382 = 22 M.L.T. 257 = 42 I.C. 953 = (1918) M.W.N. 4.

——**O. 34, R. 6**—*Right to personal decree—When entitled to proceed against properties other than mortgaged property.*

A holder of a mortgage decree cannot proceed against other properties than the mortgaged property unless the judgment-debtor has no saleable interest in that property. A mortgage decree directing payment by a certain date and ordering in default, sale of the mortgaged property is a personal decree so that the person and other property of the judgment-debtor can be proceeded against without obtaining a decree

C. P. CODE (V of 1908), O. 34, R. 6—Right to Personal Decree.

under O. 34, R. 6 of the C.P.C. (*Sadasiva Aiyar and Spencer, JJ.*) PERIASAWMI KONE *v.* MUTHIA CHETTIAR. **38 Mad. 677 = 23 I.C. 515 = 16 M.L.T. 232.**

——**O. 34, R. 6**—*Right to personal decree—Suit for personal decree, if lies.*

After an application for personal decree is disallowed under O. 34, R. 6, no separate suit to enforce the personal remedy provided by S. 68 of the Transfer of Property Act is maintainable. R. 6 covers cases where mortgaged property cannot be sold at all for any reason other than the wrongful act of the mortgagor. (*Stuart and Kanhaiya Lal, JJ.*) BRIJ BEHARI LAL *v.* INDARPAL SINGH. **23 O.C. 145 = 37 I.C. 967 = 2 U.P.L.R. (J.C.) 139.**

——**O. 34, R. 6**—*Right to personal decree—Puisne mortgagee.*

A puisne mortgagee who has partly satisfied himself from surplus of proceeds of a sale in execution of a prior mortgage decree could subsequently sue the mortgagor for the balance under O. 34, R. 6 and obtain decree against his person as well as his other property. 22 All. 404; 33 Cal. 890, Diss.; 31 All. 373, Dist. (*Stuart and Kanhaiya Lal, A.J. Cs.*) WASI ALI *v.* JANG BAHADUR SINGH. **34 I.C. 48 = 2 O.L.J. 614.**

——**O. 34, R. 6**—*Right to personal decree.*

A mortgagor cannot be proceeded against personally till the whole of the mortgage security has been sold and another decree for the balance has been obtained. (*Kanhaiya Lal and Sabonadiere, A.J.Cs.*) NAWAB MIRZA MUHAMMAD HUSSAIN KHAN *v.* AMAR CHAND PAUL. **21 I.C. 283 = 16 O.C. 238.**

——**O. 34, R. 6**—*Right to personal decree—Security unsaleable.*

Where the mortgaged property is found to be unsaleable an application for personal decree may be maintained. (*Evans, A.J.C.*) SHEO DIN *v.* BHAWANI BAKSH. **9 I.C. 752 13 O.C. 62.**

——**O. 34, R. 6**—*Right to personal decree.*

A personal decree may be obtained against the mortgagor on abandonment of all claim against the property. 26 All. 25; 29 All. 369; 25 All. 79; 28 All. 19, Foll. (*Sundar Lal, A.J.C.*) RAM RAGHUBIR *v.* IMAMI BEGAM.
9 I.C. 403 = 14 O.C. 217.

——**O. 34, R. 6**—*Right to personal decree—Mortgage decree—Sale of some out of several items—Sale of others not permitted.*

A decree-holder who has sold some of the mortgaged property but the net profits have proved to be insufficient to pay the amount of the decree and he is not allowed to sell the rest, he is entitled to a personal decree under O. 34, R. 6. (*Jwala Prasad and Ross, JJ.*) SAMANTA *v.* LOKENATH. **2 P. L.T. 736 = 61 I.C. 635 = 6 P. L.J. 106.**

C.P. CODE (V of 1908), O. 34, R. 6—Right to Personal Decree.

———O. 34, R. 6—*Right to personal decree—Mortgaged properties not found saleable—S. 46, Chota Nagpur Tenancy Act—Mortgagee, if entitled to proceed against other properties.*

Under the terms of a compromise decree in mortgage suit the amount was to be recovered from the mortgaged properties and if that should prove insufficient the balance would be recovered from the other properties of the mortgagor. The mortgaged properties were not saleable by reason of S 46 of the Chota Nagpur Tenancy Act. *Held*, that the mortgagee decree-holder was entitled to proceed against the other properties of mortgagor judgment-debtor in the event of the mortgage being found invalid. At any time up to the sale the mortgagee can abandon his claim against the mortgaged property and ask for a personal decree and bring to sale the other properties of the mortgagor without first bringing to sale the mortgaged properties. 39 Bom. 358, Foll.; 29 All. 260; 14 I.C. 591, Not foll.; 29 All. 369, Ref. (*Chapman and Atkinson, JJ.*) RAKHAL CHANDRA DIGAR *v.* SIDHI NATH SINGH. 53 I.C. 922=(1919) Pat. 390.

———O. 34, R. 6—*Right to personal decree—Omission of small portion of property in plaint—Effect of.*

Where in a plaint in a mortgage suit a small portion of the mortgaged property was inadvertently omitted, the omission did not bar the mortgagee from applying under O. 34, R. 6, C.P.C. 33 Cal. 890, Dist.; 25 All. 79; 28 All. 19; 28 All. 674, Rel. (*Roe and Jwala Prasad, JJ.*) GOPAL PANDA *v.* BAIKUNTA MAHAPATRA. 42 I.C. 86=2 P. L.J. 538.

———O. 34, R. 6—*Right to personal decree—Legality of.*

Where a personal decree under the rule is allowed to be final and not appealed against, a party thereto cannot object to its validity in execution of the decree. (*Atkinson, J.*) SITARAM SONAR *v.* RAJ KUMAR NONIA. 38 I.C. 691.

———O. 34, R. 6—*Right to personal decree.*

O. 34, R. 6, C.P.C., only applies where the mortgage-deed has already been sued upon and decree granted as against the land and the proceeds of the sale of the land prove insufficient to discharge the mortgage-debt. It has always been recognised that a mortgagee has the right to proceed concurrently with all the remedies open to him to enable him to realise his debt and therefore he is perfectly entitled to sue on the personal covenant contained in a mortgage deed. (*Atkinson, J.*) RAJA RAM LAL *v.* HANUMAN UPADHYA. 35 I.C. 48.

———O. 34, R. 7.

See also O. 34, RR. 2 AND 4.

———O. 34, Rr. 7 and 8—*Extension of time—Payment after date fixed for redemption—Validity.*

A mortgagor decree-holder who fails to pay the redemption money within the date fixed for payment but pays it before the decree is made absolute, is entitled to redeem. (*Knox, J.*) AMBIKA PERSHAD *v.* SALAMAT KHAN. 29 I.C. 438.

C. P. CODE (V of 1908), O. 34, R. 7.

———O. 34, Rr. 7 and 8—*Nature of proceedings—After preliminary decree.*

Proceedings after preliminary decree for redemption till the final decree is passed are proceedings in suit. (*Chamier and Piggott, JJ.*) MUHAMMAD MASHIULLAH KHAN *v.* JARAO BAI. 37 All. 226=13 A.L.J. 307=27 I.C. 771.

———O. 34, Rr. 7 and 8—*Mortgage—Preliminary decree for redemption—Contents.*

There is a certain amount of inconsistency between Rr. 7 and 8 of O. 34 of the Code. A preliminary decree in a mortgage suit ought not to direct more than this, that if a plaintiff makes a default, then the mortgagee should have a right to ask for a final decree either for foreclosure or sale, as is provided for by R. 8 of O. 34 of the Code. (*Macleod, C. J.*) KUSHABA *v.* BUDHAJI. 23 Bom. L.R. 1176=46 Bom. 348=1922 Bom. 127.

———O. 34, Rr. 7 and 9—*Suit for recovery of surplus profits from usufructuary mortgagee—Limitation Act, Sch. I, Arts. 105 and 148.*

A claim of a mortgagor for recovery of overpayment or the surplus profits received by the mortgage is a relief included in a suit for redemption governed by Art. 148 of the Limitation Act. But such a suit would be governed by Art. 105 of the Act where the mortgagee gave up possession after the mortgage debt had been satisfied and the mortgagor entered into possession otherwise than by means of a suit for redemption. (*Chatterjea and Newbould, JJ.*) PRASANNO KUMAR MANDAL *v.* NILAMBAR MANDAL. 26 C.W.N. 123=1922 Cal. 189.

———O. 34, Rr. 7 and 8—*Accounts—Final decree.*

If a Court in a preliminary decree instead of directing an account to be taken inserts the amount to be paid by the mortgagor, it is not final and may vary from time to time. Proper additional charges paid by the mortgagee after the preliminary decree can be added to the amount. The mortgagee cannot leave the property in jeopardy till the final decree is passed. (*Fletcher and Tuenon, JJ.*) ALLAHABAD BANK LTD. *v.* MOTI LAL BARMAN. 44 Cal. 448=35 I.C. 95=22 C.W.N. 374.

———O. 34, R. 7—*Form of decree.*

In a mortgage suit a decree was passed for redemption conditionally upon payment of the amount due within six months and declaring that in default of such payment the property was to be sold. *Held*, that the Court did not pass a preliminary decree and consequently R. 7 was not applicable. (*Scott-Smith, JJ.*) VITHAL CHANDRA *v.* GHULAM MUHAMMAD. 146 P.W.R. 1913=19 I.C. 856=235 P.L.R. 1913.

C. P. CODE (V of 1908), O. 34, R. 7.

———O. 34, Rr. 7 and 8—*Final decree—Duty to pass.*

Every preliminary decree in a mortgage suit must be followed by a final decree and when a preliminary decree is followed by redemption, a final decree for redemption should always be drawn up. (*Stanyon*, A.J.C.) BAL KISHEN *v.* ATMA RAM. **26 I.C. 701 = 10 N.L.R. 150.**

———O. 34, R. 7—*Suit for redemption—Procedure—Preliminary decree—Direction as to taking up accounts—Procedure.*

Under O. 34, R. 7 of the C.P. Code the Court may either order that an account shall be taken of what will be due to the defendant for the principal and interest due on the mortgage, and for his costs of the suit, if any, or declare the amount due at the date of such order; but in either cases the Court should proceed to ascertion the amount which would be found due on the date which is to be fixed for payment and specify what the consequence of the payment of that amount or the non-payment thereof would be. If it merely directs that an account should be taken of what would be due to the mortgagee for the principal and interest due on the mortgage as was originally done by the learned Subordinate Judge here, its order would be nothing more than an interlocutory order, to be followed by the making up of such an account, till which preliminary decree should not be prepared. (*Kanhaiya Lal*, J.C.) MOHKAN SINGH *v.* THAKUR CHANDRA PAL SINGH. **10 O.L.J. 374 = 1924 Oudh 140.**

———O. 34, Rr. 7 and 8—*Form of decree—Redemption suit—Sub-mortgagee party.*

In a suit for redemption against the mortgagee and sub-mortgagees the decree ought to provide (1) that plff. shall pay the amount due into Court; (2) that the sum shall be applied to discharge the sub-mortgagee; and (3) that the balance, if any, be handed over to the mortgagee. (*Lindsay*, J.C.) SUKH DEO PRASAD *v.* RAM AUTAR. **4 O.L.J. 475 = 42 I.C. 66.**

———O. 34, R. 7 (d)—*No applicability to—Co-mortgagor redeeming whole mortgage.*

Order 34, R. 7 Cl. (d) applies to the case of a mortgagee only and has no application to the case of a co-mortgagor who had redeemed the entire mortgage. (*Scott-Smith and Brasher*, JJ.) ALI AKBAR *v.* SULTAN-UL-MULK. **1923 Lah. 129.**

———O. 34, Rr. 8, 7 and 9—*Deposit under S. 83 of T.P. Act—Final decree can be passed once for all.*

Where there is a valid mortgage and a deposit is made in the court by the mortgagor to redeem it, the court is not bound to first pass a preliminary and then a final decree which means the prolongation of the proceedings, if no injustice will be done to either party by the passing of the final decree at once. (*Gokul Prasad*, J.) SETH ROSHAN LAL *v.* BHURI SINGH. **1922 All. 479.**

C. P. CODE (V of 1908), O. 34, R. 8.

———O. 34, R. 8—*Extension of time—Redemption suit.*

O. 34, R. 8, C.P.C., applies to redemption suits only and under that rule the Court cannot extend time for payment fixed by a decree where the decree is not the decree for redemption. (*Tudball and Sulaiman*, JJ.) NANDKUNWAR *v.* SUJAN SINGH. **18 A.L.J. 771 = 57 I.C. 1006 = 43 A. 25.**

———O. 34, R. 8—*Extension of time.*

The power to extend time for payment of mortgage money rests in the Court making the final decree in a redemption suit under O. 34, R. 8, *i.e.*, the Courts of first instance though the preliminary decree was confirmed on appeal. 31 All. 328; 39 Mad. 876, Foll. (*Richards*, C. J. *and Banerji*, J.) BENI PRASAD *v.* HARNAM DAS. **39 All. 396 = 39 I.C. 630 = 15 A.L.J. 288.**

———O. 34, R. 8—*Extension of time—Order granting time—Appeal.*

An order in a mortgage suit extending the time fixed for paying of prior mortgages on the property is within O. 34, R. 8. Such an order is a decree within S. 47 and is, therefore, appealable. (*Tudball and Rafique*, JJ.) KALIAN *v.* SADHO LAL. **35 All. 116 = 18 I.C. 14 = 11 A.L.J. 62.**

———O. 34, R. 8—*Order refusing to extend time—Second appeal—does not lie.*

Where a petition for extension of time under O. 34. R. 8 is dismissed, an appeal lies against the order under O. 43, R. 1 (o) but no second appeal lies. (*Shah*, A.C.J. *and Kemp*, J.) DATTATRAYA VITHAL GARWARE *v.* VASUDEO ANANT GARGATE. **47 Bom. 956 = 25 Bom. L.R. 920 = 1924 Bom. 98.**

———O. 34, R. 8—*Extension of time—Appeal—Effect of.*

Time allowed to a mortgagor cannot be enlarged merely because an appeal is preferred against the decree by the mortgagor or mortgagee, which is afterwards dismissed or withdrawn. (*Mookerjee and Holmwood*, JJ.) TARACHAND MARWARI *v.* BROJO GOPAL MUKERJI. **17 C.W.N. 487 = 18 I.C. 747 = 17 C.L.J. 120.**

———O. 34, R. 8—*Form of decree—Retransfer for the mortgaged property.*

After a decree for redemption the executing Court should see that all the rights acquired by the mortgagee under the mortgage are retransferred to the mortgagor that the latter is placed in his original position. (*Shadi Lal*, C.J.) MAHMAN SINGH *v.* NIHAL. **37 I.C. 763.**

———O. 34, R. 8—*Form of decree—Court's powers.*

O. 34, R. 8 (4) authorises the Court to pass a decree that the mortgaged property be sold only when the mortgagee applies in that behalf. The decree should have been limited to granting plff. the right to redeem the mortgage upon payment of the sum found due. This decree the mortgagor could execute at any time within

C. P. CODE (V of 1908), O. 34, R. 8.

the period of limitation and if the failed to execute it he would have the right to sue again for redemption so long as his right to redeem remained alive. (*Rattigan and Scott-Smith*, JJ.) NIHAL CHANDRA *v.* GHULAM MUHAMMAD. **146 P.W.R. 1913=19 I.C. 886=235 P.L.R. 1913.**

——O. 34, R. 8—*Kanom— Redemption—Notice.*

O. 34, R. 8 does not specifically require any notice given to a Kanomdar after the decree for redemption is passed and before plaintiff obtains possession. The kanamdar is not prejudiced as he is not entitled to have delivery stayed pending realisation of improvements. (*Spencer and Devadoss*, JJ.) AMBI *v.* PUDIA KOVILAGATH SRIDEVI. **(1923) M.W.N. 783=18 L.W. 686=33 M.L.T. 101 (H.C.)=45 M.L.J. 687=1924 M. 102.**

——O. 34, R. 8—*Extension of time—Suit for partition—Alienee impleaded as defendant—Decree directing possession to be delivered on plaintiff paying his share of the amount—Power to enlarge time.*

In a suit for partition the alienee of a portion of the joint family properties was made a deft. The alienation was impeached as not binding on the family to the extent of Rs. 800 and the Court directed plff. to obtain possession of the properties from the alienee after paying a sum of Rs. 400 within a day fixed. Plff. defaulted and applied for extension of time. *Held*, that the decree was one for redemption in effect in the absence of a final decree to the effect, that in case the money is not paid within the time fixed the suit for possession shall stand dismissed, and it is open to the Court to extend the time for paying the amount under the proviso to O. 34, R. 8. 1 L.W. 882, Ref. (*Seshagiri Iyer and Moore*, JJ.) IDUMBA PARAYAN *v.* PETHI REDDI. **37 M.L.J. 695=11 L.W. 25=54 I.C. 451=43 Mad. 357=27 M.L.T. 216.**

——O. 34, Rr. 8 and 10—*Accounts—Mortgagor and mortgage—Relationship, if continues.*

The relationship of mortgagor and mortgagee continues to subsist even after the preliminary decree in a redemption suit is passed and the mortgagee continues liable to account for the rents and profits by him. For certain purposes the suit remains pending and in passing a final decree the Court can take into consideration subsequent events. (*Abdur Rahim and Bakewell*, JJ.) PAPLA CHAKRAPANI CHETTIAR *v.* RAMASWAMI THENKONDAN. **42 I.C. 230.**

——O. 34, R. 8—*Extension of time—Mortgage decree—Time fixed for payment—Appeal—Whether time extended.*

Where an appellate Court decree confirms the decree of the first Court and is silent regarding the time fixed for payment by the Court of first instance, a further period cannot be given for payment from the date of the appellate decree. But a party, who is not bound to perform any act under the decree of the first Court and who appeals to get a larger benefit than what the decree grants him, is entitled to reckon the period in his favour from the date of the appellate decree, provided he has not disobeyed any direction of the Court. 15 Mad. 170; 31 Mad. 28, Foll. (*William, Ayling and Seshagiri Aiyar*, JJ.) NIMMALA MAHANKALI *v.* KALLAKURI SUBBA RAO. **41 I.C. 268=32 M.L.J. 455.**

——O 34, R. 8—*Extension of time—Forum.*

The word 'Court' in O. 34, R. 8, does not always mean the Court which passed the decree and a Court of first instance to which a suit has been remitted after a preliminary decree by the appellate Court, has the *exclusive* jurisdiction to entertain with an application for an extension of time under O. 34, R. 8 proviso (*Sadasiva Aiyar and Napier*, JJ.) DARMARAJA AIYAR *v.* SRINIVASA MUDALIAR. **39 Mad. 876=2 L.W. 1074=29 M.L.J. 708=31 I.C. 240=18 M.L.T. 486.**

——O. 34, R. 8—*Limitation—Redemption suit—Final decree for redemption.*

There is no period of limitation for the passing of a final decree in a suit for redemption. It is the duty of the Court to pass such a decree. (*Sadasiva Aiyar and Spencer*, JJ.) DOKI KHODALO PATRO *v.* LINGARAHI VIDYA BUSHANO. **22 I.C. 283.**

——O. 34, R. 8—*Accounts—Redemption.*

In a decree for redemption the accounts must be carried forward up to the date when possession is given. (*Sundara Iyer and Sadasiva Iyer*, JJ.) THIRUMATHUR *v.* SWAMINATHA PATTAR KARUJAKAR. **16 I.C. 184.**

——O. 34, R. 8—*Decree for sale—Right of mortgagor to apply.*

S. 93, T. P. Act deals with a mortgagee's application for an order for sale. But a mortgagor can apply for execution under S. 92 and obtain an order for sale. A person obtaining a judgment on condition and not fulfilling it should be held to have waived the judgment is a rule which cannot be applied to decrees for redemption under the T. P. Act. The T. P. Act has deliberately omitted the provision that a suit for redemption should be dismissed if the mortgagor fails to pay the mortgage amount. (*Sundara Iyer and Ayling*, JJ.) GOVINDA TARAGAN *v.* VEERAN. **36 Mad. 32=21 M.L.J. 941=12 I.C. 482=10 M.L.T. 322=(1911) 2 M.W.N. 328.**

——O. 34, R. 8—*Mortgage decree—Preliminary decree—Redemption—Money not paid in time—Effect of.*

Until the mortgagee chooses to take action and bring the property to sale, the mortgagor judgment-debtor under the decree absolute has no right to move in the matter. The intention of O. 34, R. 8 C. P. Code is that an end should be put to the mortgage once a suit

C. P. CODE (V of 1908), O. 34, R. 8.

for redemption is brought, and such an intention would be defeated if the mortgagee after obtaining the decree absolute for sale is permitted not to proceed with the sale, and to prevent the mortgagor from satisfying the decree. (*Dalal*, A. J. C.) HAYAT MAHOMED *v.* NAGESWARI PRASAD. **26 O.C. 306 = 9 O. & A.L R. 315 = 1923 Oudh 236.**

——O. 34, R. 8—*Proviso—Extension of time—Contract rate of interest.*

Where a mortgagor seeks an extension of the time allowed by the decree for payment of the decree amount and is allowed an extension, he must pay interest at the contract rate during the extended period. (*Daniels*, A.J.C.) MT. BASHI RAM *v.* BISHAMBAR NATH. **9 O.L.J. 439 = 1922 Oudh 268.**

——O. 34, R 8—*Mesne profits—Right to—Period prior to passing of final decree.*

A mortgagee is not obliged to vacate possession of the mortgage property until he has received the full mortgage money and therefore a suit by mortgagor for mesne profits for a period prior to the passing of a final decree in his favour in a redemption suit filed by him is not maintainable. (*Lindsay*, J.C.) MANSAB ALI *v.* SAKHAWAT HUSAIN. **7 O.L J. 24 = 53 I.C. 503 = 2 U.P.L.R. (J.C.) 33.**

——O. 34, R. 8—*Extension of time—Postponing payment.*

If no loss is caused to the mortgagee by late deposit of the mortgage money, delayed payment under O. 34, R. 8, C. P. C., may be accepted. (*Stuart*, J. C.) JOKHAN SINGH *v.* DEBI SINGH. **30 I.C. 201 = 6 O.L.J. 94.**

——O. 34, R. 8—*Extension of time—Redemption decree—Deposit—Time not limited.*

A mortgagor who obtains a decree for redemption under the T. P. Act and before the enactment of the C.P.C. of 1908 is entitled to deposit the money due before the passing of a decree absolute, without obtaining an extension of the time limited by the decree although the said Code was in force at the time he applied for the deposit. If the whole amount due under a decree is paid into Court the decree becomes satisfied without any formal order of Court recording satisfaction provided it is paid by the judgment-debtor or his authorised agent or pleader. (*Lindsay*, J.C.) BISHESHAR SINGH *v.* BEKRAMJIT SINGH. **3 O L J 189 = 24 I.C. 349 = 19 O.C. 30.**

——O. 34, R. 8—*Extension of time—Compromise decree.*

The power to enlarge time can be exercised only in cases to which the rule strictly applies i.e., to cases in which a suit for redemption has been brought and in which both preliminary and final decrees have been passed. A suit for possession by a puisne mortgagee against the prior mortgage was compromised, by which possession was to be allowed on condition of the plaintiff paying a certain sum by a

C. P. CODE (V of 1908), O. 34, R. 10.

particular date and on default of payment on the date possession of prior mortgagee was to continue on the date the plaintiff applied for extension of time, *Held*, that neither O. 34, R. 8 nor S. 148, C.P.C., applied and no extension could be allowed. (*Lindsay*, J.C.) NIRANJAN SINGH *v.* JAGANNATH. **28 I.C. 862 = 18 O.C. 38.**

——O. 34, R. 8—*Extension of time—Redemption after time fixed—Difference between—New Code and Old Code.*

Under O. 34, R. 7 a plff. mortgagor cannot redeem after the expiration of the time fixed by the Court without obtaining an extension of time. Under the T. P. Act, however, he had a right to redeem before an order absolute for sale had been passed and such a right being a vested right is saved to the mortgagor by the General Clauses Act, S. 6 if the decree was passed before the new Code came into force. (*Chamier*, J.C. *and Evans*, A.J.C.) JAGESHAR SINGH *v.* BHAGWAN BAKSH SINGH. **9 I.C. 337 = 14 O.C. 10.**

——O. 34, R. 8—*Extension of time—Payment after expiry of period fixed but before final decree.*

O. 34, R. 8, C.P.C. provides for an extension of time for good cause shown. Where a mortgagor wishes to pay in the redemption money after the time specified but before the final decree he has to apply for an extension of time. The Court may, however, treat the application to pay in the money as tantamount to an application for extension of time. The Court is not absolved from the necessity for passing a final decree. There is no provision for the execution of the preliminary decree before it has been made final. (*Pratt*, J.C.) MAUNG TUN MAUNG *v.* MA YWE. **34 I.C. 807 = (1919) 3 U.B.R. 183.**

——O. 34, R. 10—*Costs claimable under—Only costs in execution.*

Costs which should have been included in final decree, not claimable in execution. (*Ryves and Gokul Prasad*, JJ.) JAMBAR SINGH *v.* KALLYAN SINGH. **L.R. 3 A. 164 = 44 A. 350 = 20 A.L J. 170 = 1922 A. 27.**

——O. 34, R. 10—*Costs—Appellate Court—Personal liability.*

Where the mortgagor deft. preferred a second appeal which was dismissed with costs after a final decree had been prepared in the case by the lower Court, *held*, the appellant was personally liable for the costs of the High Court. 22 I.C. 42; 11 A.L.J. 975, Ref. (*Chamier*, J.) MOHAMAD SADIQ *v.* JAYGOPAL. **24 I.C. 873.**

——O. 34, R. 10—*Costs—Whether part of the mortgage debt.*

The costs of a suit allowed by a mortgage decree become part of the debt, secured by the mortgage. 11 O.C. 377, Ref. (*Chamier*, J.) PANDEY JAGANNATHA *v.* JUNIAM. **24 I.C. 63 = 12 A.L.J. 655.**

C. P. CODE (V of 1908), O. 34, R. 10.

———**O. 34, R. 10**—*Costs — Final decree applied for after an appellate decree for costs against one defendant—Costs of appeal if can be included in final decree.*

Where an application is made for a final decree after an appellate decree for costs is passed against one deft. alone, the decree-holder cannot ask for the costs of the appeal along with the amount finally held due. (*Piggott*, J.) MUHAMMAD SADIQ *v* GHAOUS MUHAMMAD. **22 I.C. 42 = 11 A.L J 975.**

——**O. 34, R. 10**—*Costs—Appellate Court—Personal liability.*

A mortgagee obtained a decree for foreclosure. One of the defts., appealed to the High Court which dismissed the appeal with costs to be paid by appellants. *Held*, the costs of the High Court must be deemed to have been awarded against the appellant personally. (*Rafique*, J.) AMBA SAHAI *v.* BHAGWANDIN. **19 I.C. 729.**

——**O. 34, R. 10**—*Costs—Appeal.*

The decree for costs on an appeal of the deft. from the decree for sale of mortgaged property is personal. (*Tudball*, J.) BANS GOPAL SINGH *v.* RUPA NARAYAN SINGH. **19 I C. 384.**

———**O. 34, R. 10**—*Costs—Appeal—Right to add on to the mortgage amount.*

Costs awarded in mortgage suits including costs of appeal form part of the decretal amount and are realisable in the first instance by sale of the mortgaged property and not otherwise. (*Kanhaiya Lal*, O.J.C. *and Daniels*, O.A.J.C.) SADIQ HUSAIN KHAN *v.* UMMATULFATIMA. **48 I.C. 329.**

———**O. 34, R. 11**—*Mesne Mortgagee—Rights of.*

A second mortgagee is entitled to the same rights as the first mortgagee with reference to his security having regard to the nature of his mortgage. (*White*, C. J., *Krishnaswami Aiyar*, *and Ayling*, JJ.) MULLA VEETIL *v* ACHUTHAN NAIR. **(1911) 1 M.W.N. 165 = 21 M.L.J. 218 = 9 I.C. 513 = 9 M.L.T. 431.**

———**O. 34, Rr. 11 and 12**—*Duty of puisne mortgagee to redeem.*

A puisne mortgagee is not bound to redeem; but if he does not elect to do so the prior mortgagee's right to sell the property is paramount as against him. 22 All. 404; 13 All. 432; 29 All. 385, Con. (*Sunderlal*, A.J.C.) RAM RAGHUBIR *v.* IMAMI BEGAM. **9 I C. 403 = 14 O C. 217.**

———**O. 34, R. 12**—*T.P. Act (IV of 1882), S. 96—Suit on puisne mortgage impleading prior mortgagee as party.*

In a suit on a puisne mortgage the prior mortgagee was made a party but no attack was made on the prior mortgage and its validity. A decree for sale was made and property was purchased by the puisne mortgagee. *Held*, that he had no power to sell free of mortgage without the consent of the prior mortgagee and that a subsequent suit by the prior mortgagee on his own mortgage is maintainable. (*Sir Lawrence Jenkins.*) RADHA KISHUN *v.* KHURSHED. **47 Cal. 662 = 47 I.A. 11 = 38 M.L.J. 424 = (1920) M.W.N. 308 = 11 L.W. 518 = 22 Bom. L.R. 557 = 18 A.L.J. 401 = 56 I.C. 959 = 25 C.W.N. 417 (P.C.).**

C.P. CODE (V of 1908), O. 34, R. 14.

———**O. 34, R. 12**—*Prior mortgagee—Ex-parte decree on puisne mortgage—Declaration of right.*

A prior mortgagee made a party to the suit on a puisne mortgage can have his rights declared under O. 34, R. 12 even though he allowed an *ex parte* decree to be passed. (*Stephen and Mullick*, JJ.) GADAHAR PROSAD *v.* AULADIN. **27 I.C. 164.**

———**O. 34, R. 12**—*Decree nisi by consent—Sale by mortgagor—First to defendant and next to plaintiff—Suit by plaintiff for possession—Decree to be passed.*

Where a decree *nisi* was got upon the mortgage by consent to the effect that the property should pass to the mortgagee without recourse to any process of public sale, on default of payment within a certain time, and the mortgagor sold his equity of redemption to the deft. and subsequently sold the same to the mortgagee plaintiff who thereupon sued for possession without obtaining an order absolute. *Held*, that the suit should be decreed subject to the defendant's right to redeem. (*Holmwood and Chapman*, JJ.) BHOBAN SHAHU *v.* GANASHAM SHAHU. **18 I.C. 457.**

———**O. 34, R. 12**—*Sale without reference to prior mortgagee.*

A sale without reference to a prior mortgagee and without his consent free of his mortgage is irregular. (*Twomey*, J.), MAUNG SEIN *v.* NGWE NU. **6 L B.R. 144 = 19 I.C. 2 = 6 Bur L.T. 72.**

———**O. 34, R. 13**—*Applicability of—Presumption.*

O. 34, R. 13, C.P.C. applies to cases of sale held free of prior mortgages and the principle of the rule applies also to the appropriation of sale proceeds held subject to a mortgage. In the absence of a distinct order to the contrary the Court must be taken to have directed the amount should be applied towards the costs of the suit and the interest first and then the balance towards the principal. (*Benson and Sundara Aiyar*, JJ.) SABAPATHI PILLAI *v.* CHOKALINGA PILLAI. **21 I.C. 691 = 25 M.L.J. 552.**

——**O. 34, R. 14.**

CHARGE.
CLAIM UNDER MORTGAGE.
COMPROMISE DECREE.
CONSENT DECREE.
MAINTENANCE DECREE.
MONEY DECREE.
PERSONAL REMEDY.

C. P. CODE (V of 1908), O. 34, R. 14—Charge.

SALE IN CONTRAVENTION.
SCOPE OF.
SECURITY.

Charge.

———**O. 34, R. 14**—*Charge — Moveable property—Flags of Pragwals—If can be charged for payment of annuity.*

The flag of the *Pragwals* at the confluence of the Ganges and Jumna for the purpose of attracting pilgrims is a valuable property and may be charged with the payment of an annuity and may be sold subject to such charge even in execution of a decree for arrears of the annuity. (*Chamier and Piggott*, JJ.) GANESH *v.* BABU RAM. **26 I.C. 427=37 All. 72=13 A.L.J. 9.**

———**O. 34, Rr. 14 and 18**—*Charge on property—Claim for future maintenance—Remedy by suit—Execution.*

The mortgage charge mentioned in O. 34, R. 14, C.P. Code, is a mortgage or charge existing prior to the date of the decree and not one created by the decree. The principle that a person who holds a mortgage or charge should have recourse to a suit, is recognised for the benefit of the person against whom the mortgage or charge may have to be enforced and it is competent to such a person to waive the protection accorded to him by O. 34, R. 14, C.P. Code, or by S. 99, T.P. Act. The petition of compromise which was incorporated in the decree, stated that the plff. would be entitled to a maintenance at the rate of Rs. 4 per month, and that if the amount was not paid from month to month, the plaintiff would be entitled to realise the sum from the defendant by execution of the decree. The petition finally recited that all the properties mentioned in the schedule to the plaint would remain charged for the payment of the allowance as maintenance. *Held*, that the decree-holder was entitled to recover in execution without further suits, the allowance as it accrued due. It is not competent to the judgment-debtors to resile in execution proceedings and contend that notwithstanding the express provisions of the decree, the decree-holder must be driven to a separate suit. (*Mookerjee and Panton*, JJ.) INDRAMANI DASI *v.* SURENDRA NATH MANDAL. **35 C.L.J. 61=1922 Cal. 35.**

———**O. 34, R. 14**—*Charge—Rent decree.*

The section applies to enforcement of a charge for rent payable in money to the landlord by the tenant. (*Sadasiva Aiyar and Spencer*, JJ.) BOLLAPRAGADA VENKATALAKSHMANA GARU *v.* NENDA SEETAYYA.
11 L.W. 466=(1920) M.W.N. 294=39 M.L.J. 30=57 I.C. 764=28 M.L.T. 44=43 M. 786.

[*See* **contra 48 I.C. 694=42 Mad. 114.**]

———**O. 34, R. 14**—*Charge—Arrears of rent—Madras Estates Land Act, S. 5.*

A statutory charge for arrears of rent is not a charge within S. 100 of the T. P. Act. A sale in execution of a decree for rent in Revenue Court passes the title to the purchaser free of all encumbrances except those specified in S. 125, Madras Estates Land Act. (*Kumaraswami Sastri and Phillips*, JJ.) PARANGI PILLAI SURRANA *v.* KATTA VENKATA SURYA NARAIN JAGAPATHI RAJU.
42 Mad. 114=35 M.L.J. 443=(1919) M.W.N. 25=48 I.C. 794=25 M.L.T. 365=
[*See* **Contra 87 I.C. 764=39 M.L.J. 30.**]

C. P. CODE (V of 1908), O. 34, R. 14—Claim under Mortgage.

———**O. 34, R. 14**—*Charge—Rights of purchaser.*

A charge on immoveable property created by a will, which is not compulsorily registrable and of the terms of which, the auction-purchaser could not be cognizant cannot be enforced against the latter, he being a *bona fide* purchaser without notice. (28 All. 655, Diss. from). (*Lindsay*, J. C.) PARBHU DAYAL *v.* BALIBHAN LAL. **28 I.C. 867=1 O.L.J. 48.**

———**O. 34, R. 14**—*Charge—Payment of Government revenue by mortgagee.*

Where the mortgagee in order to protect his mortgage lien deposits the arrears of Government revenue, the amount of deposit forms a charge on the mortgaged property. The remedy of the mortgagee to recover the deposit is by a suit under O. 34 of the C.P.C. (*Jwala Prasad*, J.) RAJ KUMAR LAL *v.* JAI KARAN DAS.
5 P.L.J. 248=57 I.C. 653=1 P.L.T. 225.

———**O. 34, Rr. 14 and 15**—*Charge—Before decree.*

The provisions of O. 34, Rr. 14 and 15 do not apply unless the charge was created before the decree was obtained. (*Mullick and Thornhill*, JJ.) MAHAMAYAPRASAD SINHA *v.* SAKUDAI KOER. **46 I.C. 169.**

Claim under Mortgage.

———**O. 34, R. 14**—*Claim under the mortgage—Mortgagor lessee—Suit for sale in execution of rent decree.*

A mortgagee granting lease of the property to the mortgagor cannot bring a suit for sale of the property under a rent decree obtained on the basis of the lease. To escape O. 34, R. 14, C.P.C. the mortgagee's claim should be distinct from, *i.e.*, unconnected with the mortgage transaction. (*Piggott and Walsh*, JJ) KADMA PASIN *v.* MUHAMMAD ALI. **41 All. 399=60 I.C. 134=17 A.L.J. 481.**

———**O. 34, R. 14**—*Claim under mortgage—Costs—Suits for possession.*

A suit was filed for the possession of the mortgaged property and a decree was obtained with costs. The mortgaged property, *i.e.*, the equity of redemption can be attached in execution of a decree for costs as it is not a claim arising under the mortgage. (*Banerji and Ryves*, JJ.) HARA BANS RAI *v.* SRINIVAS.
35 All. 518=26 I.C. 896=11 A.L.J. 841.

C. P. CODE (V of 1908), O. 34, R. 14—Claim under Mortgage.

——O. 34, R. 14—*Claim under mortgage—Mortgagor in possession as lessee—Decree for rent—Sale of equity of redemption.*

Under a usufructuary mortgage the mortgagor passed a rent note to the mortgagee and remanded in possession. The rent not having been paid the mortgagee obtained a decree for rent and the assignee of the rent decree having applied to execute the decree by sale of the mortgagor's equity of redemption *held*, that the assignee was not competent to have the mortgaged property sold inasmuch as the agreement whereby the mortgagor agreed to pay rent was passed at the same time as the mortgage and was therefore part of the mortgage transaction. The assignee was not in this respect in a better position than his assignor. (*Macleod*, C. J.) IBRAHIM GOOLAM HUSENBUX *v.* NAHAL CHAND WAGHMAL. **44 Bom. 366 = 66 I.C. 536 = 22 Bom. L.R. 131.**

——O. 34, R. 14—*Claim under mortgage—Lease—Rent.*

Where the mortgagee being in possession gave the mortgaged property in lease to the mortgagor it being stipulated that the rent payable under the lease would be taken in lieu of interest and the equity of redemption was sold in execution of his decree for arrears of rent obtained by the mortgagee on the basis of the lease and purchased by the mortgagee. *Held*, that the sale was not in execution of a decree for the satisfaction of a claim arising under the mortgage. (*Sanderson*, C.J., *Woodroffe*, *Mookerjee*, *Chatterjee and Newbould*, JJ.) UTTAM CHANDRA DAW *v.* RAJ KRISHNA DALAL. **47 Cal. 377 = 24 C.W.N. 229 = 66 I.C. 167 = 31 C.L.J. 98 (F.B.).**

——O. 34, R. 14—*Claim under mortgage—Equity of redemption—Mortgagee purchasing in execution of money decree by a stranger.*

A mortgagee is competent to purchase the equity of redemption brought to sale at the instance of a stranger decree-holder although the position is different where he acquires the equity of redemption at an execution sale at his instance in contravention of the rule enunciated in S. 99 of the T. P. Act. 23 Mad. 377 ; 12 C.L.J. 574 ; 24 Mad. 96 ; 12 M.L.J. 390 ; 27 Mad. 428 ; 32 Cal. 296, Ref. (*Mookerji and Beachcroft*, JJ.) BHARAT RAMANUJ DAS *v.* ISHAN CHANDRA HALDHAR. **43 I.C. 212 = 27 C.L.J. 431.**

——O. 34, R. 14—*Claim under mortgage—T. P. Act, S. 99—Distinction between.*

A decree-holder getting a money decree on a mortgage bond with a declaration of lien on the property cannot bring to sale the property but must sue on the basis of the declared lien. Distinction between the two provisions pointed out. (*Richardson and Roe*, JJ.) GOBIND CHANDRA PAL *v.* KAILASH CHANDRA PAL. **40 I.C. 230 = 26 C.L.J. 384.**

C. P. CODE (V of 1908), O. 34, R. 14—Claim under Mortgage.

——O. 34, R. 14—*Claim under mortgage—Sale of mortgaged property for any claim unconnected with mortgage.*

A mortgagee is competent to have his mortgaged property sold in execution in satisfaction of any claim which he may have against the mortgagor, if the claim may be unconnected with the mortgagee. (*Sharfuddin and Tuenon*, JJ.) TARAK NATH ADHIKARI *v.* BHUBANESHWAR MITRA. **30 I.C. 988 = 42 Cal. 780.**

——O. 34, R. 14—*Claim under mortgage—Rent decree.*

A usufructuary mortgagee of a share of a Zemindari can sue for rent under S. 78 of the Land Registration Act and the suit is not barred by R. 14 of O. 34 of C. P. C. (*Mookerjee and Beachcroft*, JJ.) BROMANDA NATH DEB *v.* HEMI CHANDRA MITRA. **23 I.C. 981 = 18 C.W.N. 1016.**

——O. 34, R. 14—*Claim under mortgage—Debts of mortgagor unconnected with the mortgage.*

A mortgagee is entitled to have the equity of redemption sold in satisfaction of any debt which he might have against the mortgagor unconnected with the mortgage. O. 34, R. 14 is restricted only to claims arising under a mortgage. (*Shah Din and Le-Rossignol*, JJ.) MEHR. BAKSH *v.* SANJHE KHAN. **18 P.R. 1916 = 33 I.C. 802 = 194 P.W.R. 1915.**

——O. 34, R. 14—*Claim under mortgage—T. P. Act, S. 99—Distinction.*

Difference between the provisions O. 34, R. 14 and S. 99, T. P. Act, is that by the repeal of S. 99 a mortgagee can sell mortgaged property on a claim unconnected with the mortgage. (*Abdur Rahim and Kumaraswami Sastri*, JJ.) SOWBAGIA AMMAL *v.* MANICKA MUDALIAR. **33 M.L.J. 601 = (1917) M.W.N. 782 = 22 M.L.T. 386 = 42 I.C. 975 = 6 L.W. 701.**

——O. 34, R. 14—*Claim under mortgage—Decree for costs—Execution by attachment.*

Where a usufructuary mortgagee who was not given possession by the mortgagor sued for possession, and the suit was decreed with costs, *held*, that the claim for costs is not a claim under the mortgage but by virtue of the decree for costs, and that an attachment of the equity of redemption in execution of the decree does not contravene the provisions of O. 34, R. 14. (*Lindsay*, J.C.) BRIJMOHAN *v.* RAM MILLAN. **20 I.C. 898 = 16 C.C. 350.**

——O. 34, R. 14—*Claim under mortgage—Usufructuary mortgage—Lease to mortgagor—Sale of equity of redemption—Arrears of rent.*

Where a usufructuary mortgagee in possession of the mortgaged property granted to the mortgagor a lease of the said mortgaged property and the mortgagor having failed to pay the amounts due under the lease the mortgagee instituted a suit for their recovery and obtained a decree and in execution of it sought to bring

C. P. CODE (V of 1908), O. 34, R. 14—Claim under Mortgage.

to sale the mortgagor's equity of redemption. *Held*, the sale was not barred by O. 34, R. 14, C. P. C. The claim on the basis of the lease was not a claim arising under the mortgage and the suit out of which the decree is sought to be executed was a suit by a landlord for rent against his tenant and not that of a mortgagee against his mortgagor. The suit was brought not for the recovery of interest but for rent. The mortgage and the lease must be regarded as separate transactions. 47 Cal. 377. Foll.; 23 All. 34; 23 All. 338; 27 All. 313, Dist. Where the mortgagee, granted the mortgagor a lease of the mortgaged property and obtained a decree against him for failing to pay the rent. *Held*, the decree was not in respect of a sum due in satisfaction of a claim arising under the mortgage within the meaning of O. 34, R. 14 and the equity of redemption could be sold in execution. (*Coutts and Adami*, JJ.) RAM NARAYAN SINGH *v.* BISHESWAR NATH MISSIR. **1 P. L.T. 694=57 I.C. 384=(1920) Pat. 250.**

———O. 34, R. 14—*Claim under mortgage—Independent transaction.*

A mortgagee might, by a suit on an independent transaction bring to sale and purchase the equity of redemption. (*Pratt*, J. C. *and Crouch*, A.J.C.) NUR MAHOMED *v.* KESSUMAL. **20 I.C. 523=7 S.L.R. 11.**

Compromise Decree.

———O. 34, R. 14—*Compromise decree—Provision for payment of mortgage money in instalments—Default—Provision for sale—Effect of.*

In a suit for sale on a mortgage instead of the usual mortgage decree a compromise decree was passed which provided that the judgment-debtor should pay the decretal amount in certain instalments, and if he should fail in the payment of three consecutive instalments, then execution for the whole amount should issue against the other property of the judgment-debtor and in the event of the amount not being realised in that manner, against the mortgaged properties. *Held* that the decree itself ordered, in the event of default and in the event of the other properties of the judgment-debtor proving insufficient, a sale of the mortgaged property and it was not necessary for the decree-holders to bring a suit for the sale of the property merely because the other remedy given under the decree has proved infructuous. The decree in the case was something more than a decree for the payment of the money in satisfaction of a claim arising under a mortgage and O. 34, R. 14 did not govern it. (*Miller*, C.J, *and Kulwant Sahai*, J.) CHAURASI MAHASARICK *v.* BHAGVAN SAHU. **2 Pat. 787=(1923) Pat. 209=1924 P. 20.**

Consent Decree.

———O. 34, R. 14—*Consent decree—Default in payment—Application to sell a part of the mortgaged property to recover unpaid instalment.*

C. P. CODE (V of 1908), O. 34, R. 14—Money Decree.

A mortgage decree payable in instalments provided that if any two instalments remained unpaid up to six months from the date of the second instalment the whole amount then remaining due would be payable at once. The first instalment was paid in time the second was in default and third was paid. The decree-holder applied to recover the amount of the second instalment by sale of a part of the mortgaged property. *Held*, that the application was premature as under O. 34, R. 14 where a mortgagee had obtained a decree for payment of money in satisfaction of a claim arising under the mortgage, he could not bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage. (*Shah and Hayward*, JJ.) HANMAT TIMAJI DESAI *v.* RAGHAVENDRA GURURAO DESAI. **22 Bom. L.R. 650=58 I. C. 221=44 B. 981.**

Maintenance Decree.

———O. 34, R. 14—*Maintenance decree—Annuity for.*

An arrangement for the maintenance payable by a Zemindar and his heirs to the junior members created a charge on the assets of the Zemindari and the provisions of the deed were not obnoxious to the rule against perpetuities or any other rule of law. (*Lord Phillimore.*) RATHA RAJESWAR DORAI *v.* SUNDRA PANDYASAMI TEVAR. **42 Mad. 581=17 A L J. 153=36 M L J. 164=23 C W.N. 549=29 C L J 551=25 M.L.T 400=21 Bom. L.R. 885=(1919) M.W.N. 511=49 I.C. 704=10 L W. 322 (P.C.).**

[Affirming 27 I.C. 283=27 M.L.J. 694.]

———O. 34, R. 14—*Maintenance decree—Charge—Execution.*

O. 34, R. 14 of the C.P. Code does not prevent a maintenance decree-holder from proceeding in execution against the property charged under the maintenance decree. 33 M. L.J. 61, Foll.; 17 M L.J. 270, Not foll. (*Spencer and Bakewell*, JJ.) VENKATA RAMANAMURTHI *v.* SUNDARA RAMIAH. **47 I.C. 630=23 M.L.T. 355.**

Money Decree.

———O. 34, R. 14—*Money decree—Suit for sale on mortgage.*

In a suit for sale on a mortgage the Court held the mortgage not enforceable as such and passed only a simple money decree. The decree-holder attached and sought to sell the mortgaged property in execution. *Held*, that O. 34, R. 14 of the C.P.C. did not apply as the mortgage having been held to be unenforceable there was no longer any subsisting and effective mortgage. 14 A.L J. 902, Appr. (*Tudball and Sulaiman*, JJ.) SURAJ NARAIN SINGH *v.* JAGBALI SHUKUL. **18 A.L.J. 677=2 U.P.L.R. (All.) 196=57 I.C. 15=42 All. 366.**

C. P. CODE (V of 1908), O 34, R. 14—Money Decree.

———O. 34, R. 14—*Money decree—Sale—Redemption.*

Where a sale in favour of a mortgagee in execution of a simple money decree obtained for the mortgage debt is confirmed the sale can be set aside in a redemption suit by the mortgagor or his sons. 18 All. 325; 27 All. 450; 27 All. 517; 30 All. 146, Ref. (*Rafique and Piggott*, JJ.) SIRDAR SINGH *v.* RATAN LAL. **36 All. 516=24 I.C. 612=12 A.L.J. 855.**

———O. 34, R 14—*Money decree—Charge on immoveable property—Execution—Separate suit.*

A money decree which imposed a liability on the deft. to pay a sum of money to the plffs. also declared that the plffs. had a first charge on certain immoveable property of the deft. The plffs. having applied in execution proceedings for sale of the property charged. *Held* by *Shah, J.*, agreeing with *Heaton, J.* (*Pratt, J.*, dissenting) that the plffs. had the right to bring the property charged to sale in execution proceedings, and that it was not necessary to bring a separate suit for the sale of the property. Per *Shah, J.*—O 34, R. 14 of the C P. Code means that the decree should relate to the payment of money in satisfaction of a claim arising under the mortgage (*i.e.*) mortgage independent of the decree. It can have no application where the charge or the mortgage is created by the decree and where the direction as to the payment of money is in no sense a claim arising under the mortgage. (*Shah, Heaton and Pratt*, JJ.) AMBALAL *v* NARAYAN. **43 Bom. 631=61 I.C. 929=21 Bom. L.R. 698.**

———O. 34, R. 14—*Money-decree—Sale of property in execution.*

The rule does not bar the sale of the mortgaged property in execution of a money decree obtained in respect of the property, the mortgage right being extinguished by limitation, compromise or some other legal defect. (*Spencer and Ramesam*, JJ.) ARUMUGAM PILLAI *v.* ALAGAPPA CHETTIAR. **41 M.L.J. 160=(1921) M.W N. 376=62 I.C. 756=14 L.W. 331.**

Personal Remedy.

———O. 34, R. 14—*Personal remedy—Mortgagee obtaining simple money decree—Property under mortgage can be sold in execution.*

A mortgagee, who has obtained a simple money-decree, is competent, to bring the mortgaged property to sale in execution of his decree, if the mortgage has ceased to be enforceable. (*Walsh and Wallach*, JJ.) TANSUKH RAI *v.* SRI GOPAL. **19 A.L J. 728=63 I.C. 445=43 A. 677.**

———O. 34, R. 14—*Personal remedy—Attachment—Execution of money decree based on the mortgage.*

Under O. 34, R. 14, C.P.C., a mortgagee is not precluded from *attaching* the property in execution of his money decree based on the mortgage so long as the sale is postponed till the obtaining of a decree on the mortgage. (*Lindsay and Kanhaiya Lal*, A.J.Cs.) RAMDAS *v* MUNNA. **18 I.C. 201=4 O.L J. 571.**

C. P. CODE (V of 1908), O. 34, R. 14—Sale in Contravention.

———O. 34, R. 14—*Personal remedy—As well as against property—Personal remedy, if can be enforced first.*

In Sind where the Transfer of Property Act is not in force where a mortgage decree is, of an anomalous character giving remedy both against the security and against the person, the personal remedy may be enforced first and the mortgagee may sell his security in execution of a money decree. But where the Transfer of Property Act is in force, S. 99 is a bar to such a procedure. (*Hayward*, A J C.) GHULAM MURTZA KHAN *v.* CHANGOOMAL. **11 I.C. 192=5 S.L.R. 71.**

Sale in Contravention.

———O. 34, R. 14—*Sale in contravention.*

S. 99 of the T.P. Act (O. 34, R. 14, C.P.C.) does not render a sale in violation of its terms absolutely null and void. It is only voidable. If no objection is taken to such a sale before confirmation such objection cannot be taken later. 18 All. 325; 27 All. 517; 1 A L J. 360, Foll. (*Richards, Banerjee and Tudball*, JJ.) LAL BAHADUR SINGH *v.* ABHARAN SINGH **37 All. 165=27 I C. 795=13 A.L J. 138 (F.B.).**

———O. 34, R. 14—*Sale in contravention of—Suit for redemption.*

The sons in a Hindu family can sue to redeem the joint family property which has been purchased by the mortgagee at a Court sale in execution of a simple money decree obtained against the father in a suit on the mortgage bond given by the father, 32 Cal. 296 (P. C.). Ref. (*Rafique and Piggott*, JJ.) SIRDAR SINGH *v* RATAN LAL. **36 All. 516=24 I C. 612=12 A.L.J. 855.**

———O. 34, R. 14—*Sale in contravention of—Irregular but not void—T.P. Act, S. 99.*

The violation of S. 99 of the T.P. Act (O. 34, R. 14, C. P. C.) merely renders the execution sale irregular and does not make it a nullity. (*Scott, C.J. and Heaton, J.*) GANESH NARAYAN KHARE *v*, GOPAL VISHNU APTE. **41 Bom. 357=39 I C. 3=19 Bom. L.R. 75.**

——— O. 34, R. 14—*Sale in contravention of—Effect of—Sale in execution of money decree—Purchase.*

Under O. 34, R. 14, C. P. Code, is confined only to claims arising under the mortgage and has no application to a case where the sale takes place in execution of a decree for money upon a claim not arising under the mortgage. 5 B.L.R. 450; 32 C. 296, Ref. (*Chatterjea and Pearson*, JJ.) RAJA JAGADISH CHANDRA DEO DHABAL DEB *v.* BHUBANESHWAR MITRA. **27 C.W.N. 38=37 C.L.J. 265=1923 Cal. 121.**

C. P. CODE (V of 1908), O. 34, R. 14—Sale in Contravention.

——— **O. 34, R. 14**—*Sale in contravention of—Purchase by mortgagee—Leave to bid—Mortgagee purchaser if a trustee—Limitation Act, S.* 10 *and Arts.* 120 *and* 148.

Full Bench :—Where a mortgagee in contravention of S. 99 of the Transfer of Property Act has attached the mortgaged property and brought it up to sale and purchased it himself the mortgagor or his transferee cannot successfully maintain a suit for redemption of the property without first getting the sale set aside under S. 47, C. P. C. Assuming that upon purchase by the mortgagee himself of the equity of redemption in contravention of S. 99, Transfer of Property Act, the mortgagee merely became a trustee for the mortgagor in respect of it. *Held*, by the majority that the mortgagor's right to recover the property cannot be enforced by a suit for redemption within the time prescribed by Art. 148 of the Lim. Act. (*Sanderson, C.J., Woodroffe, Mookerjee, Chatterjee and Newbould*, JJ.) UTTAM CHANDRA DAW *v.* RAJ KRISHNA DALAL.

47 Cal. 377 = 24 C.W.N. 229 = 68 I.C. 157 = 31 C.L.J. 98 (F.B.)

———**O. 34, R. 14**—*Sale in contravention—Voidable.*

When a mortgagee purchases at an execution sale in contravention of the terms of S. 99 of the T.P. Act, the sale is voidable and the mortgagor is entitled to redeem. (*Fletcher and Smither*, JJ.) NARAYAN CHANDRA *v.* KESHAB LAL. **46 I.C. 493 = 28 C.L.J. 181.**

——— **O. 34, R. 14**—*Sale in contravention—Voidable, not void.*

A sale in contravention of S. 99 is not void but merely voidable. On confirmation of the auction, the title of even the mortgagee purchaser without leave under C. P. C. (O. 21, R. 72) becomes indefeasible. Case-law discussed. (*Shah Din and Le Rossignol*, JJ.) MEHR BAKSH *v.* SANJHE KHAN.

18 P.R 1916 = 33 I C. 802 = 194 P.W.R. 1915.

——— **O. 34, R. 14**—*Sale in contravention of—Purchase by mortgage of equity of redemption in Court-sale.*

S. 99 of the T. P. Act does not lay down as a general principle that a purchase by the mortgagee of the mortgagor's equity of redemption is invariably and in all cases invalid even in the absence of fraud, misrepresentation or misconduct. 24 Mad. 96; 27 Mad. 128; 5 Cal. 193; 6 I.A. 145; 32 Cal. 203, Ref. (*Benson and Abdur Rahim*, JJ.) RAMAKRISHNA CHATRAIVA DEO *v.* PUSHAPATI VIJAYARAMA. **18 I C. 589.**

———**O. 34, R. 14**—*Sale in contravention v or voidable.*

A right to set aside sale defeating S. 99 of the Act lasts for 3 years, after which period it ceases and there is no revival of it after it has once ceased to exist. (*Coutts and Sultan Ahmed*, JJ.) PRASAD DAS GOSSAIN *v.* JITU SAHU. **(1920) Pat. 259.**

C.P. CODE (V of 1908), O. 34, R. 14—Scope of.

———**O. 34, R. 14**—*Sale in contravention of—Mortgagee's position—Purchase of equity of redemption.*

A mortgagee purchasing the equity of redemption in execution of a money decree against the mortgagor does not become a trustee in respect of the property to the mortgagor. (*Roe and Jwala Prasad*, JJ.) TAKAIT DAL NARAYAN *v.* CHRISTIAN. **50 I.C. 472 = (1919) Pat 92.**

——— **O. 34, R. 14**—*Sale in contravention of—Whether voidable or void.*

A sale in contravention of S. 99 of the T.P. Act (O. 34, R. 14, C. P. C.) is only viodable and not void and must be set aside under R. 90 of O. 21, C. P. C., by a suit within a year of the confirmation of sale, under Art. 12, Lim. Act, before redemption can be allowed. A suit for redemption is not a suit to set aside the sale, though the irregularity may be sufficient by itself to entitle the plaintiff to avoid the sale by a proper proceeding under the C. P. Code or by a suit. 32 Cal. 296 (P. C.), Foll.; 14 C. W N. 579, Diss. (*Chamier*, C. J. *and Jwala Prasad*, J.) SHEO NARAIN OJAH *v.* RAM JATAN OJHA. **1 P.L.W. 729 = 41 I.C. 533 = 2 Pat L.J. 587 = (1917) Pat. 373.**

Scope of.

——— **O. 34, R. 14**—*Scope of—Mortgagee—Meaning of—Application of rule.*

"Mortgagee" in R. 14 of O. 34 means the holder of a subsisting and effective mortgage which could still be set up by the mortgagee against a purchaser or would-be purchaser of the property. (*Walsh and Sundar Lal*, JJ.) CHEDI LAL *v.* SAADAAT-UN-NISA BIBI.

39 All. 86 = 36 I.C. 907 = 14 A.L.J. 902.

———**O. 34, R. 14**—*Scope of—T. P. Act (IV of 1882), S.* 99.

The New C. P. Code repeated S. 99, T.P. Act, and substituted in its place O. 34, R. 14 and thus merely effected a change of procedure in which mortgaged property has to be realized in execution of money decrees and therefore, the statutory rule in force for the execution of the unsatisfied portion of the decree passed in 1897 was the rule contained in O. 34, C. P. Code (1908). (*Scott*, C. J. *and Batchelor*, J.) BAI GANGA *v.* RAJARAM. **35 Bom. 248 = 10 I.C. 815 = 13 Bom. L.R. 245.**

——— **O. 34, R. 14**—*Scope of—"Bring the property to sale"—Meaning of.*

The words include not only all the steps preliminary to the sale but the sale itself. (*Beachcroft and Walmsley*, JJ.) GOBIND CHANDRA PAL *v.* KAILASH CHANDRA PAL.

41 I.C. 73 = 45 Cal. 530.

——— **O. 34, R. 14**—*Scope of—Applicability of—Mortgage not intended to be operative.*

S. 99 of the T. P. Act (O. 34, R. 14, C.P.C.) cannot be applied to the case of a mortgage which was never brought into operation or which according to its terms could not come into operation until a condition was fulfilled

C. P. CODE (V of 1908), O. 34, R. 14—Scope of

and that condition was never fulfilled. (*Abdur Rahim and Spencer*, JJ.) ARUMUGA THEVAN *v.* MEERA IBRAHIM RAVUTHAR. **55 I.C. 417.**

——O. 34, R. 14 and O. 2, R. 2—*Scope of —Personal covenant in mortgage—Remedies of mortgagee.*

In the case of a mortgage containing a personal covenant to pay, the mortgagee has two remedies distinct from one another (1) to pursue the mortgagor on the personal covenant, (2) to sell the property for the debt. But under O. 34, R. 14 of the Code, he cannot sell the property without a suit for sale, on the mortgage. O. 34, R. 14 is an exception to O. 2, R. 2. (*Jwala Prasad and Adami*, JJ.) PUNIT DEO NARAIN SINGH *v.* BHAGWATI SARAN. **63 I C. 303.**

——O. 34, Rr. 14, 15, 4 and 5—*Scope of*

R. 14 is confined to cases where a mortgagee has obtained a personal decree against a mortgagor on a mortgage-debt. In this case, the mortgagee is not entitled to bring the mortgaged property to sale in execution of the personal decree. He can sell the property only in a regular suit for sale under Rr, 4 and 5, Rr. 14 and 15 read with S. 100. T. P. Act mean that where immoveable property has been made security for the payment of the money and the beneficiary has obtained a decree for the payment of money, so secured, he cannot bring the property to sale only by a suit for sale. The decree referred to in R. 14 must be a decree subsequent to the creation of the security. (*Sharfuddin and Chapman*, JJ.) BRAJASUNDAR DEB *v.* SARAT KUMARI. **2 P L J. 55 = 38 I.C. 791 = 3 P.L.W. 202 = (1917) Pat. 67.**

Security.

——O. 34, R. 14—*Security—Performance of decree—Obligee not named in the bond.*

Where a person hypothecates his properties as security for mesne profits that might be awarded by the Appellate Court and executes a bond without naming an obligee, a suit to enforce the obligation against the surety is not maintainable. The remedy is by application in the original suit itself to make the surety a party and pass a decree against him for mesne profits. (*Lord Phillimore.*) RAJ RAGHUBIR SINGH *v.* JAI INDRA BAHADUR SINGH. **42 All. 188 = 46 I.A. 228 = 22 O.C. 212 = 13 L.W. 82 = 6 O.L.J 682 = 33 M.L.J. 302 = 18 A.L J. 288 = 55 I.C. 550 = 22 Bom. L R. 521 (P.C.).**

——O. 34, R. 14—*Security—Execution against surety's property.*

R. 14 does not prevent sale of mortgaged property of a surety under a compromise decree where the suit was for money. (*Piggott and Walsh*, JJ.) MAKTA PRASAD *v.* MAHADEO PRASAD. **38 All. 327 = 38 I.C. 982 = 14 A.L.J. 385.**

C. P. CODE (V of 1908), O. 34, R. 14.

——O. 34, R. 14—*Security—Costs of the Privy Council—Execution.*

A decree-holder seeking to execute his decree for costs of the Privy Council against the property offered as security must proceed by suit as it is a claim arising under the mortgage. (*D. Chatterjee and Walmsley*, JJ.) CHANDRABATI *v.* BABU RAM. **27 I.C. 365 = 19 C.W.N. 178.**

——O 34, R. 14—*Security bond—Performance of decree—Enforcement in execution.*

A security bond given by the judgment-debtor for the due performance of the appellate decree can be enforced in execution. A separate suit is not necessary. (*Jenkins, C.J., Harrington, Stephen, Mookerjee and Holmwood*, JJ.) BAIJ NATH *v.* SIA RAM DAS. **18 I C. 900 = 17 C L J. 267 (F.B.).**

——O 34, R. 14—*Security—Order for.*

An order directing security to pay does not amount to a decree for the payment of money within the meaning of above rule. (*Roe and Chapman*, JJ.) MADHO PRASAD *v* CHANDRABATI KUER. **38 I.C. 130.**

——O. 34, R. 14 and S. 47—*Security—Compromise decree and execution.*

When security of some property was given in compromising a suit for money due on a hand note, and a decree was passed in terms of the compromise, it was held that under the provisions of O. 34, R. 14, C. P. C., property given as security could not be subject to sale in execution of the compromise decree. 30 Cal. 1060, Dist.; 22 Cal. 859, Foll. (*Roe and Jwala Prasad*, JJ.) GOKUL NATH SHAH *v.* PRAN MAL MARWARI. **1 P L.W. 69 = 37 I.C. 397 = (1917) Pat 371.**

——O. 34, R. 15—*Mortgage—Prior and puisne mortgagees—Decree obtained by one without impleading the other—Rights.*

The rule that under the new Code of Civil Procedure the puisne mortgagee can bring the mortgaged property to sale without impleading a prior mortgagee would apply in an ordinary case in which the property belongs to the mortgagor, but where the relief claimed by the puisne mortgagee is against the mortgaged property which has been sold in satisfaction of a decree on a prior mortgage to which he was not a party, the rule would not apply. He must first redeem the prior mortgage and then bring the property to sale. (*Gokul Prasad*, J.) BENARSI GOLDSMITH *v.* BHULLAU. **1923 A. 428.**

——O. 34, R. 15—*Charge—Application.*

The rule applies to enforcement of a charge payable in money. (*Sadasiva Iyer and Spencer*, JJ.) BOLLAPRAGADA VENKATALAKSHMANA GARU *v.* NANDA SEETAYYA. **11 L.W. 466 = (1920) M.W.N. 294 = 29 M.L.J. 30 = 28 M.L.T. 44 = 57 I.C. 764 = 43 M. 786.**

C. P. CODE (V of 1908), O. 34, R. 5.

——— **O. 34, R. 15**—*Charge—Transfer of Property Act, S.* 68 (*b*).

Because the words of S 100 are very wide the provisions of S. 68 as to the liability of a mortgagor apply to a person creating a mere charge also. (*Sadasiva Aiyar and Napier, JJ.*) RAMAKRISHNAMA CHETTY *v.* VUVVATI CHENGU AIYAR. **33 I C 321 = 27 M L J. 494.**

——— **O. 33, R. 1**—*Interpleader suit—Mortgagee not denying assignment, but contending it as void, as between him and assignees.*

Where a mortgagee does not deny an assignment by him of his rights under the bond, but contends that it is void, the mortgagor is not bound to bring an interpleader suit making the mortgagee and his assignee to interplead as between them. 33 Mad. 123, Dist. (*Sadasiva Aiyar and Tyabji, JJ.*) VENKATASUBBA AIYAR *v.* SUBHARATHINAM AIYAR. **1 L.W. 419 = 15 M.L.T. 331 = 23 I C. 607 = 27 M.L.J. 134.**

——— **O. 33, R. 2**—*Deposit in Court—Allowing a party to draw it out.*

Investment of money deposited in Court pending decision with a party is objectionable as the successful party is entitled to the money from the Court without further proceeding. (*Sankaran Nair, J.*) DORASINGAM *v.* VYRAVAN CHETTIAR. **13 M L.T. 326 = 24 M.L J. 404 = 19 I.C 219 = (1913) M.W N. 363.**

——— **O. 35, R. 4**—*Interpleader suit—Non-appearance of—Claimants—Procedure.*

The plffs. in possession of a sum of money, filed an interpleader suit against two rival claimants (defendants) who did not appear at the trial. *Held*, that the proper order would be to discharge the plffs. from all liability to the defts. in respect of the money and dismiss them from the suit, and to direct them to pay the balance into the Court to the credit of the proper claimant after getting their costs. The Court might further order that the defts. or either of them might apply for payment or make one of the defts. a plff. and raise an issue. (*Martin, J.*) KHEMCHAND ISSARDAS *v.* KHAIRUDDIN RANGLAHI. **33 I.C. 365 = 21 Bom. L.R. 948.**

——— **O. 35, R. 5**—*Interpleader suit—Railway Company accepting goods—Whether agent of the consignor.*

A Railway Company by accepting goods for carriage does not become the agent of the consignor within the meaning of the rule. The Company may file an interpleader suit against consignor and another party claiming adversely against consignor. (*Heaton and Shah, JJ.*) CHAGAN LAL HIRALAL *v.* B. B. & C. I. RY. **28 I C. 948 = 17 Bom. L.R. 339.**

——— **O. 35, R. 6**—*Interpleader suit—Landlord and tenant.*

C. P. CODE (V of 1908), O. 37.

A tenant has no right to bring a suit to determine which of the two defts. both of whom claim rent from him is his landlord. (*Walmsley and Panton, JJ.*) BHUSAN CHAND GHOSE *v.* JAHARMAL BHUTRA. **48 I.C. 733.**

——— **O. 35, R. 5**—*Interpleader suit—Tenant suing to determine the landlord—If maintainable.*

Where a tenant was sued by another posing as the former's landlord for rent and a decree was passed against him on the ground that he was the plaintiff's tenant and the tenant thereafter sued to have it declared that he was the tenant of another, *held*, that such a suit was in the nature of an interpleader suit and was not maintainable under S. 42 of the Specific Relief Act as the defendant was not a person interested in denying the plaintiff's tenancy to another and as no injunction was asked for and that it was also barred by *res judicata*. (*Mookerjee and Carnduff, JJ.*) NANJI KOER *v.* UMATUL BATUL. **13 I C. 40 = 13 C L J. 653.**

——— **O. 36, R. 1**—*Special case—Re opening of.*

It is settled practice that where a special case is stated by consent it can only be re-opened by mutual consent. (*Kajiji, J.*) MONIE *v.* SCOTT. **43 Bom. 281 = 47 I C 642 = 20 Bom. L.R. 839.**

——— **O. 37**—*Suit under on promissory note—Oral agreement as to payment of interest—Decree.*

In a suit on a promissory note instituted under Chapter 37 of the C.P. Code where no leave had been obtained to defend the suit the plaintiff is not entitled to a decree for interest at 18 per cent on the strength of an oral agreement alleged in the plaint. The plaintiff can only get interest at 6 per cent. (*Rankin, J.*) KADER BUKSH HAZIR BUKSH *v.* SHAIKH SERAJUDDIN. **49 Cal. 716 = 1922 Cal. 513.**

——— **O. 37**—*Defence doubted by Court—Procedure.*

Where in a suit on a pro-note under O. 37, the deft. applies for leave to appear and defend the suit, and the Court doubts the sincerety of the defence, it should grant leave on condition that the deft. should pay into Court the amount claimed. (*Wallis, C.J. and Hughes, J.*) CHAKRAPANI CHETTIAR *v.* KAMALAVALI AMMAL. **60 I.C. 639 = 12 L.W. 712.**

——— **O. 37**—*Scope of.*

O. 37 of the Code refers only to the mode of trial in suits and does not confer any jurisdiction. (*Pratt, J.C. and Crouch, A.J.C.*) DOULAT RAM *v.* HALO KANYA. **13 I.C. 244 = 5 S L.R. 155.**

C. P. CODE (V of 1908), O. 37,

———O. 37—*Pleas.*

In summary suits under O. 37 it is impossible to go into partnership accounts and so the plea that it is part of partnership account cannot be raised. (*Crouch*, A.J.C.) KISHOMAL KIRPOMAL *v.* VISHINDAS SUKHRAMDAS. **9 I.C. 299.**

———O. 37, R. 2—*Suit* on shajak Hundi—*Leave to defend—Affidavit in support—Set off.*

An affidavit in support of an application for leave to defend as required by O. 37, R. 3 (1) of the C.P. Code must disclose facts sufficient to support the application. O. 37 contains provision for a summary procedure, which is antagonistic to an investigation of claims to a set-off, unless of the clearest description. (*Fawcett*, J.C.) FIRM OF KOOVERBHAN SUKHNAND *v.* FIRM OF MADAN DAS SIROONAL. **49 I.C. 193=12 S.L.R. 70.**

———O. 37, R. 3—*Charge on the property.*

An order charging the property of an insolvent-debtor for the repayment of plff's. claim on conditions of granting permission to defend his suit is a permanent charge till re-payment of claim. (*Mookerjee and Panton*, JJ.) EAST INDIA CIGARETTE MANUFACTURING COY., LTD. *v.* ANAND MOHAN BASAK. **68 I.C. 10=24 C.W.N. 401.**

———O. 37, Rr. 3 and 4—Ex-parte *decree in summary suit—Remedy of deft. not obtaining leave to defend—Decree, if can be set aside.*

The only remedy of a deft. against whom a decree has been passed in a summary suit under O. 37, C.P.C., he having found it impossible to obtain the required leave to defend within the time allowed, is by an application to set aside the *ex parte* decree and on such applications, leave should be given to him to defend the suit. (*Pratt*, J.C.) FIRM OF JAMNADAS *v.* A. E. GAYER. **11 I.C. 433.**

——— O. 37, R. 4—*Deposit of money—Question of ownership.*

Where money is desposited by a deft. as a condition precedent to the setting aside of a decree under the rule, the decretal amount is a charge on the deposit if final judgment is passed against the deft. The Court is not competent to enquire into the ownership of the money deposited. The case may be different if land was furnished as security. In such a case the title of the owner would not be lost. (*Abdur Rahim and Oldfield*, JJ.) GOPALAIYYAR *v.* THIRUVENGADAM PILLAI. **5 L.W 407= 38 I.C. 481=32 M.L.J. 503.**

———O. 37, Rr. 7 and 8—*Interest up to redemption.*

The parties did not complete redemption of a mortgage if it remained unredeemed on the expiry of four years from date as agreed. *Held*, the mortgagee in possession is entitled to damages

C. P. CODE (V of 1908), O. 38, R. 2.

and the fair measure of damages is *prima facie* the rate of interest determined by the parties in their original contract. Before the defendant can be redeemed the plaintiff must pay him interest in accordance with the terms of the contract up to the date of redemption. (*Le-Rossignol and Harrison*, JJ.) MANGLI *v.* BIDHA LAL. **1923 Lah. 405.**

———O. 38—*Small Cause Court—If can attach immoveable property.*

Small Cause Court cannot attach immoveable property. (*Rankin and B.B. Ghose*, JJ.) SADEK ALI *v.* SAMED ALI. **28 C.W.N. 16= 1924 Cal. 193.**

———O. 38, R. 1—*Pendency of appeal—Effect.*

The mere fact that an appeal is pending against a decree is no reason for not enforcing execution by arrest when the execution has not been stayed. (*Scott-Smith*, J.) MEHR CHAND *v.* RAM LAL. **1924 Lah. 360.**

———O. 38, R. 1—*Intent to delay—Attendance in Court at another place.*

Where a person has to leave his place of residence for attendance in a criminal Court his departure is not with a view to delay the plaintiff or avoid the process of Court or to obstruct or delay execution. Court is not justified to issue an order under O. 38, R. 1, C.P.C. (*Chevis*, A.C.J.) DAULAT RAM *v.* KIRPA RAM. **4 Lah. L.J. 428.**

———O. 38, R. 1—*Security for appearance of defendant—Object of—Mode of enforcement.*

The object of the surety bond given under O. 38, R. 1 is to secure the rights of the judgment-creditor. The Government are not interested in the proceedings in any way. The bond should be enforced on the application of the judgment-creditor only to the extent of the money payable under the decree. (*Pratt*, J.C. *and Crouch*, A.J.C.) HUSSAIN ALI SILLEMANJI *v.* SECRETARY OF STATE FOR INDIA. **28 I.C. 92=8 S.L.R. 270.**

——— O. 38, R. 2=*Arrest before judgment—Deposit of money—Lien.*

Money paid into Court by a deft. arrested before judgment sufficient to answer the plaintiff's claim, is ear-marked for the suit and is subject to the lien of the plff for his decree amount in case he succeeds. The insolvency of the deft. before decree does not vest the money in the Official Receiver. The case is different if security is given for the appearance of the deft. 39 Mad. 903; 29 Bom. 405, Dist. (*Ayling and Coutts Trotter*, JJ.) SEENA VENA RAMIAH AYYAR *v.* GOPALA AYYAR. **41 Mad. 1053=49 I.C. 20=35 M.L.J. 353.**

———O. 38, R. 2=*Attachment before judgment—Claim—O. 21, R. 63, if applicable.*

O. 21, R. 63 of the C. P. Code requires a claimant whose objection to an attachment

C. P. CODE (V of 1908), O. 38, R. 2.

before judgment has been disallowed to bring a suit on his title under O. 21, R. 63 within the period prescribed by Art. 11 of the Limitation Act. 41 Mad. 23, Overruled. (*Wallis*, C.J., *Oldfield and Sheshgiri Aiyer*, JJ.) MALIKHARJUN *v.* MATLA PALLI VIRAYA.

41 Mad. 849=24 M.L.T. 134=35 M.L.J. 231=8 L.W. 197=47 I.C. 1000=(1918) M.W.N. 699 (F.B.).

——**O. 38, R. 2**—*Surety—Extent of liability—Production of judgment-debtor.*

Where a person stand surety under O. 38, R. 2, C.P. Code for another arrested before judgment the surety is not discharged from liability unless at the time when the judgment-debtor is produced, he can be called upon to pay up the decree amount or suffer imprisonment in default. The mere production of the debtor with a production order does not absolve the surety. (*Maung Kin*, J.) SUBRAMANIA IYER *v.* ABDUL RAHMAN. **11 L.B.R. 444=1 Bur. L.J. 196=1923 Rang 98 (3).**

——**O. 38, R. 2**—*Sureties for appearance—Surety bond providing for performance of decree — Construction — When surety is discharged.*

Where a judgment-debtor was released from arrest on surety furnishing security for his appearance on a certain day and the surety executed a bond for the due performance of the decree on failure of the judgment-debtor to satisfy it, the bond was not in accordance with the Court's order and the surety was discharged from his responsibility on the appearance in Court of judgment-debtor on the specified day. (*Pratt*, J.) CHANDI CHARAN SEN *v.* RAM COOMAR CHAKRAVARTY.

23 I.C. 349=7 Bur. L.T. 5

——**O. 38, R. 3**—*Compromise—Liability.*

S. 135 of the Contract Act has no application to the case of a surety under O. 38, R. 3 and his obligation continues even though the parties to the suit entered into a compromise on the strength of which a decree was passed by the Court. (*Seshagiri Aiyar and Burn*, JJ.) ODAYAMANGALATH APPAMNI NAIR *v.* ISACK MACKADAM **37 M.L.J. 435=10 L.W. 583=53 I C. 367=43 Mad. 272.**

——**O. 38, Rr. 4 and 5**—*Attachment—Joint Hindu family—Money decree against co-parcener—Attachment of his share during his lifetime—Sale after his death—Interest of purchaser.*

Where in execution of a money decree, the share of a Hindu co-parcener in the family property was attached during his lifetime and brought to sale after his death his interest passes to the auction-purhaser and precludes the title arising from survivorship. 4 Mad. 302, Foll.; 5 Cal. 48 (P.C.); 25 Cal. 179 (P.C.), Ref. (*Sankaran Nair and Tyabji*, JJ.) THADI RAMAMURTHI *v.* MOOLA KAMIAH.

16 M.L.T. 123=34 I.C. 667=(1914) M.W.N. 733.

C. P. CODE (V of 1908), O. 38, R. 5.

——**O. 38, Rr. 5 and 6**—*Attachment—Trustee failing to produce accounts.*

The Court did not commit an error of substance by directing the trustee to furnish security before it ordered attachment as provided by Rr. 5 and 6. Where a trustee disobeyed an order of Court to furnish accounts under S. 92, C.P.C. (*Piggott and Walsh*, JJ.) JAI NARAIN *v.* BANKEY LAL. **41 I.C. 89.**

——**O. 38, R. 5**—*Attachment before judgment—Effect of.*

Attachment before judgment confers no right on the party who obtains the order of attachment. (*Richards*, C. J. *and Banerjee*, J.) BISHESHAR DAS *v.* AMBIKA PERSHAD.

37 All. 578=29 I.C. 622=13 A L J 732.

——**O. 38, R. 5 and O. 39, R. 1**—*Mortgage of* malikana*—Decree for sale—Order of attachment and injunction, if competent.*

Appellant mortgaged to respondent his right to receive *malikana* dues from a number of villages. A decree for sale was passed on the mortgage. Before the sale the decree-holder obtained an order restraining the judgment-debtor from receiving the *malikana* dues. *Held*, that the Court had no power either to attach the *malikana* dues or to prevent the appellant from receiving them. (*Chamier and Piggott*, JJ.) MUHAMMAD INAM-UL-LAH-KHAN *v.* NARAIN DAS. **37 All. 423=29 I.C. 601=13 A.L.J. 565.**

——**O. 38, R. 5**—*Attachment before judgment—Conditional—Scope.*

An order of attachment before judgment can only be made after defendant fails to show cause to the contrary or to furnish security and, a conditional order of attachment has effect only until the defendant so furnishes security. (*Ryves and Piggott*, JJ.) NATHU MAL *v.* KISHORI LAL. **23 I.C. 107.**

——**O. 38, R. 5**—*Intend to obstruct or delay is essential.*

Intend to obstruct or to delay the execution within the terms of the rule must be clearly proved. Vague allegations about the defendant being about to remove the whole or any part of the property from the local limits of the jurisdiction of the Court will not suffice. (*Macleod*, C. J. *and Shah*, J.) SENAJI *v.* PANAJI. **23 Bom. L.R. 1228=46 Bom. 431=1922 Bom. 276.**

——**O. 38, R. 5**—*Defendant attempting to dispose of property during pendency of suit is not enough.*

The fact that the defendant has attempted to sell some of his property during the pendency of the proceedings against him is not enough, to infer that the sale was with intent to obstruct or delay the execution of any decree that may be passed against him which is necessary to invite the application

C. P. CODE (V of 1908), O. 38, R. 5.

of O. 38, R. 5 of the Code. (*Macleod*, C. J. *and Shah*, J.) NOWROJI PUDUMJI *v.* DECCAN BANK, LTD. **46 Bom. 1256 = 63 I.C. 958 = 23 Bom, L.R. 550.**

———**O. 38, Rr. 5 and 6 and O. 43, R. 1—Clause (q)**—*Attachment before judgment—Conditional order on failure to give security—Security furnishing—Appeal from order—Letters Patent, cl.* 15.

O. 38, R. 6 of the C.P.C. empowers the Court in the events stated to direct the attachment of the defendant's property. The power given by O. 38, R. 5 to make an alternative order directing the defendant within a specified time to furnish security or to appear and show cause why he should not furnish security carried with it as an incident the power, after hearing the defendant, to confirm the order that security be furnished. Under its general powers the Court may then, if necessary, extend the time for the furnishing of the security. Where the defendant fails to show cause why he should not furnish security the Court may, under R. 5, direct finally that security, be furnished or in the alternative, under R. 6 direct the attachment of the defendant's property. The power of attachment also exists if the required security is not furnished. The provisions of the C.P.C. do not contemplate an appeal from an order directing the defendant to furnish security. An appeal lies from an order of attachment made under R. 6. Where an order for attachment is made on failure of the defendant to furnish security and the defendant in fact furnishes such security, there is no operative order of attachment and the remainder of the order is merely an order for the furnishing of security not appealable either under the C.P.C. or as a judgment under the Letters Patent. (*Sanderson*, C.J. *and Richardson*, J.) HAJI MOHAMUDDIN AND CO. *v.* THE EASTERN JAPAN TRADING CO.

50 Cal. 215 = 1923 Cal. 639.

———**O. 38, R. 5**—*Small Cause Court—Immoveable property.*

It is open to a Small Cause Court to attach immoveable property before judgment under O. 38, R. 5, C.P. Code. (*Newbould and Panton*, JJ.) KADARNATH PARAMANIK *v.* HEM NATH KARMAKAR. **49 Cal. 994 = 1923 Cal. 176 (2).**

———**O. 38, R. 5**—*Attachment before judgment—Money deposited by sureties for release of attachment—Assets held by Court—Rateable distribution.*

The attachment before judgment should restrict the rights of persons holding decrees against the defendant. Where assets are held by a Court, the intention of legislature is to afford every creditor equal opportunities of obtaining a rateable advantage in the available assets of the judgment-creditor. (*Richardson*, J.) GHISULAL *v.* TODARMAL.

26 C.W.N. 169 = 1922 C. 19.

———**O. 38, R. 5**—*Mortgage suit—Preliminary decree—Right to personal decree—Attachment of other properties.*

C. P. CODE (V of 1908), O. 38, R. 5.

A mortgagee, may, after preliminary decree, attach under O. 38, R. 5 other properties of the mortgagor, if the hypothecation is insufficient and the mortgagor intends to dispose of his other properties fraudulently. (*Greaves*, J.) JOGEMYA DASSI *v.* BAIDYANATH PRAMANICK.

50 I.C. 924 = 46 Cal. 245.

———**O. 38, Rr. 5 and 6 and O. 33, R. 8**—*Pauper suit—Time for attachment.*

There is no suit before the Court until the application to sue *in forma pauperis* has been granted. Consequently the Court has no jurisdiction to attach defendant's property before judgment under O. 38, C.P.C. (*Fletcher and Newbould*, JJ.) PURNACHANDRA CHABRI *v.* TARAPROSAD MAITI. **28 C.L.J 159 = 38 I.C. 600 = 21 C.W.N. 870.**

———**O 38, R. 5 and O. 43, R. 1, Cl. (q)**—*Attachment before judgment—Refused after hearing defendant—No appeal lies.*

Where an application for attachment before judgment is dismissed by the Court of first instance after hearing the defendants, no appeal lies against that order. (*Mookerjee and Chatterjee*, JJ.) MAHENDRA NARAIN *v.* GURU DAS BAIRAGI. **33 I.C. 689 = 23 C.L.J. 392.**

———**O 38, R. 5**—*Attachment before judgment—Effect of.*

Attachment before judgment does not give any interest in the attached property. A person obtaining attachment before judgment cannot restrict the right of the creditor holding previous decree. (*Mookerjee and Newbould*, JJ.) MADHUSUDAN PATITUN DA *v.* RASH MOHAN SEN PODDAR. **30 I.C. 38 = 21 C.L.J. 614.**

———**O. 38, Rr. 5 and 6**—*Attachment before judgment—Duty of Court to afford opportunity to furnish security.*

A Court has no power to pass an order of attachment before judgment without the essential elements mentioned in R. 5 and without giving an opportunity to furnish security. (*Mookerji and Carnduff*, JJ.) JAIPARKASH NARAIN SINGH *v.* BASANTA KUMAR DEBI.

15 I.C. 604.

———**O. 38, R. 5**—*Attachment before judgment—Dismissal of suit—Reversal on appeal.*

The Court ought to withdraw attachment before judgment on the dismissal of a suit. Such an attachment is not however revived by reversal of the dismissal on appeal. (*Mookerjee and Cox*, JJ.) SASIRAMA KUMARI *v.* MEHRBAN KHAN. **9 I.C. 918 = 13 C.L.J. 243.**

———**O. 38, R. 5**—*Surety's liability—Duration.*

A surety's liability ceases as soon as the first Court dismisses the suit. His liability is not revived by the appellate Court subsequently decreeing the plaintiff's claim. (*Johnstone*, J.) SHANKER *v.* RAM KISHEN.

53 P.W.R. 1915 = 29 I.C. 271 = 147 P.L.R. 1915.

C. P. CODE (V of 1908), O. 38, R. 5.

———O. 38, Rr. 5 to 11—*Order before judgment — Actual attachment after—Validity—Dismissal of execution—Application—Effect on attachment.*

An attachment applied for before judgment but actually effected after decree has still the force of the attachment before judgment under O. 38; O. 21, R. 57 does not apply to attachment before judgment under O. 38 and the dismissal of the subsequent execution application will not put an end to the attachment. (*Phillips and Kumaraswami Sastri*, JJ.) RUDRAVARAM VENKATASUBBIAH *v.* VENKATA SESHAYA. **42 Mad. 1 = 24 M.L.T. 346 = 35 M.L.J. 387 = (1918) M.W.N. 606 = 48 I.C. 282 = 8 L.W. 369.**

———O. 38, R. 5—*Hindu Law—Death of judgment-debtor—After attachment—Decree—Survivorship—Accrual.*

An attachment followed by a decree prevents the accrual of the title by survivorship where the judgment-debtor dies after attachment of decree but before the order for sale. (*Sankaran Nair and Ayling*, JJ.) MUTHUSWAMI CHETTI *v.* CHUNAMMAL. **24 I C. 320 = 26 M.L.J. 517.**

———O. 38, R. 5—*Attachment before judgment—Non compliance with the provisions of R. 5—Attachment* ultra vires—*Alienation not void.*

An attachment before judgment without complying with the provisions of R. 5, is *ultra vires* and therefore such an attachment does not come in the way of alienation of that property. (*Kotwal*, J.) BANSILAL *v.* SITARAM. **1922 Nag. 238.**

———O. 38, R. 5 and O. 21, R. 57—*Attachment before judgment—Dismissal of execution application ceases on.*

An attachment before judgment ceases to be operative on the dismissal of the first application for execution. 17 N.L.R. 121 foll. (*Hallifax*, A.J.C.) AMOLAKSAO *v.* MAHIPATRAO. **1922 Nag. 81.**

———O. 38, R. 5 and O. 21, R. 57—*Attachment before judgment—Becomes one in execution on application in execution.*

An attachment before judgment, made under O. 38, R. 5 of the Code, becomes one in execution on an application for execution and R. 57 of O. 21 will apply to it equally with the other rules of O. 21. (*Hallifax*, A.J.C.) GANPAT *v.* MUKUNDA. **63 I.C. 712 = 17 N.L.R. 121.**

———O. 38, R. 5 and O. 50, R. 1—*Attachment of immoveable property before judgment—Small Cause Court.*

A Small Cause Court has power to attach immoveable property before judgment. The C.P. Code, (1908) has altered the law in this respect. (*Drake Brockman*, J. C.) KANCHEDI *v.* KANCHEDI. **43 I.C. 128 = 14 N.L.R. 1.**

C. P. CODE (V of 1908), O. 38, R. 5.

———O. 38, R. 5—*Considerations guiding the applicability of the rule.*

The power given under the C.P. Code to attach before judgment should be exercised only on clear proof of the existence of the mischief aimed at. The court must be satisfied not only that the defendant is about to dispose of his property or to remove it from the jurisdiction of the court, but also that his object in so doing is to obstruct or delay the execution of any decree that may be passed against him. If the court accepts the view that defendant has no intention of alienating the property, there is no power to order attachment. (*Miller*, C.J. *and Kulwant Sahay*, J.) CHANDRIKA PRASHAD SINGH *v.* HIRA LAL. **5 Pat. L.T. 124 = 1924 P. 312.**

———O. 38, Rr. 5 and 11—*Attachment before judgment—Passing of decree.*

Where property is attached before judgment, the fact that a decree is made in the plaintiff's favour does not determine the attachment, which continues in force. (*Miller*, C.J. *and Jwala Prasad*, J.) HERAMBA NATH BANDOPADHYA *v.* SURENDRA NATH MITRA. **1919 Pat. 465.**

———O. 38, R. 5—*Attachment before judgment—Order, when proper.*

When a party seeks to obtain an order of attachment before judgment, he must have definite evidence to satisfy the Court that there is reasonable cause for believing that the judgment-debtor is about to dispose of the whole or part of his property with a view to defeating his creditors. It is not sufficient to make only general allegations. (*Chapman and Atkinson*, JJ.) KHOKA MARWARI *v.* RAMACHANDRA MARWARI. **44 I C 240.**

———O. 38, R. 5—*Surety — Obstruction to property attached being left with surety—Discharge of bond.*

A surety for the production before the Court of property released from attachment before judgment is entitled to be put in possession of the property. If not put in possession he cannot be proceeded against in the event of decree being passed. On giving surety, the property was released from attachment on the security of the property of the surety. If he is prevented from obtaining possession by the conduct of the plaintiff at whose instance the order of attachment before judgment was made he is entitled to have the security bond cancelled. (*Pratt*, J.) RANGLAL *v.* S.T.M. CHETTY. **12 Bur. L.T. 89 = 52 I.C. 930.**

———O. 38, R. 5—*Attachment before judgment—Property outside jurisdiction.*

A Civil Court has no power to issue a warrant of attachment before judgment on property situated without its jurisdiction. 8 B.H.C.R. (O.C.J.) 29, Appr. (*McColl*, A.J.C.) BHAI KHAN *v.* DES RAJ. **25 I.C. 771 = (1914) 2 U.B.R. 15.**

C. P. CODE (V of 1908), O. 38, R. 5.

——O. 38, R. 5—*Surety — Reference to arbitration—Liability of surety.*

Where a surety bond has been given for the property attached before judgment, the decree in the suit can be executed against the surety also. The liability of the surety is the same whether the judgment has been arrived at by the Court after a regular trial of the Court pronounces judgment on an award passed by the arbitrators appointed in the suit. Arbitration is an ordinary incident of the suit. (*Pratt*, J.C. *and Hayward*, A.J.C.) UMERMAL JANIMAL *v.* FIRM OF BHOJRAJ HASSOMAL.

45 I.C. 429=11 S.L.R. 122.

——O. 38, R. 5 (1) and (3)—*Simultaneous orders.*

Order conditional under R. 5 (3) cannot be made without accompanying order under R. 5 (1) to furnish security or to show cause why it should not be furnished. (*Newbould and Panton*, JJ.) ABDUL KARIM *v.* NUR MAHOMED.

37 I.C. 907.

——O. 38, Rr. 5 (1) (b) and 6 (b)—*Discharge of surety without notice to parties.*

An order of discharge of a surety without notice to the parties is rescindable at the instance of any party. A mere notice given by a surety that he intends not to be a surety any longer does not enable him to withdraw from the guarantee at any time. 29 Cal. 69, Dist. (*Fletcher and Richardson*, JJ.) ABDUL BARY *v.* BELAYAT ALI. **37 I.C. 919.**

——O. 38, R. 5 (1) (b)—*Attachment before judgment—Security—Attaching creditor whether acquires—Charge on money deposited.*

Per *Wallis*, C.J. plff. gets no charge on the money paid by a deft. as security for producing and placing his property at the disposal of a Court whenever required. Attachment of the property in default of such security being given does not confer title on the attachment creditor. *Per Seshagiri Iyer*, J.—R. 5 (1) (b) of O. 38 gives a control to the Court over the property and not a preferential right to the plff. who moves the Court over others who have claims against the debtor. If a creditor desires to obtain a special charge upon some specific part of the property under the writ of attachment, he must obtain some order giving him special right or charge on a specific part of the property. Pollard *in re*, Pollard *ex parte* (1903) 2 K.B. 41, Cited. (*Wallis* C.J. *and Seshagiri Iyer*, J.) ERIKULAPPA CHETTY *v.* THE OFFICIAL ASSIGNEE OF MADRAS.

32 I.C. 190=39 Mad. 903.

——O. 38, R. 5 (3)—*Attachment before judgment—Order passed without jurisdiction—Realisation without jurisdiction — Withdrawal by decree-holder—Refund.*

A Court has no power to order attachment of a debt payable to the deft. outside its jurisdiction by a person outside its jurisdiction; such order if passed is illegal and must be set aside. If on such order being passed, the money is realised by the Court and withdrawn by the decree-holder, plff. must be made to bring back the money with interest and on his failure, the money should be realised by attachment and sale of his property. (*Mookerjee and Cuming*, JJ.) SURENDRA NATH *v.* BANSI BADAN. **24 C.L.J. 533=36 I.C. 487=22 C.W.N. 160.**

C. P. CODE (V of 1908), O. 38, R. 10.

——O. 38, R. 5 (3)—*What is not a conditional order.*

An order directing the defendant not to part in any way with the property sought to be attached by the plaintiff concurrently with issue of notice to the deft, to show cause why an attachment should not issue before judgment, cannot be construed as an order of conditional attachment under O. 38, R. 5 (3). (*Mookerjee and Chatterjee*, JJ.) MAHENDRA NARAIN *v.* GURU DAS BAIRAGI.

38 I.C. 689=23 C.L.J. 392.

——O. 38, R. 6—*Order under—When to be passed.*

Order conditional under R. 6 cannot be passed unless the deft. has failed to furnish security under S. 5 or fails to show cause why such security should not be furnished. (*Newbould and Panton*, JJ.) ABDUL KARIM *v.* NUR MAHOMED. **37 I.C. 907.**

——O. 38, R. 8—*Limitation Act, Arts. 11 and 13—Order passed under O. 38, R. 8 does not govern O. 21, R. 63.*

A suit to recover property released from attachment under O. 38, R. 8 does not fall under Arts. 11 and 13, Limitation Act. The suit is not one to set aside an order of a Civil Court within Art. 13 and the existence of the order releasing the attachment before judgment is no bar to it. O. 38 only provides the mode of investigation into claims to property sought to be attached before judgment and an order passed under it cannot be said to determine the ownership of the property in dispute even for the purpose of the suit in connection with which it is made. The rule does not incorporate all the provisions of O. 21, and amongst them R. 63. (*Ayling and Napier*, JJ.) RAMANAMMA *v.* BATHULA KAMARAJU. **41 Mad. 23=39 I.C. 863=5 L.W. 704.**

——O. 38, Rr. 9 and 11—*Attachment before judgment—Dismissal of suit—Appeal—Revival of attachment.*

On the dismissal of a suit, an attachment before judgment *ipso facto* comes to an end and does not revive when an appeal is lodged. (*Richardson and Beachcroft*, JJ.) ABDUL RAHAMAN *v.* AMIR SHARIF. **45 Cal. 780=44 I.C. 229=22 C.W.N. 927.**

——O. 38, R. 10 — *Attachment before judgment—Property sold—Decree — Proceeds recovered by previous decree-holder—Suit to recover share.*

Where certain properties are attached befor judgment in a suit and sold and a decre obtained latter, and the decree-holder does no execute his decree, he cannot afterwards brin

C. P. CODE (V of 1908), O. 38, R. 10.

a suit to recover his share of the proceeds, if a previous decree holder has attached and recovered them. (*Macleod*, C.J. *and Fawcett*, J.) VISHNU DHONDDEV *v.* RAMPRATAP DAULATRAM. **45 Bom. 360=59 I.C. 713=22 Bom. L.R. 1407.**

———**O. 38, R. 10** — *Scope—Rights* in rem.

O 38, R. 10 is not limited to rights *in rem*. (*Woodroffe and Richardson*, JJ.) MADAN MOHAN DE SARKAR *v* REBATI MOHAN PODDAR. **28 C.L J. 115=34 I.C. 953=21 C.W.N. 158.**

———**O. 38, R. 10** — *Attachment before judgment—Property sold in execution of another decree—Attachment, ceases.*

Where the attached decree is sold in execution of another decree the attachment ceases, and no further proceedings can be taken against the property on the basis of that attachment. (*Jwala Prasad and Adami*, JJ.) HARNANDAN MARWARI *v* PRAN NATH RAY. **2 P.L T 240=61 I.C. 922=1921 Pat. 205.**

———**O. 38, R. 11**—*Atachment before judgmen—Sale in execution—Claim—Limitation Act, Art.* 11.

Where there is an order in execution for sale of a property attached before judgment that order proceeds in the view that the property is to be considered as attached in execution by virtue of O 38, R. 11 of the Code and under Art. 11 of the Limitation Act, the period of limitation is one year to set aside the order. (*Wallis*, C.J. *Oldfield, Spencer, Ramesam and Kumaraswami Sastri*, JJ.) ARUNACHALLAM CHETTI *v.* PERIASAMI. **44 Mad. 902=(1921) M.W.N. 569=41 M.L.J. 252=70 I.C. 439=14 L.W. 645 (F.B.)**

———**O. 38, R. 11**—*Effect of attachment before judgment.*

This rule gives the same effect to an attachment before judgment after a decree is passed as an attachment after judgment. (*Das and Adami*, JJ.) RAM HARI LAL *v.* NATHU RAM. **2 P.L.T. 719=62 I.C. 33=6 P.L.J. 332.**

———**O. 38, R. 12, (1882, S. 490)**—*Attachment order—How far continues.*

An attachment before judgment continues in force even or after the decree is passed, unless the plff.'s intention of its abandonment is proved or can be gathered. Re-attachment after judgment being superfluous is not the proof of the abandonment. (*Benson*, O.C.J. *and Napier*, J.) ALWAR CHETTI *v.* POOVALA VARDAPPA NAICKER. **16 I.C. 387 (1).**

———**O. 39, R. 1—**

APPEAL.
ARBITRATION PROCEEDINGS.
EFFECT.
EXECUTION PROCEEDINGS AND SALE.
MARRIAGE.
MUHAMMADAN LAW.
PRINCIPLES.

C. P. CODE (V of 1908), O. 39, R. 1—Arbitration Proceedings.

RIGHT TO WORSHIP.
SECURITY AND ACCOUNTS.
SPECIFIC PERFORMANCE.
STRANGERS TO SUIT.
SUIT FOR INJUNCTION.
SUIT FOR POSSESSION.
SUIT IN FOREIGN COURT.

Appeal.

———**O. 39, R. 1, and O. 43 (1) (r)**—*Appeal — Injunction purely discretionary — Appeal—Appellant to show that Court exercised jurisdiction wrongly.*

An order of injunction is purely discretionary and a party appealing against it should prove that the Court against whose judgment the appeal is preferred acted wrongly in the exercise of its jurisdiction. (*Fletcher and Chatterjee*, JJ.) UMESH CHANDRA MUKHOPADHYA *v.* NIBARAN CHANDRA KONWAR. **22 I C. 710=19 C.L J. 305.**

———**O. 39, R. 1 and O. 43, R. (1) (r)**—*Appeal.*

Order refusing grant of a temporary injunction is appealable. (*N. Chatterjee and Newbould*, JJ.) HARI LAL *v.* PRAYAG RAM. **18 C.L.J. 39=19 I.C 353=17 C.W.N. 996.**

Arbitration Proceedings.

———**O 39, R. 1**—*Arbitration proceedings—Injunction.*

It is a matter of procedure and not of substance that the party complaining of the invalidity of an award would have to apply to the Court to have the document taken off the file It is in the discretion of the High Court to grant or refuse an injunction restraining a reference to the tribunal of arbitration in respect of a commercial contract. An interlocutory injunction should not be granted upon novel considerations interfering with arbitrators. 23 C.W.N. 811, (814), Foll. (*Sanderson*, C.J. *Mookerjee and Fletcher*, JJ.) JOYLAL & CO. *v.* GOPIRAM BHOTICA. **31 Cal. L.J. 167=24 C.W.N. 612=58 I.C. 778=58 I.C. 753=47 Cal. 611.**

———**O. 39, Rr. 1 and 2**—*Arbitration proceedings—Temporary injunction — Principles governing— Injunction— Restraining arbitration.*

A temporary injunction should not be granted unless the applicant satisfied the Court that its interference is necessary to protect him from irreparable or at least serious injury before the legal right can be established at the trial. If there is any other remedy open to the applicant by which he can protect himself from the consequences of the injury apprehended, a temporary injunction will not be granted. If a party to contract alleges a breach and refers the matter to arbitration and the other party brings a suit for a declaration that he is not liable upon contract, then if the existence of the contract itself is denied, no temporary

C. P. CODE (V of 1908), O. 39, R. 1—Effect.

injunction should be granted restraining the arbitration proceedings but if the contract is impeached on grounds of equity such as fraud or misrepresentation, a temporary injunction should ordinarily be granted. (*Abdul Raoof*, J.) FIRM OF SOHANAL CHIMAN LAL *v.* JAI NARAIN BABU LAL.

34 I.C. 546=2 U.P.L.R. (L.) 30.

Effect.

——**O. 39, R. 1** — *Effect — Injunction— Alienation pending—If void.*

An alienation pending a temporary injunction is not void. (*Chevis and Shadi Lal*, JJ.) BHAGWAN DAS *v.* KANSHI RAM.

258 P.L.R. 1914=25 I.C. 180= 145 P.W.R. 1914.

Execution Proceedings and Sale.

——**O. 39, Rr. 1 and 2**—*Execution proceedings—Injunction.*

A plaintiff, who, after being defeated under O. 21, R. 99, C.P.C. brings a suit under R. 103 of the same order, is not entitled to get a temporary injunction restraining the defendant from taking possession of the property. (*Beaman and Hayward*, JJ.) CHHOTALAL HIRACHAND *v.* JETHALAL VARAJBHAI.

27 I.C. 56=16 Bom. L.R. 676.

——**O. 39, R. 1**—*Execution sale—Injunction—Irregularity.*

A prohibitory order by way of injunction can be issued so long as the property in dispute is in danger of being wrongfully sold in execution of a decree but once it is sold no such order can be passed. The rule that a stay order issued by an Appellate Court suspends the power and jurisdiction of the executing Court to conduct further proceedings from the moment of the order of superior Court cannot be extended to the case of an injunction passed under O, 39, R. 1, C. P. C. A sale held in ignorance of an order by way of an injunction staying the sale is an irregularity but the sale will not be set aside unless the judgment-debtor has sustained substantial injury by reason of such irregularity. (*Mitra and Prideux*, A.J.Cs.) DHARAM CHAND *v.* MITSUI BUSSAN KAISHA & CO.

54 I.C. 928.

——**O. 39, R. 1**—*Execution sale—Injunction.*

Where it is fairly established that there is a danger of a wrongful sale in execution, an injunction can properly be granted. (12 Cal. 515, Foll.) (*Piggott*, J.C. *and Lindsay*, A.J.C.) NARENDRA BAHADUR SINGH *v.* ABDUL HAG.

23 I.C. 9.

——**O. 39, R. 1**—*Execution proceedings and sale*—Prima facie *case—Defendant residing outside jurisdiction—Property within jurisdiction.*

On an application for a temporary injunction to restrain a sale in execution of a decree, pending a suit, the applicant must show a

C. P. CODE (V of 1908), O. 39, R. 1—Principles.

prima facie case. A Court has jurisdiction to issue an injunction upon a person residing outside its territorial limits if he has property within the jurisdiction against which the Court could proceed in the event of any contempt of the Court's authority. (*Mullick and Bucknill*, JJ.) MAHARAJADHIRAJ SIR RAMESHWAR SINGH BAHADUR *v.* KUMAR GANGANAND SINGH.

75 I.C. 381=1 Pat. L.R. 462.

——**O. 39, R. 1**—*Execution proceedings—Power to restrain proceedings in another Court—Jurisdiction.*

In a case in which the defendants have submitted to the jurisdiction of a Court by entering appearance, the Court has jurisdiction to grant an injunction restraining the defts. from executing in another Court a decree which they had obtained against plaintiff—Case law referred to. (*Coutts and Ross*, JJ.) KUMAR GANGA SINGH *v.* PIRTHICHAND LAL.

1 P. 386=4 Pat. L.T. 10=1922 P. 34.

Marriage.

——**O. 39, R. 1**—*Marriage— Injunction temporary, to restrain marriage, whether can be granted.*

An application, by the husband of a Muhammadan woman, who having exercised the option of puberty ceased to be his wife, against certain of her relatives who were parties in a cross suit by the husband which was dismissed and was the subject of an appeal, for a temporary injunction restraining them from giving away the woman in marriage was held to be not maintainable. (*Piggott and Dalal*, JJ.) MUHAMMAD YAMIN *v.* RAZI BEGAM.

17 A.L.J. 1138=1 U.P.L.R. (H.C.) 185= 54 I.C. 223=42 A. 134.

Muhammadan Law.

——**O. 39, R. 1**—*Muhammadan law— Waqf.*

Appointment of *co-mutwalli* by the first *mutawalli* grantor of waqf does not invite the application of the rule unless there is danger of waste of property. (*Banerjee and Tudball*, JJ.) MUHAMMAD RUSTAN ALI KHAN *v.* MUHAMMAD MUSHTAY MULANI.

38 I.C. 718=14 A.L.J. 554.

Principles.

——**O. 39, R. 1**—*Principles—Injunction "pending disposal of the suit"—Period for which in force.*

Where in a suit for a declaratory decree, the plaintiff got a temporary injunction restraining X from bringing the suit property to sale in execution 'pending final decision of the suit' *held*, that the injunction enured only till the decision of the suit and did not continue till the determination of the appeal preferred against the decision. (*Piggott and Walsh*, JJ.) MADHO PRASAD *v.* DRAUPADI.

43 All. 383=61 I.C. 417=19 A.L.J. 174.

C. P. CODE (V of 1908), O. 39, R. 1—Principles.

———**O. 39, Rr. 1 and 2**—*Principles—Interlocutory application for mandatory injunction—Procedure.*

Upon grounds of general expediency, the proper course when applications for mandatory injunctions are made would be to expedite the proceedings rather than to grant an injunction; and if the matter is really urgent, something like the procedure in England might be adopted by treating the order on the interlocutory application as a decree in the suit. (*Beaman and Shah*, JJ.) RASUL KARIM *v.* PIRBHAI AMIRBHAI. **16 Bom. L.R. 288 = 24 I.C. 625 = 38 Bom. 381.**

———**O 39, R. 1**—*Principles—Injunction—Deft. in possession*—Bona fide—*Irreparable injury*—Status quo—*Balance of convenience.*

Upon an application by a plaintiff for a temporary injunction it is sufficient if he shows a *prima facie* case in support of the title asserted by him. Where a plaintiff out of possession claims possession, the Court will not grant an injunction against a deft. in possession under a claim of right unless the threatened injury would be irreparable. By irreparable injury it is not meant that there must be no physical possibility of repairing but only that the injury would be a material one and one not adequately reparable by damages. An interlocutory injunction should not be lightly granted because it would be a serious thing if the person in possession were restrained from making use of the properties merely because a suit has been instituted with reference to the property. In granting an *interim* injunction the Court should see on which side, in the event of obtaining a successful result in the suit, will be the balance of convenience if the injunction do not issue, bearing in mind the importance of retaining immoveable property in *status quo*. (*N. R. Chatterjee and Newbould*, JJ.) MESSRS. BEGG DUNLOP & CO. *v.* SATISH CHANDRA CHATTERJEE. **46 Cal. 1001 = 23 C.W.N. 677 = 54 I.C. 862 = 29 C.L.J. 584.**

———**O. 39, Rr. 1 and 2**—*Principles—Temporary injunction—Suit for permanent injunction.*

In a suit for permanent injunction a temporary injunction ought not to be refused where the refusal would defeat the object of the suit and amount to denial of justice to the applicant. (*Woodroffe and Huda*, JJ.) GUNABALA CHOWDHURANI *v.* HEM NALINI CHOWDHURANI. **43 I.C. 24.**

———**O. 39, Rr. 1 and 2**—*Principles—Interlocutory—Injunction—Principles regulating grant of—Injury—Delay.*

The only thing to be considered by the Court in case of interlocutory injunctions in aid of the legal right is, if the case is so clear and free from objection on equitable grounds that it should interfere without waiting for the legal right to be established. There is no general rule to guide the discretion of Courts.

C. P. CODE (V of 1908), O. 39, R. 1—Principles.

If the Court finds that there is a substantial question to be investigated and that matters should be preserved in *status quo* till final disposal of that question, it is sufficient ground for granting the injunction. Where the plaintiff fails to prove that the damage he might sustain if the injunction is refused and he should ultimately turn out to be right, is likely to be greater than the damage which the defendants would suffer if the injunction were granted and they should finally turn out to be right, the balance of convenience is against the grant of an injunction. A plaintiff making a considerable delay is not to be assisted at the expense of the defendant. (*Mookerjee and Richardson*, JJ.) KRISHNA CHNDRA SAHA SARDAR *v.* HEM CHANDRA RAI **29 I C. 855 = 21 C.L.J. 469.**

———**O. 39, R. 1**—*Principles—Temporary injunction—Principles guiding, grant of.*

Where the defendants put forward a claim of right which is quite inconsistent with the rights which plaintiffs sue to establish as theirs, and where it appears probable that the claim is sought to be exercised in a wholly unwarranted manner, out of spite and ill-feeling, the Court will grant temporary injunction. But under colour of temporary injunction a plaintiff cannot seek a relief which forms the cause of action in the suit. (*Holmwood and Chapman*, JJ.) BROJONDRA KISHORE ROY CHOWDHURY *v.* ABDUS SOBHAN CHOWDHURY. **27 I C. 647.**

———**O 39. R. 1**—*Principles—Injunction, temporary—When to be granted.*

Before granting an injunction though a temporary one, the Court must be satisfied that there is a serious question to be tried at the hearing, and that there is a probability of the plaintiff succeeding. (*Brett and Chapman*, JJ.) KALIDAS *v.* PROBAL CHANDRA. **18 I C. 394 = 17 C.W.N. 984.**

———**O. 39. R. 1**—*Principles—Injunction—Essentials.*

In granting temporary injunction the Court should exercise wise discretion and see that the machinery of the Court is not abused for the fraudulent purposes. So where in a suit to set aside decree on the ground of fraud, the plaintiff applied for temporary injunction restraining the deft. from executing the decree, the Court should not grant temporary injunction on the sole ground of the institution of the suit but should decide whether the suit is *bona fide* or not, especially when the deft. pleads that the suit is not *bona fide*. (*Woodroffe and Carnduff*, JJ.) BHABIKHAN SINGH *v.* CHAKRADHAR SINGH. **9 I.C. 227.**

———**O. 39, R. 1**—*Principles—Temporary injunction.*

When plaintiff has made out a *prima facie* case for possession and there is a real danger of damage or waste to the suit property which

C. P. CODE (V of 1908), O. 39, R. 1—Principles.

is in defendant's possession, an order for temporary injunction restraining defendant from using the property is good. (*Shadi Lal*, C.J. *and Flordе*, J.) SUNDAR SINGH *v* RAM SARAN DAS. **5 Lah. L.J. 262=1923 Lah. 227.**

———**—O. 39, R. 1**—*Principles — Temporary injunction.*

The granting of a temporary injunction is a matter of discretion albeit a judicial discretion. One of the prinoiples the Court has to bear in mind is that it must first see that there is a *bona fide* contention between the parties and then, on which side in the event of success the balance of inconvenience will lie if the injunction does not issue. The real point is not how the question should be decided at the hearing of the case, but whether there is a substantial question to be investigated and whether matters should not be preserved in *status quo* until that question can be finally decided. (*Broadway*, J.) KANSHI RAM *v.* SHARF DIN. **1922 Lah. 336.**

———**—O. 39, Rr, 1 and 2**—*Principles — Interim injunction—Mandatory form—Power of Court to issue—Limits of.*

Whether the injunction be one restraining a party from altering the position of affairs or directing him to restore the conditions which prevailed at the time the cause of action arose, that order must not go further and must not create a totally new state of things. 38 B. 331, Ref. (*Harrison*, J.) THE LAHORE ELECTRIC SUPPLY CO., LTD. *v.* BOMBAY MOTOR CYCLE CO. **67 I.C. 742.**

———**—O. 39, R. 1**—*Principles—Balance of convenience—Irreparable injury.*

In granting a temporary injunction the Court has to balance the convenience and inconvenience of both sides where the basis of the appellants' claim would be gone if the status *quo ante* is not preserved and irreparable injury would accrue to him the Court would issue an interim injunction pending the appeal. (*Abdul Raoof*, J.) ALLAH DIN *v.* SHANKAR DAS. **66 I.C. 893.**

———**—O. 39, Rr. 1 and 2**—*Principles—Temporary injunction—* "*Injury*" *—Meaning of Inherent power.*

The word "injury" in O. 39, R. 2 (1), C.P.C. means an act which is contrary to law. To justify a temporary injunction plaintiff must show irreparable injury or inconvenience likely to result to him before the disposal of the suit, if the opposite party were not restrained by injunction. The Court has inherent power to grant a temporary injunction. (*Shadi Lal and Martineau*, JJ.) FIRM OF MANOHAR LAL MAHABIR PERSHAD *v.* FIRM OF JIA NARAIN BABU LAL. **65 I.C. 403=2 Lah L.J. 283.**

———**—O. 39, R. 1 and O. 40, R. 1**—*Principles—Waste—Receiver—Temporary injunction—Proper relief.*

Proof of waste is a ground for appointing a receiver. To obtain an injunction or a receiver, the applicant must show that the property is in danger of being wasted or alienated. To secure an injunction it is enough if the applicant has a fair question to raise regarding his right. The Court will not appoint a receiver while one party is in possession and an irreparable wrong may be done to him by the Court taking possession of the property. 22 Cal. 459 and 4 H.L.C. 977, Ref. (*Odgers*, J.) GURUSWAMI PANDIYAN *v.* CHINNA THAMBIRAR. **53 I.C. 760=10 L.W. 551.**

———**—O. 39. R. 1**—*Principles—Injunction—Reasons.*

In an application for a temporary injunction the Court will have to be satisfied that the applicant has a *prima facie* case and further that the protection of his interst requires that an injunction should issue temporarily. *Quaere.* Whether when a party goes to Court claiming an injunction against his opponent to restrain him from doing something wrongful, the opponent should have the right, as a matter of interlocutory relief to restrain him from doing the very act which he claims to be entitled to do and which he asks the Court to be allowed to be done without obstruction from his opponent. (*Sundara Iyer*, J.) VATHIAR RAMANUJA AIYANGAR *v.* AIYANACHARIAR. **17 I.C. 219=23 M L J. 316.**

———**—O. 39, R. 1**—*Principles — Defendant residing outside jurisdiction—Acts within jurisdiction—Interference with acts of religion.*

No Court would grant an injunction against persons residing outside its jurisdiction and not subject to its jurisdiction in cases where they would have no means of enforcing the order. But where the acts complained of are acts taking place within the Court's jurisdiction and a party although a resident outside the Court's jurisdiction appears in the suit and submits personally to the jurisdiction of the Court (not under protest or to question the Court's jurisdiction) the Court has power to grant an injunction against him. Before granting a temporary injunction the Court must be satisfied in the first instance that the plaintiff applicant has a fair question to raise as to the existence of the right alleged, and further that the defendants have infringed or are threatening an infringement of these rights. No person is entitled to enforce his religious views upon another or to restrain that other from committing any lawful act or making any lawful use of his property, merely because it would not fit in with the tenets of his particular religion. The right to worship is a right in *aliena solo*, and so long as it is not interfered with, the owner can do what he would like with his own property. (*Miller*, C.J. *and Ross*, J.) MAHARAJAH BAHADUR SINGH *v.* SETH HUKUM CHAND. **4 P.L T. 48=1923 P. 209.**

———**—O. 39. R. 1**—*Principles.*

The general principles applicable to cases to *interim* injunctions is that where a permanent

C. P. CODE (V of 1908), O. 39, R. 1—Principles.

injunction cannot be given, no prayer for a temporary injunction will be allowed. (*Mullick and Kulwant Sahay*, JJ.) BISHUN PRASHAD PATHAK *v.* SASHI BHUSAN MITRA.
2 P.L.R. 17=1923 P. 133.

———**O. 39, R. 1**—*Principles—Interlocutory injunction—Court, duty of.*

The onus is upon the petitioner to show that his inconvenience exceeds that of the other side, not govern the granting or withholding an interlocutory injunction the Court considerations as to the comparative mischief or inconvenience to the parties likely to arise from granting or withholding the injunction. (*Raymond*, A.J.C.) FIRM OF KIRPALDAS KALIANDAS *v.* FIRM OF GAJANMAL BHAGWANDAS. **70 I.C. 864=15 S.L.R. 5**

Right to Worship.

———**O. 39, Rr. 1 and 7**—*Right to worship—Injunction to restrain plff. from preventing defts. entering and worshipping in certain temples.*

Application by the defts. in a suit for injunction to restrain the plff. pending the suit from interfering with the deft.'s rights to worship in, and free access to the temples which were the subject-matter of the suit, does not fall under O. 39, R. 1. (*Chamier* C.J. *and Sharfuddin*, J.) KARORI CHAND *v.* MAHARAJ BAHADUR SINGH. **3 P.L.W. 98=38 I.C. 40=1 P.L.J. 560.**

Security and Accounts.

———**O. 39, R. 1**—*Security and accounts—Order directing furnishing of accounts.*

An order directing the furnishing of security and submission of accounts passed on an application for the issue of *interim* injunction is not an order under O. 39, R. 1. (*Mookerjee and Beachcroft*, JJ.) SITO MAHTO *v.* F. F. CHRISTIEN. **17 I.C. 361=17 C.W.N. 318.**

———**O. 39, R. 1**—*Security and accounts—Order for.*

An order to defendants to prepare an inventory and to keep accounts is not an order under the inherent powers of the Court but one under O. 39, R. 1, C.P. Code. (*Campbell*, J.) THE FIRM RAGHBIR SINGH JASWANT *v.* NARAYAN SINGH. **1923 Lah. 48.**

Specific Performance.

———**O. 39, R. 1**—*Specific performance—Temporary injunction—Concealment of facts—Specific performance of contract.*

A temporary injunction will be granted to a plaintiff restraining defts. from selling property to a third person during the pendency of a suit for specific performance of contract for sale, where permission necessary to sell the property was obtained owing to certain facts not being brought to the notice of the Court granting it. (*Teunon and Beachcroft*, JJ.) MANARANJAN SADHUKHAN *v.* BIRENDRA NATH DUTT. **37 I.C. 847.**

C. P. CODE (V of 1908), O. 39, R. 1—Suit for Injunction.

———**O. 39, R. 1**—*Specific performance—Contract to lease—Temporary injunction.*

Pending a suit for the specific performance of an agreement to grant a lease of certain property to the plff. the Court should grant a temporary injunction to restrain the deft. from granting a lease of the same property to any other person during the pendency of the litigation. If there is a valid contract for transfer, the Court will not permit the transferor afterwards to transfer the legal estate to a third person, although such third person would be affected by *lis pendens*. 26 Mad. 168; 14 Mad. 18, Rel. (*Mookerjee and Beachcroft*, JJ.) PRAMMOTHA NATH ROY *v.* JAGANATH, KISHORE LAL SINGH. **16 I.C. 359=17 C.L.J. 427.**

Strangers to Suit.

———**O. 39, R. 1**—*Strangers to suit—Injunction—Person not party to suit—Property not in dispute—Effect.*

An order for an injunction can be issued only under the conditions specified in O. 39, R. 1 and when the conditions do not exist the injunction has no legal force. An injunction issued against a person who is not a party or respecting property which is not the subject-matter of the case, is illegal. (*Abdul Raoof*, J.) SANT LAL *v.* ISHAR DAS
51 I.C. 108=46 P.L.R. 1919.

———**O. 39, R. 1**—*Strangers to suit—Injunction against person not a party.*

A Court has no jurisdiction under O. 39, R. 1, to issue an injunction upon a person who is not a party before it. (*Mullick and Thornhill*, JJ.) RAM SUNDER RAJ *v.* RAM DHOYAN RAM. **3 P.L.J. 486=5 P.L.W. 280=46 I.C. 224=1918 Pat. 303.**

Suit for Injunction.

———**O. 39, R. 1**—*Injunction—Notice of prohibitory order.*

A party is presumed to have knowledge of a prohibitory order "not to alienate his property, when it is made in the open Court, in the presence of the parties appearing before the Court." Hence no notice of it is necessary and he cannot plead excuse of its failure, to disobey it. (*Knox*, A.C.J. *and Piggott*, J.) RAM PRASAD SINGH *v.* BENARES BANK, LTD
42 All. 98=58 I.C. 600=17 A.L.J. 1127.

———**O. 39, Rr. 1 and 2**—*Suit for injunction—Interlocutory injunction—When is dissolved.*

An interlocutory injunction in a suit for perpetual injunction is disolved *ipso facto* by a decree granting a perpetual injunction. (*Fletcher and Richardson*, JJ.) MOHINI MOHAN MISSER *v.* SURENDRA NARAYAN SINGH. **42 Cal. 550=18 C.W.N. 1189=26 I.C. 296=21 C.L.J. 68.**

———**O. 39, R. 1**—*Suit for injunction—Co-sharer—Building on land—Injunction.*

Where the plffs. who were joint owners with defts. but who left the latter in sole occupation

C. P. CODE (V of 1908), O. 39, R. 1—Suit for possession.

of a building being constructed by the latter on the common land and brought a suit for declaration of title and injunction, a temporary injunction could be granted restraining further building on the land. (*Mookerjee and Beachcroft*, JJ.) ISRAD *v.* SAMSET RAHMAN.
41 Cal. 436=18 C.W.N. 176=
21 I.C. 861=19 C.L.J. 47.

Suit for Possession.

———O. 39, Rr. 1 and 2 and O. 40, R. 1—*Suit for possession—Restraining execution of decree for possession—Receiver—Appointment of.*

Plffs. were owners of a bungalow which had been let to deft. on lease, which plffs. alleged expired on 30-6-1920. Meanwhile deft. had sub-let the premises or part of them, and as he could not get possession from his sub-tenants a suit had to be filed in which there was a decree in deft.'s favour. The plffs. as owners of the property sued deft. claiming that they were entitled to possession and that the decree which the deft. had obtained against his sub-tenants was not binding upon them, and for an injunction against deft. not to take possession. An application was made by plffs. for a temporary injunction restraining deft. from executing his decree against the sub-tenants. *Held*, that the Court had no jurisdiction to restrain the deft. from seeking to get the benefit of his decree which had nothing whatever to do with the plaintiff's claim. What the plffs. ought to have asked for was the appointment of a Receiver, so that the Court might take charge of the property through its Receiver pending the settlement of the dispute between the plff. and the deft. (*Macleod*, C.J. *and Coyajee*, J.) NASARVANJI CAWASJI ARJANI *v.* SHAHAJADI BEGAM. 24 Bom. L.R. 378=
1922 Bom. 385.

———O. 39, R. 1—*Suit for possession—Temporary injunction—Possessory suit.*

In a suit for possession, an injunction restraining the defendant from committing waste may be granted only if he is committing waste. But it must be precise. (*Mookerjee and Caspersz*, JJ.) KESHO PRASAD SINGH *v.* SHRINIVASA PRASAD SINGH, 38 Cal. 791=
10 I.C. 256=13 C.L.J. 394.

Suit in Foreign Court.

———O. 39, R. 1—*Suit in Foreign Court—Injunction to restrain defendant from prosecuting action in Foreign Court.*

An application for an injunction restraining the deft. in a pending suit, from prosecuting an action in a Foreign Court must be made at a very early stage of the proceedings. (*Rankin*, J.) TIKAMCHAND SANTOKCHAND *v.* SANTOKCHAND SINGHI. 59 I.C. 218=
24 C.W.N. 735.

———O. 39, R. 2—*Injunction—Order of single Judge—Notice.*

C. P. CODE (V of 1908), O. 39, R. 2.

An order prohibiting a judgment-debtor from transferring his property, when passed in the presence of counsel for both parties takes effect from the date of its delivery just as much as a permanent injunction embodied in a judgment and the judgment-debtor is not absolved from liability simply because it is not served upon him personally. A single Judge of the High Court has jurisdiction to pass the order of stay, subject to certain conditions. (*Knox*, A.C.J. *and Piggott*, J.) RAM PRASAD SINGH *v.* BENARES BANK, LTD. 17 A.L.J. 1127=
38 I.C. 600=42 All. 98.

———O. 39, R. 2—*Injunction—Legal proceedings—High Court—Original Side.*

In a suit before the High Court on the original side, the Judge can restrain the deft. by an injunction proceeding with a suit instituted by him in a mofussal Court if it causes delay or embarrasses the trial of the suit in the High Court. (*Heaton and Marten*, JJ.) MULCHAND RAICHAND *v.* GILL & CO. 44 Bom. 283=
53 I.C. 518=21 Bom. L.R. 963.

———O. 39, R. 2—*Mandatory injunction.*

On an interlocutory application, the Court has power to pass a mandatory injunction before the suit is heard. (*Daver*, C.J. *and Heaton*, J.) CHAUSSEY BHIMJEE & CO *v.* JAMNA FLOWER MILLS.
28 I.C. 121=16 Bom L.R. 566.

———O. 39, R. 2 and S. 115—*Mofussil Courts—Competency to grant—Revision.*

It is doubtful whether mofussil Courts have power to grant mandatory injunctions on interlocutory applications, still more to grant them before the hearing; in such cases, the High Court may interfere in revision. (*Beaman and Shah*, JJ.) RASUL KARIM *v.* PIRBHAI AMIRBHAI. 38 Bom. 381=
24 I.C 625=16 Bom. L.R. 288.

———O. 39, R. 2—*Trade name—Infringement—Temporary injunction.*

Where there is real danger of the plaintiff suffering irreparable loss by the user of the defendant of his present name, which was similar to the plaintiffs, the Court would issue a temporary injunction restraining defendant from issuing the name till the case is over. (*Fletcher*, J.) ORIENTAL GOVERNMENT SECURITY LIFE ASSURANCE CO., LTD. *v.* ORIENTAL ASSURANCE CO., LTD.
21 I.C. 238=40 Cal. 570.

———O. 39, R. 2—*Election—Suit to contest—Injunction* pendente lite.

In a suit by plff. to declare the election of deft., invalid, plff. applied for a temporary injunction restraining deft. from sitting and voting as member of the Legislative Council. *Held*, having regard to the fact that the plff. had deliberately elected to carry his appeal to the Governor-General-in-Council and failed, and to the serious delay occasioned, and to the fact that deft. had already sat and voted on the Council for two sessions, the injunction should

C. P. CODE (V of 1908), O. 39, R. 2.

not be granted. (*Fletcher*, J.) BHUPENDRA NATH *v.* RANJIT SINGH. **20 I.C. 676 = 41 Cal. 384.**

——**O. 39, R. 2**—*Decree of Revenue Court —Suit for declaration that decree bad—Temporary injunction—No prayer for permanent injunction.*

Although a decree may have been passed by a Revenue Court, proceedings in execution in a Civil Court may be stayed by the Civil Court if a suit has been brought for a declaration that the decree was obtained by fraud or was made without jurisdiction and for a perpetual injunction to restrain the decree-holder from executing the decree. 36 Cal. 252, Foll., 16 All. 406, Diss. from. If the suit is brought simply for the declaration and the plff. do not ask for perpetual injunction then the Court cannot grant a temporary injunction under O. 39, R. 2 of the C.P. Code. (*Mookerjee and Beachcroft*, JJ.) JITAL SINGH *v.* KAMALESWARI PROSAD. **16 C.L.J. 555 = 18 I.C. 614 = 18 C.W.N. 12.**

——**O. 39, R. 2**—*Principles—Stay of execution proceeding in Munsiff's Court by subordinate judge—Specific Relief Act, Ss. 56 and 53.*

S. 56 which occurs in the chapter relating to perpetual injunctions has no application to temporary injunctions which are, by the express words of S. 53 left to be regulated by the Code of Civil Procedure. A Sub-Judge could issue a temporary injunction staying the execution of a decree proceeding in a Munsiff's Court. The Civ. Pro. Code is not exhaustive and the Court has inherent jurisdiction to act *ex debito justitiæ*, in order to do that real and substantial justice for the administration of which alone it exists. 23 Cal. 351 and L. P. A. 17 of 1920 Foll. (*Shadi Lal*, C.J. *and Abdul Qadir*, J.) KANSHI RAM *v.* SHARAF DIN. **1923 Lah. 144 (2).**

——**O. 39, R. 2**—*Injunction can be granted only against deft.—Principles.*

A temporary injunction can only be issued to the defendant and not to any other person. A suit for a declaration that a certain person is not eligible to stand as a candidate, cannot be said to be a suit for restraining him from committing an injury of any kind. Where a person has been declared by competent authority to be eligible for standing as a candidate at the election, and as the election itself could not be stopped, it would not be right to restrain him from taking part in it. To restrain the defendant in such a case would be tantamount to granting the plaintiff the relief sought in his suit and might deprive the defendant of a right to which he is really entitled. This would be a grave injustice to him for which he could not be adequately compensated afterwards. (*Scott-Smith*, J.) THE ELECTION OFFICER, GUJRAT *v.* ABDUL GHANI, ETC. **1923 Lah. 47.**

——**O. 39, R. 2**—*Mandatory—Injunction, temporary—Mandatory in form.*

C. P. CODE (V of 1908), O. 39, R. 2.

Courts in India have power by virtue of the order to issue temperory injunctions in a mandatory form. 38 Bom. 381, Diss. (*Spencer and Srinivasa Aiyar*, JJ.) KANDASWAMI CHETTY *v.* SUBRAMANIA CHETTY. **41 Mad. 208 = 6 L.W. 140 = (1917) M.W.N. 301 = 41 I.C. 384 = 33 M.L.J. 448.**

——**O. 39, R. 2**—*Injunction—Person not a party.*

A Court has no jurisdiction to issue an injunction against a person not a party to the suit or to summon before it any person not a party to the injunction. (*Roe and Jwala Prasad*, JJ.) MA-HI-UD-DIN AHMED *v.* ATHAR HOSSAIN. **44 I.C. 496.**

——**O. 39, R. 2 (2)**—*Guardians and Wards Act (VIII of 1890), S. 43 (4)—Guardian of the person of a female ward—Power to demand security from.*

A District Court can demand security from the guardian of the person of a female infant ward to prevent his giving her in marriage without the consent of her "proper male relations." Such an order does not abate by the death of the applicant. (*Reid*, C.J.) GANDA MAL *v.* RAMJI DAS. **20 P.L.R. 1914 = 12 P.W.R. 1914 = 23 I.C. 351.**

—— **O. 39, R. 2 (3)**—*Injunction—Extent of operation—Disobedience—Government's liability.*

An injunction which is discharged subsequently must be obeyed during its subsistence. The Government paid the money against Court's order of injunction, with notice of the order to one of the parties, *held*, though with regard to the payments made under statutory powers, the action of the executive is justifiable, the question whether any particular sum mentioned in the contract in suit could be paid as for "labour and supply" was a question of construction and therefore of law. The proper course for the executive would have been either to apply to the Court to determine the question of construction of the contract and to pay accordingly or to pay the whole amount over to the Receiver and to obtain an order from the Court or the Receiver to pay the sums properly payable according to the true construction of the terms of contract. *Ooiter*—Where the true owner of a pension is prevented by injunction from getting his pension from Government he should be committed for contempt if he disobeys the Court's injunction and gets the pension from the Government. (*Sir George Farewell.*) EASTERN TRUST & CO. *v.* MACKENZIE MAN & CO., LTD. **20 C.W.N. 457 = 36 I.C. 378 = 34 L.J. P.C. 152 (P.C.).**

——**O. 39, R. 2 (3)**—*Injunction restraining deft. company from disposing of the goods—Assistant of the Firm*

When an injunction was issued restraining the deft. company from disposing, selling or

C. P. CODE (V of 1908), O. 39, R. 2.

dealing in any manner with certain goods, in the absence of a mention of servants and agents in the order, an assistant in the firm not named in the order, cannot be punished for contempt of Court. (*Jenkins*. C.J.. *Woodroffe and Mookerjee*, JJ.) JOHN INNES *v.* GRANDHI VENKATA RATNAM. **42 Cal. 1169=30 I.C. 4=21 C.L.J. 578.**

———**O. 39, R. 2 (3)**—*Disobedience of injunction—Issued by Court—Suit transferred to another Court—Jurisdiction of second Court to punish disobedience.*

Under O. 39, R. 2 (3) the Court granting the injunction can punish its disobedience; where after an order for injunction was passed the suit was transferred to another Court, that Court cannot punish the disobedience of the injunction as the order for granting the same was not passed by it. (*Carnduff and Richardson*, JJ.) JAHARUDDIN *v.* HARI CHARAN PODDAR. **22 I.C. 499=18 C.W.N. 470.**

———**O. 39, R. 2 (3)**—*Injunction—Breach—Penalty—Order without jurisdiction.*

Unless the Court has jurisdiction over the subject-matter of the controversy disobedience of its injunction is not punishable. An injunction in matters beyond the jurisdiction of a Court is void. (*Mookerjee and Carnduff*, JJ.) SUBHADRA KOER *v.* DHAJADHARI GOSWAMI. **16 C.L.J. 147=14 I C. 380=16 C.W.N. 447.**

———**O. 39, R. 2 (3) and O. 43, R. 1 (r)**—*Order refusing to attach property.*

Order refusing to attach property for disobedience of an injunction is one under O. 39, R 2 and is appealable. (*Scott-Smith*, J.) DIWAND CHAND *v.* JHARIA COAL CO. **1922 Lah. 347.**

———**O. 39, R. 2 (3)**—*Injunction — Disobedience—Application for contempt — Transfer of venue.*

The Court of M. passed an injunction order under O. 39, R. 1, C. P. Code. Subsequently the local jurisdiction as well as the suit in which the injunction was ordered, were both transferred to the Court of D. Thereupon the applicant applied to the Court of D. for punishing the opposite party for contempt for disobeying the injunction. *Held*, that the Court of D. had jurisdiction to entertain the application for punishment for alleged contempt. 26 C.W.N. 216, Diss.; 39 M. 907, Foll. (*Krishnan and Venkatasubba Rao*, JJ.) MOUNA GURUSWAMY NAICKER *v.* SHEIKH MAHOMEDHU ROWTHER. **46 Mad. 81=(1922) M.W.N. 743=16 L.W. 748=43 M.L.J. 713=1923 Mad. 92.**

———**O. 39, R. 2 (3)**—*Injunction—Breach of* — Karnavan *restrained from contracting loans—Validity of loans contracted thereafter.*

In a suit by the member of a Malabar *tarwad* against a *Karnavon* for removing him from his office, an injunction was issued restraining him from contracting loans. *Held*, that notwithstanding such injunction, a loan

C. P. CODE (V of 1908), O. 39, R. 3.

raised by the *Karnavan* for family purposes and utilised for such purposes, was binding on the tarwad. (*Abdur Rahim and Oldfield*, JJ.) EDOM *v.* PATTER. **47 I.C. 778=35 M.L.J. 96.**

———**O. 39, R. 2 (3)**—*Contempt—Disobedience to order of Court.*

The provision as to punishment for disobedience to orders of Court is not confined to suits of the nature contemplated by R. 2, O. 39 has to be read along with S. 94, Cl. 3. R. 2 of O. 39 applies to case of disobedience to an order to do or abstain from doing a single act. Cl. (3) is independent of and is not controlled by R. 4 of O. 39, C.P.C. (*Kumaraswamy Sastri*, J.) VIDYAPURN THIRTHASWAMI *v.* THE VICAR OF SURATKA CHURCH. **44 I.C. 56=7 L.W. 328**

———**O. 39, R. 2 (3)**—*Extent of the order under—If a disobedience of an injunction granted under O. 39, R. 2 (3).*

If a disobedience of an injunction granted under O. 39, R. 2 (3) has occurred and an application for action being taken within R. 2 (3) is made and a dissolution of the injunction takes place subsequently as a result of the dismissal of suit the dismissal of the suit does not excuse the party guilty of disobedience. The Court is not bound under R. 2 (3) in the first instance to attach property and then only order imprisonment. The matter is one left to the discretion of the Court. An order for attachment of property or imprisonment of the person guilty of disobedience of an injunction is not an enforcement of the order of injunction but is a punishment for past disobedience. (*Wallis*, C.J., *Abdur Rahim and Srinivasa Aiyangar*, JJ.) OTTAPURAKHAL THAZATH SUPPI *v.* ALABI MASHUR KOYANNA KOYA. **39 Mad. 907=3 L.W. 430=30 M.L.J. 523=19 M L.T. 314=34 I C. 588=(1916) 1 M.W.N. 328.**

———**O. 39, R. 2 (3)**—*Disobedience to injunction order—Detention in prison—Attachment of property, if a necessity for—O. 30, R. 1 (r)—Disobedience to order of injunction.*

Attachment of property is not a pre-requisite for passing an order to detain a person in prison for disobedience of an order of injunction. An order refusing to attach property of a person who had disobeyed an injunction is one under O. 39, R. 2 (3) and appeal lies from it under O. 43, R. 1 (r). (*Miller*, J.) OTTAPURAAKL THAYATH SUPPI *v.* ALABI MUSHUR KOYA. **(1913) M.W.N. 1019=14 M.L.T. 348=26 M.L.J. 37=22 I.C. 404=(1914) M.W.N. 30.**

———**O. 39, R. 3**—Ex parte *order.*

If the object of granting the injunction is likely to be defeated by delay, the Court may grant an *ex parte* injunction without notice to the opposite party. (*Rigg*, J.) BURMA OIL COMPANY, LTD. *v.* SIMPSON. **64 I.C. 334=18 Bur. L.T. 227**

C. P. CODE (V of 1908), O. 39, R. 5.

——O. 39, R. 5—*Corporations — Unregistered.*

The rule applies only to Corporations strictly so-called to bodies authorised by law to act as a person in law and not to unregistered or unincorporated bodies or associations. (*U. Kin, J.*) MAGYI *v.* PAT LOU. **38 I.C. 572 = 9 Bur. L.T. 247.**

——O. 39, Rr. 6, 7 and 8—*Attachment before judgment—Release of property on security—Execution against the property—Preferential right.*

Where property attached before judgment is released on security which comprised some items of attached property, the plaintiff is preferentially entitled to execute his decree against the property given as security. *Seshagiri Iyer and Moore, JJ.*) JANAKI NAGASWAMI *v.* RAMASWAMI. **11 L.W. 6 = 36 I.C. 267 = (1920) M.W.N. 264.**

——O. 39, R. 7—*Inventory, when to be made.*

An order directing the preparation of an inventory of the property which is the subject matter of a suit, should be made only where it is essential for a proper decision of the case and not otherwise. (*Chatterjee and Panton, JJ.*) MAHOMED RASEK *v.* TANIDUNNESSA. **52 I.C. 33.**

——O. 39, R. 7 (1) (a)—*Pledge—Suit for redemption—Pledges not in possession of things pledged—Order for production.*

In a suit of a pledge of jewels the deft. pleaded a settlement, under which plff. had abandoned his right to redeem and that he had dealt with them as his property having pledged some and broken up others. *Held*, that although the articles were not in the custody or possession of the deft. he nevertheless was in a position to redeem them and produce them on Court. The trial Court was, therefore, competent to make an order for the production of the jewels under O. 39, R. 7 (1) (*a*), C.P.C. (*Sanderson, C.J., N. R. Chatterjea and Walmsley, JJ.*) JITENDRA NATH CHATTERJEE *v.* ASOKE NATH MITTER. **32 I.C. 4 = 30 C.L.J. 65.**

——O. 40, R. 1.

APPEAL.
CONTEMPT.
DIRECTIONS TO RECEIVER.
DISCHARGE OF RECEIVER.
DISCRETION OF COURT.
EFFECT OF APPOINTMENT.
EXECUTION.
GROUNDS FOR APPOINTMENT.
INTERIM RECEIVER.
LEAVE OF COURT.
LEAVE TO SUE.
MISCELLANEOUS PROCEEDINGS.
MORTGAGE.
OFFICER OF COURT.
PARTITION SUIT.
PARTNERSHIP.
POSSESSION.

C. P. CODE (V of 1908), O. 40, R. 1—Appeal.

POWERS OF RECEIVER.
PRIMA FACIE CASE.
PRIVATE RECEIVER.
PRIVY COUNCIL APPEAL.
REMOVAL OF RECEIVER.
SCHEME SUIT.
SELECTION OF RECEIVER.
SUIT AGAINST RECEIVER.
TRUST.
WASTE.

Appeal.

——O. 40, R. 1—*Appeal—Order of refusal to appoint.*

An order refusing to appoint a Receiver is open to appeal. (*Batchelor and Hayward, JJ.*) CURSETJI DINSHAW BOLTON *v.* GANGARAM LIMBAJI GAIKWAD. **30 I.C. 545 = 17 Bom. L.R. 680.**

——O. 40, R. 1—*Appeal—Order refusing removal of Receiver.*

An order refusing an application for removal of a Receiver cannot be appealed from. (*Woodroffe and Coxe, JJ.*) EASTERN MORTGAGE AGENCY & CO., LTD. *v.* PERMANAND SAHA. **23 C.L.J. 217 = 34 I.C. 789 = 20 C.W.N. 789.**

——O. 40, Rr. 1 and 4 and O. 43, R. 1—*Appeal—Order refusing to remove receiver.*

An order refusing to remove a Receiver is not an order under R. 1 or of R. 4, of O. 40 and is therefore not appealable. (*Mookerjee and Beachcroft, JJ.*) SAHEBJADA FARIDUN SALIKO *v.* FAKIR MUHAMMAD. **24 I.C. 862.**

——O. 40, R. 1, and O. 43, R. 1 (s)—*Appeal—Order made ex parte — Subsequent confirmatory order—Receiver appointed under S. 146, Cr. P.C.*

Where an order appointing a receiver was made *ex parte* against some defts. who thereafter preferred objections which were overruled and a second order was passed confirming the first order, *held* that the first order merged in second and that the latter order was appealable. A Civil Court cannot appoint a receiver in respect of properties for which a Criminal Court has already appointed a receiver under S. 146, Cr. P.C., unless the Magistrate withdraws the attachment. (*Sharfuddin and Richardson, JJ.*) BIDYA PROSAD NARAIN SINGH *v.* ASRAFI SINGH. **40 Cal. 852 = 20 I.C. 269 = 17 C.W.N. 1070.**

——O. 40, R. 1—*Appeal—Appointment—When liable to be set aside.*

A court of appeal will not, except in an extreme case, disturb an order as to the appointment of a Receiver by a Court below. (*Moti Sagar, J.*) DHUMI *v.* NAWAB MUHAMMAD SAJJAD ALI KHAN. **5 Lah. L.J. 583 = 1923 Lah. 628.**

——O. 40, R. 1 and O. 43, R. 1 (s)—*Appeal—Dispossession by receiver of a third party.*

When property of a third party is interfered with by an officer of the court like the Receiver

C. P. CODE (V of 1908), O. 40, R. 1—Appeal.

the party has ordinarily two remedies. He may apply to the court for a summary order restraining the Receiver from interfering or he may ask the leave of the court to permit him to sue the Receiver and restrain him from interfering and for any other appropriate relief. Where the party has adopted the summary remedy, the order of the Court is an order under O. 40, R. 1 (*b*) and is appealable. 39 C. 713; 3 Pat. L.J. 573 Rel. (*Oldfield and Venkatasubba Rao*, JJ.) RAMASWAMY PILLAI *v.* JANAKI AMMAL. (1922) M.W.N. 725 = 16 L.W. 833 = 32 M.L.T. 96 = 1923 Mad. 129.

———O. 40, R. 1—*Appeal—Order for appointment—O.* 43, *R.* 1 (s.)

Per Abdur Rahim and Srinivasa Iyengar, JJ.:—The pronouncement by a Court that a receiver should be appointed without naming a specific person is an order under O. 40, R. 1, C.P.C., and is appealable under O. 43, R. 1, clause (s). *Per Spencer, J.—dissenting.* An order that a receiver should be appointed is merely interlocutory and as it cannot be put in operation until some one is actually appointed, an appeal against the same is permature. Case-law discussed. (*Abdur Rahim, Spencer and Srinivasa Iyengar*, JJ.) PALANIAPPA CHETTY *v.* PALANIAPPA CHETTY. 40 Mad. 18 = 3 L.W. 776 = 32 M.L.J. 304 = 40 I.C. 185 = (1917) M.W.N. 393.

———O. 40, R. 1—*Appeal—Order appointing receiver without appointing a particular person by name.*

An order of a Court that a receiver should be appointed in a case without appointing anybody by name as receiver is appealable. (*Jwala Prasad and Bucknill*, JJ.) GOBIND RAM *v.* GANESH RAM. 4 U.P.L.R. (Pat) 68 = 1 P. 628 = (1922) Pat 250 = 1 Pat. L.R. 161 = 4 P.L.T. 210 = 1922 P. 377.

———O. 40, R. 1 and O. 41, R. 5 (3) (c) and O. 43, R. 1 (s)—*Appeal Stay of proceedings by appellate court* ex-parte—*Without security—Revision.*

In an appeal against an order appointing a receiver the appellate court ordered the proceedings in connection with the appointment to be stayed pending the hearing of the appeal. *Held*, the order was, in effect, not an order of discharge but a direction to the receiver not to take any steps in regard to, or exercise any dominion over the property till further orders in the appeal. The appellate court in not hearing the opposite party may have committed an error of procedure but as there was no defect in jurisdiction the High Court had no power to interfere under S. 115, C.P.C. Where a receiver is appointed by a writ and an appeal is preferred against the appointment, it is competent to the appellate court either to stop the issue of the writ pending the appeal or if the writ has been issued, to direct the receiver, through the court which appointed him, not to take any steps in compliance with the writ of appointment. In the latter case O. 41, R. 5 does not apply and no security need be taken under sub-clause (3) (*c*). (*Mullick and Jwala Prasad*, JJ.) MULCHAND SINGH *v.* TARRU PRASAD SINGH. (1920) Pat. 40 = 54 I.C. 222 = 4 Pat. L.J. 642.

C. P. CODE (V of 1908), O. 40, R. 1—Directions to Receiver.

———O. 40, R. 1—*Appeal—Objection to appointment.*

An order dismissing an objection to the appointment of a receiver of property of which the objector is in possession falls within O. 40, R. 1 and is appealable. (*Miller*, C. J. *and Millick*, J.) AGA BEG *v.* MUSSAMMAT SUNDARI. 48 I.C. 133 = 3 Pat. L.J. 573.

Contempt.

———O. 40, R. 1—*Contempt—Receiver—Obstruction of receiver in discharge of his duty.*

Where a receiver is appointed to take possession of property, the person in possession of property, though he may have a right to continue in possession, cannot interfere with the receiver but should apply to the Court for redress; a person who is guilty of contempt of Court by obstructing a Receiver in the discharge of his duty may be made to pay costs of the receiver such as those of a hearing. (*Imam*, J.) MR. P. ROY CHOUDHURY *v.* NOLINI PROKASH SEN. 18 C.W.N. 289 = 22 I.C. 417 = 15 Cr. L.J. 65.

Directions to Receiver.

———O. 40, R. 1 (2)—*Directions to Receiver—Court's duty—Claim by third parties.*

Where in a petition under O. 40, R. 1, a claim of title and possession is made by the third parties the Court before directing the Receiver to take possession of the properties must make an enquiry and such enquiry cannot be delegated to the Receiver. (*Newbould and Suhrawardy*, JJ.) HAMIDA *v.* JAMILA KHATUN. 65 I.C. 837 = 34 C.L.J. 128.

———O. 40, R. 1 (1) (d)—*Directions to Receiver—Deed providing for appointment of—Direction by Court to Receiver to pay money to mortgagor to prefer appeal from mortgage decree—Order whether appealable—Appeal.*

A Receiver was appointed in a suit by the mortgagee as provided for in the deed of mortgage. The Court gave an order to the Receiver to pay certain sums of money to enable the mortgagors to appeal from the decree passed against them in the mortgage suit. *Held*, the order was appealable. The mortgage-bond and the order passed for the appointment of the Receiver did not provide for any payment to the mortgagors for instituting appeals from decrees on the mortgage and the Court below should not have allowed them the amounts. (*Brett and Chapman*, JJ.) EASTERN MORTGAGE AND AGENCY CO. LTD. *v.* FAKURUDDIN MAHOMED CHOWDHURY. 17 I.C. 859 = 17 C.W.N. 16.

C. P. CODE (V of 1908), O. 40, R. 1—Discharge of Receiver.

Discharge of Receiver.

———**O. 40, R. 1**—*Discharge of Receiver—Resignation of one of two Receivers — Order appointing Receivers not at an end.*

If two persons are appointed Receivers by the Court one for one party, and the other for the opposite party, the retirement of one of them does not put an end to the order appointing the Receiver. (*Woodroffe and Coxe*, JJ.) EASTERN MORTGAGE AGENCY CO., LTD. *v.* PREMANAND SAHA.

23 C.L.J. 217=34 I.C. 789=20 C.W.N. 789.

———**O. 40, R. 1**—*Discharge of Receiver.*

A Receiver appointed in a suit or proceedings by consent of parties, may be discharged, even before the termination of the suit or proceeding, if the Court finds that it will cause no injury to the estate. (*Abdur Rahim and Sadasiva Aiyar*, JJ). VENKATALINGAMA *v.* VENKATARAMA RAO. **29 M.L.T. 175= 13 L.W. 367=61 I.C. 562= (1921) M.W.N. 173.**

———**O. 40, R. 1 (d)**—*Discharge of Receiver—Termination of proceedings.*

Neither the termination of the suit in a decree nor the pendency of the appeal against that decree will put an and to the authority of the Receiver appointed to collect rents. (*Srinivasa Aiyangar*, J.) MANIKAM PILLAI *v.* KUPPA GOUNDAN. **33 I.C. 69.**

———**O. 40, R. 1**—*Discharge of receiver—Dismissal of suit—Duties and rights of receiver thereafter.*

The power conferred on the Court by O. 40, R. 1 (*a*) to appoint a Receiver of "any property whether before or after the decree" refers only to the appointment of receiver in respect of the property in regard to which the litigation is pending, *i.e.*, as long as the suit remains *lis-pendens*. The function of the Receiver will continue until he is discharged by the Court. Although the dismissal of a suit may in some cases mean the discharge of the Receiver still the Court has jurisdiction over the Receiver who is an officer of the Court and the Court may require him to furnish accounts, to allow parties to examine accounts and to deal with all the matters connected with the management of the Receiver. (*Coutts and Sultan Ahamd*, JJ) CHANDRASWAR PRASAD NARAIN SINGH *v.* BISHWASWAR PRATAP N. SAHI.

5 Pat. L.J. 513=1 Pat. L.T. 648= 38 I.C. 405=(1920) Pat. 231.

Discretion of Court.

———**O. 40, R. 1**—*Discretion of Court—Receiver, appointment of—Costs.*

The appointment of a Receiver being discretionary, it does not follow, that costs should follow, the granting or rejecting an application for the appointment of a Receiver. (*Piggott and Walsh*, JJ.) SHEO PARKASH *v.* NAND KISHORE. **61 I.C. 112=2 U.P.L.R. (A.) 389.**

C. P. CODE (V of 1908), O. 40, R. 1—Discretion of Court.

———**O. 40, R. 1**—*Discretion of Court—Remuneration of receiver—Insolvency proceedings.*

A receiver is generally remunerated by the method of percentage or commission but there is no absolute rule that he should be so remunerated. The Court has a discretion, if it thinks fit to allow him remuneration at a fixed rate. The receiver's remuneration must come out of the estate of the insolvent and the legal representatives of the insolvent cannot be made personally liable for the same. (*Sanderson*, C.J. *and Richardson*, J.) SREPAT SINGH *v.* RAM SARUP SURYA PRASAD. **1923 Cal. 516.**

———**O. 40, R. 1**—*Discretion of Court* "*Just and convenient.*"

The expression just and convenient" in O. 40, R. 1 (1) does not mean that the Court can appoint a Receiver because it thinks convenient to do so. The appointment should be made for the protection of property or the prevention of injury according to local principles. The words do not confer an arbitrary and non-regulated discretion on the Court. When the allegation against the deft. trustee is that since his acceptance of office he has not paid allowances to the beneficiaries without any other allegation of waste or mismanagement there is no ground for appointing a Receiver in his place. (*Mookerjee and Chatterjee*, JJ,) HABIBULLA *v.* ABTIAKALLAH. **34 I.C. 693= 23 C.L.J. 567.**

———**O. 40, R. 1**—*Discretion of Court—Receiver—Appointment.*

The appointment of a Receiver is a matter entirely within the discretion of the Court and in exercising this discretion the Court ought to be guided by a considerations of the particular case. (*Mookerjee and Teunon*, JJ.) WEATHERALL *v.* EASTERN MORTGAGE AND AGENCY CO., LTD. **9 I.C. 985=13 C.L.J. 495.**

———**O. 40, R. 1**—*Discretion of Court—Declaratory suit—Agricultural lands.*

Even in a case of a pure declaratory suit, where no possession is asked for, a court has power to appoint a receiver as the object of such an appointment is only to keep the property in *custodia legis* and to preserve the same. A civil court in the Punjab can make such an appointment to collect the rent even in the case of agricultural lands. (*Moti Sagar*, J.) DHUMI *v.* NAWAB MUHAMMAD SAJJAD ALI KHAN. **5 Lah. L.J. 533=1923 Lah. 628.**

———**O. 40, R. 1**—*Discretion of Court—Appeal.*

A Court before appointing a Receiver in any particular case must take all circumstances of the case into consideration and then decide whether it would be just and convenient to appoint a Receiver. This discretion is primarily to be exercised by the Court in which the case is pending and to which the application is made. The Appellate Court will not as a rule when the first Court has acted after considering

C. P. CODE (V of 1908), O. 40, R. 1—Effect of Appointment.

all the circumstances interfere with the exercise of that discretion. (*Rooof*, J.) HAJI KADIR BAKHSH *v.* GHULAM MOHAMMAD
2 U.P.L.R. (Lah.) 56=55 I.C. 60=30 P.W.R. 1920.

Effect of Appointment.

——O. 40, R. 1—*Effect of appointment—Mortgage suit — Final decree — Subsequent appointment of receiver—Receiver proper party to execution proceedings—Refusal to add—Revision—C.P. Code, S.* 115.

Where after the final decree on a simple mortgage is passed in a mortgage suit and before the sale, a receiver is appointed of the properties of the mortgagor in a partition suit between them and the Receiver applies to be made a party to the execution proceedings, he ought to be made a party. The mere fact that there is a mortgage on the property in the hands of the Receiver would not take the case out of the general rule that no process can be permitted in respect of the properties in the hands of a receiver without the sanction of the Court which appointed him. Property in the possession of a receiver is in the custody of the law and cannot be seized under a writ of attachment or execution. It is in the discretion of the Court to refuse to permit a sale of the property its possession under a judgment though the levy was made before the Receiver was appointed. 26 C. 127, doubted. The Receiver in such a case is not a new party under O. 1, R. 10, C. P. Code and that rule does not stand in the way of the Receiver being made a party. The refusal to make the Receiver party to the execution proceedings is a material irregularity in the exercise of the jurisdiction of the lower Court justifying the interference of the High Court under S. 115, C. P. Code. (*Devadoss*, J.) FRASER AND ROSS *v.* KRISHNASWAMI IYER. 47 Mad. 47=(1922) M.W.N. 746=43 M.L.J. 211=16 L.W. 322=31 M.L.T. 290=1923 M. 144 (2),

——O 40, R. 1—*Effect of appointment.*

Where a receiver is appointed, property vests in him only when the orders under O. 40, R. 1 (*b*), (*c*) and (*d*) are made. (*Hallifax*, A.J.C.) RAMAKRISHNA *v.* GANAPATI. 1923 Nag. 6.

——O. 40, R. 1—*Effect of appointment does not bar execution.*

Although there is some doubt as to whether the appointment of a Receiver is equivalent to execution and therefore to a delivery in execution the order appointing a Receiver does not operate as a stay of execution so as to disentitle the decree-holder from executing his decree in respect of the same debt in any manner provided by the C. P. Code. The mere fact that the decree-holder consented to the appointment of a receiver does not estop him from subsequently seeking to enforce his

C P. CODE (V of 1908), O. 40, R. 1—Execution.

decree by execution. (*Das and Ross*, JJ.) HITENDRA SINGH *v.* MAHARAJ DHIRAJ SIR RAMESWAR SINGH. 6 Pat. L J 208=62 I.C. 469=2 Pat. L.T. 628.

Execution.

——O. 40, R. 1—*Execution — Trust property —'Just and convenient' — Decree against* Waqf *property — Receiver — Disinterested person.*

As a trust property cannot be sold in execution of a decree against the trustee; the only method by which a judgment-debtor may be compelled to satisfy the claim of the execution-creditor is by the appointment of a receiver. (*Mookerjee and Beachcroft*, JJ.) SYED ASAD RAZA *v.* WAHIDUNNESSA BEGAM.
37 I. C. 70=30 C.L.J. 231.

——O. 40, R. 1—*Execution—Receiver—Possession of—Disturbance by third person—Creditor whether can proceed in execution.*

The rule that the possession of Receiver may not be disturbed without leave, does not apply, so far as third persons are concerned until a receiver has been actually appointed, and is in possession. It is not enough that an order has been made directing the appointment of a Receiver. Until the appointment has been perfected and the Receiver actually is in possession, a creditor is not debarred from proceeding to execution. Property in the hands of a receiver is exempt from judicial process and the purchaser of such property at an execution sale buys at his peril for the sale may be cancelled upon an application to the execution Courts. Where property is in the hands of a Receiver appointed by a Court, a sale under an execution issued by another Court may be avoided by an appropriate process. 11 C.L.J. 489, Ref. (*Mookerjee and Beachcroft*, JJ.) KANAI LAL JALAN *v.* MANOO BIBI 28 C.W.N. 982=31 I.C. 394=29 C L.J. 424.

——O. 40, R. 1—*Execution decree.*

The fact that a judgment-debtor will be reduced to poverty if his properties are allowed to be sold is no ground for the appointment of a Receiver in such a case is not of his properties. The appointments of a Receiver just and convenient within R. 1 of O. 40, C.P.C. (*Sharfuddin and Coxe*, JJ.) RAMESHWAR SINGH *v.* BHEEKDHARI SINGH.
28 I.C. 505.

——O. 40, R. 1—*Execution — Monthly allowance.*

Right of a person to receive allowance charged on property is attachable but a receiver cannot be appointed to receive money month by month. (*Mookerjee and Beachcroft*, JJ.) PADMANAND SINGH *v.* RAMA PRASAD MALVI. 16 C.L.J. 354=17 I.C. 284=17 C.W.N. 662.

C. P. CODE (V of 1908), O. R. 1—Execution.

———O. 40, R. 1 — *Execution—Receiver—Ghatwali property.*

In execution of a decree against a Ghatwal though the Ghatwali property could not be attached a Receiver of the rents and profits could not be appointed so as to apply them in satisfaction of the decree. (*Coxe and Imam*, JJ.) KESHABATI KOERI *v.* MOHON CHANDRA MONDAL. **39 Cal. 1010=14 I.C. 227=16 C.W.N. 802.**

———O. 40, R. 1—*Execution — Maintenance allowance.*

A mere right to maintenance not being liable to attachment and sale, a Court has no power to appoint a Receiver to receive such maintenance and apply it in satisfaction of the decree. 28 C. 483, dist. (*Sadasiva Aiyar and Moore*, JJ.) PALIKANDY MAMMAD *v.* CHINGORAM KALOTH VALIAPPA.
40 Mad. 302=30 M.L.J. 361=34 I.C. 381.

———O. 40, R. 1—*Execution—Maintenance decree — Attachment of immoveable properties—Sale in execution of mortgage decree—Purchaser.*

Where properties, attached in execution of a maintenance decree and in respect of which a Receiver had been appointed by the Court, are sold in execution of mortgage decrees and the purchasers are put in possession thereof, the Receiver cannot be allowed to continue in possession. (*Spencer and Seshagiri Iyer*, JJ.) GANSHAM DAS *v.* RAJA OF KALAHASTI.
(1916) M.W.N. 245=28 I.C. 851=2 L.W. 326.

———O. 40, R. 1—*Execution—"Just or convenient."*

When appointment of a receiver is the only way to recover the decretal amount and when the interest of both parties can be safe-guarded, the appointment is neither unjust nor inconvenient. A Receiver can be appointed to receive rents and profits of non-attachable property. (*Brockman*, J.C.) LOHAMI BAI *v.* HARAKCHAND. **13 I.C. 285=11 N.L.R. 113.**

———O. 40, R. 1—*Execution—Receiver—Mortgage decree.*

Mere convenience on the part of the decree-holder would not justify the appointment of a receiver. Where the mortgagee had other mortgage properties to proceed against and the security is adequate a Receiver to realise the rents and profits of one of the mortgaged properties which is not easily saleable could not be appointed. (*Kanhaiya Lal and Sabonadiere*, A.J.Cs.) NAWAL MIRZA MUHAMMAD HUSSAIN KHAN *v.* AMER CHAND PAUL.
21 I.C. 283=16 C.C. 238.

———O. 40, R. 1—*Execution — Ghatwali estate—Collection of rents.*

Payments of Chowkidars, Sardars and Government dues in a Ghatwali estate do not belong to the Ghatwal; while the rents and profits belong to the Ghatwal. If a decree is to be executed against him these can be collected by a receiver appointed therefor. (*Jwala Prasad and Ross*, JJ.) TIKAIT DAMODAR NARAIN SINGH *v.* GANGA RAM MARWARI.
1923 Pat. 372=5 P.L.T. 34=3 Pat. 339=1924 P. 269.

C. P. CODE (V of 1908), O. 40, R. 1—Grounds for Appointment.

Grounds for Appointment.

———O. 40, R. 1 — *Grounds for appointment—Receiver.*

It would be very improper under O. 40, R. 1 to take property out of the hands of ladies of culture and well capable of managing the property and examining accounts where they were in possession of it for something like two years and to hand over the property to a receiver upon nothing more than mere rumours. (*Know and Piggott*, JJ.) TEJBALL BIKRAM SINGH *v.* RAMRAJ KUAR. **11 I.C. 703.**

———O. 40, R. 1—*Grounds for appointment—Just and convenient—Meaning of—Principles guiding appointment—Merits of case—Appeal—Parties.*

The appointment of a Receiver is a matter of judicial discretion and Courts should proceed cautiously viewing all the circumstances of the case. The words "just and convenient" mean that the Court should appoint a Receiver for the protection of property or prevention of injury according to legal principles and not because it thinks it convenient to do so. They confer no arbitrary and non-regulated discretion on the Court The Receiver appointed in an action should as a general rule be a disinterested person, but it is competent to the Court upon the consent of parties and in a proper case, without such consent to appoint a person mixed up in the subject-matter of the litigation, if it will be beneficial to the estate. In an appeal against an order refusing to appoint a receiver, the only necessary parties are those who are entitled to present possession. The order on an application under O. 40, R. 1 should not express an opinion on the merits of the case. (*Mookerjee and Chotzner*, JJ.) BHUPENDRA NATH MUKHERJEE *v.* MANOHAR MUKERJEE. **28 C.W.N. 86=1924 Cal. 456.**

———O. 40, R. 1—*Grounds for Appointment — Impartible zemindari — Large estate—Mines and minerals.*

Where the subject of dispute between the parties to a litigation was a large impartible zemindari with valuable forests and mines and minerals and the zemindari had been long under the management of the Court of Wards. *Held* that the case was a fit one for the appointment of a receiver pending the appeal and for stay of execution of the decree by the successful claimant. (*Mookerjee and Rankin*, JJ.) SRI PRATAB CHANDRA DEO DHABAL DEB *v.* SRI RAJA JAGADISH CHANDRA DEO.
75 I C. 417=37 C L J. 417.

———O. 40, R. 1—*Grounds for appointment—Co-sharers.*

The appointment of an *interim* Receiver pending the final appointment of a common

C. P. CODE (V of 1908), O. 40, R. 1—Grounds for Appointment.

manager under S. 95, can be made only on the abduction of evidence establishing the necessity for such appointment under O. 40, R. 1; a mere verified petition filed in support of the application for appointment of a common manager, which does not set forth the sources of the petitioner's knowledge or belief, is not sufficient. (*Chatterjee and Beachcroft*, JJ.) ASAD ALI *v.* MOHAMED HUSAIN
31 I.C. 83

——— **O. 40, R. 1**—*Grounds for appointment—Selection—Appellate Court—Interference.*

The pendency before the Dt. Judge of the question of appointment of a common manager under the B. T. Act, is no bar to a Civil Court appointing a Receiver in respect of a certain property. Where some provision for the management of an estate is urgently called for and there is none in effective possession of the estate and able to collect rents there is no necessity for making out a strong case for the appointment of a Receiver. A Court of appeal will not ordinarily disturb the selection of a Receiver by the Court except on some fatal objection in principle. A receiver should be an impartial person and wholly disinterested in the subject-matter of the suit. (*Carnduff and Beachcroft*, JJ.) JIBANESSA KHATUN *v.* MAJEDUNNESSA KHATUN.
18 I.C. 398=17 C.W.N. 581.

——— **O. 40, R. 1**—*Grounds for appointment—Notice of application—Necessity for.*

O. 40, R. 1, C. P. Code, does not lay down that notice to the opposite party should be issued before appointing a Receiver and it is obvious that in many cases the object of the appointment might well be nullified if notice were issued. 22 C. 459; 21 M. L. J. 821; 107 P. R. 1908; 36 P. R. 1910, Dist. The question that the Courts have to see in dealing with applications for a Receiver, is whether, in the circumstances of the case, the appointment of the Receiver is just and convenient, the main object being to preserve the property. The power is discretionary with the Court, but at the same time discretion is not to be exercised arbitrarily but in a regulated manner. Where there are a large number of outstandings due to the estate of the deceased person, some of which are liable to be lost owing to the efflux of time, and the heir of the deceased is a lady and there is a *bona fide* dispute between the parties the Court is justified in appointing a Receiver to recover the outstandings and to bring the proceeds into Court. (*Broadway*, J.) MT. ISHRI *v.* SHIB RAM.
1923 Lah. 239 (2).

——— **O. 40, R. 1**—*Grounds for appointment—Mahant—Disputes regarding title—Convenience.*

Where disputes arose between two persons as to who was entitled to be *mahant* and there was something to be said regarding the claim of each and under the circumstances putting one of them into possession would give him a great

C. P. CODE (V of 1908), O. 40, R. 1—Grounds for Appointment.

advantage over the other, a proper case was made out for appointing a Receiver. (*Scott-Smith*, J.) MANOHAR DAS *v.* KALYAN DAS.
69 I.C. 361.

——— **O. 40, R. 1**—*Grounds for appointment—Discretion—Interference on appeal.*

A Court has a right to proceed under O. 40, R. 1, C. P. Code where it appears to be just and convenient to do so and the Court may make an order appointing a Receiver *suo motu*. Though a suit is brought for a mere declaration and possession of the property cannot be awarded by the Court to one party or the other, the Court has jurisdiction to appoint a Receiver to maintain the *status quo ante* pending a suit or appeal. Where a single Judge of the High Court has appointed a Receiver the exercise of his discretion will not be lightly interfered with on appeal. (*Shadi Lal*, C. J. *and Abdul Qadir*, J.) AMARNATH *v.* MT. TEHAL KAUR.
4 U.P.L.R (Lah.) 73=1922 Lah. 444.

——— **O. 40, R. 1**—*Grounds for appointment—Declaratary suit.*

An appointment of a Receiver can be made only on proof of strong grounds of necessity and an appointment without any justifying necessity, such as one made in a declaratory suit that certain widows were entitled only to maintenance, is illegal and improper. (*Kensington*, J.) BAKHT BHARI *v.* ISA-SHAH.
11 I.C. 403=62 P.W.R. 1911.

——— **O. 40, R. 1**—*Grounds for appointment—Poverty—Order under S. 145, Cr. P. C.—Effect of—Powers of appellate Court.*

Poverty of the defendant trustee is no ground for the appointment of a Receiver unless there be in addition some danger to the estate. Where no specific acts of mismanagement or malversation are proved against a defendant in possession, the Courts should be very slow to displace him by appointing a Receiver; so also, where *prima facie* the title to the property in dispute is in him who is in possession of the property. As a rule an appellate Court will not interfere with the discretion of the lower Court appointing a Receiver; but where the lower Court has based its order on a wrong view of the facts, it is the duty of the appellate Court to interfere and set it right. A Court can appoint a Receiver for property which has been declared to be in the possession of the defendant under S. 145, Cr. P.C. (*Seshagiri Aiyar and Kumaraswamy Sastry*, JJ.) SHIVAJI RAJA SAHEB *v.* AISWARIYANANDAJI SAHIB.
29 M.L.J. 209=29 I.C. 485=18 M.L.T. 155.

——— **O. 40, R. 1**—*Grounds for appointment.*

The late production of accounts and documents by the manager is not sufficient evidence of dishonesty to warrant the appointment of a Receiver. (*Miller and Abdur Rahim*, JJ.) NARAYANASWAMI AIYAR *v.* JANAKI AMMAL.
17 I.C. 261=(1912) M.W.N. 904.

C. P. CODE (V of 1908), O. 40, R. 1—Grounds for Appointment.

———O. 40, R. 1—*Grounds for appointment--Mahomedan widow in possession—Procedure on application—Refusal to appoint Receiver at one stage—Subsequent application.*

The mere fact that a Mahomedan widow is entitled to a lien for dower on her husband's estate is no ground for refusing the appointment of a Receiver summarily without enquiry into the merits of the application. There is nothing in O. 40, R 1, C.P. Code to prevent the appointment of a Receiver in such a case. The mere fact that a Receiver has not been appointed at a prior stage of the suit is no ground for refusing the application at a later stage, when fresh grounds are made out. (*Batten*, J.C. *and Halifax*, A.J.C.) ZAHROS SYED ALI *v.* AHMAD SYED. 1923 Nag. 21.

———O. 40, R. 1—*Grounds for appointment—Money-creditor cannot apply for Receiver.*

A Court has no jurisdiction to appoint a Receiver at the instance of a simple money-creditor unless he establishes a special equity in his favour. The appointment of a Receiver is an equitable relief and will be only granted on equitable grounds. In the absence of any special equity in the applicant's favour a Receiver cannot be appointed simply on the ground that it is 'just and convenient' to grant it. The first essential condition is that the applicant must have "an interest" in the property to be affected by the order. A Court appointing a Receiver ought to take care to protect the rights of persons other than the applicant. A prior incumbrancer desiring to take possession is entitled to have the Receiver obtained by a puisne incumbrancer, and therefore by a simple contract creditor, discharged, and a Receiver of his own substituted. (*Das and Adami*, JJ.) PIRTHI CHAND LAL CHAUDHURI *v.* KALIKANAND SINGH. 61 I.C 849=6 P.L J. 366.

———O. 40, R. 1—*Grounds for appointment—Insolvency of administrator.*

The insolvency of an administrator is a good reason for appointing a Receiver in spite of the facts that the administrator has been administering the estate for a number of years and has kept proper accounts. That waste or mismanagement is not alleged, and that all the persons, for whom the estate has been administered have not joined in the application are not sufficient reasons for refusing to appoint one. (*Young*, J.) OFFICIAL ASSIGNEE *v.* HAJEE MAHOMAD HADI. 48 I.C. 182= 11 Bur. L.T. 127.

———O. 40, R. 1—*Grounds for appointment—No risk of loss.*

A Receiver should not be appointed where no risk of loss is shown by the application. (*Shaw*, J. C.) MI SHWE M. A. *v.* MI MI. 12 I.C. 198=4 Bur L.T. 241.

Interim Receiver.

———O. 40, R. 1—Interim *Receiver—Guardianship, proceedings—Guardians and Wards Act (VIII of 1890)—Applicability.*

C. P. CODE (V of 1908), O. 40, R. 1—Leave of Court.

O 40, R. 1, C.P.C., has no application to a petition under the Guardians and Wards Act. (*Robertson*, J.) *In re* JAMNABAI. 36 Bom 20=11 I C. 551= 13 Bom. L.R. 487.

———O. 40, R. 1—Interim *Receiver—Interference with possession of third parties—Injunction.*

Where a Receiver is appointed there seems to be no valid objection to a third party, whose property is being interfered with from applying to the Court for redress and for an injunction restraining the Receiver from such trespass. It is not necessary for them to file a separate suit. (*Kumaraswami Sastri*, J.) THAVASIMUTHU NADAR *v.* BALAGURUSWAMI NADAR. 17 L.W. 64=1923 Mad. 304.

Leave of Court.

———O. 40, R. 1—*Leave of Court—Proceedings instituted against a Receiver without permission of Court, if contempt of Court.*

Proceedings cannot be instituted against a Receiver without the permission of the Court and if so instituted they constitute a contempt of the Court. Where several Receivers are appointed in respect of different portions of same property, and one of the receivers brought a suit against another without the permission of the Court though it is a contempt of Court yet it is not so grave or serious one as to make it obligatory on the Court to dismiss the suit. (*Fletcher and Chatterjee*, JJ.) SATYA KRIPAL BANNERJEE *v.* SATYA BHUPAL BANERJEE. 19 C L.J. 191=22 I.C. 623=18 C.W.N. 346.

———O. 40, R. 1—*Leave of Court—Prosecution—Receiver.*

To charge a Receiver for the breach of the ordinary criminal law of the country the sanction of the Court is not necessary, (*Fletcher*, J.) NAGENDRA NATH *v.* JOGENDRA NATH. 16 I.C 491=13 Cr. L J. 491.

———O. 40, R. 1—*Leave of Court—Criminal proceedings.*

It is not a general rule of law that sanction of Court appointing a Receiver is not necessary in the case of Criminal proceedings against him (*e.g.*, a charge for defamation) arising out of his office. (*Holmwood and Imam*, JJ.) ANATH NATH DEY *v.* MOHENDRA NATH. 15 I.C. 489=13 Cr. L.J. 489.

———O. 40, R. 1—*Leave of Court—Receiver—Execution of decree against—Application for rateable distribution—Prohibitory order against Receiver, if amounts to grant of leave.*

Leave of Court is necessary both for execution of a decree against the Receiver of the property of the judgment-debtor as well as for prosecuting an application for rateable distribution against the Receiver; such leave may be obtained at a subsequent stage of the proceedings. A prohibitory order under S. 272 of the C.P.C. of 1882 against the Receiver is not

C. P. CODE (V of 1908), O. 40, R. 1—Leave to sue.

equivalent to the grant of leave to the decree-holder to execute the decree against the property of the judgment-debtor in his hands. (*Mookerjee and Casperss*, JJ.) SARAT CHANDRA BANERJEE *v.* APURBA KRISHNA ROY. **14 C.L J. 55=11 I.C. 187=15 C.W.N. 925.**

Leave to sue.

——**O. 40, R. 1**—*Leave to sue—Receiver in Insolvency—Distinction.*

A Receiver appointed under the Code of Civil Procedure merely holds the estate on behalf of the Court. The estate does not vest in him, nor does he in any way represent it. Leave of the Court is necessary in order that by impleading him the estate may be bound. A Receiver under the Insolvency Act holds a different capacity altogether. He is more than a mere officer of the Court. Under S. 28 (2) the insolvent's estate vests in him. He alone, and no one else, represents the estate. He therefore is the proper party to be impleaded in the action. No leave is accordingly necessary for suing him. (*Lindsay and Sulaiman*, JJ.) MAHRANA *v.* DAVID. **21 A L J. 737=L.R. 4 A. (Civ.) 483=46 All. 16=1924 A. 40.**

——**O. 40, R. 1**—*Leave to sue—Receiver—Suit against, without leave of Court—Application for such leave after filing of suit,*

Failure to obtain the leave of the Court prior to the institution of the suit against a Receiver appointed by it could not be cured by leave subsequently granted. Where a Receiver is sued without leave of the Court appointing him the defect can be cured by leave subsequently granted. (*Pratt*, J.) JAMSEDJI *v.* HUSSEINBHAI. **56 I.C. 424=22 Bom. L.R. 819.**

——**O. 40, R. 1**—*Leave to sue—Grant of, after institution of suit.*

A Court will grant leave to continue a suit instituted by or against a Receiver of the Court commenced without such leave, provided a proper case is made on the merits. The grant of subsequent leave will cure the defect. 32 Cal. 270; 14 Cal. 104 and 13 Cal. 593, Diss.; 13 C. W.N. 54; 15 C.W N. 925 and 15 C.W.N. 872, Foll.; 9 L.T. (O.S.) 310, Ref. (*Greaves*, J.) RUSTOMJEE DHUNJIBHAI SETHNA *v.* FREDERICK GAEBELE. **46 Cal. 852=51 I.C. 486=23 C.W.N. 496.**

——**O. 40, R. 1**—*Leave to sue—Not obtained—Effect.*

A suit against a Receiver without leave of Court should be dismissed and not remanded to lower Court for obtaining the necessary leave, especially where the defendant had objected and the plff. had disregarded the objection. (*Oldfield*, J.) C. VENKATA SURIARAMAYIAH *v.* NAMBURA RAMIAH SETTI. **24 I.C. 622.**

——**O. 40, R. 1**—*Leave to sue—Receiver.*

In every case a Receiver as such need not be sued but where any right is established by a

C. P. CODE (V of 1908), O. 40, R. 1—Miscellaneous Proceedings.

decree in the suit to the property in the hands of a Receiver the Court may on an application by the party in whose favour the right is established make an order directing the Receiver to satisfy the decree which may be passed in the case. (*Wallis*, J.) ADMINISTRATOR-GENERAL OF MADRAS *v.* DARSI GOUNDEN. **10 I.C. 673=9 M L.T. 300.**

——**O. 40, R. 1**—*Leave to sue—Payment of revenue by purchaser—Sale set aside—Right to recover money paid—Receiver of the properties—Receiver appointed by the High Court, effect of.*

A Receiver was appointed in a mortgage suit and the mortgaged properties were subsequently sold in execution but the receiver was not discharged. The auction-purchaser continued to pay the Govt. revenue, the Receiver at the same time also paid the revenue on behalf of the judgment-debtor. The sale was set aside subsequently and the auction-purchaser applied for an order on the Receiver to re-imburse him for the amounts of renewal. *Held*, that the Receiver, having been appointed by the High Court to which he had submitted his accounts must be regarded as an officer subject to the orders of that Court and that the proper order was to give the auction-purchaser leave to sue the Receiver in respect of his claim. (*Mullick and Adami*, JJ.) MAHARAJA GURUMURTHI MAHADEVA ASRAM PRASAD SAHAI *v.* RAM SEKHAR PRASAD SINGH. **51 I.C. 706.**

——**O. 40, R. 1**—*Leave to sue—Refusal—Receiver.*

There is no statutory provision which requires a party to obtain the leave of a Court to sue a Receiver. The rule is based on public policy and the grant of leave is made not in the exercise of any power conferred by statute but the exercise of the inherent power, which every Court possesses to prevent acts which constitute or are akin to an abuse of its authority. A Court should not refuse leave to sue ordinarily. (*Mullick and Thornhill*, JJ.) BRAJA BUSAN *v.* SRIS CHANDRA TEWARI. **4 P. L J. 20=47 I.C. 719=(1918) Pat. 337.**

——**O. 40, R. 1**—*Leave to sue—Contempt of Court—Application to set aside.*

A Receiver can only be sued with the leave of the Court appointing him. A decree against a Receiver without permission must be set aside. (*Parlett*, J.) BALTHAZAR AND SONS *v.* BURMA ENGINEERING AND TRADING COMPANY. **17 I.C. 916=5 Bur. L.T. 168.**

Miscellaneous Proceedings.

——**O. 40, R. 1 and S. 141**—*Miscellaneous proceedings — Receiver — Appointment of — When allowable—Notice to parties—Difference in the old and new Code.*

O. 40, R. 1 does not restrict the appointment of Receiver only in the case of suits. S. 141 extends the procedure to all proceedings. A Court may pass an order without notice to

C. P. CODE (V of 1908), O. 40, R. 1—Mortgage.

the parties concerned in cases of emergency, S 503, C.P.C. (1882) speaks of the appointment of a Receiver in a suit while O. 40, R. 1 is general. (*Chatterjee and Beachcroft, JJ.*) ASADALI *v.* MAHAMMAD HASSAIN.

43 Cal. 986=38 I.C. 177=20 C.W.N 1009.

Mortgage.

———O. 40, R. 1— *Mortgage — Suit — Receiver—Appointment of.*

In the case of simple mortgage the mortgagor is entitled to remain in possession of the mortgaged property until such time as the property is brought to sale in due course of law. While the appeal from the preliminary decree is pending, the Court cannot appoint a Receiver in a suit on simple mortgage. (*Richards, C.J, and Banerjea, J.*) GOBIND RAM *v.* JWALA PRASAD. **43 I.C. 583.**

———O. 40, R. 1—*Mortgage—Prior and subsequent—"Just and convenient."*

A Receiver may be appointed at the instance of the first mortgagee when there is reason to apprehend that the property was insufficient to pay the incumbrances thereon. Whether the mortgagee is or is not entitled to possession, he may ask for a Receiver, if the demands of justice require that the mortgagor should be deprived of possession. A Receiver can be appointed at the instance of a simple mortgagee. A Receiver appointed in the presence of the mortgagor and the second mortgagee at the instance of the first mortgagee holds the property for his (first mortgagee's) benefit alone and must hand him over the entire income for the satisfaction of his dues. The order for the appointment of the Receiver, binds the mortgagor and the second mortgagee though the second mortgagee obtains a decree on his mortgage in the absence of the first mortgagee and purchases the equity of redemption in execution of that decree. His position in relation to the Receiver at the instance of the first mortgagee is not affected. (*Mookerjee and Panton, JJ.*) MAHARAJA SIR RAMESWAR SINGH BAHADUR *v.* CHUNNI LAL SHAH.

31 C.L J. 385=56 I.C. 839=47 Cal. 418.

———O. 40, R. 1 — *Mortgage — Floating charge—Appointment of Receiver without going into evidence.*

In a suit to enforce a floating charge of the good-will and stock in trade of a business, to secure money that would be due by the mortgagor to the mortgagee, under a mortgage containing a proviso that the mortgagor should not permit the stock in trade to fall below a certain value, the Court can appoint a receiver without taking any evidence after offering to allow the mortgagor to remain in possession on giving security. (*Fletcher and Smither, JJ.*) HARDWARIMULL DIBI CHAND *v.* LACHMANDAS KURUK CHAND. **46 I.C. 389.**

———O. 40, R. 1—*Mortgage—Suit—Receiver — Considerations that should determine the necessity of appointing.*

C. P. CODE (V of 1908), O. 40, R. 1—Mortgage.

Where a receiver is asked to be appointed in a mortgage suit the primary question for consideration is what steps should be taken to protect the mortgagee; the fact that the application for appointment is supported by Reversioners of the mortgagor (a Hindu widow) is not a matter that need be considered. (*Mookerjee and Chatterjee, JJ.*) GOVIND RANI DASI *v.* BRINDA RANI DASI.

31 I.C. 405=23 C.L.J, 440.

———O. 40, R. 1—*Mortgage—Receiver—Appointment of—Guiding principles.*

Though the appointment of a Receiver *pendente lite* is within the discretion of the Court such discretion must be exercised carefully having regard to the circumstances of each case. The appointment of a Receiver at the instance of a mortgage will be made as a matter of course if interest payable under the security is in arrears. The right to propose a Receiver belongs to the party interested in the nomination. (*Brett and Chapman, JJ.*) EASTERN MORTGAGE AND AGENCY, COY., LTD. *v.* RAKEA KHATUN. **17 I.C. 202=16 C.W.N. 997.**

———O. 40, R. 1 and S. 81—*Mortgage—Suit for sale—Decree.*

A receiver can be appointed in a mortgage suit for sale, although a receiver has been appointed in a prior partition suit. A Receiver need not be appointed if the mortgagee has obtained a decree for foreclosure, and cannot recover even the costs of the litigation from the mortgagors personally. The only right of the mortgagee is to foreclose and take the property for his dues on his security, but after the final decree had been passed and the decree-holder applies for possession then a Receiver may be appointed, if the judgment-debtor wants to remain in possession. 13 C. L. J. 495; 13 C. L. J. 487, Foll. (*Mookerjee and Carnduff, JJ.*) KHUBSARAT KOUR *v.* SARADA.

16 C.W.N. 126=12 I.C. 165=14 C.L.J. 526.

———O. 40, R. 1—*Mortgage—Termination of suit.*

A mortgage suit does not terminate on the sale of the mortgaged properties as such a sale is liable to be set aside on successful objections by the judgment-debtor, 2 C. L. J. 288; 29 A. 76; 35 C. 803 Ref. So a receiver may be appointed even after sale of the mortgaged properties. (*Mookerjee and Teunon, JJ.*) MADESHWAR SINGH *v.* MOHANAYA PARSAD SINGH. **13 C.L.J. 487=9 I.C. 1027=15 C.W.N. 672.**

———O. 40, R, 1—*Mortgage—Receiver—Appointment.*

Though ordinarily a Receiver is not appointed when mortgagee is in possession yet when he is in possession through one of the mortgagor's who became insolvent then the Court can appoint a Receiver. (*Sadasiva Aiyar and Phillips, JJ.*) KAKI VENKATARAJU *v.* OFFICIAL RECEIVER. **32 I.C. 691=(1916) M.W.N. 864.**

C. P. CODE (V of 1908), O. 40, R. 1—Mortgage.

———**O. 40, R. 1**—*Mortgage — Decree — Absence of personal decree—Right of mortgage to decree-holder have a Receiver appointed.*

Per Oldfield, J.—A mortgage decree-holder prevented from executing the decree is entitled to have a receiver appointed if the security is not sufficient to discharge the debt and the interest has not been paid, 6 M.L.T. 238, Foll. *Per Sadasiva Iyer*, J:—A decree-holder on a mortgage who has not shown a right to a personal decree against the mortgagor cannot have a Receiver appointed even if he is obstructed in executing the decree. (*Oldfield and Sadasiva Aiyar*, JJ.) VENKATA RAJAGOPAL SURYA ROW *v.* BASAVI REDDY.

1 L.W. 785=(1914) M.W.N. 771=26 I C. 986=16 M.L.T. 407=29 M.L.J. 457.

———**O. 40, R. 1**—*Mortgage.*

Appointment of a receiver should not be made where under mortgage decree the decree-holder has a right to sell the mortgage property. (*Jwala Prasad and Bucknill*, JJ.) MOKHTAR AHMAD *v.* BIBI RAHIMUNNISSA.

1922 Pat. 66=4 P.L.T. 68=1922 P. 369.

———**O. 40, R. 1**—*Mortgage—Execution—Objection by third party—Appeal—Revision.*

An order appointing a Receiver in execution of a mortgage decree is not binding on a person not a party to the suit, and claiming to be in possession in his right as prior mortgagee. A court has no jurisdiction to overrule an objection petition put in by such a person unless it has reason to think that the objection is not *bona fide* or made on behalf of one of the parties. Any objector whose petition is dismissed and who is not a party to the suit has no right of appeal but a revision lies to the High Court, at his instance. (*Chapman and Atkinson*, JJ.) INDERDEO NARAIN SINGH *v.* GOURI SHANKER.

4 P. L.W. 414=48 I.C. 177=1918 Pat. 188.

Officer of Court.

———**O. 40, R. 1**—*Officer of Court—Appointment by—Subordinate Court—High Court—Powers over—Accounts.*

A High Court has no jurisdiction to examine the accounts in order to ascertain his liability of a Receiver appointed by a Subordinate Court, he not being an officer of the High Court. (*Mullick and Adami*, JJ.) GANESH LAL *v.* KUMAR SATYA NARAYAN SINGH.

4 P L.J. 636=55 I.C. 207=1920 Pat. 35.

Partition Suit.

———**O. 40, R. 1**—*Partition suit—Court ordering parties to have control and management of different portions pending suit—Order if covered by O. 40, R. 1, C.P.C.*

An order directing the parties in a partition suit to have the control and management of different portions of property pending suit, is not *ultra vires* but is covered by O. 40, R. 1 of the C.P.C., even if made without an application for the appointment of a Receiver to take charge of the partnership assets does not transfer the ownership therein from the partners to the

C. P. CODE (V of 1908), O. 40, R. 1—Partnership.

tion for the appointment of a Receiver. (*Ryves and Piggot*, JJ.) DAN PRASAD *v* GOPI KISHEN.

36 All. 19=22 I.C. 59=11 A L.J. 973.

———**O. 40, R. 1**—*Partition suit—Appointment of receiver—Joint family property—Practice.*

The Court will not appoint a Receiver, in a partition suit between members of a joint family except by consent and especially where the family property consists of land. Thus in order that a Receiver should be appointed of joint family property in a partition suit, special circumstances will have to be proved before the Court will be entitled to appoint a Receiver. When an application is made to the Court to take the property into its hands by appointing a Receiver the plff. must prove that *prima facie* he has a very excellent chance of succeeding in establishing the case made out in his plaint, and in the next place he must satisfy the Court that the property in possession of the opposite party is in danger of being wasted. The mere fact that there is a dispute is no reason whatever for appointing a Receiver. (*Macleod*, C.J. *and Heaton*, J.) GOVIND NARAYAN RAO DESAI *v.* VALLABHRAO NARAYAN RAO DESAI

55 I.C. 827=22 Bom. L. R. 217.

———**O. 40, R. 1**—*Partition suit—Appointment—Receiver—Appeal.*

The Court should not appoint a Receiver, merely because of strained relations, except by consent and upon proof by the plaintiff that *prima facie* he has a very excellent chance of succeeding in establishing the case made out in the plaint and that the property in possession of defendants the opposite party, was in danger of being wasted especially where one of the defendants is presumably manager. In any case the facts, that a mere declaration is sought for the land, that the Civil Court cannot divide it, that the plaintiffs appear from the materials on the record to be out of possession and that the Court has no jurisdiction over the apportionment of the produce make the order of the appointment of a Receiver for the agricultural lands still less justifiable than that regarding the other property. An order of a Court that a Receiver should be appointed in a case, without appointing any body by name as receiver, and adjourning the case to a later date for so appointing one is an order under O. 40, R. 1 and appealable under O. 43, r. 1 (s). (Case-law discussed). 55 I.C. 827; 86 P.R. 1910, foll. (*Campbell*, J.) THE FIRM RAGHBIR SINGH JASWANT *v.* NARIJAN SINGH.

1923 Lah. 48.

Partnership.

———**O. 40, R. 1**—*Partnership—Effect of appointment—Transfer of ownership.*

The application of a Receiver to take charge of the partnership assets does not transfer the ownership therein from the partners to the

C. P. CODE (V of 1908), O. 40, R. 1—Partnership.

Receiver. (*Shadi Lal*, J.) IMPERIAL OIL SOAP AND GENERAL MILLS CO., LTD. *v.* RAM CHAND. **36 I.C. 980=91 P.R. 1917.**

——**O. 40, R. 1**—*Partnership—Dissolution—Appointment of Receiver.*

Where a dissolution is inevitable and the partners are on bad terms the usual way of guarding their interests is by appointing a Receiver and ordering the goodwill of the business and the stock-in-trade to be sold, the partners being at liberty to bid at the sale. (*Fox*, C. J, *and Hartnoll*, J) E. F. DOVER *v.* E. S. DOVER. **8 Bur. L.T. 87=29 I.C. 684=8 L.B.R. 332.**

——**O 40, R. 1**—*Partnership—Receiver—Guiding principles for partnership.*

The principles guiding the appointment of a Receiver are the preservation of the estate pending litigation and proper management. The court is always reluctant to dispossess a party who is in actual possession under *prima facie* title. The English and Indian Law are now the same. An appellate court will be slow to interfere with the discretion of the lower court in appointing a Receiver unless it is satisfied that the discretion has not been properly exercised. In the absence of proof of waste or mismanagement a receiver should not be appointed. An order directing the appointment of a Receiver in a suit where all the partners are not parties to the suit is *ultra vires*. (*Pratt*, J.C. *and Hayward*, A.J.C.) MIKKANBAI *v.* DASSIMAL GANGARAM. **45 I.C. 224=11 S.L.R. 115.**

Possession.

——**O. 40, R. 1 (2)**—*Possession, removal from—Parties to the suit.*

The provisions of O. 40, R. 1 (2), C. P. Code, refer to the case of the removal of a person other than a party to the suit and the Court is not debarred from removing one of the parties from the possession of the property, 18 C.W. N. 537 ; 24 M.L.J. 658, foll. (*Shadi Lal*, C.J. *and Abdul Qadir*, JJ.) AMARNATH *v.* MT. TEHAL KAUR. **4 U.P.L.R. Lah. 73=1922 Lah. 445.**

——**O 40, R. 1 (2)**—*Possession—Court—Jurisdiction of to put in possession—Any person—Meaning of.*

Under O. 40, R. 1 (2) of the Code the Court has full power to put a Receiver, appointed by it, in possession of the properties removing any of the parties to the suit, but not a party cannot be so removed unless some one or more or all of the parties have such a right. The words "any person" in O. 40, R. 1 (2), are not confined to persons who are not parties to the suit. A tenant could not be ousted to be replaced by a Receiver in an interlocutory order. (*Sadasiva Aiyer and Spencer*, JJ.) KUMARASAMI PILLAI *v.* PASUPATHIA PILLAI. **61 I.C. 605=12 L.W. 254.**

C. P. CODE (V of 1908), O. 40, R. 1—Powers of Receiver.

——**O. 40, R. 1**—*Possession—Receiver—Possession for rightful owner.*

The possession of the Receiver although in a sense the possession of the Court is also the possession of all the parties to the suit according to their title. During the continuance of the Receivership it is incompetent for the Receiver to set up a title in himself adverse to that of the parties, 12 A.C. 230, 246, foll. Even if the Receiver is discharged he would still hold the property on behalf of the rightful owner. (*Wallis*, C. J. *and Spencer*, J.) KUPPUSWAMI CHETTY *v.* KUSALA RAMIAH. **(1918) M.W.N. 683=24 M.L.T. 424=49 I C. 89=8 L.W. 551.**

——**O. 40, R. 1**—*Possession—Effect on adverse possession.*

The possession of the Court through its Receiver is possession on behalf of the party finally held to be entitled to the properties in dispute and does not suspend the operation of adverse possession, if the successful party is holding it by adverse possession. (*Ayling and Srinivasa Iyengar*, JJ.) SUBBAIYA PANDARAM *v.* MAHAMAD MUSTAPHA MARACAYAR. **21 M.L.T. 62=5 L.W. 690=40 I.C. 50=32 M.L.J. 85.**

——**O. 40, R. 1**—*Possession—Property not within subject matter of suit.*

A property outside the pending litigation cannot be made over to a receiver appointed by the Court without jurisdiction. (*Coutts and Sultan Ahmed*, JJ.) CHANDRESHWAR PRASAD NARAYAN SINGH *v.* BISESHWAR PRATAB. **3 P.L.J. 513=1 P.L.T. 653=58 I.C. 405=1920 Pat. 231.**

——**O. 40, R. 1, (2) and O. 43, R 1 (s)**—*Possession — Resistance to—Adverse order—Appeal.*

The powers of a Receiver are regulated by O. 40 of the C.P.C., and the only ground upon which his possession can be resisted is under O. 40, R. 1 (2), C.P.C. Where a person who refuses to deliver possession to a Receiver appointed by the Court appeal lies under O. 43. R. 1 (s) of the C.P.C. (*Miller*, C.J. *and Mullick*, J.) MUSSAMAT DULHIN SONA KUER *v.* JAMIL AHMED. **48 I.C. 779.**

Powers of Receiver.

——**O. 40, R. 1 (d)**—*Powers of receiver.*

Where the receiver was given power to collect outstandigs and do all things necessary for the realisation and preservation of the assets of a firm, *held* the Receiver had no authority to mortgage the property of the firm. (*Lord Carson.*) M. SUBRAMANIAN *v.* M. L. R. M. LUTCHMAN. **44 M.L.J. 602=50 Cal. 338=2 Bur. L.J. 25=32 M.L.T. (P.C.) 184=25 Bom. L.R. 582=38 C.L.J. 41=16 L.W. 446=(1923) M.W.N. 762=28 C.W.N. 1=1 Rang. 66=50 I.A. 77=1923 P.C. 50 (P.C.).**

C. P. CODE (V of 1908), O. 40, R. 1—Powers of Receiver.

———O. 40, R. 1— *Powers of Receiver—Partition suit.*

A Receiver in possession of the estate, is entitled to require payment of rent from the party who is is in possession of an important item of the family property in suit. (*Tuenon and Newbould*, JJ.) PULIN BEHARY DE *v.* SATYA CHARANDE. **38 I.C. 301.**

———O. 40, R. 1 (d)— *Powers of Receiver—Partition suit—Empowered to sell share of infant—Sale certificate.*

In a partition suit in which a Receiver is authorised to sell properties there can be no difficulty in directing him to convey the properties. Under O, 40, R. 1, Cl. (*d*), C.P.C., the Court may confer on a Receiver all such powers for the realization of properties and the execution of the documents as the owner has. A certificate reciting the order of the Court authorising the Receiver to sell and stating that the sale has been effected thereunder and also reciting that sale has subsequently been confirmed by the Court, when so confirmed, can be granted, when the purchaser applies for it and is content to take it as evidence of his title without asking for a conveyance. (*Chaudhuri*, J.) BASIR ALI *v.* HAFIZ NAZIR ALI.
43 Cal. 125=30 I.C. 406=19 C.W.N. 817.

———O. 40, R. 1 (d)— *Powers of Receiver—Right to sue.*

Though ordinarily a suit can be brought only by a person in whom there is a present title to sue and by his appointment no property becomes vested in a Receiver, this rule is subject to modification by legislature and the C.P.C. empowers the Court to confer upon a Receiver all such powers as to bringing and defending suits, as the owner himself has, even if it involve the setting aside of a voidable instrument executed by one of the co-owners who purports to deal with the entire interest. (*Jenkins*, C.J. and *N. R. Chatterjea*, J.) KASSIM MAMOOJI *v.* K. B. DUTT. **27 I.C. 459=19 C.W.N. 46.**

———O. 40, R. 1— *Powers of Receiver—Right to sue.*

On the appointment of a Receiver the estate vests in him and thereafter the Receiver is the only person competent to prosecute suits and obtain decrees. (*Mookerjee and Caspersz*, JJ.) BHUBANESWARI KOER *v.* AJODHYA SINGH.
11 I.C. 102=15 C.L.J. 339.

———O. 40, R. 1— *Powers of Receiver—Right to compel payments.*

A judgment-debtor took a sum of money from the receiver and refused to pay it back. The Court ordered repayment. *Held*, that the Receiver being an officer of the Court the Court could pass an order to help him in his duties, and that the orders could be executed as a decree. (*Mookrjee and Caspersz*, JJ.) CHANDRA SHEKAR PRASAD *v.* HARENDRA SAHI.
10 I.C. 898=15 C.L.J. 255.

C. P. CODE (V of 1908), O. 40, R. 1—Powers of Receiver.

———O. 40, R. 1— *Powers of Receiver—Right to sue.*

A Receiver is a person appointed to receive and there is no vesting of any cause of action in him and he can not institute a suit even with the previous sanction of the Court which appointed him. The general powers of the Receiver who can sue and defend a suit with the express permission of the Court do not necessarily contain a power to sue and liability to be sued. (*Rattigan and Beadon*, JJ.) BADRI PERSHAD *v.* CIVIL NAZIR, AMBALA.
56 P.R. 1913=17 I.C. 751=247 P.L.R. 1913

———O. 40, R. 1 and S. 51— *Powers of Receiver—Claim by Receiver outside jurisdiction.*

A Receiver appointed by a Court in execution can prosecute a cause of action outside the jurisdiction of the Court by which he was appointed Receiver. (*Walis*, C.J. *and Krishnan*, J.) MUTHU, K.R.V. ALAGAPPA CHETTY *v.* S.A. KKISHNASAMY IYER.
13 L.W. 180=(1921) M.W.N. 106=61 I.C. 783=29 M.L.T. 110.

———O. 40, R. 1 (d)— *Powers of Receiver—Extent of—Suit by Receiver.*

A Receiver appointed to collect outstandings can file suits in that behalf even though the suit in which he was appointed has terminated in a decree or an appeal is pending from that decree. (*Srinivasa Aiyangar*, J.) MANIKAM PILLAI *v.* KUPPA GOUNDAN, **33 I.C. 69.**

———O. 40, R. 1— *Powers of Receiver.*

Receivers powers are entirely conditioned by terms of his appointment, subject to any subsequent change by the Court under which he holds the appointment. Where general powers of management are conferred authorising him to do such acts as may be necessary for the efficient administration of the property subject to the control of the Court, he has all the powers of a proprietor within S. 4 and is entitled to nominate persons to *Karnamships* under S. 15. (*Ayling and Phillips*, JJ.) THE SECRETARY OF STATE *v.* KOMARGIBI JANARDHANA RAO. **32 I.C. 207=30 M.L.J. 456**

———O. 40, R. 1— *Powers of Receiver—Discretion to spend on litigation—Security for restitution.*

There is no ground for the appellate Court to interfere with a Receiver's discretion to spend money for the conduct of the defence of the minor, in appeal against the refusal of the lower Court to direct the Receiver not to spend. The lower Court will, however, if necessary or desirable, pass orders that the Receiver shall give security for restitution to the estate of such expenses in certain events. 14 I.C. 277; 5 I.C. 69; 17 C.W.N. 1; 35 C. 568, Foll. (*Sadasiva Aiyar and Napier* JJ.) JAMBAGATHAMMAL *v.* KANAKATHAMMAL.
25 I.C. 64.

C. P CODE (V of 1908), O. 40 R 1—Powers of Receiver.

———**O. 40, R. 1**—*Powers of Receiver—Suit by Receiver to recover property sold prior to his appointment.*

The functions of a Receiver appointed under O. 40. R. 1, being to take possession from parties to the suit of any moveable and immoveable property in respect of which he has been appointed Receiver to manage it, to realise its income and to be in custody till removed, he cannot recover property acquired before his appointment from a stranger to the suit, nor does his appointment affect any rights previously by third persons, nor has he right to recover property sold away by the judgment-debtor as being void under S. 53, Transfer of Property Act or on the ground that the sale was not binding on the creditors of the judgment-debtor. (*Benson and Sundara Aiyar*, JJ.) MAHAMED KASIM *v.* PANCHAPAKESA CHETTI. **17 I.C. 233=35 Mad. 578.**

———**O. 40, R. 1**—*Powers of Receiver—Properties not comprised in suit.*

O. 49, R. 1 does not permit of the appointment of a Receiver in respect of properties not comprised in suit. (*Sundara Iyer and Sadasiva Iyer*, JJ.) MARULASIDDA RAJA *v.* SIDDALINGA RAJA. **17 I.C. 16.**

———**O 40, R. 1 (2)**—*Powers of Receiver—Mortgagee in possession, whether can be removed.*

A Receiver appointed by a Court can oust a mortgagee decree-holder put in possession of the lands subsequent to his mortgage decree. (*Das and Adami*, JJ.) HITENDRA SINGH *v.* RAMESHWAR SINGH. **6 P.L.J. 37= 61 I.C. 67=2 Pat L.T. 593.**

———**O. 40, R. 1**—*Powers of Receiver—Collection of rents.*

Receiver can collect only such assets as become due to the estate after his appointment. Rents falling due prior to his appointment are not such assets. (*Roe and Jwala Prasad*, JJ.) GANPAT SINGH *v.* SACHIA JHAIN. **42 I.C. 785=1917 Pat. 311.**

———**O. 40, R. 1 (d)**—*Powers of Receiver—Notice to quit.*

Special leave of the Court is not necessary, for giving notice to quit, or to sue for compensation for use and occupation when the Receiver is given full powers. (*Parlett*, J.) MEER MAHOMED *v.* HOMASJEE. **38 I.C. 92= 10 Bur. L.T. 244.**

———**O. 40, R. 1**—*Powers of Receiver.*

In the absence of any mention as to what powers are conferred on a particular Receiver, there is no presumption that all the powers allowed by O. 40, R. 1 are conferred. (*Hartnoll*, J.) HOE HIN *v.* BALTHAZAR. **30 I.C. 678= 3 Bur. L.T. 164.**

Prima Facie Case.

———**O. 40, R. 1**—Prima facie *case—Discretion of Court—Dispossession of third person—Injunction.*

C. P. CODE (V of 1908), O. 40, R. 1—Privy Council Appeal.

An appointment of a Receiver and the vesting of property in him is a matter of judicial discretion which can and must be exercised according to the merits and circumstances of each case and the sole consideration being to guard against possible waste or alienation of the property. But a *bona fide* possessor of property should not be superseded by a Receiver except on equitable grounds. 22 C. 279; 32 C. 141; 31 C. 214, expl. and dist. An appellate Court will not rightly interfere with an order of the first Court passed after taking all the circumstances into consideration. 14 C.W.N. 252, Foll. Plff. has to make a good *prima facie* title to obtain a Receiver for an injunction it is enough if he shows a fair question to raise as to the existence of an alleged right. (*Ayling* and *Spencer*, JJ.) SIVAGNANATHAMMAL *v* ARUNACHALAM PILLAI. **(1911) 2 M.W.N. 75=21 M.L.J. 821= 11 I.C. 870=10 M.L T. 490.**

———**O. 40, R. 1**—Prima facie *case—Receiver—Appointment of.*

In cases where a receiver is applied for, it is settled law that the applicant should at least present a *prima facie* case and should convince the Court that there may be a fair chance of succeeding in the suit. (*Coutts and Adami*, JJ.) BANWARI LAL CHOWDHURY *v.* MOTI LAL CHOWDHURY. **3 Pat. L.T. 466= 1922 P. 493.**

———**O. 40, R. 1**—Prima facie *case—Deft. in uninterrupted possession—Effect of.*

In a case of disputed title where the deft. admittedly the original owner of the property, claims to have been in uninterrupted possession of the property, the appointment of a Receiver can be justified only when a strong case is made out. (*Twomey*, C.J., *and Parlett*, J.) S.R.M. MEYYAPPA CHETTY *v.* NARAYANAN CHETTY. **43 I.C. 350.**

Private Receiver.

———**O. 40, R. 1**—*Private Receiver—Appointment of, by mortgagee.*

A private Receiver deriving his power from the appointment of a mortgagee is almost unknown to the Indian people. (*N.R. Chatterjee and Newbould*, JJ.) SYAM PEARY DASSYA *v.* EASTERN MORTGAGE AND AGENCY COY, LTD. **40 I.C. 865.**

Privy Council Appeal.

———**O. 40, R. 1 and O. 45, R. 13 (d)**—*Privy Council appeal—Receiver—Appointment of.*

R. 13 of O. 45 applies where an application for appointing a Receiver is made after leave to appeal is granted but the principle for appointing a Receiver shall be the same as laid down in O. 40, R. 1. (*Shaw*, J.C.) MI SHWE MA *v.* MIMI. **12 I C. 196= 4 Bur. L.T. 241.**

C. P. CODE (V of 1908), O. 40, R. 1—Removal of Receiver.

Removal of Receiver.

———O. 40, R. 1—*Removal of Receiver—Power to appoint if includes power to remove—General Clauses Act* (X *of* 1897), *S.* 16—*Burden of proof.*

A power to appoint a Receiver does not of itself include a power to remove him as S 16 of the General Clauses Act has no application to appointments of Receivers by Court. The burden of proving circumstances justifying the removal of a Receiver is upon the person applying for such removal. The appointment of the next friend of a minor as a Receiver to manage his property is not illegal. (*Seshagiri Aiyar and Napier*, JJ.) RUKMANI AMMAL *v.* ADVOCATE GENERAL OF MADRAS.
31 I.C. 908 = (1916) 1 M.W.N. 10.

Scheme Suit.

———O. 40, R. 1 and S 92—*Scheme suit—Receiver, appointment of.*

In a suit under S. 92 of the Code, the Court, has power to supersede a trustee and appoint a Receiver during the pendency of the suit, notwithstanding that the trustee was appointed manager by the Temple Committee and was removeable only after regular enquiry. (*Oldfield and Ramesam*, JJ.) KUPPUSAMI MUDALIAR *v.* SUBRAMANIAM CHETTIYAR.
41 M.L.J. 548 = (1923) M.W.N. 75 = 16 L.W. 927 = 1923 Mad. 224.

———O. 40, R. 1—*Scheme suit—Receiver, appointment of.*

O. 40, R. 1 (2), C.P.C., is intended to protect third persons and not parties to the suit and does not debar the Court from appointing a Receiver in a scheme suit. (*White*, C.J. *and Sankaran Nair*, J.) AJAPA NATESA PANDHARA SANNADHI *v.* RAMALINGAM PILLAI.
20 I.C. 767 = 24 M.L.J. 668.

Selection of Receiver.

———O. 40, R. 1—*Selection of Receiver—Party to a litigation, if can be appointed, Receiver.*

Ordinarily a party to a litigation should not be appointed a Receiver unless very exceptional circumstances are established to justify such an appointment. The Court can appoint a Receiver until the hearing of a partition suit wherever it is just and convenient and the necessity for a Receiver will be greater when one party is in exclusive occupation in which case the Court may also allow the party in sole occupation to elect to pay to other an occupation rent or may require him to furnish security for the account for the share of the rents and profits to the other party. (*Mookerjee and Beachcroft*, JJ.) SUPRASANNA ROY *v.* UPENDRA NARAIN ROY.
18 C.L.J. 638 = 22 I.C. 601 = 18 C.W.N. 533.

———O. 40, R. 1—*Selection of Receiver—Parties.*

The selection and appointment of a Receiver is a matter of judicial discretion to be determined by the Court according to the circumstances of the case and the exercise of this discretion will rarely be interfered with by the appellate Court. Unless a special case is made out one of the parties to a suit will not be appointed without the consent of the other. When a non-resident is appointed Receiver, there must be adequate guarantee that he will be subject to the effective control of the Court. The fact that the Receiver resides at a great distance from the property to be managed, is not an absolute disqualification but is an important circumstance to be taken into consideration. (*Mookerjee and Beachcroft*, JJ.) KALI KUMARI *v.* BOCHHAN SINGH.
19 I.C. 873 = 17 C.W.N. 974.

C. P. CODE (V of 1908), O. 40, R. 1—Suit against Receiver.

———O. 40, R. 1—*Selection of Receiver—Appeal—Ground for.*

A person who is guardian of an incapacitated deft. in a suit is not always disqualified to be a Receiver. The Court has to consider the whole circumstances of the particular case in making such appointments and the appellate Court will not interfere unless a general principle can be shown to have been infringed. (*Oldfield and Sadasiva Iyer*, JJ.) AIYA NADAR *v.* TENAMMAL. (1916) 2 M.W.N. 256 = 33 I.C. 939 = 4 L.W. 283.

———O. 40, R. 1—*Selection of Receiver—Appointment of party.*

Under special circumstances of the case, the appointment by a Court of one of the parties as a Receiver, without the consent of the other, is justified. (*Oldfield*, J.) *In re.* THYYANAYAKI ACHI. 25 I.C. 602.

Suit against Receiver.

———O. 40, R. 1—*Suit against Receiver—Leave of Court—Death of Receiver—Continuance of suit against successor.*

The omission to get leave of the Court to institute a suit against a Receiver can be made good during the pendency of the proceedings. Where the Receiver dies, further proceedings can be continued against his successor and no one else. (*Tudball and Lindsay*, JJ.) LALMAN *Alias* LALOO *v.* GOPI NATH. 61 I.C. 888.

———O. 40, R. 1—*Suit against Receiver—Leave to sue.*

Permission to conduct a suit implies permission to institute a suit. A permission granted by a Court to sue a Receiver relates back to the time of the institution of the suit. (*Panton*, J.) NRIPENDRA KUMAR DUTTA *v.* NIKUNJA BEHARI DAS. 63 I.C. 848.

———O. 40, R. 1—*Suit against Receiver—Accounts.*

An owner of an estate cannot sue a Tahsildar for accounts, where he is appointed by a Receiver under order of Court; the suit is one of the nature of a bill of discovery and can be maintained only on proof of fiduciary relation between the parties. A Receiver can be sued if he has monies belonging to the

C. P. CODE (V of 1908), O. 40, R. 1—Suit against Receiver.

estate on hand even after his discharge. A Receiver is not a representative of the owner but an officer of the Court. (*Mookerjee*, A.C.J. *and Fletcher*, J.) HARIHAR MUKERJI *v.* JAHARADDIN MANDAL. **62 I C 768 = 26 C.W.N. 992.**

——— **O. 40, R. 1—*Suit against Receiver—Sanction.***

Per *Sadasiva Aiyar*, J.:—*Obiter.*—The necessity to obtain the sanction before the institution of a suit against the Receiver is imposed by the Common Law, merely to enforce due respect towards Courts of Justice and omission to do so does not affect the jurisdiction of the Courts. (*Sadasiva Aiyar and Spencer*, JJ.) JAGNA SANYA SAIT *v.* MYCHERLA PEDA ATCHARNNA. **15 L.W. 289 = 70 I.C. 759 = 42 M.L J. 339.**

——— **O. 40, R. 1—*Suit against Receiver—Sanction of Court, when to be obtained.***

The omission to obtain the previous sanction of the Court to a suit against a Receiver appointed by the Court, does not affect the jurisdiction of the Court trying the suit, but is an illegality which can be cured by obtaining it during the course of litigation. (*Sadasiva Aiyar and Spencer*, JJ.) KARUTH PARAKOTE AMMUKUTTY *v.* MANAVIKRAMAN. **43 Mad. 793 = 59 I.C. 568 = 12 L.W. 331.**

——— **O. 40, R. 1—*Suit against Receiver—Acts done in official capacity—Court's leave necessary.***

It is clear law that as a Receiver is an officer of the Court he cannot be sued for acts done in his official capacity by a third party except with the leave of the Court. Ordinarily the party feeling aggrieved by the Receiver's conduct should seek redress against him in the very proceeding in which he was appointed as Receiver and any separate proceeding taken against him either in that Court or elsewhere should be with the leave of the Court under whose authority the Receiver was acting. (*Rutledge*, J.) K. K. SECUNDER *v.* J. A. M. KASAIAR & CO. **1 R. 138 = 1923 Rang. 208.**

Trust.

——— **O. 40, R. 1—*Trust—Grounds for appointment—Trustee a poor man.***

The fact that the trustee is a poor man, and that in case a decree for mesne profits is passed against him, it would be difficult to realize the decretal amount, is not a sufficient ground for his removal and appointment of Receiver in his place. (*Piggott and Walsh*, JJ.) MAHAMAD ASKARI *v.* NISAR HUSAIN. **48 All. 311 = 60 I.C. 901 = 19 A.L.J. 50.**

——— **O. 40, R. 1—*Trust — Receiver—Appointment—Conditions.***

Where a mortgagor transfers properties to trustees who take the estate subject to the mortgage and who agree to liquidate the debt by periodical payments but are unable to do so

C. P. CODE (V of 1908), O. 40, R. 3.

and one of them dies while the other absents himself from the country for a long time without taking effective interest in the management, of the estate a Receiver may be appointed. (*Mookerjee and Teunon*, JJ.) WEATHERALL *v.* EASTERN MORTGAGE AND AGENCY CO., LTD. **9 I.C. 885 = 13 C.L J. 495.**

Waste.

——— **O. 40, R. 1—*Waste—Reversioner.***

A mere intention to transfer by a life-tenant does not constitute waste but may constitute danger to the reversionary interests and to protect them the Court may appoint a Receiver. (*Macleod*, C.J. *and Heaton*, J.) AHMED ASMAL MUSE *v.* BAI BIBI. **44 Bom. 727 = 37 I.C. 553 = 22 Bom. L.R. 826.**

——— **O. 40, R. 1 (2)—*Waste—Receiver.***

Where it is clearly proved that an estate is so grossly mismanaged that the whole estate will be jeopardised it is a clear case for the appointment of Receiver. (*Chitty and Teunon*, JJ.) SATYA NARAIN SINGH *v.* KESBATI KUMARI. **28 I.C. 406 = 18 C.W.N. 537.**

——— **O. 40, R. 2 and O. 43, R. 1—*Appeal—Receiver—Order increasing remuneration, if appealable.***

An order increasing remuneration to be paid to a Receiver, is an order made under O. 40, R. 2 and not under Cl. (*d*) of R. 1 of the order and is not appealable under O. 43, R. 1, C.P.C. (*Carnduff* and *Richardson*, JJ.) THOMAS CUNLIFF TWEDIE *v.* POKEA KHATUN. **22 I.C. 352.**

——— **O. 40, R. 3—*Receiver—Security not furnished by Receiver—Suit dismissed on that ground.***

The Subordinate Judge appointed the plff. as Receiver and authorised him to bring and defend suits in his own name. Plff. instituted a suit, which was dismissed on the ground that the Receiver was not competent to maintain the action, and that as he had not furnished security, his appointment was inoperative in law. *Held*, that the propriety of an order or decree made in a cause in which the Court had jurisdiction could not be challenged collaterally. The general principle applied to an order for the appointment of a Receiver by a Court of competent jurisdiction. The order of the Subordinate Judge was not conditional but absolute in its terms and took immediate effect. An order which is erroneous in law is not necessarily an order made without jurisdiction. (*Mookerjee and Beachcroft*, JJ.) BHAIRAB CHANDRA DUTT *v* BENOY CHANDRA DUTTA **46 Cal. 70 = 22 C.W.N. 520 = 43 I.C. 804 = 27 C.L.J. 395.**

——— **O. 40, R. 3—*Surety of Receiver—Liability—Remedy.***

The liability of a surety for a Receiver for the due discharge of his duties is limited to cases of a violation of those duties which may

C. P. CODE (V of 1908), O. 40, R. 3.

properly be said to be within the scope of his appointment as Receiver (*i.e.*) if the Receiver is found liable in taking accounts then the surety is liable. The surety is liable for the payment of interest on balances improperly retained by him as also costs of proceedings in Court necessarily or properly incurred in consequence of the default of the Receiver, such as costs of proceedings to take accounts for failure to account, of an application for his discharge and for the appointment of another person in his place and of any proceedings taken to enforce the cognizance. When the surety satisfies the claim of the plff. he will be entitled to stand in the place of the Receiver to the extent of the payment made by him and to reimburse himself from the sums ordered to be paid to the Receiver in the suit, without derogation of his right to sue the Receiver. (*Mookerjee and Beachcroft*, JJ.) RASHMAN DASSI *v.* BARODA KANT SARKAR.

28 I C. 31=20 C.L.J. 128.

———O. 40, Rr. 3 and 4—*Accounts—Payment in excess—If valid discharge—Bribe—Liability of minor—Charges for litigation—Servants—Right of re-imbursement — Excess deposit—Liability for interest—Borrowing at high interest—Remedy of peoson damnified.*

The Receiver advanced to an infant more than the amount sanctioned and it was not shown that it was applied for his benefit. *Held*, that a receipt by the infant for the amount was no valid discharge to the Receiver. A bribe to the Police officer to release the minor is unauthorised and the Receiver cannot claim the amount against the payee. The Receiver is bound to furnish details of litigation expenses and he is not entitled to the salary of officers appointed without leave of Court. On the application for discharge of Receiver, the applicant was directed to pay into Court the dues to the Receiver before release of the property. The applicant attempted to raise money but owing to the obstruction of the Receiver, a high rate of interest had to be paid and the deposit was made. *Held*, the inquiry as to the raising of the loan at a high rate was foreign to the accounting by the Receiver and the remedy of the applicant is by a separate suit if the Receiver claimed a larger sum that was due to him, he is liable for interest on the excess paid. (*Mookerjee and Beachcroft*, JJ.) BARODA KANTA *v.* RASH MANI DASI. 28 I.C. 25= 20 C.L.J. 118.

———O. 40, R. 3—*Liability of Receiver—Accounts.*

A succeeding Receiver cannot sue a former Receiver for recovering funds which he should have realized and accounted for. (*Fletcher*, J.) K. DUTT *v.* SHAMAL DHONE DUTT.

24 I.C. 768=41 Cal. 92.

———O. 40, R. 3—*Accounts—Rights and liabilities—Duties of Receiver.*

O. 40, R. 3 does not mean that the alleged payment should simply be supported by

C. P. CODE (V of 1908), O. 40, R. 3.

vouchers. The Court must see that the payments are properly made. The Receiver must keep his accounts and vouchers ready for examination at any time. At the time of adjustment of accounts the Receiver and other interested parties have a right to be heard. A Receiver will not be permitted without Court's sanction to incur expenditure seriously diminishing the funds entrusted to him. If a Receiver proves that a transaction made by him is beneficial to the parties interested, he must be allowed credit for such transaction. A Receiver should be allowed fees for legal assistance though not previously sanctioned by the Court. The fees will not be allowed where no legal skill is required or where the estates in the hands of the receiver has no concern in the matter, but the Receiver personally is involved. He should not employ the counsel of either of the parties to the litigation in which he was appointed as they are likely to represent their client's case; but this rule applies where the Receiver is acting adversely to the interest of the parties. A Receiver cannot make interest for his own benefit. Receiver's account filed and vouched before un examiner can be reopened on the discovery of errors though a Judge's certificate is attached and the Receiver may be surcharged though he has been discharged. (*Mookerjee and Caspersz*, JJ.) MOHINI MOHAN *v.* BARODA KANT.

12 I C. 780=14 C.L.J. 445.

———O. 40, R. 3—*Accounts—Mesne profits — Expenses of litigation—Rent decrees—* Bona fides.

Where in recovering rents from tenants a Receiver obtains only decrees against them he cannot be compelled to execute those decrees and recover the amounts and account to the party on that basis. If the Receiver had failed to realize rents by taking proper proceedings he will not be exampt from liability. Mistaken proceedings though taken in good faith will not absolve the Receiver from liability for rent. A decree-holder need not accept pronotes from the Receiver for arrears of rent from the tenants and the Receiver must make good the amounts for which the pronotes were executed. Proceedings by way of distraint are of an exceptional and summary character and a Receiver is not entitled to recover the costs of such proceedings initiated by him through mistake. 27 M. 94, 7 M. 138, Foll. (*Abdur Rahim and Spencer*, JJ.) LAKSHMI VENCAYAMMA *v* GOPISETHE NARAYANASWAMI NAIDU.

11 M L.T. 90=22 M L.J. 253= 14 I.C. 396=(1912) M.W.N. 101.

———O. 40, R. 3—*Accounts—Court which has to pass.*

A Receiver was appointed by the High Court in an appeal and on his death the first court appointed a successor to the deceased Receiver. *Held*, that the successor was an officer of the first court and not of the High Court and therefore, his accounts were subject to examination by the first court. The High Court declined to

C. P. CODE (V of 1908), O. 40, R. 4.

examine them. 1 P.L.J. 449 ref. (*Mullick and Adami*, JJ.) GANESH LAL *v.* KUMAR SATYA NARAYAN SINGH. **4 P L J. 636 = 54 I.C. 207 = (1920) Pat. 35.**

———**O. 40, R. 4, O. 43, R. 1 (s)**—*Order passing accounts of Receiver—Appealable.*

An order passing a Receiver's account is one under O. 40, R. 4 and is appealable under O 43, R 1 (s). (*Macleod* C.J. *and Heaton*, J.) SHRINIWAS KUPPUSAMI MUDALIAR *v.* M.C. WAZ. **45 Bom. 99 = 59 I.C. 421 = 22 Bom. L.R. 1126.**

———**O. 40, R. 4**—*Order for accounts from —Appeal from, is not competent.*

An appeal from an order on an application to the Court below, to call upon a discharged receiver in a suit to render accounts and refund losses due to his neglect during the time he was in the office of a Receiver, is not competent. (*Le Rossignol and Abdul Qudir*, JJ.) GOKAL CHAND *v.* UDHERAM. **1924 Nag. 53.**

———**O. 40, R. 4, and O. 43, R. 1 (s)**—*Order directing to Receiver to pay money in Court—Is not appealable.*

An order directing a Receiver to pay a certain amount into Court is not an order within O. 40, R. 4, and hence is not appealable. (*Ayling*, O. C. J. *and Krishnasamy Row*, J.) PALANIAPPA CHETTY *v.* PALANIAPPA CHETTY. **(1921) M.W.N. 806 = 1922 Mad. 234.**

———**O. 40, R. 4** — *Misappropriation by deceased—Reciever — Legal representatives — Execution—C.P.C., S. 50, cl. 2 and 145.*

The proper procedure to bring to sale under O. 40, R. 4 of the C.P.C. the properties of a deceased Receiver in the hands of his legal representatives is by way of execution and not by a separate suit. "Property" in this and in other clauses of the section is synonymous with estate and covers income from the property. The clause is a residuary provision intended to deal with all cases of loss to the estate not specially provided for and therefore applies to the case of misappropriation also. (*Oldfield and Seshagiri Iyer*, JJ.) ITTUNNI RAMAN NAIR *v.* GOPALA MENON. **39 Mad. 586 = 30 I.C. 383 = 18 M.L.T 127.**

———**O. 40, R. 4**—*Liability to account.*

A Receiver is not liable to account for any period other than that for which he is appointed or for period covered by the account under consideration by the Court. (*Sultan Ahmed* J.) SAMHUTTA SINGH *v.* BHAGWANT SINGH. **3 Pat. L.J. 97 = 55 I.C. 15 = 1920 Pat. 121.**

———**O. 40, R. 4**—*Claim for salary—Suit.*

Semble. A Receiver who has given up possession of the estate must institute a separate suit for recovery of sums due to him in respect of salary allowances, etc. 17 C. W. N. 16, Ref. (*Mullick and Adami*, JJ.) GANESH LAL *v.* KUMAR SATYA NARAYAN SINGH. **4 P.L.J. 636 = 54 I.C. 207 = (1920) Pat. 35.**

C. P. CODE (V of 1908), O. 41, R 1.

———**O. 40, R. 4 and O. 43, R. 1 (s)**—*Order declaring Receiver liable for money—Appeal.*

An order declaring a Receiver liable in respect of a sum of money is not appealable unless it is accompanied by order of attachment under O. 40, R. 4, C.P.C. 14 C.L.J. 445; 31 I. C. 242 and 14 C. W. N. 183 Ref. When the taking of the accounts was completed, the Subordinate Judge found that the Receiver was liable to the estate for a certain sum of money. *Held*, that no appeal lay from that decision, and the expression of opinion by the former Division Bench was not binding. 39 Ch. D. 57 Dist. (*Mullick and Adami*, JJ.) GANESH LAL *v.* KUMAR SATYA NARAYAN SINGH. **4 P.L.J. 636 = 54 I.C. 207 = (1920) Pat. 35.**

———**O. 40, R. 4 (b)**—*Appeal—Scope—Order for payment in Court—Court's duty.*

In an appeal from order under O. 40, R. 4 it is open to the Receiver to question the correctness of the amount said to be due from him. A Court should first direct the Receiver to submit his accounts for the period during which he was in possession of the properties; and then give the plaintiff an opportunity to surcharge and falsify them and raise his objection to them. Thereafter hearing the objections he should decide the exact amount which the Receiver is liable to pay. After that the Receiver should be directed to pay into Court the amount due within a certain time fixed by the Court. If he fails to pay the amount without proper reason within the time fixed, the Court can then pass an order directing the attachment of his property under R. 4. (*Krishnan and Venkatasubba Rao*, JJ.) R.M P. PALANIAPPA CHETTI *v.* M.S.A. PL PALANIAPPA CHETTI. **(1922) M.W.N. 741 = 16 L.W. 784 = 1923 Mad. 83 (2) = 43 M.L.J. 707.**

———**O. 41, R. 1**—

See also (1) APPEAL.
(2) C.P. CODE, SS. 2 (2), 96, 100, 104.
(3) PRACTICE.

———**O. 41, R. 1**—*Appellant, must show that judgment is wrong.*

In every appeal the appellant must show some reason why the judgment appealed from should be disturbed. There must be some balance in their favour when all the circumstances are considered to justify the alteration of the judgment that stands. (*Lord Buckmaster*,) FAKRUNISSA *v.* IZARUS SADIK. **17 N.L.R. 72 = 63 I.C. 898 = 25 C.W.N. 866 (P.C.).**

———**O. 41, R. 1**—*Failure to file copy of order appealed from.*

The appellants before the District Judge failed to file a copy of the formal order appealed against but the formal order was a precise copy, so far as its operative words were concerned, of the judgment of the order which they did file, *held* that the failure mattered to nobody

C. P. CODE (V of 1908), O. 41, R. 1.

and the objection was futile. (*Walsh and Ryves*, JJ.) MT. KAUSILLA KUER *v.* MT. SUKHDEI. 21 A.L.J. 452=4 L.R. All. (Civ) 246=1923 All. 679.

——O. 41, R. 1—*Valid presentation—What is.*

In cases in which a formal order is not drawn up, it is sufficient for the appellant to attach to his memorandum of appeal a copy of the judgment alone, but where a separate order is drawn up both are necessary. (*Kanhaiya Lal*, J.) KEDAR NATH *v.* NANAK, 1924 All. 162.

——O. 41, R. 1—*Allahabad High Court Rules, Ch. III, R. 2—Presentation of second appeal—Judgment copy of first Court not filed—Procedure.*

O. 41, R. 1 of the Code as revised by R. 1, Chap. III of the Allahabad High Court Rules, required a copy of the first Court judgment, to be filed with the appeal and a Judge of the High Court must decline to allow an appeal to be presented, without such a copy nor can he extend the time for filing the same. (*Walsh, Lindsay and Sulaiman*, JJ.) BHAIRON GHULAM *v.* RAMANTAR SINGH. 19 A.L.J. 898=63 I.C. 338=3 U.P.L.R. (A.) 165 (F.B.).

——O. 41, R. 1—*Right to appeal—Legal representative.*

An appeal by a legal representative without being recorded as a legal representative, on an application duly made by him, is not maintainable. (*Piggott and Walsh*, JJ.) BANARASI DAS *v.* SHEO DARSHAN DAS SHASTRI. 45 I.C. 451=16 A.L.J. 394.

——O. 41, R. 1—*Miscellaneus appeal—Copy of decree cannot be dispensed with.*

Where there is a judgment and decree on a question decided under S. 47, C. P. C. a copy of decree must be filed. (*Tudball and Walsh*, JJ.) PISIN ALI KHAN *v.* BHAGWANTA KUAR. 40 All. 12=42 I.C. 888=16 A.L.J. 801.

——O. 41, R. 1—*Appeal—Order refusing to appoint.*

An order refusing to appoint a Receiver during the pendency of a suit is appealable. (*Piggott and Walsh*, JJ.) MUNI LAL *v.* JAGAN NATH. 33 I.C. 735.

——O 41, R. 1—*Presentation of appeal—Pleader—Vakalat not signed by party.*

Where a memorandum of appeal is presented by a pleader whose *vakalat* is not signed by the party but the defect is subsequent by rectified, there is a valid presentation of the appeal. (*Lyle*, J.) HABEEB *v.* NAUSH ALI. 21 I.C. 444=11 A.L.J. 779.

——O. 41, R. 1—*Decree—Amendment—Pending appeal—Procedure.*

If a decree is amended after an appeal had been preferred against it, and an application to the appellate Court, to attach to the memorandum of appeal, a copy of the amended

C. P. CODE (V of 1908), O. 41, R. 1.

decree, is granted, then from that moment the pending appeal becomes an appeal against the amended decree. (*Mookerjee and Beachcroft*, JJ.) SADHUPHADYA UMESHANAND OJA *v.* RAVANESHWAR PROSAD SINGH. 43 I.C. 772.

——O 41, R. 1 and O. 42, R. 1—*Right to appeal—Estoppel—Adoption of and enjoyment under, an order bars appeal against the order.*

An unconditional adoption of, coupled with enjoyment of the benefit under, an order directing payment of money, bars an appeal against the order, which after such adoption and enjoyment cannot be said to be valid for one purpose and invalid for another. 8 I. C. 79, Foll. (*Sanderson*, C.J. *and Woodroffe*, J.) BANKU CHANDRA BOSE *v* MARIUM BEGAM. 37 I.C. 804=21 C.W.N. 232.

——O. 41, R. 1—*Presentation of appeal—Copy of decree.*

An appeal is preferred only when a copy of the decree appealed against, is filed. (*Holmwood and Chapman*, JJ.) ABDUL HAKIM *v.* HEM CHENDRA DAS. 30 I.C. 165=42 Cal. 483.

——O. 41, R. 1—*Presentation of appeal—Memo. of appeal unaccompanied by copy of decree—Invalid presentation.*

A memorandum of appeal unless accompanied by a copy of the decree appealed from, is in effective and useless. (*Fletcher and Richardson*, JJ.) SITIKANTHA ROY *v.* BIPRADDAS CHARAN. 27 I.C. 447.

——O. 41, R. 1—*Separate orders—Joint appeal in respect of two distinct orders—Legality.*

If there are two distinct orders in two separate execution proceedings, there cannot be a joint appeal in respect of both. 15 I.C. 897, 10, I.C. 415, Ref. (*Mookerji and Beachcroft*, JJ). RAKHAL CHANDRA TEWARI *v.* MANMATHA NATH. 24 I.C. 488.

——O. 41, R. 1—*Presentation of appeal—Decree copy not filed.*

Where the decree copy was not attached to the memorandum of appeal as required by O. 41, R. 1 (1) and the appellant's vakil stated that the decree had not been drawn up though as a matter of fact it had been drawn up, the memorandum of appeal must be rejected. 15 C.L.J. 498; 16 C.L.J. 116, Foll. (*Mookerjee and Beachcroft*, JJ.) BENAHANI DEBI *v.* SHASHIBHUSHAN SINHA. 17 I.C. 119=16 C.L.J. 133.

——O. 41, R. 1—*Presentation of appeal—Copy of decree or judgment—Not filed with memo. of appeal—Decree not drawn up.*

Where an appeal is preferred against a decree or an order, the memo. ought to be accompanied by a copy of the judgment and a copy of the decree or order as the case may be. Where an order has not been drawn up, the.

C. P. CODE (V of 1908), O. 41, R. 1.

appellant may simply attach to his memorandum a copy of the judgment alone and time should run from the date of the judgment. Where, however, a separate order is drawn up embodying the formal expression of the decision, copies of both the documents should be attached and the appellant will be entitled to a deduction of the time required for obtaining copies thereof. (*Mookerjee and Teunon, JJ.*) KAMALA DASI *v.* TARAPADA MUKERJEE.
14 I.C. 1006=15 C.L.J. 498.

———**O. 41, Rr. 1 and 19**—*Dismissal for default—Court has inherent power to restore.*

Under the Civ. Pro. Code the Court has power to restore even where the pleader is not able to prove that he was prevented by sufficient cause when the appeal is called on for hearing. (*Mookerjee and Carnduff, JJ.*) RUKMINIMOYI DASI *v.* PORAN CHANDRA BHERA.
15 C.L.J. 334=14 I.C. 823 (1)=39 C. 34.

———**O. 41, R. 1**—*Presentation of appeal*—Vakalatnama *filed after limitation period—Effect of delay.*

An appeal is barred though it is filed in time, if the *vakalathnama* is filed after the limitation period. (*Piggott and Stephens, JJ.*) SRI CHANDAN BHUYA *v.* HAROO SETHI.
11 I.C. 387=13 C.L.J. 544.

———**O. 41, R. 1**—*Presentation of appeal—Memorandum of appeal not accompanied by copy of decree.*

A memorandum of appeal not accompanied by a copy of the decree appealed from is not a valid memorandum and the appeal must be dismissed on that ground; an appeal from an amended decree must be accompanied by a copy of that decree and not the original decree. (*Coxe, J.*) KEAMAT *v.* ABHOORAM MISTRY.
11 I.C. 8.

———**O. 41, R. 1**—*Separate orders—Single appeal—One judgment in separate order—No order of consolidation.*

One appeal from three distinct orders recorded in three distinct execution cases which were decided by one judgment, there being no order consolidating the cases, is incompetent and irregular. (*Mookerjee and Coxe, JJ.*) RAKHAL CHANDRA TEWARY *v.* MANMATHA NATH MITTER. **10 I.C. 415=15 C.W.N. 994.**

———**O. 41, R. 1**—*Memorandum of appeal written by petition-writer—Not invalid.*

It is immaterial whether a memorandum of appeal is written by the appellant himself or by some body else as long as it is signed by the appellant or his agent duly authorised in his behalf, and represented to the proper authority. Hence there is no valid objection to the entertainment of the appeal where the memorandum is written by a petition-writer. (*Shadi Lal, C.J. and Zafar Ali, J.*) MUSSAMMAT SHIB DEVI *v.* RALLA RAM. **1923 Lah. 484.**

———**O. 41, R. 1**—*Two appeals and two decrees in suit—Both decrees must be filed.*

Where from the decree in a suit two appeals were preferred and two decrees drawn up by the appellate Court, O. 41, R. 1, C.P. Code, requires both decrees to be filed for the presentation of a second appeal to be valid. (*Scott-Smith and Harrison, JJ.*) MAHOMMAD DIN *v.* MSST. ZERUNNISSA. **3 Lah. 218=1922 Lah. 390.**

———**O. 41, R. 1**—*Copy of decree not filed—No valid presentation.*

Presentation of memorandum of appeal unaccompanied by a copy of decree is no legal presentation. (*Chevis, J.*) BASHI RAM *v.* MUNICIPAL COMMITTEE, CHINIOT.
4 Lah. L J. 193=1922 Lah. 191.

———**O. 41, R. 1 and O. 42, R. 1**—*Second appeal—Presentation of—Copy of interlocutory order not filed—Does not affect validity of presentation.*

Where a second appeal is filed without a copy of the interlocutory order referred to in the judgment of the Court below it does not affect the validity of the presentation, especially when the points decided by the interlocutory order do not arise in the appeal. Even if the appeal could be considered to have been presented only when the copy of the interlocutory order was filed, there was sufficient cause for excusing the delay. (*Martineau, J.*) LAKSHMI DAS *v.* ISHAR DAS. **4 Lah. L J. 20=1922 Lah. 98.**

———**O. 41, R. 1**—*Copy of translation of decree filed—Not a valid presentation.*

Where a second appeal was presented within Urdu translation of the decree of the District Court and without an English copy is invalid and the Court refused to excuse the delay in filing a proper copy. (*Chevis and Le-Rossignol, JJ.*) DAIM *v.* HAYAT, **4 Lah. L J, 381.**

———**O. 41, R. 1**—*Appeal—Copy of decree not presented—Decree not prepared—Effect of.*

Where the plaintiff's suit was dismissed by the trial Court but no decree was drawn up it is not competent for an appellate Court to entertain an appeal from the decision of the trial Court. The proper course for the appellate Court is to adjourn the appeal to enable the plaintiff to file a copy of the decree. 19 P.R. 1919; 66 P.R. 1916, Foll. (*Harrison, J.*) SHER MAHOMED *v.* MAHOMED KHAN.
1924 Lah. 352.

———**O. 41, R. 1**—*Copy of judgment, if necessary.*

Memo. of appeal must be accompanied by a copy of the judgment appealed from and in the absence of an explanation for delay filing the copy after the period of limitation will justify dismissal of the appeal. (*Martineau, J.*) DYALA *v.* HIRU. **67 I.C. 670=3 Lah. L.J. 255.**

———**O. 41, R. 1**—*Memo. of appeal without judgment—Not valid.*

A memo. of appeal not accompanied by a copy of the first Court's judgment is not a valid memorandum. (*Chevis, J.*) MOLU MAL *v.* SRI RAM. **63 I.C. 30=2 Lah. 227.**

C. P. CODE (V of 1908), O. 41, R. 1.

———**O. 41, R. 1**—*Separate cases—Two cases decided by one judgment — Separate appeals.*

If two separate cases are finally decided in one judgment, two separate appeals should be filed. (*Scott-Smith and Wilberforce, JJ.*) DEVI DITTAMAL *v.* OFFICIAL LIQUIDATORS, AMRITSAR BANK. **56 I.C. 69=1 Lah. 368.**

———**O. 41, R. 1**—*Vernacular copy of decree filed—Not valid presentation.*

An appeal presented with a vernacular translation of the decree only is not a valid presentation. Where the defect was not cured within a reasonable time, the delay cannot be excused. (*Scott-Smith, J.*) DAME *v.* HAYAT. **2 Lah. L.J. 728.**

———**O. 41, Rr. 1 and 3**—*Urdu stamped paper with a title and English paper containing grounds.*

A document in Urdu with stamp and the title of the case accompanied by a document in English, containing the grounds, form together a valid memorandum of appeal. Even if the vernacular memorandum is regarded as an appeal the defect could be cured under R. 2. (*Martineau, J.*) KARMAN *v.* BISHNA. **2 Lah. L.J. 507=55 I.C. 24= 2 U.P.L.R. (Lah.) 49.**

——**O. 41, R. 1**—*Presentation of appeal—Decree not framed by the lower Court.*

O. 41, R. 1 of the C.P.C. requiring a copy of the decree along with the appeal does not apply where the original Court has omitted to frame a decree. The proper course for the appellate Court in such a case is to grant an adjournment until a copy of the decree is forthcoming. (*Wilberforce, J.*) MANGAL SINGH *v.* HIRDA RAM. **49 I.C. 673=19 P.R. 1919.**

———**O. 41, R. 1**—*Presentation of appeal—Decree not containing grounds of appeal to lower appellate Court.*

A second appeal filed with a copy of a decree of the lower appellate Court not containing the grounds of appeal to that Court, is properly presented under O. 41, R. 1 and O. 42, R. 1 of the C.P.C. (*Shah Din, J.*) RAM PEARA *v.* RUPLAL. **80 P.R. 1918=48 I.C. 102= 181 P.W.R. 1918.**

——**O. 41, R. 1**—*Right to appeal—Party.*

The right of appeal is allowed only to a person who is a party to the suit from which the appeal lies and who is aggrieved by the decree. (*Scott-Smith, J.*) FONJOO *v.* KARAM DIN. **84 P.W.R. 1918=46 I.C. 181= 82 P.L.R. 1918.**

———**O. 41, R. 1**—*Presentation of appeal—Copy of judgment filed after limitation—Limitation.*

When the copy of the judgment is filed after the period of limitation, the appeal must be dismissed in the absence of just cause shown for extending the time. (*Shadi Lal, J.*) DHANPAT MAL *v.* MELA MALL. **67 P.R. 1917=41 I.C. 918= 183 P.W.R. 1917.**

C. P. CODE (V of 1908), O 41, R. 1.

———**O. 41, R. 1**—*Appeal—Presentation—Cross-appeals decided by lower Court by one judgment—Omission to file a copy of rival appeal, effect of.*

The lower appellate Court decided by one judgment the cross-appeals of plff. and deft. and dismissed the plff.'s suit, the decree embodying the result of deft.'s appeal. Plff. preferred an appeal wherein the decree in deft.'s appeal in the lower Court was not filed. It was held that this failure to file copy of other decree was a *bona fide* mistake and did not debar plff. from attacking the decision of the lower Court but the order relating to costs in the decree of which the copy was not filed was binding on the plff. (*Shadi Lal and Jones, JJ.*) MURAD KHATUN *v.* MUHAMMAD BAKSH. **83 P.W.R. 1916=33 I.C. 742= 84 P.R. 1916.**

———**O. 41, R. 1**—*Right to appeal—Stranger.*

A party cannot appeal from a decree in his favour merely because of an adverse finding on an unnecessary issue. (*Rattigan, J.*) NUR BAKSH *v.* AHMAD BAKSH. **120 P.L.R. 1911=9 I.C. 1030= 101 P.W.R. 1911.**

——**O. 41, R. 1**—*Second appeal—Presentation of, without copy of decree is not valid—Power to excuse delay in furnishing copies—Ex parte order excusing delay—Application to vacate order by respondent is competent.*

The provisions of O. 41, R. 1, C. P. Code are imperative and the presentation of a memorandum of second appeal without a copy of the decree appealed against is not a valid presentation. 27 I.C. 447; 16 C.L.J. 135; 16 All. 77, Foll. It is open to the Court in the exercise of its discretion under S. 5 of the Limitation Act to excuse the delay in the presentation of the decree appealed against. 17 C.L.J. 66, Referred to. Where an *ex parte* order is passed excusing the delay in the presentation of an appeal, it is open to the respondent to apply to have the order set aside. (*Kumaraswamy Sastri, J.*) SUNDARAM AIYAR *v.* RAJA RAJESWARA MUTHURAMALINGA SETHUPATI. **44 M.L.J. 279=(1923) M.W.N. 164= 17 L.W. 352=32 M.L.T. (H.C.) 232= 1923 Mad. 482.**

———**O 41, R. 1**—*Presentation of appeal—Judgment copy to be filed.*

A memorandum of appeal must be accompanied by a copy of the judgment unless dispensed with by the Court. (*Sadasiva Iyer and Tyabji, JJ.*) AVUDAI AMMAL *v.* GANAPATHI IYER. **25 I.C. 28.**

C. P. CODE (V of 1908), O. 41, R. 1.

——O. 41, Rr. 1 and 4—*Right to appeal—Party.*

A deft. not appearing in an appeal preferred by his co-deft. cannot be said to be constructively a party to the appeal. He cannot prefer appeal from an order of the lower Court after remand. (*Sundara Iyer and Sadasiva Iyer*. JJ.) KARIAN KUPPUSWAMI NAIDU *v.* DESAYI NAMBERUMAL. **16 I.C. 693.**

——O. 41, R. 1—*Presentation of appeal by pleader with no authority is not valid.*

The appellant engaged one pleader *A* and executed a power-of-attorney in his favour authorizing him to appoint another pleader if necessary. *A* engaged another pleader *B* but did not execute a power in his name. *B* put his own name on the power executed in favour of *A*. *Held*, the appeal was not validly presented as there was no proper appointment of *B* either by the appellant or by *A*. (*Batten*, O.J.C.) CHITTAR *v.* LAXMI NARAYAN. **62 I.C. 259.**

——O. 41, R. 1—*Conditional order setting* ex-parte *decree—Appeal—Order of dismissal.*

An *ex-parte* decree was set aside on condition the defendant deposited in Court a large sum of money; an appeal was preferred against it, but meanwhile for non-compliance with the order, the petition had been dismissed. *Held*, the order of dismissal should also be filed. (*Dalal*, J.C.) INDAR SINGH *v.* GURDAYAL SINGH. **1924 Oudh 229.**

——O. 41, R. 1—*Presentation of appeal—Copy of judgment.*

An second appeal preferred to a Revenue Court under the provisions of special enactment like the Oudh Rent Act should not be dismissed on the ground that it is unaccompanied by a copy of the lower Court's judgment which is incomplete and refers to another main judgment not filed with the memo. of appeal, inasmuch as he is not required by law to file such a copy. (*Holms*, S.M.) ABDUL HASAN KHAN *v.* RAJ KUMARI. **34 I.C. 706=3 O.L.J. 209.**

——O. 41, R. 1—*Appeal—Presentation without copy of judgment is not illegal.*

A second appeal filed without a copy of the trial Court's judgment within time is not incompetent, inasmuch as O. 41, R. 1, C.P.C., requires that only a copy of the lower appellate Court's judgment is to be filed and does not require the filing of the judgment of the trial Court. (*Jwala Prasad and Ross*, JJ.) RAMDEO SINGH *v.* MAKHAN SINGH. **74 I.C. 330=(1923) Pat. 19.**

——O. 41, R. 1—*Several appeals, from one judgment—Copies of judgment necessary with memo.*

Where there are several appeals from one judgment by different appellants, the High Court will insist under the rules to have copies of judgment filed with each memo. of appeal though where there are several appeals from the same judgment by the same appellant, he should be permitted to file one copy only of the judgment with the memorandum in one of his appeals. (*Dawson Miller*, C.J. *and Coutts*, J.) RIAJAN THAKUR *v.* CHARITAR THAKUR. **1 P. 670=4 Pat. L.T. 290=1922 P. 580.**

C. P. CODE (V of 1908), O. 41, R. 1.

——O. 41, R. 1—*Presentation of appeal—Copy of decree not filed.*

A petition of appeal filed without a copy of the decree appealed against, is not valid as an appeal. (*Adami*, J.) CHATURBHUJ SAHAY *v.* MUHAMMAD HABIB. **54 I.C. 36.**

See also:—

(*Pelman*, J.). BHAN SINGH *v.* GOKUL CHAND. **53 I.C. 137.**

——O. 41, R. 1—*Separate decrees—Separate appeals—Single suit.*

Two or more decrees cannot be challenged in the appeal even when such decrees are based upon one judgment to one suit. (*Roe*, J.) RAMNARAIN LAL *v.* HARI KRISHNA PRASHAD NARAIN. **44 I.C. 418=3 Pat. L.J. 96.**

——O. 41, R. 1—*Appeal—Copy of decree not filed—No valid presentation.*

Under O. 41, R. 1, C. P. Code, every memorandum of appeal must be accompanied by a copy of the decree appealed from and without such copy there is no valid presentation of the appeal. (*Brown*, J.C.) MAUNG PO SAUNG *v.* MA MUN. **65 I.C. 68=(1921) 4 U.B.R. 75.**

——O. 41, R. 1 (1)—*Decree—Copy of, to be filed.*

A copy of the decree appealed against is absolutely necessary for an appeal. The Court may in its discretion dispense with a copy of the judgment. (*Drake-Brockman*, J.C.) PARASHRAM *v.* LIKHAN. **10 I.C. 866=7 N.L.R. 67.**

——O. 41, Rr. 1 (2) and 3—*Memorandum of appeal—Partly in English and partly in Vernacular.*

A Vernacular memorandum and a document attached to it containing the grounds of appeal in English can constitute the memorandum of appeal; and even if the vernacular memorandum alone could be regarded as the appeal, the omission in it could be remedied by amendment. (*Martineau*, J.) KARMAN *v.* BISHNA. **2 Lah. L.J. 307=55 I.C. 24=2 U.P.L.R. (Lah.) 49.**

——O. 41, R. 1—*Specific issue for each plea must be raised.*

Where a memorandum of appeal ran as follows:—"That the Court below should have decided issues 6, 7, 8, 9, 10, 12, and 13 in favour of the defendants-appellants." *Held*, each plea should raise a specific issue. Appeals drawn up in this way are liable to be returned for amendments. (*Daniels*, J.C.) BANKE LAL *v.* KANHALAL. **9 O.L.J. 357=1923 Oudh. 113.**

C. P. CODE (V OF 1908), O. 41, R. 2.

———O. 41, R. 2—*Plaintiff accepting decision of Trial Court—Cannot challenge in Second Appeal.*

A plaintiff accepting the decision of the Trial Court as to the amount due to him, and not appealing, cannot challenge its correctness in Second Appeal by means of a cross objection. (*Tudball and Rafique, JJ.*) HARDEO PRASAD *v.* GANGA SAHAI. 61 I. C. 48 : 19 A. L. J. 155.

———O. 41, R. 2—Res judicata—*Plea of, if can be taken first time at hearing of second appeal.*

A plea of '*res judicata*' can be raised for the first time at the hearing of a second appeal though not taken in the memo of appeal. (*Rafique, J.*) CHHADAMI LAL *v.* SHYAMA CHARAN. 22 I. C. 12.

———O. 41, R. 2—*Presentation of appeal—At a private residence of Judge.*

A Judge is justified in receiving an appeal at his private residence out of court hours and such appeal must be deemed to have been presented within time. 7 N. W. P. H. C. R. 5, overruled. (*Richards, C. J., Karamat Hussain and Tudball, JJ.*) DIN RAM *v.* HARI DAS. 14 I. C. 744 : 34 All. 482 : 9 A. L. J. 743.

———O. 41, R. 2 and O. 47, R. 1—*Grounds not urged in memorandum of appeal.*

Grounds taken in an application for review but not urged in the memorandum of appeal as originally filed, cannot be urged in support of the appeal after its readmission upon the application for review. (*Fletcher and Cuming, JJ.*) SASADHAR BHATTACHARJEE *v.* ARUN KUMAR BHATTACHARJEE. 54 I. C. 631.

———O. 41, R. 2—*Alternative grounds of appeal—Power of Court to go into.*

Where Alternative grounds of appeal are raised an appellate Court can go into questions admitted for the purposes of an alternative argument and finding adversely to the appellant. (*Broadway and Martineau, JJ.*) RAM DAS *v.* MT. PANNA DEVI. 5 Lah. L. J. 117.

———O. 41, R. 2—*Presentation without copy of a decree is invalid.*

There is no proper presentation of an appeal without a copy of a decree even when there is no decree in existence (*Shadi Lal, C. J. and Martineau, J.*) THE MUNICIPAL COMMITTEE, CHINIOT *v.* BASHI RAM. 69 I.C. 895 : 1922 Lah. 170.

———O. 41, R. 2—*Appeal — New grounds — When allowed—New basis of claim.*

A plea which is not raised in the trial should not be considered by the Dist. Court. (*Leslie Jones and Broadway, JJ.*) RAMCHAND *v.* RAMA NAND. 68 I. C. 227 : 3 Lah. L. J 392.

———O. 41, R. 2—*New ground not taken in memo—Leave of Court.*

A party can overrun his ground of appeal with the leave of the Appellate Court. (*Chevis, J.*) PARMANAND *v.* THIKHU. 57 P. L. R. 1916 : 30 I. C. 817 : 121 P. W. R 1915.

———O. 41, R. 2—*New point — Not raised in the memorandum.*

C. P. CODE (V OF 1908), O. 41, R. 2.

An appellant will not be allowed to argue a new point in appeal, especially if it was raised by way of additional grounds, long after the period of limitation for filing the appeal had expired (*Chevis and Leslie Jones, JJ.*) CHHUTTAN *v.* HAZARI LAL. 30 I. C. 22 : 7 P. R. 1916 ; 46 P. L. R. 1916 : 129 P. W. R. 1915.

———O. 41, R. 2—*Additional grounds.*

Additional grounds of appeal should not be allowed to be filed at a late stage. (*Johnstone and Shah Din, JJ.*) FAZAL HUSSAIN *v.* MALIK JINDA. 49 P. R. 1914 : 252 P. L. R. 1914 : 25 I. C. 443 : 160 P. W. R. 1914

———O. 41, R. 2 — *Abandonment of plea — Ground of attack in plaint but not mentioned in appeal.*

A ground of attack mentioned in the plaint in respect of which no issue is drawn and which is not repeated either in the written grounds of first or second appeal cannot be allowed in second appeal. (*Shah Din and Beadon, JJ.*) HIRA SINGH *v.* LAHORI MAL. 174 P. W. R. 191? 17 I. C. 247 : 217 P. L. R. 1912.

———O. 41, R. 2—*New case.*

An appellant cannot put forward a new case in appeal. (*Rattigan, J.*) RAM DITTA MAL *v.* KARAM DEVI. 167 P. W. R 1912 : 17 I. C. 243 : 190 P. L. R. 1912.

———O. 41, R. 2—*New plea—Grounds that can be raised in appeal.*

Where the first court has neither put in issue, a plea of the deft. nor has given a finding thereon and the appellant has not mentioned it in the ground of appeal, such plea cannot be raised in appeal. A point not raised in the original court cannot be allowed to be advanced for the first time in appeal. (*Shah Din and Scott-Smith, JJ.*) NATHU MAL *v.* MUL CHAND. 183 P. W. R. 1912 : 17 I. C. 232 : 197 P. L. R, 1912.

———O. 41, R. 2—*Factum of Adoption not questioned—Effect.*

Where the finding of the lower appellate Court against the *factum* of adoption was not questioned on the grounds of second appeal. *Held* the validity of the adoption could not be allowed to be urged at the further proceedings. (*Ayling and Odgers, JJ.*) RAJAMBAL AMMAL *v.* SHANMUGA MUDALIAR. 70 I. C. 653 : 1922 M. W. N. 481 : 1923 Mad 11.

———O. 41, R 2—*New ground—Not raised in memorandum of appeal—When entertained.*

An appellate Court is not bound to consider a contention not put forward in the memorandum of appeal unless there can be no reasonable doubt on the record that the evidence on the new point raised had been completely given on both sides or the decision on the new point is a pure question of law and it is expedient in the interests of Justice to consider and decide it though it was not mentioned in the memorandum of appeal to the Lower Appellate Court. (*Sadasiva Iyer, J.*) VEMI REDDI *v.* NALLAPPA REDDI. 57 I. C. 800 : 11 L. W. 611.

———O. 41, R. 2—*Appeal—Decision on grounds not raised at the trial.*

C. P. CODE (V OF 1908), O. 41, R. 3.

The decision in appeal should not proceed on grounds not raised at the trial. (*Parlett, J.*) PETER VERTANNES *v.* MUTHIAH.
19 I. C. 48 : 6 Bur. L. T. 53.

——0. 41, R. 3—*Effect of wrong name of the respondent.*

Where in an appeal the respondent was wrongly named owing to a clerical error in the decree, the mistake is not fatal, but can be rectified. (*Richardson and Walmsley, JJ.*) GOLAPDI MEAH *v.* POORNA CHANDRA DATTA. 21 C. W. N. 774 : 41 I. C. 37 : 27 C. L. J. 129.

——0. 41, Rr. 3 and 20—*Appellate court—Addition of parties—No duty.*

There is no duty on the court to add the proper persons as parties to the appeal if the appellant neglects to do so: (*Rattigan and Beadon, JJ.*) FAKIR CHAND *v.* MUNICIPAL COMMITTEE OF HAZRO. 18 I. C. 37 : 88 P. W. R. 1913 : 59 P. L R. 1913 : 59 P. R. 1913.

——0. 41, Rr. 3 and 11—*Dismissal of appeal on the point of limitation—Appeal.*

If the memorandum of appeal is in the proper form it cannot be rejected under R. 3 but if the appeal is time barred it should be dismissed under R. 11. Rejection of appeal on the ground of limitation amounts to dismissal and the rejection is thus appealable. (*Jwala Prasad, J.*) FARZAND ALI *v.* ABDUL HAMID.
60 I. C. 493.

——0. 41, R. 3—*Appeal against deceased person—Application to substitute names of legal representative after limitation.*

Where a possible respondent dies before the appeal is filed ; the names of his representatives cannot be substituted in the appeal, after the expiry of the period of limitation. (*Mc Coll, A.J.C.*) MI EIN ZI *v.* MI NI.
21 I. C. 306 : (19'3) 1 U. B. R. 175.

——0. 41, R. 4—*Joint plaintiffs—Appeal by one—All must be made parties.*

Where one of several plaintiffs prefers an appeal in which the other plaintiffs are also interested. O. 41, R. 4 does, not authorise him to proceed with the appeal without making the other plaintiffs parties thereto. (*Rafique and Piggott, JJ.*) AMBIKA PRASAD *v.* JHINAK SINGH.
45 A. 286 : 21 A.L.J. 91 : L R. 4 A. 92 : 71 I.C. 321 : 1923 All. 211.

——0 41, R. 4—*Reversal of decree—Appeal by one unsuccessful deft.—Suit if may be dismissed against all—Discretion of Court.*

Relief can be given to non-appealing parties if their grounds of attack are the same as those of the appealing party. (*Piggott, J.*) ISHAR DUTT *v.* MUSAI DUBE. 31 I.C. 886.

——0. 41, R. 4—*Discretion of court—Reversal of decree on common ground—Appellate Court—Discretion.*

The reversal or variation of a decree in favour of a non-appealing party, on the ground common to all the defts. is in the discretion of the court. (*Chamier and Rafique, JJ.*) NARAIN DIKSHIT *v.* BENAIK BHAT.
36 All. 510 : 24 I.C. 439 : 12 A L.J. 883.

C. P. CODE (V OF 1908), O. 41, R. 4.

——0. 41, R. 4—*Common interest — Several appellants—Death of one—Legal representative.*

Where several co-defendants jointly appeal against a joint decree to which S. 544 of the old Code applies, the death of one appellant, his legal representatives not being brought on record within limitation period has only the effect of causing the appeal to abate, so far as the deceased is concerned but it has no effect on the appeal as a whole. 22 All. 222 overruled. (*Stanley, C. J. and Banerji, J.*) RAM LAL *v* DEBI SINGH.
10 I. C. 27.

——0. 41, R. 4—*Appeal by one deft.—Decree against several—When can be set aside.*

Though a decree against several defendants which proceeds upon a ground common to them all, can be set aside on appeal at the instance of one of them, it cannot be so set aside when the appealing deft. values the appeal for a sum representing the amount decreed against him alone. Such an appeal is not one against the entire decree at all. (*N. R. Chatterjee and Panton, JJ.*) JOGENDRA NATH ROY CHAUDURI *v.* RAJENDRA NATH RAI CHAUDHURI. 63 I.C. 95.

——0. 41, R. 4—*Powers of Appellate Court—Variation in decree.*

If a decree is passed against several defendants on a common ground, the appellate Court can, on appeal by one defendant only, vary the decree in favour of all. (*Shamsul Huda and Panton, JJ.*) RAM SUNDER DAS *v.* SHAJIDUR RAHMAN.
60 I. C. 460.

——0. 41, Rr. 4 and 33—*Powers of Appellate Court—Modification of decree.*

On an appeal by one of several defendants the court can examine the grounds of the decision appealed against in respect of all, especially where the appellant is not a stranger to the property in suit. (*Mookerjee and Panton, JJ.*) SYAM KISHORE DE *v.* UMESH CHANDRA BHATTACHARYA. 31 C.L J. 75 : 55 I.C. 154 : 24 C. W. N, 463.

——0. 41, Rr. 4 and 33—*Powers of appellate Court.*

O. 41, Rr. 4 and 33, give the court ample power to make the appropriate order needed in the interests of justice. (*Mookerjee and Panton, JJ.*) DEBENDRA *v.* NARENDRA. 30 C. L. J. 417 : 54 I.C. 636 : 24 C.W.N. 110.

——0. 41, R. 4—*Reversal of decree—Non-appealing defendant.*

O. 41, R. 4 of the C. P. C. gives the appellate Court power to reverse the decree in favour of all the defendants even though the appeal is made only by some, when the decree proceeds on any ground common to all of them. (*Jenkins, C.J. and N. R. Chatterjee, J.*) RAKHA CHANDRA CHATTERJEA *v.* BAJI SANTHAL. 23 C.W.N. 372.

——0. 41, R. 4.—*Abatement—Death of one of joint plaintiffs—Abatement of appeal.*

Where all plaintiffs are interested in appeal, O. 41, R. 4 of the C. P. C. does not authorise one of them to proceed with the appeal without making the other plaintiffs parties thereto. (*Newbould and Duval, JJ.*) BALARAM PAL *v.* KANYSHA MAJHI, 53 I.C. 548.

C. P. CODE (V OF 1908), O. 41, R. 4.

———O. 41, Rr. 4 and 33—*Power of appellate court to vary decree—Parties not appealing.*

Except under O. 41, R. 4 of the C. P. C. an appellate court cannot vary a decree of a lower court as regards its adjudication on the rights and liabilities of the parties who have not joined in the appeal and who are not parties to the litigation in the appellate court, O. 41, R. 33 of the C. P. C. does not apply to a person who is not a party to the appeal. (*Fletcher and Shamsul Huda, JJ.*) HARIDAS DEY *v.* KAILASH CHANDRA BOSE. **44 I. C. 480.**

———O. 41, Rr. 4, 33 and 22—*Powers of appellate Court.*

Where a suit claiming reliefs alternatively against A and D is decreed against B and he prefers an appeal, it is not necessary for the plaintiff-respondent to file a cross objection against A in order to enable the Appellate Court to settle the rights of the respondents *inter se.* (*Fletcher and Newbould, JJ.*) SARAT CHANDRA BOSE *v* THE KHARAREA MEZEJULA ZEMINDARI SYNDICATE, LTD. **42 I. C. 548.**

———O. 41, Rr. 4 and 33—*Powers of appellate Court.*

To justify the application of O 41, R. 4 the appeal should have been preferred against the whole decree but for the application of R. 33 it is not essential that the appeal should be directed against the entire decree nor need the order be made in favour of the persons who are parties to the appeal or have filed objections in the Court below. (*Mookerjee and Newbould, JJ.*) AMBICA CHARAN *v.* SASI TARA DEBI.
30 I. C. 868 : 22 C.L.J. 61.

———O. 41, Rr. 4 and 33—*Common decree—Appeal by one party—Reversal.*

When there is no bar to the application of O. 41, R. 4, it is not necessary to invoke the aid of O. 41, R. 33 which is couched in very wide terms and gives the Courts of appeal very wide powers for the purpose of doing justice between the parties. For the application of O. 41, R. 4, it is enough if the decree proceeds on any ground common to all the parties. Every ground need not be common to the parties. (*Chatterjee and Walmsley, JJ.*) AMBICA PRASAD SINGH *v.* PARDIP SINGH. **42 Cal. 451 : 28 I.C. 446 : 19 C.W.N. 233**

———O. 41 R. 4—*Parties—Suit for possession decreed—Decree reversed at the instance of one defendant—Second appeal by plaintiff—Other defendants if should be made respondents.*

Where a suit for possession is decreed, and one of the defts. alone appealed, the appellate Court has the power to reverse the entire decree of the first Court, but this appellate decree so far as it is in favour of the defts. that have not been made parties to the appeal, cannot be set aside in their absence, and they should necessarily be made parties. (*Mookerjee and Beachcroft, JJ.*) DASARETH PATEL *v.* BROJO MOHAN GAONTIA.
22 I. C. 90 : 18 C L. J. 621.

———O. 41, Rr. 4 and 33—*Power of appellate Court—Setting aside decree from which no appeal was filed—Jurisdiction.*

C. P. CODE (V OF 1908), O. 41, R. 4.

There is no provision of law which enables a court in the course of the decision of an appeal from one decree, to set aside the decree which dismisses a separate suit and from which no appeal has been lodged. (*Chevis, J.*) GOBIND RAM *v.* MUSSAMMAT PALI.
53 I.C. 883 : 116 P. R. 1919.

———O. 41, R. 4—*Scope of—Grounds not common.*

The provisions of O. 41, R. 4 of C.P.C. do not apply to a case where the grounds of appeal are not common to all the appellants (*Scott-Smith and Broadway, JJ.*) NANDA *v.* JAICHAND.
40 I. C. 184 : 35 P.W.R. 1917.

———O. 41, Rr. 4 and 33—*Scope of—Powers of Court.*

Rr. 4 and 33 do not apply to parties not exercising the right of appeal and made *pro forma* respondents by the appellants; the non-appealing parties cannot claim the right to be heard in support of the appeal. (*Ratligan, Shah Din and Le Rossignol, JJ.*) GOKAL CHAND *v.* HUKKAM CHAND NATHUMAL. **109 P. W. R. 1916 : 154 P.L.R. 1916: 34 I.C. 714: 70, 71 P.R. 1917, (F.B.)**

———O. 41, R. 4—*Abatement—Death of party.*

Where one of the parties to an appeal against a decree dies and his legal representative is not brought on record within the period of limitation, the appeal abates so far as the deceased is concerned but the other appellants are not precluded from prosecuting the appeal as O. 41, R. 4 empowers any one of the parties to appeal against the whole decree (*Scott Smith and Shadi Lal, JJ.*) MED SINGH *v.* KABIR-UN-NISSA.
235 P. L. R. 1915 : 26 I. C. 486 : 88 P. R. 1914.

———O. 41, R. 4—*Reversal of decree—Appeal by some of the unsuccessful plffs.—Common ground—If whole decree could be set aside.*

Where only some of the plffs. appealed, but the decree proceeded on a ground common to all, the appellate Court under O. 41, R. 4 can set aside the whole decree. (*Johnstone and Beadon, JJ.*) SUNDER SINGH *v.* KRISHNA MILLS CO., LTD.
11 P. L. R. 1914 : 22 P. W. R. 1914 : 23 I. C. 91 : 63 P. R. 1914.

———O. 41, R. 4—*Appeal by some defts.—Rights of others.*

An appeal against a decree for partition of the village *abadi*, by defts. representing a very small share in the village, on the ground that the Lower Courts have not rightly determined the area which should be divided again, cannot be treated as an appeal under O. 41, R. 4 as one on behalf of the whole body of the defts. If the defts. generally wished to appeal they should have given a power of attorney to some one or more of their number to represent them. (*Kensington, J.*) HIRA SINGH *v.* MOHAR SINGH.
228 P. W. R. 1911 : 12 I. C. 605 : 2 P. L. R. 1912.

———O 41, R. 4—*Deceased defendant—Judgment in favour of appellate court can reverse.*

Under O. 41, R. 4, C.P. Code an appellate court has power to reverse a judgment in favour of a deceased defendant as regards the whole of the plaintiff's claim and not only as regards that

part of it in which the surviving defendants were particularly interested. 40 M. 846, 848, 25 M. L. J. 248 foll. (*Spencer and Ramesam, JJ.*) SUBBARAYA MUDALIAR *v* KANDASWAMI MUDALI.

32 M L. T. (H. C.) 124 : 70 I. C. 168 : 16 L. W. 330 : (1922) M. W. N 674 : 1923 Mad. 58.

——— **O. 41, Rr. 4 and 33**— *Common ground—Appeal by some—Effect.*

The decision of an Appellate Court in favour of appellants extends to others who did not appeal if the grounds of decision were common to all others. (*Wallis, C. J. and Burn, J.*) SOMASUNDARM CHETTIAR *v.* VAITHILINGA MUDALIAR.

40 Mad. 846 : 41 I. C. 546 : 6 L. W. 253.

———— **O. 41, Rr. 4 and 33**—Ex parte *defendant —Reversal of decree.*

(Per *Seshagiri Iyer, J.*) Where in a suit against two defts. one alone defended the suit and the others remained *ex parte* and where a joint decree for possession was passed against both the defts. and the contesting deft. alone appealed, the appellate court has no power, under O. 41, R. 4 to dismiss the whole suit as against the *ex parte* deft. but if the sale deed on foot of which the suit was brought was a sham one, a decree even against the *ex parte* deft. can be supported under O. 41, R. 33 of the Code. O. 41, R. 33 gives full power to the Appellate Court to pass the decree which should have been passed by the court of first instance on the findings arrived at by the Appellate Court and in favour of any of the parties to the suit, whether such a party is a party to the appeal or not ; (Per *Sadasiva Iyer, J.*) The High Court will not interfere in second appeal with a finding of fact by the Lower Appellate Court even though a few of the reasons for the finding are unsatisfactory. (*Sadasiva Iyer and Seshagiri Iyer, JJ.*) PERIA KRISHNASAWMI NAICK *v.* AIYAPPA NAIK. **24 I. C. 924 : 1 L. W. 376.**

———— **O. 41, R. 4**—*Reversal of decree—Common ground—Power to reverse against party—Not appealing.*

Where the ground of reversal is common to all, the appellate court can reverse the decree even against parties not appealing. (*Sadasiva Aiyar and Spencer, JJ.*) SOKKAPPA REDDI *v.* SINGANNA REDDI. **1 L. W. 169 : 23 I. C. 620.**

———— **O. 41, R. 4**—*Object of.*

The policy of the Legislature in enacting O 41, R. 4 is that the appellate court should have full power to do justice to all parties whether before it or not, provided the whole case is gone into at the instance of parties representing all the necessary contentions in the case. 27 B. 284, Foll. (*Sadasiva Aiyar and Tyabji, JJ.*) ARTHO RAMA *v.* ARTHO PADHI. **14 M. L. T. 177 : (1913) M. W. N. 687 : 20 I. C. 952 : 25 M. L J. 248.**

———— **O. 41, Rr. 4 and 33**—*Common ground—Damages—Decree in favour of person not appealing.*

Where only one plff. claimed in his appeal damages for an infringement of right, but the right was common to all the plffs., the appellate court could pass a decree in favour of all.

(*Sundara Aiyar and Ayling, JJ.*) SOMA BALLACHARIAR *v.* THIRUVENKATACHARIAR. **15 I. C. 409.**

———— **O. 41, R. 4**—*Common ground—Decree in the case where heirs are not brought on record.*

The Appellate Court has power to vary or reverse the decree in favour of all the appellants including heirs of the deceased not brought on record on grounds common to all. (*Lindsay, J. C. and Kanhaiya Lal, A.J.C.*) JANG BAHADUR *v.* MUHAMMAD HUSSAIN KHAN. **35 I. C. 743 : 3 O. L. J. 279.**

———— **O. 41, R. 4**—*Appeal—Parties—Some of the parties entitled to rent made respondents—Effect of.*

Where certain tenants appealed making only some of the co-sharer landlords respondents, *Held*, that as the respondents alone could not have sued for rent, the appeal impleading them without joining the other landlords as respondents was unsustainable. Under O. 1, R. 9, C.P Code a person who is a necessary party to the suit is a necessary party to the appeal. 6 C.W. N. 196 : 11 C. W. N. 504; 31 C. 489 P. C. Rel. 34 C. 1020 not foll. (*Ross, J.*) JITENDRANATH CHATTERJI *v.* JHAKU MANDAR. **3 P. L. T. 456 : 66 I. C. 780 : 1922 P. 4.**

———— **O. 41, Rr. 4 and 33**—*Common ground—Mortgage decree—Appeal by one of the parties—Effect on others.*

An order in an appeal by one of several defts. enures to the benefit of the other defts. only if the interests of the latter are inseparable from the interest of the defts. appellant. A decree in a mortgage suit made all the properties covered by the mortgage liable to sale and a person who had purchased one of the properties at a revenue sale appealed from decree, and the appellate Court exonerated him from liability under the mortgage. *Held* that the result of the appeal was to free only the property in which the deft. appellant had an interest leaving untouched the property in which the mortgagor and puisne mortgagees were concerned. (*Roe and Imam, JJ.*) MAGHEANDRA KOER *v.* SAT NARIN LAL. **44 I. C. 762 : 3 P. L. J. 166.**

———— **O. 41, Rr. 4 and 33**—*Reversal of decree—Common ground.*

Under Rr. 33 and 4 of O. 41, the Appellate Court can reverse the decree against all based on a common ground though only one appeal from it. The rules prevent two contrary decisions in the same suit. (*Mullick, J.*) RAM TAHAL SINGH *v.* SUKESHWAR REYANI. **35 I.C. 547 : 1 P. L. J. 143.**

———— **O. 41, R. 4**—*Power of Court to vary decree in favour of person not party to appeal.*

O. 41, R. 4 deals with the case where the decree passed by the Trial Court proceeds on any ground common to all the plffs. or to all the defts. (*Maung Kin, J.*) A. C. T. R. M. CHETTY *v.* Po U. **63 I. C. 973: 13 Bur. L. T. 163.**

———— **O. 41, R. 5**—*Effect of appeal—Operation of original decree not suspended or interrupted by presentation of appeal.*

C. P. CODE (V OF 1908), O. 41, R. 5.

Whatever may be the theory under other systems of law, under the Indian law and procedure an original decree is not suspended by the presentation of an appeal nor is its operation interrupted where the decree on appeal is one of dismissal. (*Sir Lawrence Jenkins*). HUKUMCHAND BOID *v.* PIRTHICHAND LAL CHOWDHURY.

46 Cal. 670. 17 A L. J. 514: 36 M. L. J. 557: 23 C. W. N. 721: 21 Bom. L. R. 632: (1919) M. W. N. 258: 30 C. L. J. 71: 26 M L. T. 131 50 I. C. 444 : 10 L. W. 416. (P. C.)

———O. 41, R. 5—*No appeal before Appellate Court—No stay of execution.*

An Appellate Court has no jurisdiction to order the stay of a sale unless it has seizin of the case and where there is no appeal before the appellate Court the order staying execution is *ultra vires* and is a nullity. (*Mears, C. J. and Bannerji, J.*) PARSHOTTAM *v* HARGU LAL.

43 All. 513: 63 I. C. 837: 19 A. L. J. 462.

———O. 41, R. 5—*Appeal not filed—Appellate Court cannot order stay.*

An Appellate Court cannot grant a stay of execution of a decree of the subordinate Court unless it is actually hearing an appeal from such decree. When no appeal has been preferred the Court passing the decree can alone grant a stay for sufficient cause within the time allowed for appeal. (*Walsh and Gokul Prasad, JJ.*) PARSHOTTAM SARAN *v.* HARGULAL.

43 All. 198: 2 U. P. L. R. (A.) 424: 60 I. C. 131: 18 A. L. J. 1121.

———O. 41, Rr. 5 and 6—*Effect of order—Sale held after* ex parte *order for stay—Stay subsequently cancelled.*

An *ex parte* order for stay on an execution sale was obtained but was subsequently discharged by the Judge who passed it. Before the *ex parte* order was set aside the sale was held and the property sold. *Held* that the sale was not void. (*Richards, C. J. and Banerjee, J.*) THE GANGES FLOUR MILLS COMPANY, LTD. *v.* SHADI RAM.

43 I. C. 656 (1) : 16 A. L. J. 46.

———O 41, R. 5—*Execution—Appeal—Application to stay execution, whether maintainable on execution side of High Court.*

The provisions of Rule 5 apply, *mutatis mutandis* to applications on execution side. An application by an appellant pending the appeal to the execution side of the High Court for stay of execution proceedings is maintained under R. 5. (*Piggott, J.*) BALBIR PRASAD *v.* KARAN SINGH.

37 I. C. 752.

———O. 41, R. 5—*Power of trial court.*

When an appeal is preferred to High Court, the lower court cannot stay execution, it can only stay its own hands. Where the decree for possession is executed, the decree cannot be stayed pending appeal. The Court cannot oust the decree-holder and put the judgment-debtor in possession. (*Tudball and Rafique, JJ.*) SATYA SHANKAR *v.* MAHARAJ NARAIN.

35 All. 119: 17 I. C. 728: 11 A. L. J. 83.

C. P CODE (V OF 1908), O. 41, R 5.

———O. 41, R. 5—*Execution sale—Application to stay—Where to be made.*

An application for stay of an execution sale should be made to the Court executing the decree although an appeal is pending in a higher Court against that decree. (*Knox and Piggott, JJ.*) AMIR ALI *v.* BATUK PRASAD.

11 I. C. 22.

———O. 41, R. 5—*Insolvency Appeal—Sentence—Prov. Insol. Act, Ss. 43 and 47.*

Under O. 41, R. 5 read with S. 47 (2), Prov. Insol. Act, the High Court can suspend the sentence of imprisonment under S. 43 of Prov. Insol. Act till the disposal of the appeal from the sentence. (*Heaton and Pratt, JJ.*) NAGINDAS BHUKANDAS *v.* GHALABHANI GULABDASS.

44 Bom. 673: 56 I. C. 449: 22 Bom. L. R. 322.

———O. 41, R. 5—*Execution—Stay of—High Court, original side—Application to whom to be made—Practice.*

If a party, against whom judgment has been given on the original side, desires to obtain a stay of execution, pending an intended appeal, and desires to apply in the first instance on the original side, he must apply within reasonable time to the Judge who decided the case. (*Sanderson, C. J. and Richardson, J.*) CHATURBHUJ CHANDANMULL *v.* BASDEO DAS DAGA.

25 C. W. N. 928: 66 I. C. 198: 48 C. 796.

———O. 41, R. 5—*Security—Acceptance of, without considering objections.*

Where the High Court allowed execution on security being furnished the executing court was wrong in accepting the securities without holding any enquiry into their sufficiency and the case must go back to the executing Court for making the necessary enquiries (*Teunon and Newbould, JJ.*) RUDRA NARAIN JANA *v.* NABA KUMAR DAS.

44 I. C. 156: 22 C. W. N. 657.

———O. 41, R. 5—*Object of.*

The policy underlying the legislature is that the decree-holder is not to be prevented from reaping the fruits of his decree unless sufficient cause is established for stay of execution. (*Mookerjee and Teunon, JJ.*) SRINIVASA PRASAD SINGH. *v.* KESHEO PRASAD SINGH

38 Cal. 754: 13 C. L. J. 365: 9 I. C. 862: 15 C. W. N. 475.

———O. 41, R. 5—*Order for—Security—No Appeal lies.*

An injunction was granted to stay execution on the condition of filing security. The judgment-debtor thereupon offered to hypothecate his immoveable property by way of security. The Judge, however, refused to accept this security as sufficient and allowed two weeks' time to the judgment-debtor to produce some other person as surety, *Held*, every interlocutory order passed in the course of execution proceedings is not appealable, and an appeal lies only from a decree and a decree must conclusively determine the rights of the parties with regard to all or any of the matters in

C. P. CODE (V OF 1908), O. 41, R. 5.

controversy. The order attacked is not appealable. (*Moti Sagar, J.*) BAJRANG DAS *v.* DONGARSE DAS.
75 I. C 793: 1923 Lah. 446.

———O. 41, R. 5—*Stay of sale during appeal.*

If the decree-holders shall have sufficient security in the property itself which will remain under attachment, execution therefore ought to be stayed. (*Moti Sagar, J.*) RAM GOPAL *v.* MANPUL SINGH.
75 I. C. 791: 1923 Lah. 445 (2).

———O. 41, R. 5—*Scope of.*

Where it had been found that the sale in favour of the petitioner, a rival pre-emptor, was not genuine and that he waived his right of pre-emption, *Held*, unless it is shown that substantial loss would result to the petitioner, an order to stay execution in favour of the pre-emptor would not be made especially where the decree holder has deposited a large sum of money which would be idle and where he would be placed in the same position as the petitioner with respect tothe collection of rent. (*Brasher, J.*) ARJAMAND KHAN *v.* SHANKAR LAL.
1922 Lah. 364.

———O. 41, R. 5—*Stay of execution—Principles—Power of Appellate Court.*

Where the learned Judge in Chambers has exercised a discretion vesfed in him by law his order should not be disturbed unless there is anything to show that it was without jurisdiction or was passed with material irregularity or there is any adequate proof that some loss would be occasioned by it to the appellant which can be called substantial. Where one obvious loss is that the appeal which is pending becomes useless, another probable loss is that the business of the appellant firm will be seriously disturbed by their account books passing into the hands of the receiver, and where the process is likely to be a protracted and expensive one, the balance of convenience is in favour of staying the execution rather than proceeding with it. (*Shadi Lal and Abdul Qadir, JJ.*) THE FIRM OF BADRI DAS JANKIDAS OF DELHI *v.* MATHANMAL.
1922 Lah. 185.

———O. 41, R. 5—*Execution not pending—No stay.*

A stay of execution cannot be directed where there is no application for execution pending before the executing Court. (*Abdul Qadir, J.*) NAWAB *v.* HUKAM DIN.
63 I. C. 897.

———O. 41, R. 5—*Grounds for stay—Substantial loss.*

Sufficient cause for the stay of execution under O. 41, R. 5 of the Code is not shown merely by putting in an affidavit, containing a bare statement that the appellant will suffer substantial loss. The rule laid down in O. 41, R 5, C.P.C., applies to immoveable equally with moveable property. (*Scott-Smith and Leslie Jones, JJ.*) DHERA MAL *v.* HAIDAR SHAH.
61 I. C. 77 : 2 Lah. 61.

———O. 41, R. 5—*Stay of execution. Mortgage-decree.*

C. P. CODE (V OF 1908), O. 41, R. 5.

The execution of a mortgage-decree to be realized from the mortgaged property and the balance, if any, from the judgment-debtor's other property, cannot be stayed simply because a caim by a prior mortgagee is pending. The hypothecated property should be sold, and after retaining out of the sale proceeds the amount sufficient to meet the claim, the balance should be paid to the decree-holder. (*Scott-Smith, J.*) UDE RAM *v.* BENI PRASHAD
60 I.C. 378 : 57 P. W. R. 1920.

———O. 41, R. 5—*Security.*

A Court has no authority to stay execution upon a mere vague speculation; and cannot allow a judgment-debtor the benefit of staying execution if the failed to give security required by law which security he can ask the Court to fix. The order to stay the execution can be done only before the decree is executed. (*Abdul Raoof, J.*) GULAM MUSTAFA KHAN *v.* GHULAM NABHI.
58 I. C. 442.

———O. 41, R. 5—*Order when made.*

When there is no application for execution of a decree, under appeal no order for stay of execution can be made. (*Dundas, J.*) NARAIN SINGH *v.* ANUP SINGH.
58 I. C. 302.

———O. 41, R. 5—*Pre-emption decree—Stay of execution.*

The practice of the Lahore High Court is to stay execution of a pre-emption decree, except as to costs, provided the decree-holder is permitted to recover from the court the money deposited by him without prejudice to his right to re-deposit it in the event of the failure of the appeal. (*Le Rossignol and Pelman, JJ.*) GOKULCHAND *v.* SANWAL DAS.
12 P.W.R 1920 : 79 P. L. R. 1920 : 55 I. C. 933 : 1 Lah. 348 ; 2 Lah. L. J. 32.

———O. 41, R. 5—*Security when necessary.*

Under O. 41, R. 5, C. P. C., a stay of execution cannot be granted in the absence of security by the judgment-debtor, but if the decree is secured on the property it is unnecessary to require him to furnish security for that amount. (*Shadi Lal and Martineau, JJ.*) SAGAR CHAND *v.* DEWAN RAM.
2 Lah. L. J. 330.

———O. 41, R. 5—*Effect of order*—Ad interim *order—Date of operation.*

An *ad interim* order issued by an appellate Court for stay of execution of a decree under appeal takes effect from the time it is pronounced and not from the time of its official communication to the lower court and proceedings subsequent to and contrary to such order will be set aside. It is the practice of the Chief Court of Punjab not to stay execution for mere costs. 53 P. W. R. 1917, Ref. (*Broadway, J.*) KAHAN CHAND *v.* JOWANDI.
41 I. C. 752 : 53 P. W. R. 1917.

———O. 41, R. 5—*Sufficient cause—Substantial injury.*

On appeal from a decree in a suit for declaration that certain property is not liable to attachment and sale in execution of a decree, the

C. P. CODE (V OF 1908), O. 41, R. 5.

appellate Court should stay execution as otherwise it would be difficult for the claimant to recover the property in the event of his succeeding in the appeal 82 P. R. 1910, Ref The property should remain under attachment pending decision of the appeal. (*Chevis, J.*) RADHA BALAB SINGH *v.* SEVA RAM.
15 I. C. 876 : 94 P W. R. 1912.

——O. 41, R. 5—*Stay of execution—Costs—Practice.*

Where the respondent is an insolvent and an application for stay of execution on the term of taxed costs the proper order to make is to direct the appellant to pay the costs to the respondent's solicitor on the latter's undertaking to repay the same in the event of the appellant succeeding on appeal. (*Schwabe, C. J. and Krishnan, J.*) RAMANUJAM CHETTY *v.* PADMANABHAM PILLAI.
16 L. W. 975 : 1923 M. W. N. 73 : 31 M. L T. 440 : 70 I. C. 784 : 1923 M. 229 (2).

——O. 41, R. 5—*Effect of order—Order become effective only when communicated.*

An order by the Appellate Court for stay of execution takes effect only when it is communicated to the lower Courts. An attachment ordered by the lower Court after passing of the order for stay of execution but before it was communicated is valid. 33 M. 74, Appr , 33 C. 927 not Foll. (*Ayling, Seshagiri Aiyar and Bakewell JJ.*) VENKATACHALAPATHY RAO *v.* KAMESWARAMMA.
33 M. L. J. 515 : 22 M. L. T 330 : (1917) M. W. N. 785 : 6 L W. 617 : 43 I. C. 214 : 41 Mad. 151 (F. B.).

——O. 41, R. 5—*Effect of order—Proceedings stayed by appellate Court.*

A Subordinate Court cannot proceed with a sale in execution when it knows, *e.g.*, by telegram from a Vakil that the Appellate Court has stayed all proceedings in execution of the decree though no official communication has been sent to it. (*Sadasiva Iyer and Spencer, JJ.*) RAMANATHAN CHETTY *v.* ARUNACHELLAM CHETTY.
38 Mad. 766 : (1914) M. W. N. 46 : 15 M. L T. 151 : 26 M. L. J. 275 : 22 I. C. 99 : 1 L. W. 22.
[But *see* 43 I. C. 214 : 41 M. 151.]

——O. 41, Rr. 5 and 6—*Sufficient cause.*

In an application for stay of execution the Courts has to be satisfied that the appellant is likely to sustain substantial injury by execution taking place before the disposal of the appeal. The appeal itself must raise fairly original questions. Where no pecuniary or tangible loss is shown the Court cannot grant stay merely on the ground of annoyance to feelings. (*Sundara Iyer, J.*) VATHIAR RAMANUJA AIYANGAR *v.* AIYANACHARIAR.
17 I. C. 219 : 23 M. L. J. 316.

——O. 41, Rr. 5 and 6—*Security—Mortgage decree.*

In a redemption suit the mortgagor having obtained a decree paid the amount of the decree nto the court and applied for execution. The court directed them to pay a security for the probable amount of mesne profits claimable by the mortgagees in case the decree is reversed. The decree-holders-mortgagors applied that the deposit may itself be treated as a security. *Held.* in appeal that the amount may be treated as a valid security. Per *Sundara Iyer, J.*—The plaintiff, mortgagor had no disposing power over the amount and so under S. 6, T.P. Act, an expectant possibility of something cannot be transferred and separate security must therefore be tendered (*Abdur Rahim and Sundara Iyer, JJ.*) SINGARAM CHETTIAR *v.* KALIYANA SUNDARAM PILLAI.
11 M. L. T. 248 : 15 I. C. 383 : (1912) M. W. N. 397.

——O. 41, R. 5—*Security—Right to.*

Under O. 41, R. 5, Cl. 3 proviso (*c*) security is to be given by the applicant for the due performance of such decree or order ultimately binding upon him. The appellant can withdraw the deposit on satisfying such decree. The appellant is entitled to refund of the deposit in a proper application offering to satisfy that decree. The proviso does not contemplate a decree or order in a separate proceeding in future by the decree-holder. (*Abdur Rahim and Spencer, JJ.*) SAMINATHA PATHAN *v.* SORANATHA AMMAL.
22 M. L J. 190 : 10 M. L T. 426 : 12 I. C. 692 : (1911) 2 M. W. N. 432.

——O. 41, Rr. 5 and 6—*Power of Appellate Court—Sale by first Court—Mere irregularity.*

An order by a inferior Court to a superior Court to stay a sale does not take away the jurisdiction of the latter Court to sell, especially where an appeal lies to the superior Court. A sale held in ignorance of the order is only an irregularity and will not be set aside unless the judgment-debtor was materially prejudiced. (*Mitra and Prideaux, A.J.Cs.*) DHARAM CHAND *v.* MESSRS. MITSUI BUSSAN KAISHA & CO.
54 I. C. 928.

——O. 41, R. 5—*Proceedings for taking accounts—Stay of.*

Unless irreparable injury will otherwise be caused, stay of proceedings for taking accounts, will not be allowed. (*Mullick, and Bucknill, JJ.*) HARIHAR PRASAD SINGH *v.* KESHVA PRASAD SINGH,
61 I. C. 9.

——O. 41, R. 5—*Staying proceedings in suit—Registrar—Power of—Inherent power of Court.*

The Registrar of the Patna High Court has power to receive and dispose of applications under O. 41, R. 5 only for stay of execution and has no power to stay proceedings in a suit pending appeal. An appellate Court has that jurisdiction, not under O. 41, R. 5 but under its inherent power. (*Das and Adami, JJ.*) NENA OJHA *v.* SARBHOO DUTT OJHA.
59 I. C. 883 : 2 Pat. L. T. 70.

——O. 41, R. 5—*Receiver—Appeal—Interim order directing Receiver not to act pending decision, validity of—Revision, whether lies.*

An order by Appellate Court, on an appeal against an order appointing a Receiver directing

C. P. CODE (V OF 1908). O. 41, R. 5.

him not to act till further orders, is an order within the jurisdiction of the court and the High Court has no power to interfere under C. P. C., S. 115. Where a Receiver is appointed by writ an appellate Court may stop the issue of the writ, and if already issued may direct him through the lower Court not to act. (*Mullick and Jwala Prasad, JJ.*) MULCHAND PRASAD SINGH *v.* TARNI PRASAD SINGH. **4 P. L. J. 642 : 54 I. C. 222 : (1920) Pat 40.**

——O. 41, R. 5—*Inherent power—Stay of execution—Appeal under Chota Nagpur Tenancy Act.*

As the C. P. C does not in itself apply to cases under the Chota Nagpur Tenancy Act and as the Chota Nagpur Tenancy Act which alone gives a right of appeal to the High Court does not provide for stay of execution, the right of the High Court to stay proceedings in cases of this nature cannot be exercised under O. 41, R. 5, C. P. C. The High Court has inherent jurisdiction as a Court of appeal to stay proceedings in the lower court as auxiliary to its powers as an appellate court to reverse the decision of the court below. 3 C. L J. 929 : 31 C. 722, Foll. (*Miller, C. J. and Coutts, J.*) DAL NILMAN NATH SAHI *v.* RAI BAHADUR BALDEO DAS. **4 Pat. L. J. 371 : 52 I. C. 185 : (1919) Pat. 145**

——O. 41, R. 5—*Application to set aside ex-parte decree refused.*

When an appeal against an order refusing to set aside an *ex parte* decree is pending the original court has discretion to stay execution proceedings pending the disposal of the appeal but he appellate court has no such power. 31 C. 1081 Ref. (*Roe and Jwala Prasad, JJ.*) N. JAMUNA PRASAD *v.* MAGAI RAM. **35 I. C. 443.**

——O. 41, R. 5—*Appeal—Does operate as stay.*

8 An appeal does not by itself operate as a stay of execution. (*Saunders, J. C.*) MAUNG YANSIN *v.* KATHERESAN CHETTY. **63 I. C 799 : (1921) 4 U. B. R. 1.**

——O. 41, R. 5 (2)—*Power of trial Court.*

An appellant can before filing an appeal obtain an order for stay. (*Sanderson, C. J., Woodroffe and Mookerjee, JJ.*) RAMESHWARY *v.* DUTT. **33 I.C. 685 : 23 C. L. J. 310.**

——O. 41, R. 5 (3) (a) (b) (c)—*Decree for possession of immoveable property—Stay of execution.*

The execution of a decree for possession of property, moveable or immoveable, is not to be stayed unless all the three conditions in O. 41, R. 5 (3) (*a*) (*b*) and (*c*) are satisfied. The most important thing to be remembered is whether *substantial loss* will result to the plff. if the order applied for is not made. (*Abdul Raoof, J.*) RAJINDRA SINGH *v.* UMRAO SINGH. **61 I. C. 827.**

——O. 41, R. 5 (3)—*Security—Land given as —Realisation of—Execution.*

Where immoveable property is given by a judgment-debtor as security under O. 41, R. 5. cl. (3) of the C. P. C. the property can be realised by the decree-holder in execution without a separate

C. P. CODE (V OF 1908), O. 41, R. 10.

suit. (*Wallis, C. J. and Kumaraswami Sastri, J.*) SUBRAMANIA CHETTIAR *v* RAJESWARA SETHUPATHI, **41 Mad. 327 : 6 L. W. 762 : (1917) M. W N. 872 : 43 I. C. 187 : 34 M. L. J. 84.**

——O. 41, R. 6—*Claim suit dismissed—Appeal—Sale in execution in which claim was preferred cannot be stayed.*

After the rejection of a claim petition in execution proceedings the claimant filed his suit for declaration of title and on its being dismissed appealed. Pending the appeal, he applied for a stay of sale. *Held*, O. 41, R. 6, applies only to cases where the appeal is against the decree which is to be executed. The petitioner's remedy is to ask for a temporary injunction under O. 39. (*Le Rossignol, J.*) MOLAR *v.* KANHAYA LAL. **4 Lah. L. J. 188 : 1922 Lah. 58.**

——O. 41, R. 6—*Stay of sale—Inherent power of Court.*

An appellate Court can direct stay of sale of immoveable property in execution of the decree under appeal before it. The inherent powers given to appellate courts by O. 41, R. 5 are not restricted or cut down by the special and emergency powers given to executing Courts under O. 41, R. 6 (2). (*Sadasiva Iyer and Napier, JJ.*) LAKSHMANAN CHETTY *v.* PALANIPPA CHETTY. **41 Mad. 813 : 34 M. L. J. 470 : 7 L. W. 612 : 24 M. L. T. 18 : 45 I. C. 30 : (1918) M. W. N. 502.**

——O. 41, R. 6—*Stay of sale — Appellate Court.*

According to R. 6 (2) of O. 4 an application for stay of an order for sale of an immoveable property should be made only to the court making the order. (*White, C. J. and Sankaran Nair, J.*) KANNIAPPAN CHETTY *v.* MANIKKAVASAGAM CHETTY. **17 I. C. 763 : 23 M. L. J. 677.**

[Dissented from in 45 I. C. 30 : 41 Mad. 813.]

——O. 41, R. 6 (2)—*Stay of sale of immoveable property.*

The court which passed a rent decree is bound to stay the sale of immoveable property in execution of its decree during the pendency of an appeal though the judgment-debtor is entitled to have a sale set aside on deposit of the purchase money. But the court can make it a condition of the order that the money decreed should be deposited in cash. (*Woodroffe and Carnduff, JJ.*) RAM NATH SINGH *v.* KAMLESHWAR PRASAD SINGH. **9 I. C. 323 : 15 C. W. N. 432.**

——O. 41, R. 6—*Surety's position after the death of decree-holder.*

A surety under O. 41, R. 6, C. P. C. is not entitled to be discharged on the death of the decree-holder for whom he was surety. No arrangement between the decree-holder and the surety can bind the judgment debtor's interest on reversal of the decree. (*Beachcroft and Mullick, JJ.*) JAGADAMBA KUMARI *v.* NILKANTH NARAYAN SINGH. **32 I. C. 807.**

——O. 41, R. 10—*Applies to Letters Patent appeal—Language mandatory.*

C. P. CODE (V OF 1908), O. 41, R. 10.

The rule applies to Letters Patent Appeal. The words as to rejecting an appeal if the order for security for costs is made and is not complied with within the time fixed are mandatory. (*Lord Sumner.*) SABITRI THAKURAIN *v.* SAVI.
48 Cal. 481 : 48 I A. 76 : 40 M. L. J. 308 : (1921) M. W. N. 159 : 19 A. L. J. 281 : 23 Bom. L. R. 681 : 25 C. W. N. 557 : 33 C. L. J. 307 : 14 L. W. 362 : 60 I. C. 274 : 3 U. P. L. R. (P.C.) 57 (P.C.)

——O. 41, R. 10—*Failure to give security—Dismissal of appeal—Restoration.*

The High Court has power to reconsider upon cause shown, an order rejecting an appeal under O. 41, R. 10 (2), C. P. C., and such a power is inherent also in Subordinate Courts of appeal. *Per Kanhaiya Lal, J.*—Although there is an absence in O. 41, R. 10 of a specific provision similar to that contained in O. 25, R. 2 (2) yet a Court which has rejected an appeal for default of filing security for costs is competent to take action in review of its order of rejection and to discharge that order and grant further time for filing the security. 30 All. 143, Ref. (*Piggott and Kanhaiya Lal, JJ.*) SUNDAR *v.* HABIB CHICK.
42 All. 626 : 2 U. P. L. R. (H.C.) 283 : 60 I. C. 81 : 18 A. L. J. 838.

——O. 41, R. 10—*Rejection of appeal—Order setting aside is not appealable.*

No appeal lies from an order setting aside an order rejecting an appeal for failure of the appellant to give security for costs nor is the order open to revision when it is made in the interests of justice. (*Piggott and Kanhaiya Lal, JJ.*) SUNDER *v.* HABIB CHICK.
42 A. 626 : 18 A. L. J. 838 : 60 I. C. 81 : 2 U. P. L. R. (H.C.) 283.

——O. 41, R. 10—*Notice to show cause—Dismissal of appeal—Irregularity—Revision.*

A notice was issued to the appellant to show cause why he should not be required to furnish security before his appeal was heard. The notice did not put the appellant on his guard that the security must be ready in Court in the event of sufficient cause not being shown. The Court dismissed the appeal unheard for not showing the cause. *Held*, that the dismissal by the Court of the appeal was under the circumstances a material irregularity liable to be set aside in revision. (*Chamier and Piggott, JJ.*) BHOLA NATH *v.* KARTICK PRASAD PANDE. 29 I. C. 59

——O. 41, R. 10—*Appeal under the Letters Patent—Power to demand security for costs—Bombay High Court Rules, 1922, R. 736.*

The High Court has power on an appeal under Cl. 15 of the Letters Patent to demand security for costs from the appellant in addition to the deposit of Rs. 500 under Rule 736 of the Bombay High Court Rules. But the power to demand security for the costs of an appeal must in any event be exercised according to well-known principles. The mere fact that the appellant may lose and may not pay the costs of the appeal is not a sufficient ground for demanding security. There must be some evidence at least of facts

C. P. CODE (V OF 1908), O. 41, R. 10.

which cast doubts on the honesty and *bona fides* of the appellant, such as obstruction to the execution of the decree in the lower Court, or the fact that the appellant is not the real litigant, or if in any way it can be shown that the application is vexatious. (*Macleod, C. J. and Crump, J.*) RATANCHAND *v.* DAMJI 25 Bom. L. R. 468 : 73 I. C. 474 : 1923 Bom. 399.

——O. 41, R. 10—*Security for costs—Discretion of Court—Interference on appeal.*

Under O. 41, R. 10, C. P. Code, the appellate Court may in its discretion demand from the appellant security for the costs of the appeal or of the original suit or of both. The poverty of the defendant is no ground for depriving him of his right to appeal. As a general rule a Court is loth to prevent an appellant from pursuing the remedy allowed to him by law merely on the ground of poverty. But each case must stand on its own facts, and there may be cases in which a party should be directed to give security, at any rate for the costs of the appeal, before he is allowed to go further. (*Macleod, C. J. and Crump, J.*) GULAB RAO *v.* VINAYAK.
25 Bom. L. R. 195 : 72 I. C. 285 : 1923 Bom. 264.

——O. 41, R. 10 and O. 44—*Pauper appellant—Security for costs.*

The provisions of O. 41, R. 10, C. P. C., do not apply to pauper appeals and no security should be demanded from a pauper appellant. The maxim "*Generais specialibus non derogant*", applies. (*Scott, C. J. and Beaman, J.*) E. KHEMRAJ SHRIKRISHNA DAS *v.* KISANLALA KURAJMAL.
42 Bom. 5 : 42 I C. 67 : 19 Bom. L. R. 771.

——O. 41, R. 10—*Security for costs—Appeal dismissed—Effect.*

Where during the pendency of an appeal, security for costs was ordered, and then the appeal was allowed, the sureties ceased to be liable thereafter. Sureties are not liable where the respondent was able to get the appellate order reversed. (*Mookerjee and Panton, JJ.*) KEDAR NATH CHAKRABARTY *v.* CHANDI CHARAN MITTER. 38 C. L. J. 190 : 76 I. C. 510 : 1924 Cal. 528.

——O. 41, R. 10—*Appeal—Rejection of for failure to furnish security—Effect of—Subsequent extension of time.*

Once an appeal has been dismissed for failure of the appellant to give security for costs within the time fixed, it is not thereafter open to the court to extend the time for giving security. (*Greaves and Ghose, JJ.*) SRIMATI HARI BHABINI DEBI *v.* NARENDRA NATH ROY.
67 I. C. 883 : 1923 Cal. 317.

——O. 41, R. 10—*Appeal—Failure to furnish security.*

No appeal lies from an order rejecting an appeal under R. 10, for failure to furnish security for costs, either as an order or as a decree. (*Mookerjee and Buckland, JJ.*) ROMESH CHANDRA DAS *v.* SARADA KRIPALAL. 62 I. C. 751.

——O. 41, R. 10 and O. 44, R. 1—*Pauper appellant—Security for costs,*

C. P. CODE (V OF 1908), O. 41, R. 10.

A plff. appealing in *forma pauperis* cannot be required to give security for costs of the original suit or of the appeal. (*Teunon and Cuming, JJ.*) KANCHANI BEWA *v.* JADUB PARAMANIK.
48 I. C. 971.

———O. 41, R. 10—*Minor respondent— Costs of guardian* ad litem—*Failure to give security—Dismissal of appeal.*

On failure of an appellant to furnish security for the costs of the guardian *ad litem* of a minor respondent, the appeal was dismissed as against the minor by the Dt, Judge. *Held*, that the order of dismissal passed by the Dt. Judge was a proper order and binding upon the parties. (*Fletcher and Shamsul Huda, JJ.*) KAILASH CHANDRA KANDOR *v.* HARIHAR PATRA. **47 I. C. 928.**

———O. 41, R. 10—*Insolvency Appeal—Appeal from an order in insolvency—Security for costs.*

O 41, R. 10 applies to appeals from order of the High Court in its Insolvency Jurisdiction. (*Sanderson, C. J., Woodroffe and Mukerjee, JJ.*) RAJ KISHORI DASI *v.* KISHORI DASI.
43 Cal. 243 : 20 C. W. N. 140 : 32 I. C. 3 : 23 C. L. J. 24.

———O. 41, R. 10—*Grounds for security.*

Where it cannot be said that the suit is merely vexatious, the mere fact that the appellant has no money of his own, but has got relations who can afford to pay is not a sufficient ground for demanding security for costs of the appeal. (*Woodroffe and Sharfuddin, JJ.*) RAGHUNATH SINGH *v.* PREYA SAKHI DEBI.
28 I. C. 598 : 19 C. W. N. 446.

———O. 41, R. 10—*Government appellant—Respondent's cost—Question of.*

Where the costs which the appellants had been ordered to pay amounted to 2 lakbs 50 thousand rupees, the appellant (a public servant defended by Govt,) had not much means and the prosecution of the appeal would cost a good deal to the respondents *Held*, that this was a fit case in which security for costs should be directed to be given by the Secretary of State. (*Jenkins, C. J. and Woodroffe, J.*) WESTON *v.* PEARY MOHAN DAS.
13 I. C. 335 : 16 C. W. N. 119.

———O. 41, R. 10—*Non-applicability to pauper appeals.*

O. 41, R. 10, C. P. Code, does not apply to pauper appeals. 42 Bom. 5 foll, (*Chevis and Campbell, JJ.*) NAZIM *v.* ABDUL HAMID.
3 Lah. 30 : 4 U. P. L. R. (Lah.) 87 : 67 I, C. 256 : 1922 Lah. 87.

———O. 41, R. 10—*Security for ocs's—Delay.*

Applications for security for the costs must be made promptly, not only on the ground that the respondent should apply for security for the costs before he incurs them but also on the ground that it is reasonable that security should not be applied for till the appellant has incurred the costs of the appeal. 5 C. W. N. 119, Ref. (*Shadi Lal, J.*) MUSSAMMAT DALIP KOER *v.* JAGIR SINGH.
20 P. L. R 1918 : 44 I. C. 23 : 41 P. W. R. 1918.

——— O. 41, R. 10—*Security for costs—Poverty of appellant alone is not sufficent ground.*

C. P. CODE (V OF 1908), O. 41, R. 10.

Poverty of the appellant by itself is not a sufficient ground for an order directing a security to be given. But no case has gone to the length of saying that mere want of means on the part of the appellant is a sufficient ground for dispensing with security. The true rule is that poverty of an appellant, standing by itself and without reference to the general facts of the case under appeal ought not to be considered sufficient to warrant his being required to furnish security for costs. 8 A. 203 and other cases cited. (*Venkatasubba Rao, J.*) KONAMMAL *v.* ANNADANA JADAYA GOUNDAR. **17 L. W. 26: 70 I. C. 586 : (1922) M. W. N. 801 : 1923 Mad. 204.**

———O. 41, R. 10—*Pauper appellant.*

An Appellate Court can ask for security from a pauper appellant for the respondent's costs under R. 10 of O. 41 of C. P. C. (*Ayling and Krishnan, JJ.*) SALDANHA *v.* HENRY HART.
43 Mad 902 : (1920) M. W. N. 534 : 58 I. C. 794 : 12 L. W. 333 : [But *See* 42 Bom. 5 : 42 I. C. 67 : 19 Bom. L. R. 771.]

———O. 41, R. 10—*Where security for respondent's cost is to be demanded—Whether security can be demanded for respondent's cost in the lower Court.*

Mere poverty of the appellant is no ground for demanding security. It must be shown that the appellant is a mere puppet in the hands of others and that he is merely a nominal party acting on behalf of others who are keeping themselves behind the scene. It is unnecessary to ask the appellant to furnish security for ths costs incurred by the respondent in the Court below, for the respondent has got a decree for costs in his favour and is entitled to execute that decree. (*Das and Adami, JJ.*) MAHANTH RAGHUNATH DAS *v.* SHEO KUMAR MISSIR. **1 P. L. T. 114 : 55 I. C. 835 : (1921) Pat. 359.**

———O. 41, R. 10 (2)—*Pauper appeal—Security for costs cannot be ordered—Validity—Appeal if lies.*

No appeal against an order rejecting an appeal for failure to furnish security for costs but the validity of the same can be tested in revision. Where a District Court allowed the appellants to appeal in *forma pauperis* and subsequently directed them to furnish security for costs, it acted illegally and with material irregularity. (*Chevis and Campbell, JJ.*) NAZIM *v.* ABDUL HAMID.
3 Lah. 30 : 4 U. P. L. R. (Lah.) 67 : 67 I. C. 256 : 1922 Lah 87.

———O. 41, R. 10 (2)—*Provisions mandatory—Security not furnished in time—Dismissal of appeal.*

In the absence of security within the time fixed by the court the appeal should be rejected. The provisions of O. 41, R. 10 (2) are mandatory and the mere fact that the whereabouts of the client are not known is not sufficient. Per *Chevis, A. J. C.*—It is the duty of every litigant to keep in touch with his case, and not to go wandering around the country at large without giving any address where a communication from

C. P. CODE (V OF 1908), O. 41, R. 10.

the Court or from his Counsel can readily find him. (*Chevis and Martineau, JJ.*) PARMA NAND *v.* RAM PARKASH. **68 I. C. 306 : 2 Lah L. J. 391.**

———**O. 41, R. 10 (2)**—*Dismissal of appeal—Restoration.*

A Judge has jurisdiction to re-admit an appeal by an order under cl. (2), R. 10, O. 41, but he cannot do so without notice to the other side. (*Richardson and Walmsley, JJ.*) GOLJAN BIBI *v.* NAFAR ALI. **40 I. C. 234 : 28 O. L. J. 163.**

———**O. 41, R. 11** — *Summary dismissal—Grounds for.*

A decree in a pre-emption suit directed the plff. to pay the pre-emption money within a month. The pre-emptor appealed against this condition of payment and while the appeal was pending, one month passed without his paying the money. The appeal was dismissed for non-payment within the prescribed period. *Held*, that as the ground of appeal was the condition of payment, the suit should not have been dismissed. (*Richards, C. J. and Tubdall, J.*) KHURSHEDUNNISSA *v.* ALINA UNNISSA. **17 I. C. 868 : 10 A. L. J. 421.**

———**O. 41, R. 11**—*Summary dismissal of appeal—Effect on mortgage decree—Time for payment.*

In case of an appeal from a mortgage decree being summarily dismissed under O. 41, R. 11, the time for payment of the mortgage money is not extended as the decree appealed from cannot be taken to have been confirmed under O 41, R. 32. (*Shah, A.C.J. and Kemp, J.*) DATTATRAYA VITHAL GARWARE *v.* VASUDEO ANANT GARGATE. **47 Bom. 950 : 25 Bom. L. R. 990 : 76 I C. 1023 : 1924 Bom. 98.**

———**O. 41, R. 11**—*Summary dismissal—Contents of judgment—Civil Circular No* 51 (*Bombay*).

An Appellate Court dismissing an appeal under O. 41, R. 11, must write a formal judgment in compliance with Civil Circular No. 51 (36 B. 116 overruled.) (*Scott, C. J., Beaman and Shah, JJ.*) HANUMANTA RUKHMAJI *v.* ANNAJI HANMANT. **37 Bom. 610 : 20 I. C. 966 : 15 Bom L. R. 765.**

———**O. 41, Rr. 11 and 31**—*Summary dismissal—Contents of judgment.*

A formal judgment is not necessary in the case of an appeal dismissed under R. 11 without sending notice to the lower court or to the respondent. (*Beaman and Hayward, JJ.*) TANAJI DAGDE *v.* SHANKER SAKHARAM. **36 Bom. 116 : 12 I. C. 564 : 13 Bom. L. R. 1002.**

———**O. 41, Rr. 11 and 31**—*Dismissal of appeal—Contents of judgment.*

The dismissal of an appeal under O. 41, R. 11 of the Civil Procedure Code, by Court whose decision may be subject of an appeal does not relieve the Appellate Court from the necessity of writing a judgment which, however, need not be a long one. But the judgment, whatever it is, should show the points raised, the decision upon those points and the reasons for the decision. (*Ghose and Panton, JJ.*) SURENDRA NATH SHOME *v.* RAGHUNATH DUTT. **27 C. W. N. 501 : 76 I. C. 1052 : 1923 Cal 558.**

C. P. CODE (V OF 1908), O. 41, R. 11.

———**O. 41, R. 11**—*Second appeal—Dismissal under* O. 41, R. 11—*Review of judgment—Discovery of new evidence—Not a sufficient ground.*

There is no review when a second appeal has been dismissed under O. 41, R. 11. Discovery of new evidence is not a sufficient ground for review of such a judgment. (*Sanderson, C. J. and Richardson, J.*) SAILABALA DEI *v.* GADADHAR HAZRA. **36 C. L. J. 76 : 70 I. C. 408 : 27 C. W. N. 918 : 1922 Cal. 165.**

———**O. 41, R. 11 and O. 47, R. 1**—*Summary dismissal—Admission on review.*

When an appeal summarily dismissed under O. 41, R. 11 is admitted on review without notice to respondents, it is not open to the succeeding Judge to question the order subsequently. (*Beachcroft, J.*) MUHAMMAD HASAN MIA *v.* ABDUL HAMID. **50 I. C. 431.**

———**O. 41. R. 11**—*Review after dismissal of appeal under—Review by co-deft. after dismissal of appeal—Dismissal of appeal, effect of, on review.*

Dismissal of an appeal under O. 41, R, 11, is a decree and supersedes the decree of the lower Court. Therefore, after the dismissal of an appeal, under O. 41, R. 11, the decree cannot be reviewed by the Court of first instance on the application of the appellant but in so far as a co-party who did not appeal is concerned, the decree of the Lower Court is not affected by the result of the appeal and continues to be reviewable. A party, therefore, who was not appellant may apply for a review of judgment, though an appeal by a co-party is pending except in two cases first, where the ground for review and the ground for appeal is the same, and secondly, when as respondent in the appeal he can present to the Appellate Court the grounds of review. (*Mookerjee and Cuming, JJ.*) CHANDRA KANTA BHATTACHARJEE *v.* LAKSHMAN CHANDRA CHAKKRAVARTI. **24 C. L. J. 517 : 36 I. C. 460 : 21 C. W. N. 430**

———**O. 41, R. 11**—*Grounds of appeal—Restriction of, on admission.*

It is not competent to a court of appeal to restrict grounds upon which an appeal admitted under O. 41, R. 11 is to be heard finally and any such restrictive order made at the time of the admission of the appeal is *ultra vires*. (*Mookerjee and Carnduff, JJ.*) LAKHI NARAIN *v.* SRI RAM CHANDRA, **15 C. W. N. 921 : 11 I. C. 212 : 14 C. L. J. 146.**

———**O. 41, R. 11**—*Summary dismissal—Order under, whether decree—Revision.*

An order under O. 41, R. 11 (1) is a "decree" from which an appeal lies, but if no decree is drawn up, the appeal may be treated as an application for revision. (*Kensington, C.J. and Rattigan, J.*) BISHEN SINGH *v.* BISHEN KUAR. **191 P. L. R. 1914 : 23 I. C. 902 : 116 P. W. R. 1914.**

———**O. 41, R. 11**—*Discretion under.*

The discretion given by R. 11 of O. 41 is not an arbitrary discretion but a judicial discretion. (*McColl, J. C.*) NGA SAN BAW *v.* NGA LU E. **33 I. C. 666 : U. B. R. (1915) II. 92.**

C. P. CODE (V OF 1908), O. 41, R. 14.

——— O. 41, R. 14 and O. 9, R. 3—*Notice of appeal—Absence of date—Ex parte decree.*

A Judge cannot decide an appeal *ex parte* when notice of appeal does not specify the date on which the appeal will be heard. (*Richardson and Smither, JJ.*) JADU KANTA SARMA *v.* HEMA KANTA GOSWAMI. **36 I. C. 624.**

———O. 41, Rr. 14, 17 and 21—*Appeal—Notice to respondent—Appellant's duty to furnish address.*

An appellate Court should not presume that respondent has knowledge of the date of hearing of the appeal, if notice has not been duly served upon him. The appellant must give the correct address of the respt. who is not bound to communicate his address either to the trial court or the appellate court and his omission to do so is no abuse of the provisions of the Code. (*Shah Din, C.J.*) JUMNA DAS *v.* BISHAN DAS. **63 P.W.R. 1917: 41 I. C. 889 : 136 P. L. R. 1917.**

———O. 41, R. 16—*Procedure at hearing—Counsel for one party, if could be heard after close of case.*

The judgment of a Court of Appeal will not be valid if the Court heard counsel for one of the parties after the case had been closed and in the absence of the Counsel for the other party. (*Shadi Lal, C. J. and Harrison, J.*) KESHO DAS *v.* RAM NARAIN. **63 I. C. 945.**

———O. 41, R. 17—*Dismissal for default—Effect of.*

An order dismissing an appeal for defau lt is not a decree and therefore the decree of the court of first instance is not superseded by it nor does it merge into it. 39 All. 13: 36 All. 350 (P.C.) Foll. Therefore if an appeal from an *ex parte* decree is dismissed for default, the first court can allow application to set aside that *ex parte* decree. (*Banerjee, J.*) RAFIQUAT HUSSAIN *v.* BIBI TAWAEF. **39 All. 393 : 39 I.C. 519 : 15 A.L.J. 286.**

———O. 41, R. 17—*Appellant present—Pleader absent—Appeal dismissed without going into merits.*

An appeal cannot be dismissed without going into the merits where the appellant was present but his pleader was absent and the appellant on being asked to argue his case said that he had nothing to say as he was a layman. The Court should have considered the grounds of appeal and decided the case on the merits. (*Tudball and Rafique, JJ.*) BALDEO PRASAD *v.* KUNWAR BAHADUR. **35 All. 105 : 11 A. L. J. 18 : 18 I. C. 364.**

———O. 41, R. 17——*Dismissal for default—Pleader unable to argue.*

Where the pleader is present but is prevented by physical disability from arguing the case, there is no default. (*Griffin, J.*) SHEOALAMBH SINGH *v.* BODHAI SINGH. **9 I. C. 857.**

———O. 41, R. 17 and O. 23, R. 3—*Dismissal of appeal for default--Compromise thereafter--Power to record.*

Where an appeal has been dismissed for default of appearance of both the parties and both the appellant and respondent within a month of the dismissal file a petition of the compromise settling their disputes, with an additional application for restoration of the appeal. *Held* that in the circumstances of the case, the court ought to have restored the appeal and passed a decree in terms of the compromise. (*Suhrawardy and Panton, JJ.*) ASWINI KUMAR DUTT *v.* SUKHODA SUNDARI DEBYA. **68 I. C. 448 : 1923 Cal. 319 (2).**

C. P. CODE (V OF 1908), O. 41, R. 17.

———O. 41, Rr. 17 and 19—*Dismissal for default— Restoration—Sufficient cause.*

Where an appeal was transferred by the Dt. Judge from one Subordinate Court to another without notice to any party and the appellants were thereby unable to be present in the latter court at the time the case was called on, *Held*, that sufficient cause has been shown to restore the appeal dismissed for default. (*Fletcher and Shamsul Huda, JJ.*) ISABLI *v.* BHAGHAN CHANDRA SHAH. **46 I. C. 881.**

———O. 41, R. 17—*Dismissal for default—Presence of party to ask time to get pleader is not proper presence.*

Mere appearance of the appellant on the date of hearing to ask the Court to give time to get his pleader is not an appearance within the meaning of the Code. Where an appeal dismissed in such a case should be readmitted. (*Chatterjee and Greaves, JJ.*) NANDA KUMAR BARNA *v.* NABIN CHANDRA. **30 I. C. 878 : 22 C. L. J. 72.**

———O. 41, R. 17—*Notice of hearing not fixed—Dismissal of appeal for default is invalid—Application to set aside the dismissal—Limitation.*

Where no date was fixed for the hearing of an appeal and the Court purported to dismiss the appeal for default, *Held*, that the dismissal was without jurisdiction and that an application to set aside the dismissal was not governed by Art. 168 of the Limitation Act. (*Scott Smith, J.*) ATA MAHOMED *v.* SHANKAR DAS. **69 I. C. 618 : 1924 Lah. 279.**

———O. 41, Rr. 17 and 19—*Dismissal of appeal for default—Remedy of appellant—Court if has an inherent power to restore.*

The Court has inherent power to restore an appeal dismissed for default. (*Schwabe, C. J, and Waller, J.*) KRISHNASAMI NAIDU *v.* CHENGALROYA NAIDU. **18 L.W. 870 : 33 M. L T. 207: 47 Mad 171 : 76 I. C. 836: 45 M. L. J. 813 : 1924 Mad. 114.**

———O. 41, R. 17—*Appellant absent—Dismissal on the merits not proper.*

On the day fixed for hearing an appeal the appellant was not present in court but a vakil holding a vakalat from him was present and applied for an adjournment. This was refused and thereupon the vakil informed the court that, as he had no instructions or papers, he could not argue the appeal and took no further part in the proceedings. The appellate court instead of dismissing the appeal for default under O. 41, R. 17, C. P. Code, considered the evidence in the light of the grounds raised in the appeal memo. and dismissed the appeal with costs. *Held* (1) that there was no appearance on the part of the appellant within the meaning of O. 41, R. 17, C. P. Code.

C. P. CODE (V OF 1908), O. 41, R. 17.

(2) that the appellate court has no power to go into the merits of the case and to dismiss the appeal on the merits; (3) and that the proper order to be made on second appeal was to set aside the order of the lower appellate court dismissing the appeal on its merits as *ultra vires* and to direct him to restore the appeal to file and dispose of it according to law. (*Ayling and Odgers, JJ.*) MUSALIARAKATH MAHOMED *v.* MANAVIKRAMA. **43 M. L. J. 317 : 16 L. W. 434 : (1922) M. W. N. 604 : 45 M. 882 : 69 I. C. 513 : 1923 Mad. 13.**

———O. 41, Rr. 17 and 19—*Restoration of appeal—Dismissed for default.*

A court has the discretionary power to restore an appeal dismissed owing to the negligence of the appellant's pleader, where the appellant himself has shown all possible diligence towards causing appearance to be made. (*Sundara Iyer and Spencer, JJ.*) MURUGA CHETTY *v.* RAJAH SWAMI. **(1912) M. W. N. 332 : 11 M. L. T. 280 : 14 I. C. 823 : 22 M. L. J. 284.**

———O. 41, Rr. 17 and 22—*Dismissal under O. 41, R. 17—Cross-objections.*

When an appeal is dismissed under O.41, R.17, C. P. C., the cross-objections cannot be adjudicated upon the merits. When the appeal is dismissed under an erroneous impression as to procedural law, an appeal lies from the order of dismissal. (*Stuart, J. C.*) SUBHADRA KUAR *v.* BIRASHWAR PRASAD. **25 I. C. 916 : 1 O. L. J. 485.**

———O. 41, R. 17—*Default of appearance—Pleader refusing to argue the case.*

Where when an appeal was taken up for hearing the pleader for the appellant declined to argue the appeal as he was unready and the court dismissed the appeal for default. *Held*, that it was a case of non-appearance of the appellant. To constitute appearance by a pleader it must be shown that the pleader was ready to place the materials before the Court to enable it to apply is judicial mind. 34 C. 403 foll. (*Mullick and Kulwant Sahay, JJ.*) FIRM OF JAI NARAIN RAMJASH *v.* SITARAM MARWARI. **74 I. C. 947 : 1923 Pat. 175 : 1923 P. 520.**

———O. 41, R. 17—*Non-appearance of appellant—Duty of court.*

In an appeal in which the appellant has failed to appear, the appellate court cannot enter into the merits of the case and decide the appeal on the merits. (*Sultan Ahmed, J.*) DAULAT SINGH *v.* SRINIVASA PRASAD. **57 I. C. 75 : 2 P. L. T. 36.**

———O. 41, R. 17—*Dismissal for default—Appellant present—Pleader absent.*

If an appellant is appearing through a pleader and the pleader is absent but the appellant is present in court and states that his pleader is engaged elsewhere, the mere presence of the appellant is not an appearance within O. 41, R.17, C.P. C. 3 Pat. L. J. 355 ; 30 M. 274; 45 I. C. 189 Foll, It is desirable to accommodate litigants to some extent if their pleaders happen to be absent in another court and have a chance of attending

C. P. CODE (V OF 1908), O. 41, R. 18.

within a short time so as not to disturb the business of the court. (*Miller, C. J. and Foster, J.*) RAMDHAN TEWARI *v.* BISHUN PRAGASH NARAIN SINGH. **5 Pat. L. J. 17 : 54 I. C. 715 : 1 Pat. L. T. 156.**

———O. 41, Rr. 17 and 19—*Dismissal for default—Pleader—'No instructions'—Procedure.*

If appellant's pleader intimates to the Court that he has no instructions to argue the appeal, the judge must dismiss the appeal under O. 41, R. 17. C.P C., so that the appellant may have the opportunity of applying re-admission of his appeal under O. 41 R. 19. (*Das, J.*) MANGAR SINGH *v.* BABU BHARAT PRASAD. **51 I. C. 46.**

———O. 41, Rr. 17 and 19—*Dismissal for default—One vakil refusing to appear in the absence of another—Negligence.*

Where two vakils appeared for an appellant and adjournment of an appeal, sought on the ground that the better of the two vakils was absent from the station was refused and the appeal was dismissed for default: *Held*, (1) that the vakil's conduct amounted to a very gross neglect of the client's interests, (2) that there was no sufficient ground for setting aside the order of dismissal for default as condonement of such negligence can result only in its continuance. (*Mullick and Roe, JJ.*) RANG BEHARI LAL *v.* RACHEYA LAL. **35 I. C. 429 : 1 Pat. L. J. 65.**

———O. 41, R. 17—*Appearance, meaning.*

An appearance by a pleader who is instructed only to apply for adjournment, is no such an appearance as is contemplated by R. 17. (*Maung Kin, J.*) MENSEE DEVJEE & CO. *v.* MAUNG THAN GYAUNG. **62 I C. 57 : 10 L. B. R, 329.**

———O. 41, R. 17—*Default—Translation or copying charges not paid.*

A Court has power to dismiss a suit or appeal where the material essential for the progress of the case such as translation of Vernacular documents, preparation of copies, etc., are wanting owing to the plaintiff's or appellant's default. (*Twomey, C. J. and Maung Kin, J.*) MA ON BWIN *v.* MA SHWE MI. **47 I. C. 691 : 9 L. B. R. 266.**

———O 41, R. 18—Talabnama *deposited—Notice to respondent not filed—Dismissal of appeal if valid.*

A dismissal of appeal is wrong if it is made under O.41, R. 18 when the *Talabnama* has been deposited but the notice to the respondent for the issue of process has not been filed. (*Stephen and Chatterjee, JJ.*) GULMAHOMED *v.* ABDUL JUBBAR. **15 C. L. J. 683 : 13 I. C. 694: 16 C. W. N. 498.**

———O. 41, R. 18—*Order not appealable.*

No appeal lies against an order passed under O. 41, R. 18, and to avail itself of the provisions of 41, R. 18 the Appellate Court must fix a date by which the process fees are to be paid. (*Petman, J.*) ATTAR SINGH *v.* KARAM CHAND. **52 I. C. 179 : 169 P. R. 1919.**

———O. 41, R. 18—*Dismissal of appeal—Omission to provide identifier—Effect of.*

An appeal cannot be dismissed under O. 41, R. 18, C. P. C., on account of the omission of the

appellant to provide a person to identify the respondent as required by O. 5, R. 18, C. P. Code. (*Jwala Prasad and Ross, JJ.*) NAGENDRA NATH GHOSH *v.* SHAMBHU NATH PANDE.
65 I. C. 49 : 3 Pat. L. T. 498 : 1923 P. 114.

——O. 41, R. 19 —*Restoration —Sufficient cause—Date of hearing postponed but not communicated.*

Where an order of postponement of a case was not communicated to any of the parties concerned and the appeal was dismissed for default of appearance on the part of appellant : *Held*, that there was sufficient cause for restoration of the appeal. (*Piggott and Walsh, JJ.*) BAIJI NATH *v* WALI HASAN. 32 I. C. 936.

——O. 41, R. 19--*Notice- Both parties absent.*

Notice is not necessary for the restoration of an appeal dismissed for default owing to the absence of both parties. (*Rafique, J.*) BRIJ LAL *v.* BUA RAM. 17 I. C. 292: 10 A. L. J. 399.

——O. 41, R. 19—*Power of court not exhaustive.*

The rule does not exhaust the powers of the Appellate Court to readmit an appeal dismissed for default. (*Shah and Crump, JJ.*) SONUBAI BABURAO *v.* SHIVAJIRAO KRISHNARAO. 45 Bom. 648: 60 I. C. 919 : 23 Bom. L. R. 110.

——O. 41, R. 19—*Restoration—Procedure.*

When an appeal is dismissed for default the applicant should be given an opportunity of proving sufficient cause before rejecting his application for restoration of appeal. (*Teunon and Chaudhuri, JJ.*) HEMANTA KUMAR BOSE *v.* PUNCHANAN CHAKRAVARTHI. 57 I. C. 762.

——O. 41, R. 19—*Restoration—Non-appearance of pleader—Whether a sufficient cause.*

The non-appearance of the pleader due to his engagement in another court is not a sufficient cause for the restoration of an appeal dismissed for default. (*Fletcher and Richardson, JJ.*) MAJIDUNNESSA BIBI *v.* AMMESSA. 24 I. C. 826.

——O. 41, R. 19—*Sufficient cause—Council engaged in another court.*

The fact that the counsel was engaged in another court when the appeal was called on and had sent word to the Reader of the court for a short pass over is not sufficient to set aside the dismissal for default and re admitting the appeal. (*Abdul Raoof and Martineau, JJ.*) SAIF ALI *v.* CHIRAGH ALI SHAH. 68 I C. 785 : 1923 Lah. 97 (1).

——O. 41, R. 19--*Dismissal for default—Absence of counsel, unintentional—Restoration.*

When there is an unintentional omission to appear at the hearing of an appeal and it is dismissed for default, the restoration of appeal must be made wholly unintentional. (*Broadway, J.*) BALMUKAND *v.* WAZIR CHAND.
5 Lah. L. J. 89.

—— O. 41 R. 19—*Sufficient cause—Case put down lower in the list without notice to petitioners vakil.*

There is no rule laying down that where a Judge for any reason orders a case, which is before him, for having, to be put down lower in the list he must give notice to the counsel of the parties in other cases. On the other hand the counsel are expected to be present within the compound of the Court if they have got any case in the list. Where at the time of the hearing of a case transferred lower down in the list without notice to the appellant, the appellant's counsel was not present in court and the appeal was consequently dismissed for default. *Held* that there was no cause for the restoration of the appeal. (*Abdul Raoof, J.*) NANAK CHAND *v*, SAJED HUSSAIN.
71 I. C. 813 : 1924 Lah. 189.

——O. 41, Rr. 19 and 21—*Minor—Notice—Not given to the minor appellants.*

Where a next friend of the minor defts had not been served with a notice of the date fixed, the order of dismissal of the appeal for default could not be sustained. (*Shadi Lal, J.*) MAHMUD HUSSAIN *v.* MUHAMMAD USMAN.
53 I. C. 333.

——O. 41, R. 19—*Dismissal for default—Application to restore—Summary rejection.*

An application to restore an appeal dismissed for dafault, an appellant cannot be rejected summarily without giving appellant the opportunity to establish the grounds set forth therein. Whether there is or is not any reason why the appellant's counsel should not have been present is immatertal. if the applicant himself was quite in and unable to attend. (*Abdul Raoof, J.*) RAMSARAN DAS *v.* NATHWA. 38 P. W. R. 1919 : 52 I. C. 926 : 69 P. L. R. 1919.

——O. 41, R. 19— *Restoration—Sufficient cause—Pleader's mistake.*

Through error of a pleader in noting a wrong date in his diary as the date of the appeal was not a sufficient cause for restoring the appeal dismissed for default, the Court could have passed an order of restoration if it considered that a case for such an order had been made. As the default was not intentional and was due to a *bona fide* error of appellant's pleader. the Court should in the case have passed such an order. (*Broadway, J.*) MUSAMMAT GAURAN *v.* BRIJ RAJ SARAN.
51 I. C. 607 : 53 P. R, 1919.

——O. 41, *R.* 19—*Absence of service--Appearance by Pleader.*

An appeal cannot be dismissed in default if the appellant not being properly served does not appear but the pleader appears though without instructions. (*Twcedy, S. M. and Holms, J. M.*) SUKH MANGAL TEWARI *v* RANNAQ BIBI.
30 I. C. 199 : 2 O. L. J. 198.

——O. 41, R. 19—*Effect of—Not the sole remedy.*

When an appeal is dismissed for default under O. 41, R. 18, C.P.C., O. 41, R. 19, gives an option to the appellant to apply for re-admission, but it does not take away any other remedy that may be available. The omission of a provision for fresh appeal cannot have the effect of taking away such right. (*Das and Kulwant Sahay, JJ.*) SURAJDEO NARAIN SINGH *v.* PARTAP RAI.
2 Pat. 739 : 4 Pat. L, T. 405 : (1923) Pat. 213 = 75 I. C. 284 : 1923 P. 514.

C. P. CODE (V OF 1908), O. 41, R. 19.

———O. 41, R, 19—*Restoration of dismissal for default—Right of opposite party.*

Where an appeal has been dismissed for not making good the stamp in the prescribed time, the appeal cannot be restored under O. 41, R. 19, nor under O. 47. R. 4 (2) Proviso (*a*), without notice to the opposite party. But if the case is dealt with, without notice to the opposite party, he is entitled to a hearing even in Second Appeal, as soon as the matter has been brought to his knowledge. (*Miller, C. J. and Coutts, J.*) SURAJPAL PANDEY *v.* UTIM PANDEY. 63 I. C. 99 : 1921 Pat, 337.

——O. 41, R. 19—*Restoration—Sufficient cause—Transfer of cause—Notice to parties affected—Omission to give—Disposal of appeal in absence of parties.*

Where on a transfer of an appeal from the Dt. Judge's to the Subordinate Judge's Court, there was nothing to show that the information was communicated to the parties or their pleaders, the appellant had a very good cause for not appearing when the case was called on. (*Miller, C. J., Chapman and Atkinson, JJ.*) RAM SUKUL PATHAK *v.* MAHARAJ KESHO PRASAD SINGH.
3 Pat. L. J. 218 : 4 Pat L. W. 75 : 43 I.C. 925 : 1918 Pat. 17 (F. B.).

——O. 41, R. 20—*Non-joinder of parties in appeal—Practice.*

The sole question in a mortgage suit was whether he contesting deft. could claim priority over the plff.; deft. appealed and impleaded the plff. only as respdt. The Court dismissed the appeal on the ground that non-joinder of other defts. was fatal to it. *Held* that the Lower Appellate Court ought to have made them parties to the appeal and ought to have decided the case thereafter under O. 41, R. 20. (*Karamat Husain and Tudball, JJ.*) JANGLI SAHU *v.* GOPINATH SAHU. 15 I. C. 295.

——O. 41, Rr. 20 and 33—*Addition of parties—Powers of Court.*

The appellate Court refused under the circumstances of the case, to add the representatives of the deceased respt. under O. 41, Rr. 20 and 43 of the C.P.C. as the appellant could well have impleaded them in time and thus prevented an abetment (*Mookerjee and Panton, JJ.*) KALI DAYAL BHATTACHARJEE *v.* NAGENDRA NATA PAKRASHI.
24 C. W. N. 44 : 54 I. C. 822 : 30 C. L. J. 217.

——O. 41, R. 20—*Parties—Representatives—Addition of.*

The words "any person who was a party to the suit" in O. 41, R, 20, C P. C., on a reasonable construction include the representative of that party. The power given to the Court to add parties is a power which is to be exercised at the hearing, for, it is necessary that the Court should have before it all the circumstances of the case. (*Woodroffe and Mullick, JJ.*) ROMESH CHANDRA DAS *v.* ANTHONY PENHEIRO. 29 I. C. 470.

——O. 41, R. 20—*Power of appellate Court—Discretion.*

An appellate Court has discretionary powers to add a party as respondent to an appeal, even when the time for appealing has expired. But an application to enforce a judgment within the meaning of Article 183 of the Limitation Act against a new party can be allowed only if it is in time. (*Jenkins, C. J. and Woodroffe, J.*) AMOLAK CHAND *v.* SHARAT CHANDRA.
38 Cal. 913 : 11 I. C. 943 : 16 C. W. N. 49.

C. P. CODE (V OF 1908), O. 41, R. 20.

——O. 41, R 20—*Applicability of Law of Limitation.*

The Law of Limitation does not apply to action taken by a court under O. 41, R. 20, but the power to take action is discretionary and should not be exercised in a case of extreme neglect. A third party cannot appeal on behalf of co-sharers who are interested in the appeal against a co-sharer and if they are not made respondents in time the appeal abates. (*Broadway, J.*) MUNICIPAL COMMITTEE, BHERA *v.* SHIVRAM. 75 I.C. 90 : 1923 Lah. 503.

——O. 41, R. 20—*Strangers cannot be made parties—Scope of S. 151—Inherent powers when to be exercised.*

An appellate court has power to implead only such persons as parties to the appeal as were parties in the trial court and were not made parties to the appeal but not those who were complete strangers to the suit. 18 All. 133 Ref. Powers of a court to implead parties under S 151, C. P. Code, are circumscribed by O. 41, R. 20, and it is only in exceptional circumstances that the inherent powers under S. 151 could be invoked. 3 Pat. L.J. 409 Dist. (*Moti Sagar, J.*) MUSSAMMAT HALIMAN *v.* NUR MAHOMMED KHAN.
73 I. C. 136: 1923 Lah. 490.

———O. 41, R 20—*Second appeal—Necessary parties—Addition of.*

If the plff. in second appeal to the High Court failed to implead necessary respt., the power to add him could not be exercised. The case being on a joint footing against all respts., the appeal abated in *toto*. (*Chevis, J.*) RAUSHAN RAM *v.* SHERAN KHAN. 57 I. C. 259 : 2 Lah. L. J. 5.

———O. 41, R. 20—*Limitation—Negligence—Courts powers, discretionary.*

The Law of Limitation has application to an action by the Court under O. 41, R 20. The power to take action is discretionary and will not be exercised in cases of extreme negligence. (*Johnstone and Shadi Lal, JJ.*) SHAHAB DIN *v.* MIRAN BAKSH
79 P. R 1914 : 268 P. L. R. 1914 : 25 I. C. 549 : 169 P, W. R. 1914.

——O. 41, R. 20—*Addition of party—Party impleaded in Appellate Court—Higher Court will not interfere.*

When an Appellate Court impleads a person, a Higher Court will not upset the order on the score of limitation. (*Johnstone and Rattigan, JJ.*) SHIB NATH *v.* ALLIANCE BANK OF SIMLA, LTD., LAHORE. 110 P. W, R. 1914 : 215 P. L. R. 1914 : 25 I. C. 480 : 3 P. R. 1915.

——O. 41, Rr. 20 and 22—*Parties—Addition of.*

A respondent to an appeal can proceed against his co-respondent by way of cross-objections; for this purpose he may join him as party to the appeal though previously he was not interested. (*Oldfield and Krishnan, JJ.*) PONNUSWAMI ASARI *v.* PALANIANDI MUDALI 27 M. L. T: 266 : 56 I. C. 612 : 11 L. W. 602

C. P. CODE (V OF 1908), O. 41, R. 20.

———O 41, R. 20—*Power of appellate Court to implead parties struck off,*

O. 41. R. 20 applies to persons who were parties to the suit and persons are none the less parties to the suit because they ceased to be so before the passing of the decree. An appellate Court is therefore authorised to consider whether they are interested in the result of the appeal and to implead them if it thinks they are interested. (*Oldfield and Tyabji, JJ.*) ISSAKKAN AKATH MALAYAKKAL MAHOMED HAJI *v.* POURAKURIKKALAKATH KUNHI MAMMOD, **27 I. C. 423.**

———0. 41, R. 20—*Parties—Assignee of decree*

The assignee of the decree is not a necessary party to an appeal by the judgment-debtor. But he is in the absence of fraud bound by the order of the Appellate Court. (*Abdul Rahim and Sadasiva Aiyar, JJ.*) GOVINDAPPA *v.* HANUMANTHAPPA. **38 Mad. 36 : 23 M. L. J. 513 : 17 I. C. 420 : (1912) M. W. N. 1152.**

———0. 41, R. 20—*Adding of parties—Not necessary for appeal—If can be allowed.*

Though a Court can add parties, apart from the provisions of O. 41, R. 20, yet it cannot allow a respondent to add an unnecessary party to an appeal and raise cross-objections against him. (*Miller, J.*) VALLIAMMAI ACHI *v.* NATARAJA PILLAY. **11 M. L. T. 157 : 13 I. C. 906 : (1912 M. W. N. 198.**

———0. 41, R. 20—*Appeal—Joinder of parties—Court's power of.*

Where names of certain defendants are omitted by mistake, in a memorandum of appeal, the Court has power to add them as parties under O. 41, R. 20, of the Code. (*Drake Brockman, J. C.*) DEOKARAN *v.* NATHU. **63 I. C. 352 : 4 N. L. J. 138.**

———0 41, R. 20—*Limitation— Power of—Court to add parties.*

Under O. 41, R. 20, C.P.C. the court has full authority to direct addition of parties in an appeal. It has been held that when court takes action under this rule, no question of limitation can arise. (*Lindsay, J.C.*) GAJRAJ SINGH *v.* GOURI SHANKAR. **20. L. J. 20 : 27 I. C. 609 : 18 O. C. 90.**

———0. 41, R. 20—*Addition of parties—Powers of appellate Court.*

It is competent to an appellate court to add respondents to an appeal under the provisions of O. 41, R. 20, C.P.Code, even though the time within which an appeal against those persons might have been prepared had expired 14 A. 154 : 33 C. 329 Rel. on. (*Brown, A.J.C.*) MAUNG AN GALE *v.* MA MIN DUN. **66 I.C. 365 : (1921) 4 U.B.R 87.**

——0. 41, Rr. 20 and 33—*Second Appeal—Court can add respondents.*

An appellate Court can in Second Appeal add as respondents persons impleaded in the Original Court but not in first appeal, even though an appeal against them is time-barred. (*Robinson, J.*) YOOSOF OOSMAN BROS. & CO. *v.* WINNEYA. **59 I.C. 798 : 10 L.B.R. 191.**

———0. 41, R.20—*Limitation—Limitation Act, S. 22.*

C. P. CODE (V OF 1908), O. 41, R. 22.

O. 41, R. 20, C. P. C., is not subject to S. 22 of the Lim. Act. Persons who were parties to the original suit can be added as parties in the appeal even after the period for presenting the appeal has expired. 33 C. 329 Foll (*Pratt, J. C.*) HAJI YUSIF *v.* GHULAM HUSSAIN KASSIM. **16 I. C. 771 : 6 S. L. R. 74 (Note).**

———O 41, R. 21—*Appeal heard ex parte—Restoration—Sufficient cause, what is.*

There is no universal rule as to what is sufficient cause in restoring an appeal decided *ex parte*, each case being dealt with on its own facts where a respondent's attorney failed to instruct his pleader, who consequently reported no instructions, *held*, there was sufficient cause for restoration under O. 41, R. 21 of the Code. (*Walsh and Lindsay, JJ.*) GODHNI *v.* SHYAM LAL. **63 I. C. 737 : 19 A. L. J. 547.**

———0. 41, R. 21—*Scope of.*

A principal cannot be relieved for the neglect of his agent in not appearing as respondent in an appeal in the High Court. Consequently if the appeal is decreed, there is no right in the principal to ask the Court to grant a rehearing of the appeal. (1905) A.W.N. 4 Ref. (*Piggott and Walsh, JJ.*) BAJI LAL *v.* NAWAL SINGH. **15 A L.J. 413 : 39 I.C. 636 : 39 All. 388.**

———0. 41, Rr. 21 and 11—*Jurisdiction of first appellate Court.*

A Court has jurisdiction to entertain an application and rehear an appeal under R. 21, O. 41 at the instance of a respondent in whose absence the appeal was first decided. A second appeal by a co-respondent dismissed under R. 11, O. 41, does not take awaythe absent respondent's consent to the jurisdiction of the first appellate Court. (*Chitty and Chatterjee, JJ.*) INDU MESH *v.* DARBAKSH BHUIYAN. **14 C. L. J. 42 : 10 I. C. 275 : 15 C. W. N. 798.**

———0. 41, R. 21—Ex parte *decree—Application to set aside—Pendency of appeal—Decree set aside—Effect of.*

Where the Lower Appellate Court passed an *ex parte* decree against the defendant who preferred an appeal and also applied under O. 41, R. 21 to the Lower Appellate Court *held* that the pendency of the appeal was no bar to the application under O. 41, R. 21 and that when the lower appellate court set aside the *ex parte* decree and passed a judgment in favour of the defendant, the "cause of appeal" to the Judicial Commissioner's Court disappeared and that the second appeal should be dismissed. (*Stanyon, A. J. C.*) SADARAM *v.* DULAR. **43 I.C. 902 : 14 N. L. R. 30.**

———S. 41, R. 22.

Co-respondent.
Court fee.
Cross-objections.
Dismissal of Appeal.
Letters Patent Appeal.
Limitation.
New grounds.
Revision Petition.
Right to support Decree.
Right to support Judgment.
Scope of.
Withdrawal of Appeal.

C. P. CODE (V OF 1908) O. 41, R. 22—Co-respondent,

Co-respondent.

———O. 41, R. 22—*Co-respondents—Cross objections.*

A plaintiff as respondent to an appeal, is entitled to support the decree of the Court below, upon a ground that had been decided against him by the trial Court. It is within the comeptence and discretion of the High Court to permit the petition of cross objections to be heard, even as against those defendants to suit who were arraved as respondents to the appeal. (*Piggott and Walsh, JJ.*) FATIMA BIBI *v.* RAM NARAIN SAHU.

16 A.L.J. 587 : 51 I.C. 646 : 40 All. 536.

———O. 41, R. 22—*Co-respondents.*

It is competent to an appellate Court to allow a respondent to cross objections against another respondent. (*Chamier and Rafique, JJ.*) BALGOBIND *v.* RAM SARUP. 12 A.L.J. 892: 26 I.C. 83 : 36 All. 505.

———O. 41, R. 22—*Co-respondents—Cross-objections.*

Cross-objections cannot be urged against a co-respondent except in exceptional cases and should not be allowed to be urged where they could be raised by an appeal. (*Scott, C.J. and Chandavarkar, J.*) NERSEY VIRJI *v.* ALFRED H. HARRISON. 37 Bom. 511 : 21 I.C. 7 : 15 Bom. L. R. 781.

———O. 41, Rr. 22 and 33—*Co-respondent.*

A cross objection by a respondent as against his co-respondent should not be entertained under O. 41, R. 22 of the C. P. C. where the question raised thereby is entirely distinct from and in no way related to the question in controversy in the appeal. 15 C.L.J. 61 foll. (*Sanderson, C.J. Woodroffe and Mookerjee, JJ.*) SHAIB CHANDER KAR *v.* DULCKEN. 48 I.C. 78 : 28 C.L.J. 123.

———O. 41, Rr. 22 (3) and 33—*Co-respondent.*

As an ordinary rule a respondent in an appeal is not entitled to urge cross objections except as against the appellant but under special circumstances, the appellate Court can under O. 41, Rr. 22 (3) and 33 which have materially altered the existing law and given wide discretionary powers to the Appellate Courts to alter the decree of the Courts below, give effect to the cross-objections of one respondent against another. (*Mookerjee and Chatterjee, JJ.*) MATHURA MOHAN SAHA *v.* RAMKUMAR SAHA. 23 C.L.J. 26: 20 C.W.N. 370 : 35 I.C. 305 : 43 Cal. 790.

———O. 41, R. 22—*Co-respondents — Cross-objections against.*

Under O. 41, R. 22, one respondent can file cross objection against another. (*Mookerjee and Carnduff, JJ.*) JADU NANDAN PRASAD SINGH *v.* KOER KALLYAN SINGH. 15 C. L. J. 61 : 13 I. C. 653 : 16 C. W. N. 612.

———O.41, R. 22—*Co-respondent—Cross-objection.*

Under O. 41, R. 22 a respondent can file a memorandum of cross objections against a co-respondent. 38 Mad. 705 foll. (*Martineau, J.*) CHHAJU *v.* QUTAB DIN. 5 Lah. L. J. 92 : 69 I. C. 330 : 1923 Lah. 39.

C. P. CODE (V OF 1908) O. 41, R. 22—Co-respondent.

———O. 41, R. 22—*Co-respondents.*

As a general rule a respondent can urge cross objections only against the appellant and it is by way of exception that he may urge a cross objection against another respondent, the exception holding good among other cases in those in which the appeal of some of the parties opens out questions which cannot be disposed of completely without matters being allowed to be opened as between co-respondents. 26 Cal. 114, 30 Cal., 655 Foll. (*Scott Smith, and Abdul Raoof, JJ.*) SANT RAM *v.* KEDAR NATH.

2 U. P. L. R. (Lah) 97 : 56 I. C. 469 : 2 Lah L. J. 747.

———O. 41, R. 22—*Co-respondents.*

A respondent can claim a relief against a co-respondent by way of memorandum of objections.(*White, C.J, Miller and Sadasiva Aiyar, JJ.*) MUNUSAMI MUDALI *v.* ABBU REDDI. 38 Mad. 705 : (1915) M. W, N. 45 : 27 I. C, 323 : 27 M.L.J. 740. (F. B.)

———O. 41 R. 22—*Co-respondent.*

A cross appeal should ordinarily be directed, against the appellants and not against the co-respondents, (*Daniels and Lyle, A. J. C*). QARA MAHOMED SHABAN *v.* BAZAR ARA BEGUM.

25 O. C. 280 : 70 I. C. 79 : 1923 Oudh 108.

———O. 41, Rr. 22 and 33— *Co-respondents —Cross objections.*

Where one of several defendants against whom a decree is passed has allowed the period for appealing to elapse, he cannot prefer a memorandum of objections against the other respondents on the appeal. O. 41, R. 22, C. P. C, should ordinarily be confined to cases of crose-objections urged against the appellant. but O. 41, R. 33 C. P. C. gives the court a very wide discretion and cases may occasionally arise where cross-objections against a co-respondent should be heard. (*Daniels, J.C and Dalal, A. J. C*) SHEIK MAHOMED MUZAFFAR ALI *v.* BHAGWATI PRASAD SINGH.

66 I. C. 642 : 8 O. L. J. 358.

———O. 41, R. 22— *Co-respondents— Memorandum of cross objections.*

O. 41, R. 22 C. P. C. allows a respondent in an appeal to claim to relief against a co-respondent by way of a memorandum of cross objections, 38 M. 705 Foll. (*Lyle, A.J.C.*) JAGANNATH *v.* HANUMAN SINGH. 6 O. L. J. 544 : 54 I. C 332 : 2 U. P. L. R. (J. C.) 27.

———O. 41, Rr. 22 and 33—*Co-respondents.*

Cross objections against a co-respondent are not illegal and where an appellate Court cannot do complete justice between the parties without opening the whole case, it can take into consideration the objections filed by one of the respondents not only against the appellant but against the co-respondent also, and to modify the decree if necessary. (*Kanhaiya Lal, A. J. C.*) SAIYID MUHAMMAD *v.* JAWAD HUSSAIN.

53 I. C. 659: 6 O. L. J. 495.

———O. 41, R. 22—*Co-respondents—Cross objections against.*

Cross objections against a co-respondent should be entertained where the appeal re-opens the

C. P. CODE (V OF 1908) O. 41, R. 22—Co-respondent.

whole matter in controversy between the respondents *inter se*. R. 22 cannot be construed to revive only a right of appeal of one of several co-defendants allowing the time of appeal to elapse. (*Miller, C.J. and Coutts, J.*) OFFICIAL TRUSTEE OF BENGAL *v.* CHARLES JOSEPH SMITH.
5 Pat. L. J. 328 : 1 Pat. L. T. 434 : 56 I. C. 252 : 1920 Pat. 161.

——0. 41, R. 22—*Co-respondents.*

In an appeal by one of several defts. plff. can raise cross objections even though they may relate to deft. who is not an appellant. *Quaere* :—Whether a plaintiff respondent can raise cross objections against a defendant who is not an appellant. (*Atkinson, J.*) BALKU BHAGAT *v.* AGHORI MANDAL. **38 I. C. 641.**

——0. 41, R. 22—*Co-respondents.*

A respondent in an appeal is not ordinarily entitled to urge cross objections except against the appellant. (*Saunders, A. J. C.*) NGA TIN *v.* NGA SAW. **29 I. C. 610 : (1915) II U. B. R. 58.**

Court Fee.

——0. 41, R. 22—*Court fee—Cross objections—Supporting the decree of the lower court—No Court fee.*

Where the respondent in an appeal from a decree which totally dismissed the plaintiff's suit put in a petition stating the reasons on which they supported the decree, the respondent need not pay court fee on the petition. (*Banerji and Ryves, JJ.*) RAM PRASAD KALWAR *v.* MT. AJANASIA. **68 I. C. 861 : 44 All. 577 : (1922) All. 280**

——0. 41, R. 22—*Court fee—If and when payable.*

Where a suit was dismissed in toto as against the deft. respondent and it is obvious he could not have appealed against that decree, what he is clearly seeking by filing objection, in an appeal by the plff. is to support the decree on some of the grounds which have been decided against him in the court below. The objections are not cross-objections and did not require any court fee. (*Tudball, J.*) BHAGAN LAL *v.* CHAHAT RAI **39 I. C. 176 : 15 A. L. J. 325.**

——0. 41, R. 22—*Court fee.*

For a cross-objection covering relief referred to in the articles, respondent's valuation if reasonable should be accepted. (*Kanhaiya Lal, J. C and Lyle, A. J. C.*) SRI RAJEO LOCHAN *v.* MAHANT RAM MANOHAR. **25 O. C. 275 : 70 I. C. 286 : 1923 Oudh 44 (1).**

——0. 41, R. 22—*Court fee—Valuation.*

Where the object of a cross objection is to have a declaration in respect to a mortgage, set aside the proper value of the cross objection for Court fees is the value of the mortgage. (*Coutts, J.*) SATDEO NARAIN *v.* RAMAYAN TEWARI. **52 I C. 1002.**

Cross Objection.

——0. 41, R. 22—*Cross objection—Decree in favour of party.*

Petition to support decree in appeal on other grounds does not amount to cross objections. (*Banerjee and Ryves, JJ.*) RAM PRASAD *v.* AJNASIA. **68 I. C. 861: 44 A. 577 : (1922) All. 280 (1).**

C. P. CODE (V OF 1908) O. 41, R. 22—Dismissal of Appeal.

——0. 41, R. 22—*Cross-objection as to jurisdiction to attach not taken in the execution court cannot be taken in cross-objection.*

When an objection to jurisdiction of the execution Court was not taken in first Court, *Held* it is doubtful whether the order of the Court attaching the property could be properly attacked by means of cross objections in connection with an appeal from an entirely different order. It is not open to the judgment debtor to raise his objection by way of cross objections in the appeal of the decree holder from the order of the executing Court refusing to set aside a prohibitory order. (*Scott Smith, J.*) FITZ HOLMS *v.* WARYAM SINGH. **75 I. C. 419 : 1923 Lah. 514.**

——0. 41, R. 22—*Cross-objection— Second Appeal.*

A memorandum of cross-objections as to costs in the Courts below cannot be considered on second appeal. (*Shadi Lal, C. J., Le Rossignol, J.*) MADHO PRASAD *v.* FIRM OF ASHAN ILAHI. **5 Lah. L. J. 108.**

——0. 41, R. 22—*Cross objections—Hearing of—Dismissal of appeal—Co respondents.*

A cross appeal should ordinarily be directed against the appellants and not against the co-respondents. Where an appeal is dismissed for failure to furnish security under O. 41, R. 10 C. P. Code in the presence of the respondent and without any objection on his part he cannot subsequently proceed with his cross-objections. 5 Pat. L. J. 328; 8 O. L. J. 358 foll. (*Daniels and Lyle, A.J.C.*) QARA MAHOMED SHAHAN *v.* BAZAR ARA BEGUM. **25 O.C. 280 : 70 I.C. 79: 1923 Oudh 108.**

Dismissal of Appeal.

——0. 41, R. 22—*Dismissal of appeal—Appeal unsustainable—Cross objections, if valid.*

A respdt. can file cross-objections even in cases where the appeal filed is not maintainable. (*Karamat Hussain and Chamier, JJ.*) SANKAR LAL *v.* SARUP LAL. **34 All. 140 : 13 I.C. 19 : 8 A. L. J. 1297.**

——0. 41, R 22 (4)—*Dismissal of appeal—Appeal—Insufficiently stamped—Rejected—Cross objections if can be heard.*

The rejection of a memorandum of appeal as insufficiently stamped is not a dismissal for default and no cross-objections can be entertained or heard where the appeal is rejected. (*Scott-Smith, J*). LAJPATRAI *v.* LACHMAN DAS. **59 I. C. 795 : 46 P. W. R. 1921.**

——0. 41, R. 22 (4)—*Dismissal of appeal—Court fee—Cross-objections.*

There are only two exceptions as provided by R 22 (4) of O. 41 which allow the hearing of cross-objections even when the original appeal is not heard. If the original appeal is dismissed without hearing for failure to pay proper Court fee, the Court has no jurisdiction to hear and determine the cross-objections. (*Rattigan, J.*) DUNI CHAND *v.* AZIZ KHAN. **131 P. L. R. 1911 : 180 P. W. R. 911 : 10 I. C. 207 : 11 P. R. 1912.**

——0. 41, R. 22—*Dismissal of appeal—Appeal incompetent and not pressed.*

C. P. CODE (V OF 1908) O. 41, R. 22—Dismissal of Appeal.

A memorandum of objections can be heard even though appellant admits that the appeal is incompetent and it is consequently dismissed. (*Bakewell and Moore, JJ.*) VENKATA PERUMAL PILLAI *v.* VENKATASWAMI NAIDU. **54 I. C. 506 : 10 L. W. 605.**

——— **O. 41, R. 22**—*Dismissal of appeal—Miscellaneous appeal—Memorandum of objections—Prov. Insol. Act, Ss. 46 and 47—Appeal filed out of time—Respondent, if can present a memorandum of objections.*

A respondent in an appeal filed under S. 46 of the Prov. Insol. Act has the right to present a memo. of objections under O. 41, R. 22 of C. P. C. A memo of objections, presented in an appeal, which is dismissed as out of time, cannot be heard. The right of a respondent to proceed by way of memo of objections is strictly incidental to the filing of the original appeal in time; and it is open to a party against whom a memo of objections has been filed to set up the bar that the original appeal was filed out of time. (*Wallis, C. J. Spencer and Sadasiva Iyer, JJ.*) ALAGAPPA CHETTIAR *v.* CHOKKALINGAM CHETTY.
41 Mad. 904 : 35 M. L. J. 236 : 24 M. L. T. 137 : 8 L. W. 240 48 I. C. 203 (F. B.) : (1918) M. W. N. 688.

——— **O. 41, R. 22**—*Dismissal of appeal—Limitation—Memo. of objections.*

A respondent filing objections within time is entitled to be heard even though the appeal is dismissed as time barred. (*Ayling and Abdur Rahim, JJ.*) DEVI BHASHYAM *v.* PADINTI VEKATARAMANIA. **8 L. W. 109 : 32 I. C. 579 : 19 M. L. T. 86.**
[This is no longer law. *See* 48 I. C. 203 : 41 M. 904.]

——— **O. 41, R. 22**—*Dismissal of appeal—Time barred—Memorandum of objection filed in time by respondent after notice.*

If a respondent, who is served with a notice, though by mistake, files his cross-objection in time, he must be heard even though the appeal is time barred. (*Coutts Trotter and Kumaraswami Sastri, JJ.*) BIRIDUGADDA VENKADU *v.* RECEIVER N. M. ESTATES. **30 I. C. 832 : 1915 M. W. N. 792.**
[This is not good law, *See* 41 Mad 904 : 35 M. L. J. 236 : 24 M. L. T. 137 : 8 L. W. 240 : 48 I. C. 203 (F. B.) : (1918) M W N. 688.

——— **O. 41, R. 22**—*Dismissal of appeal for default—Memo. of objection.*

The appellate Court can deal with the memo of objections even though the appeal itself is dismissed for default. 26 M. 654, Foll. (*Abdur Rahim and Krishnaswami Iyer, JJ.*) RAMAN *v.* RAMAN. **9 I. C. 572 : 9 M. L. T. 217.**

——— **O. 41, R. 22**—*Dismissal of appeal—Cross objections—Hearing of.*

Where an appeal is dismissed for failure to furnish security under O. 41, R. 10 C. P. Code in the presence of the respondent and without any objection on his part she cannot subsequently proceed with his cross-objections. 5 Pat. L.J. 328; 8 O. L. J. 358 foll. (*Daniels and Lyle, A. J. C.*) QARA MAHOMED SHABAN *v.* BAZAR ARA BEGUM. **70 I. C. 79 : 25 O. C. 280 . 1923 Oudh 108.**

C. P. CODE (V OF 1908) O. 41, R. 22—Limitation.

——— **O. 41, Rr. 22 (4) and O. 41, R. 10**—*Dismissal of appeal—Failure to furnish security—Cross objections.*

Rejection of appeal for failure to furnish security for costs is equivalent to dismissal for default and the respondent can have his cross objections heard. (*Chapman and Atkinson, JJ.*) SHEO BAKSH SINGH *v.* THAKUR DAYAL. **50 I. C. 729 : 4 Pat. L. J. 164.**

Letters Patent Appeal.

——— **O. 41, R. 22**—*Letters Patent Appeal—Provisions of Code if apply.*

The provisions of the Code of Civil Procedure relating to cross objections do not apply to Letters Patent Appeals. (*Mears C. J. and Banerjee, J.*) PURNA KUAR *v.* MANGAT RAI. **1922 All. 55.**

——— **O. 41, R. 22**—*Letters Patent Appeal—Memorandum of cross objections cannot be filed.*

No cross-objections can be filed on a Letters Patent Appeal as O. 41, R 22 does not apply to it 21 A. 297 foll (*Mears C. J. and Banerjee, J.*) MANGAT RAI *v.* MUSST. PURNA KUAR. **L. R. 3 A. 198.**

——— **O. 41, R 22**—*Letters Patent Appeal—Rule does not apply.*

O. 41, R. 22 of the Code does not apply to a Letters Patent Appeal and a memorandum of cross-objections filed therein cannot be entertained. (*Mookerjee, A. C. J. and Fletcher, J.*) BROJENDRA CHANDRA SARMA *v.* PROSANNA CUMAR DHAR. **32 C. L. J. 48 : 53 I. C. 589 : 24 C. W. N. 1016.**

Limitation.

——— **O. 41, R. 22**—*Limitation—Appeal barred by limitation—Effect of.*

Where it is found that the appeal itself was preferred out of time and therefore barred, the memorandum of objections could not be heard. (*Shadi Lal, C. J. and Fforde, J.*) JAI GOPAL SINGH *v.* MUNA LAL. **4 Lah 140 : 5 Lah. L. J. 345 : 73 I. C. 655 : 1924 Lah. 43.**

——— **O. 41, R. 22**—*Limitation—Time expired appeal can be treated as memorandum of objections.* (*Martineau, J.*) BAWA SINGH *v.* THAKUR SINGH. **4 U. P. L. R. Lah. 80 . 67 I. C. 478 : 1922 Lah. 423.**

——— **O. 41, R. 22**—*Limitation—Time of one month, had to be calculated—Principle.*

The memorandum of objections was presented on the 16th of March, the plaintiff having been served with notice on the 13th February. The principle applicable to the calculation of the time, one month allowed by O. 41, R. 22, is that it shall be taken to extend up to and including the day before the corresponding date of the next month and there is no authority for any special rule as regards February—March,

C. P. CODE (V OF 1908) O. 41, R. 22—Limitation.

for these reasons the memorandum was considered to be presented out of time although 15th March was a Sunday. (*Oldfield and Tyabji, JJ.*) CHENNAMA SHETTI *v.* KRISHNAYYA SHETTI.
30 I. C. 832 (1) : 29 M. L. J. 182.

——0. 41, R. 22—*Limitation—Presented out of time—Excusing delay.*

It is clear from the words of O. 41, R. 22 C. P. Code that a cross-objection can be admitted after the expiry of 30 days from service of notice of the appeal on the respondent, so that even if one be put in during the argument of the appeal, it might be admitted in a proper case. (*Hallifax, A. J. C.*) KUKSA *v.* DAJIBA BHAN.
5 N L. J. 192 : 66 I. C. 217 : 1922 Nag. 213.

——0. 41, R. 22—*Limitation—Advancement of hearing.*

An Appellate Court cannot advance the hearing of an appeal and hear it within one month of the date of issue of notice on the respondent thereby depriving him of the right of filing cross-objections. (*Atkinson, J.*) SHANKERLAL *v.* BANKEY BEHARI SINGH. 1 Pat. L. W. 680 : 38 I. C. 522 : 1917 Pat. 103.

——0. 41, R. 22—*Limitation—Memo of cross-objections—Within what time to be filed.*

Under O. 41, R. 22 cross-objections should be filed within one month from date of service of notice of appeal or within such further time as the Appellate Court may allow. But it is not necessary that further time must be granted before his objections are actually filed. (*Fox, C. J. and Ormond, J.*) VETTATUPPA PILLAY *v.* MAUNG PO HMYIN. 39 I. C. 125.

New Grounds.

——0. 41. R. 22—*New grounds—Points not raised in objections*

The respondent cannot raise at the hearing of the appeal grounds not set forth in objections. (*Scott, C. J and Chandavarkar, J.*) NADIRSHAW HORMASJI *v.* PIROJSAW RATANJI RATNAGAR.
19 I. C. 98 : 15 Bom. L. R. 130.

——0. 41. R 22—*New Grounds*—Exparte *decree—Appeal from decree—Right to prefer—Conditions.*

A defendant who has been placed *ex parte* can impugn the decree in appeal on the ground that he was wrongly made *exparte* provided he has not moved the trial Court under O. 9, R. 13 C. P. C. The fact that before the decree was passed he took futile proceedings purporting to be under O. 9, R. 13 on the erroneous impression that a decree had been passed, does not take away the right of appeal. He can only file a cross objection in place of appeal. (*Oldfield and Devadoss, JJ.*) BAVA LEVVAI SAHIB *v.* AMMEENAMMAL.
45 M. L. J. 805 : 1924 Mad. 107.

Revision Petition.

——0. 41, R. 22—*Revision petition.*

The respondents, in a revision petition have no right to put in cross-objection. (*Scott Smith, J.*) GURDITTA *v.* DHERU. 150 P. W. R. 1912 : 14 I. C. 562 : 160 P. L. R. 1912.

C. P. CODE (V OF 1908) O. 41, R. 22—Right to support decree.

Right to support decree.

——0. 41, R. 22—*Right to support decree—New ground.*

Under the rule, the respondent can support a decree on any of the grounds decided against him or take cross objections. He cannot take an entirely new ground which was not decided against him and which was not in issue in the lower Court and not made the subject of adjudication. (*Woodroffe and Walmsley, JJ.*) PRANKRISHNADAS *v.* PROTAP CHANDRA DALAL. 38 I. C. 536 : 21 C. W. N. 423.

——0. 41, R. 22—*Right to support decree—Without filing cross-objections.*

In an appeal a respondent can without filing a cross- objection support the judgment and decree of the Lower Court by traversing any ground which that Court may have found against him. 17 I. A. 57 ; 17 C. 809 and 13 B. 75 Ref. But the Court will not of itself raise a case which he does not choose to raise himself. (*Holmwood and Chapman, JJ.*) NAGENDRA NATH GHOSE *v.* RAM BHAROSA HALNAI. 24 I. C. 68.

——0. 41, R. 22—*Right to support decree.*

Though a respondent has not filed cross-objections in an appeal still he is entitled to urge that the decree of the Lower Court errs in favour of the appellant and that it should not be disturbed. Only he cannot claim that the decree should be altered in his favour. (*Chevis and Jones, JJ.*) MAHOMED ALI *v.* PERMANANDA.
48 P. W. R. 1918 : 45 I. C. 232 : 125 P. L. R. 1918.

——0. 41, R. 22—*Right to support decree—Cross objection not filed—Effect.*

Respondents are entitled to maintain the decree in their favour upon any ground decided against them without filing any cross-objections under O. 41, R, 22, C.P.C. (*Shah Din, J.*) PARSANI *v.* MANGAL SINGH. 103 P. L. R. 1917 : 40 I. C. 237 : 85 P. W. R. 1917.

——0. 41, R. 22—*Right to support decree—On new grounds.*

A party is allowed to set up a new argument even on appeal enabling heni to prevent the appellants from getting a decree reversed. (*Chevis and Le Rossignol, JJ.*) DEVA SINGH *v.* LEHNA SINGH. 8 P. W. R. 1916 : 44 P. L. R. 1916 : 31 I. C. 740 : 45 P. R. 1916.

——0. 41, R. 22—*Right to support decree—Punjab Courts Act (XVIII of 1884), S. 30 (1) (a)—Finding—Finding reversed by Appellate Court and decree passed without considering defendant's objection to other findings—Revision, if lies—Material irregularity.*

Where a suit is dismissed on one finding which is reversed in appeal and decree passed without considering the defendants' objections to other findings the Appellate Court acts with material irregularity and its decree is open to revision. (*Chevis, J.*) CHUHAR *v.* BHAG MAL.
144 P. W. R. 1911 : 11 I. C. 41 : 202 P. L. R. 1911.

C. P. CODE (V OF 1908) O. 41, R. 22—Right to support decree.

———O. 41, R. 22—*Right to support decree—Failure to file memo. of cross-objections—Effect.*

Under O. 41, R. 22 a respondent may support a decree in appeal on a ground decided against him in the Court below without filing cross objections. (*Stuart, J. C.*) RAM SAHU *v.* GOURI SHANKAR.
39 I. C. 153 : 4 O. L. J. 101.

———O. 41, R. 22—*Right to support decree—Other grounds.*

Though a person who has not appealed from a decree cannot question its correctness he can support the decree on reasons not given by the lower Court under O. 41, R. 22 (2) C.P.C. (*Miller, C.J. and Coutts, J.*) RAJ KUMAR JAGANNATHA PRASAD SINGH *v.* MIRZA EKBAL BAHADUR.
5 Pat. L. J. 239 : 55 I. C. 214 : 1 Pat. L. T. 65.

———O. 41, R. 22—*Right to support decree of lower Court.*

A respondent in an appeal can support the decree on any of the grounds decided against him in the lower court without preferring a cross appeal. (*Miller, C. J. and Adami, J.*) RAGHUNATH KURMI *v.* DEO NARAIN RAI. 51 I. C. 981 : 1919 Pat. 393.

———O. 41, R. 22—*Right to support decree—Powers of Appellate Court.*

O.41, R. 22, C.P.C. allows a respondent to support a decree on any of the grounds decided against him by the trying Court. He may not file cross-objection or cross appeal. (*Hartnoll, O.C.J. and Ormond, J.*) U. L. GALE *v.* MY PO KIN.
12 I. C. 20 : 4 Bur. L. T. 209.

Right to support Judgment.

———O. 41, R. 22—*Right to support judgment—Rival suits—Appeal.*

If an appeal from one of two rival suits dismissed by one judgment is preferred, it opens the whole judgment and the non-appealing plff. can support the judgment even on points decided against him. (*Stuart, A. J. C.*) MOHAMMAD HABIBULLAH *v.* WAZIR HASAN KHAN, 22 O. C. 29 : 50 I. C. 869 : 1 U. P. L. R. (J. C.) 38.

Scope of.

———O. 41, Rr. 22 and 33—*Scope—Powers of Appellate Court.*

R. 33 is not controlled by R. 22. (*Hudа, J.*) JOGENDRA KISHORE *v.* NASIMUDDIN SARKAR.
62 I. C. 623.

———O. 41, Rr. 22 and 33—*Scope of—Absence of cross-objections—Power of Appellate Court.*

A trial court's decision in the appellant's favour does not in the absence of cross objections by the respondent justify the lower appellate Court to interfere with the trial court's decree under O.41, R.33, C.P.C. (24 I. C. 208, 32 I. C. 494 Fol.) (*Sanderson, C. J. and Chatterjee, J.*) GOPAL CHANDRA DAS *v.* NADIR CHANDRA DAS.
46 I. C. 142 : 22 C. W. N. 526.

———O. 41, Rr. 22 and 23—*Scope of—Persons not parties to appeal.*

No cross objection under O. 41, R. 22, C.P.C. could be entertained against a person not a party to the appeal and the lower appellate Court was not justified in passing a decree against him. 39 I. C. 662 Ref. (*Abdul Raoof, J.*) ILAHI BAKSH *v.* JAVINDRA MAL. 54 I. C. 971.

C. P. CODE (V OF 1908) O. 41, R. 22—Scope of

———O. 41, R. 22—*Scope of—Cross-objection to obtain a distinct relief indirectly.*

A cross-objection in appeal, that the decree should have been in the form set forth in Appendix D of Schedule I., C. P. C., No. 6 the object of which is not so much to have the decree put in proper form, as to obtain a right to claim interest not merely up to date of the judgment of the Lower Court but up to date of realization, could not be allowed as it is in reality a relief claimed in an indirect way, which could have been granted by the Lower Court if the respondent, had applied for amendment of the decree or by the Court of appeal if there had been in the appeal a claim in respect of additional interest. (*Rattigan and Le Rossignol, JJ.*) MUHAMMAD ISMAIL *v.* GAURI PRASHAD. 34 I. C. 916 : 24 P. R. 1916.

———O. 41, R. 22 (4)—*Scope of—Abatement of appeal.*

Under R. 22 (4), a person filing a memorandum of objections has a right to have his case heard and determined, even where after filing the memorandum, the appeal is withdrawn or dismissed for default ; but he has no such right when the appeal abates. (*Wallis, C. J. and Napier, J.*) MURUGAPPA CHETTIAR *v.* PONNUSWAMI PILLAI.
44 Mad. 828 : 41 M. L. J. 304 : 13 L. W. 705 : 62 I. C. 757 : (1921) M. W. N. 438.

———O. 41, Rr. 22 and 33—*Scope of—Memo. of objections as to parts of the decree not affected—Appeal by Dy. Collector with regard to the valuation of some of the plots acquired—Memo. as to some of the plots acquired—Memo. of objections regarding other plots.*

When an appeal is preferred by the Govt, to the High Court as regards the valuation of some of the plots in a land acquisition case, it is open the respdt. to prefer a memo. of objections relating not merely to the plots covered by the appeal but also to the other plots, the subject of the same petition though not covered by the appeal. A memo of objections may be filed against the decree as a whole or against any part of it though it may not be the subject matter of the appeal. (*Abdur Rahim and Seshagiri Iyer, JJ.*) THE DEPUTY COLLECTOR, MADURA DIVISION *v.* MUTHIRALA MUDALI. 35 M. L. J. 83 : 24 M. L. T. 33 : (1918) M. W. N. 458 : 48 I. C. 1003 : 8 L. W. 271.

———O. 41, R. 22 (3) and (4)—*Scope of—Parties.*

Quaere. Whether under O. 41, R. 22 (3) and (4) an Appellate Court can make a deft., exonerated by the court of first instance a party to the memo. of objections when not made a party to the appeal itself (*Sadasiva Iyer, J.*) REBALLA BABU REDDI *v.* DEDLA RAMI REDDI. 31 I. C. 978.

———O. 41, R. 22—*Scope of.*

Where a decree is given for a portion of the amount claimed and an appeal is filed claiming more, it is not open to the respdt. who has not

C. P. CODE (V OF 1908) O. 41, R. 22—Scope of.

appealed to urge any objection with respect to the portion not appealed against. (*Wallis, C. J. and Seshagiri Iyer, J.*) CHIDAMBARA MUDALIAR *v.* KRISHNASWAMI PILLAI **39 Mad. 365 : 28 M. L. J. 285 : 28 I. C. 221 : 2 L. W. 241.**

——O. 41, R. 22—*Scope of—Common right—Memo. of objection—Damages—Claimed by only one given to all.*

Where in a memo. of objections put in by respdts. (Plffs.) in an appeal only one plff. claimed damages for an infringement by the defts. of a right common to all the plffs., damages could be awarded to all the plffs. as the basis of the claim was common to them all. (*Sundara Iyer and Ayling, JJ.*) SOMA BALLA CHARIAR *v.* THIRUVENKATA CHARIAR. **15 I. C. 409.**

——O. 41, R. 22—*Scope of—Absence of Memo. of objections—Findings favourable to applicants—Power to disturb.*

When there are no cross-objections an Appellate Court cannot disturb so much of the original decree as is favourable to the appellant so as to place him in a worse position than before. (*Lindsay, J.*) RAM MANOHAR PRASAD *v.* MAHOMED MAHMUD ALAM. **57 I. C. 555: 23 O. C. 110.**

——O. 41, R. 22—*Scope—Cross objection.*

The object of R. 22 of O. 41, Civil Procedure Code is to allow a respdt. content with a decree in his favour an opportunity of contesting findings against him in case his opponent appeals. (*Miller. C. J. and Coutts, J.*) OFFICIAL TRUSTEE OF BENGAL *v.* CHARLES JOSEPH SMITH. **5 P. L. J. 328: 1920 Pat. 161 : 56 I. C. 262 : 1 P. L. T. 434.**

——O. 41, R. 22—*Scope of—Parties to appeal—Deft. not party to appeal.*

Where one of two defts. appeals the respdt. is not entitled to raise a cross-objection which is directed against the deft. who is not a party to the appeal. (*Chamier, C. J. and Jwala Prasad, J.*) BAKSHI BINDESHWARI PRASAD *v.* DHENENDRA DAS. **39 I. C. 662 : 2 P. L. J. 162.**

Withdrawal of Appeal.

——O. 41, R. 22—*Withdrawal of appeal——Right to file cross objections.*

If an appeal is no longer pending having already been dismissed cross objections cannot be filed as the pendency of an appeal is a condition precedent to the filing of cross objections. (*Banerji, J.*) HEMRAJ *v.* BIBI KUAR. **39 I. C. 947.**

——O. 41, R. 23.

Appeal.
Burden of proof.
Costs.
Defective trial.
Effect of order.
Exclusion of evidence.
Finality of order.
Grounds for remand.
Inadmissible evidence.
Inherent Power.
New plea.
Powers of Appellate Court.

C. P. CODE (V OF 1908) O. 41, R. 23—Appeal.

Preliminary point.
Question of law.
Transfer of case.

See also C. P. CODE, S. 107.

Appeal.

——O. 41, R. 23—*Appeal—Remand order made under inherent power—C. P. C., O. 43, Sub-R. 1 (u).*

In a suit for partition, the defendants resisted the claim of the plaintiffs in the Primary Court on the allegation that the land had been previously partitioned by metes and bounds and that they and their predecessors had long been in separation. The trial Court held in favour of the defendants and dismissed the suit. Upon appeal, the plaintiffs asked for permission to adduce in evidence any entry in the record of rights which had been finally published after the date of the decree of the Trial Court. The lower Appellate Court acceded to the request of the plaintiff and set aside the decree of the Court of first instance and directed a re-trial of the suit with reference to the entry in the record of rights and such other evidence as might be adduced by both the litigants. Against this order for re-trial the defendants preferred an appeal to the High Court. *Held* (1) that the order of remand was made not under the provisions of O. 41, R 23. C. P. C. but under the inherent powers of the Court (2) that an appeal lay against the order of the lower Appellate Court in as much as it amounted to a decree irrespective of the provisions of O. 43, R. 1 (u) C. P. C. (3) that the admission of the record of rights was justified under the circumstances of the case. (*Mookerjee and Cholzner, JJ.*) BHAIROB CHANDRA DUTTA *v.* KALI KUMAR DUTTA. **37 C. L. J, 491: 71 I. C. 453: 74 I. C. 1038: 1923 Cal. 606.**

——O. 41, R. 23 and O. 43, R. 1 (4)—*Appeal—Remand—Powers of appellate Court—Inherent power.*

In a suit for dissolution of partnership and rendition of accounts, the trial court appointed a Commissioner to examine the account books and then passed a preliminary decree based upon the Commissioner's report. On appeal the District Judge was of opinion that the trial of the suit in the first court had not been a satisfactory one and that the pleadings of both parties ought to have been required to be amended. He set aside the whole proceedings of the trial Court and remanded the case for a new trial. The order of remand did not show under what provision of the Code it professed to have been made. The defendants having appealed from the order of remand, the question arose whether an appeal lay. *Held* without expressly deciding the question whether the District Court had an inherent right of remand and whether an appeal lay from a remand made in the exercise of such a right, that having regard to the fact that the policy of the Allahabad High Court had always been to allow as wide a meaning as was reasonably possible to O. 41, R. 23. C. P. C., and that the District Judge presumably conceived himself to be acting simply under those provisions and did not express himself as

C. P. CODE (V OF 1908) O. 41, R. 23—Appeal.

acting in the exercise of any inherent jurisdiction, the appeal lay. (*Piggott and Walsh, JJ.*) FIRM OF GOKUL PRASAD HAR PRASAD *v.* RAM KUMAR. 44 A. 176 : 19 A. L. J. 971 : 64 I C. 878 . 1922 All. 254.

——— O. 41, R. 23 and O. 43, R. 1 (A)—*Appeal Order of remand—Provision of law not specified.*

Where an appellate court passes an order of remand without specifying the provision of law under which the order is made, it must be presumed to be made under O. 41, R 23, C. P. Code and the order is appealable. 19 A. L. J. 971 foll (*Walsh and Ryves, JJ.*) BIBI KULSOOM-UN-NISSA *v.* RAM PRASAD. 20 A. L. J. 321: L. R. 3 A 394 : 44 A. 492 : 67 I. C. 713 : 4 U. P. L. R. (A) 168 : 1922 A. 226.

———O. 41, R. 23 and O. 43, R. 1 Cl.(u)—*Appeal—Small cause nature—Order of remand in appeal—Whether appeal lies.*

No appeal lies against an order of remand passed by the first appellate court in a suit of a nature cognizable by a Court of Small Causes. (*Rafiq, J.*) SARUP *v.* KUNDAR. 36 I. C. 396.

———O. 41, R. 23—*Appeal—Remand under Agra Tenancy Act.*

Under the Agra Tenancy Act an order of remand made by the Dt. Judge under O. 41, R. 23 is not appealable (*Piggott and Walsh, JJ.*) HIRA LAL *v.* MAHARAJ SINGH. 35 I. C. 105.

———O. 41, R. 23—*Appeal—Remand under Agra Ten. Act.* S. 193.

An order of remand made by Dt. Judge in an appeal from a suit brought under S. 193 of the Agra Ten. Act is not appealable to the High Court. 28 A 283 Foll. (*Karamat Hussain and Tudball, JJ.*) RAGHUNATH PRASAD *v.* JAGANNATH DAS. 14 I. C. 176.

———O. 41, R. 23—*Appeal—Decision not on preliminary point—Further investigation.*

An order made by the lower Appellate Court purporting to be and being in form and substance an order under O. 41, R. 23 is appealable though the Court ought not to have remanded the case under the provisions of that rule. Where the Lower Appellate Court thinks that the investigation is wrong and that there should be further investigation or that it is necessary to take additional evidence in order to enable it to pronounce judgment it might direct such investigation or take such additional evidence, retaining the appeals on its file but should not make an order under R. 23. (*Chatterjee and Panton, JJ.*) PROSANNO CHATTOPADHYA *v.* BAIDYA NATH MISTRY. 24 C. W. N. 708 : 56 I. C. 516 : 31 C. L. J. 360.

———O. 41, R. 23—*Appeal—Custom—Punjab Courts Act*, S. 4.

There can be no appeal from an order of remand under O. 41, R. 23 of the Code of Civil Procedure where the question involved is one of custom. As the Appellant would have a right of second appeal from the decree of the Appellate Court only if he were to obtain a certificate under sub-S. 3 of S. 40 of the Punjab Courts Act, it could not be said definitely that an appeal would lie from the decree of the appellate Court. The question of custom can be agitated in second appeal from the final decree if the certificate is obtained. (*Scott Smith and Forde, JJ.*) MT. CHANDO *v.* MIRAN BAKHSH. 5 Lah. L. J. 392 : 73 I. C. 650 : 1923 Lah. 535.

———O. 41, R 23, S. 151—*Appeal—Amendment of plaint.*

Where a suit is remanded for rehearing after amending the plaint, the order is one made under S. 151 and not under O.41, R. 23 and hence there is no right of appeal. The remand is not on a preliminary point and as O. 41, R. 23 will not apply, the court has power under S. 151 to remand. (*Martineau, J.*) MAHOMED SHAH *v.* TALAB HUSSAIN SHAH. 73 I. C. 915 : 1924 Lah. 245

———O. 41, R. 23—*Appeal—Order under.*

The Legislature intended to put orders of remand on exactly the same footing as appellate decree and to make them appealable on precisely the same grounds. If a mistake in deciding the question of custom can be corrected in an appeal from an appellate decree it is reasonable to hold that it can be and ought to be corrected in an appeal from an order of remand also, 20 I. C. 788 Approved.

Per *Martineau, J.*—The competency of a second appeal is not dependent on the question whether the decision of the lower Appellate Court is based on a finding of fact or on a finding of law for even when the decision is based on a finding of fact a second appeal will be on one of the grounds mentioned in S. 41 (1) (b) and (c) of the Punjab Courts Act. Whether or not a second appeal lies depends on the nature and value of the suit a second appeal not being barred by S. 42 (2) only in a suit of the nature cognizable by a Court of Small Causes when the amount or value of the subject matter of the suit does not exceed Rs. 500. S. 42 (1) merely restricts the grounds on which a second appeal can be entertained to those mentioned in S. 41. (*Shadi Lal, C.J Abdul Raoof and Martineau, JJ.*) MT. UMRI *v.* SHAH MAHOMED. 4 L. L. J. 359 : 3 L. 218 : 63 I. C. 849 : 1922 Lah. 178.

———O. 41, R. 23 and O. 43, R. 1 (u)—*Appeal—Remand.*

An order of an appellate court setting aside the order of the Lower Court rejecting a plaint and directing to proceed with the trial of the suit on the merits is not an order under O. 41, R. 23 and so is not appealable under O. 43. R. 1 (u). (*Chevis and Shadi Lal, JJ.*) TIRATH SINGH *v.* RAMCHAND. 133 P. L. R. 1915 : 26 I. C, 519 : 85 P. W. R. 1915.

———O. 41, R. 23—*Appeal—Revision.*

An order of remand under O. 41 R. 23 which is not appealable is not open to revision 50 P. R. 1911 ; 101 P. R. 1910 : 9 P. R. 1894. (*Robertson, J.*) RAMJI DAS *v.* SANKAR DAS. 10 P. W. R. 1912 : 13 I. C. 855 : 140 P. L.R. 1912.

———O. 41, R. 23—*Appeal—Remand of case for disposal after the Decision of the main point.*

C. P. CODE (V OF 1908) O. 41, R. 23—Appeal.

Where the Appellate Court decides the main point in a case and remands the case for disposal of the remaining issues, the decision is not one on a preliminary point and thus the order is not appealable. 44 Cal. 929, Foll. (*Abdur Rahim and Oldfield, JJ.*) PONANGI VENKATA SUBBARAIDU *v.* ZEMINDAR OF NUZVID. 60 I.C. 609 : 12 L. W. 667.

——— O. 41, R. 23 and O. 43, R. 1—*Appeal—Remand order.*

When a remand order is not passed under O. 41, R.23, no appeal is allowed against it under O. 43, R. 1. *Quaere*: Whether an appellate court can set aside an *ex parte* decree aud remand the case to the original court, if the deft. could not get an opportunity to adduce his evidence or whether the appellate court should direct the Lower Court to take further evidence and send the case to it for its decision on the merits. (*Abdur Rahim and Sundara Aiyar, JJ.*) VIJAYARAGHAVA REDDI *v.* KOMARAPPA REDDI. (1912) M. W. N. 410 : 11 M. L. T. 199 : 15 I. C. 367 : 22 M. L. J. 409.

——— O, 41. R. 23 and O. 43. R. 1 (u) S. 105 (2)—*Appeal—Remand.*

An appeal against a remand order can be filed and heard even if the order is already carried out by the first court. (*Lindsey, A. J. C.*) HUB LAL *v.* GAGNA. 15 I. C. 191 : 15 O. C. 43.

——— O. 41. R. 23 and O. 43. 1 (u)—*Appeal—Order of remand—Preliminary point.*

O. 41, R. 23, C. P, C. does not contemplate a case decided upon the whole evidence and upon all the issues which were raised. If, in such a case an Appellate Court thinks that the burden of proof has been cast on the wrong party it can remand the case for re-trial in the light of the evidence already taken and authorise the taking of fresh evidence. The order of remand is not appealable.(*Miller. C. J. and Coulls, J.*) BRIJ MOHAN PATHAK *v.* DEOBHOJAN PATHAK. 55 I. C. 484 : 1 P. L. T. 509 :

Burden of Proof.

——— O. 41, R. 23—*Burden of proof—Error as to—Preliminary point—What is.*

A wrong view of the burden of proof is no sufficient ground for an order of remand unless the Appellate Court finds the decision too was wrong. (*Ratique and Piggott, JJ.*) HABIBULLAH KHAN *v.* LALITA PRASAD. 34 All. 612 : 17 I. C. 94 : 10 A. L. J. 190.

——— O. 41, R. 23—*Burden of proof—Error as to.*

If a case is decided on a wrong view of S. 107 and 108 Evidence Act it should be remanded to the Court, as a case of wrong disposal on a preliminary point. (*Macleod, C.J. and Heaton, J*). JESHANKAR REVASHANKAR *v.* BAI DEWALI. 57 I. C. 525 : 22 Bom.L. R. 771.

——— O. 41, R. 23—*Burden of proof—Error as to.*

A Shah Jog hundi is a negotiable instrument presumed to be drawn for due consideration under S. 118 (*a*) of the Neg. Ins. Act. When the question of the consideration for the Hundi is

C. P. CODE (V OF 1908) O. 41, R. 23—Defective Trial.

raised in a suit and the first appellate Court compels the wrong party to prove it, the second appellate Court can rectify the mistake, disregarding the first decision. (*Shadi Lal, and Wilberforce, JJ.*) MADHORAM *v.* NANDU MAL. 58 I. C. 982 : 1 Lah. 429.

——— O. 41, R. 23—*Burden of proof—Error as to.*

Where an appeal was decided on a wrong view as to the burden of proof, a remand in second appeal, was ordered. (*Coutts Trotter and Seshagiri Aiyar, JJ.*) RAM RAO *v.* KUTTIYA GOUNDEN. 40 Mad. 654: 3 L.W. 331 : 19 M. L. T. 275: 34 I.C. 294: 30 M. L.J. 514.

Costs.

——— O. 41, R. 23—*Costs—Remand—Indulgence.*

Where an appeal is remanded to the Lower court because the appellant did not set out his case properly in the first Court and support it by proper evidence the respdt. must be paid his costs of the appeal. (*Spencer and Coutts Trotter, JJ.*) LAKSHUMANAN CHETTY *v.* MUTHIAH CHETTY. 18 M. L. T. 247 : 30 I. C. 785 : 2 L. W. 755.

Defective Trial.

——— O. 41. R. 23—*Defective trial—Remand.*

Where a Court refused to grant time for the production of certified copies of certain material documents and disposed of the suit on the materials on record the appellate Court remanded the suit for trial after taking the evidence adduced (*Banerjee and Ryves, JJ.*) MUHAMMAD ABDUL AZIZ *v.* MUHAMMAD ABDUL JALIL. 43 I. C. 57.

——— O. 41, Br. 23 and 25—*Defective trial—Pleadings—Evidence—Remand.*

Where the appellate Court finds that the plff. is prejudiced by defective pleadings and a finding on evidence which was insufficient and which he had not the opportunity of meeting, the proper course would be to remit an issue on the point. (*Pigott, J.*) AHMAD BAKHSH *v.* SAIRA BIBI. 15 I. C. 3.

——— O. 41, R. 23—*Defective trial—Remand—Suit dismissed on a preliminary point.*

When the lower Court has disposed of a case on a premliminary point, the Appellate Court will not set aside the decree and remand the case without evidence or without any statement based upon affidavit to induce the Court to hold that evidence is forthcoming which ought to have been produced in the Lower court and which would have been produced but for some grave error on the part of the pleader. (*Scott, C. J. and Batchelor, J.*) DATTAJI RAO *v.* NILKANTH RAO. 39 Bom. 352: 28 I. C. 485 : 17 Bom L. R. 187.

——— O. 41, R. 23—*Defective trial—Remand.*

Where in a suit for possession by an auction purchaser in execution of a mortgage decree, the defts. pleaded tenancy rights as a bar to the suit, the court is bound to adjudicate upon the plea. If not, the appellate court will remand. (*Walmsley and Greaves, JJ.*) ICHAN CHANDRA BANERJEE *v.* HRISHIKESH BISWAS. 42 I. C. 550.

C. P. CODE (V OF 1908), O. 41, R. 23—Defective trial.

——0. 41, R. 23—*Defective trial—Powers of Appellate Court.*

The powers of appellate courts under the new Code are much wider than under the old Code of 1882 in respect of remand. Where the Appellate Court finds there had been no proper trial in the court below and important questions had been disallowed and opportunity was not given to the parties to adduce evidence fully the appellate Court can remand the case for retrial though the lower Court had not disposed of the case on a preliminary point. (*Mookerjee and Carnduff, JJ.*) GORA CHAND *v.* BASANTA KUMAR.
12 I. C. 684 : 15 C. L. J. 258.

——0. 41, Rr. 23 and 25—*Defective trial—Remand—Issue not tried by lower Court.*

Where a case is badly conducted in the lower Court and an important point has not been put in issue, an appellate Court can raise the issue and remand the case for retrial. (*Rattigan C. J. and Scott Smith, J.*) HAR KISHEN SINGH *v.* LAHORE BANK, LTD. 51 I. C. 712 : 64 P. R 1919.

——0. 41, Rr. 23 and 25—*Defective trial—Remand.*

Where a lower Appellate Court thinks the first Court should have framed an issue and given a decision thereon, it should remand the case. (*Rattigan, J.*) KARIMKHAN *v.* SECRETARY OF STATE. 223 P. L. R. 1911 : 12 I. C. 53 : 121 P. W. R. 1911.

——0. 41, R. 23—*Defective trial—Decision on all issues by trial court—Appellate Court differing in its conclusion—Legality of remand.*

When a suit is tried by the first court and is dismissed on the merits and the appellate court comes to a different conclusion on the main issue in the case but nevertheless remands the case on the ground that evidence was not properly directed, the order of the appellate court recording its finding on the issue and then directing a remand is materially irregular and should be set aside in revision by the High Court. (*Devadoss, J.*) PERICHERLA SURYANARAYANA RAJU *v.* GANAPATHI RAJU.
30 M. L T. 314 (H. C.) : 16 L. W. 593 : 70 I. C. 655 : 1923 M. 113.

——0. 41, Rr. 23 and 25—*Defective trial—Remand— Preliminary point— Evidence not placed on record.*

An order of remand may, in some cases, be made by an Appellate Court, even where the disposal has not been on a point which can be strictly called a preliminary point. 9 M. L. T. 373 Foll. In an inquiry as to whether a dispute between the parties was settled out of Court, the Munsif looked at a receipt, and without exhibiting it in evidence or taking other evidence, decided that there had been a settlement out of Court. *Held* that the Dt, Judge had power to order a remand for re hearing. (*Miller and Sadasiva Iyer, JJ.*) VEMULA JAMBALAYA *v.* ISKALA RAJAMMA.
36 Mad. 492 : 24 M. L. J. 512 : 15 I C. 859 : (1912) M.W. N. 1000

——0. 41, Rr. 23 and 25—*Defective trial—Procedure.*

C. P. CODE (V OF 1908), O. 41, R. 23—Effect of order.

When a Court of first instance fails to frame and determine a particular issue the case should be sent below for a finding on that issue and the decree should not be set aside entirely and the case remanded for a retrial. (*Atkinson, J.*) BALKU BHAGAT *v.* AGHORI MANDAL. 38 I. C. 641.

Effect of order.

——0. 41, Rr. 23 and 25—*Effect of order—Interference on appeal with that order—Effect in proceedings in the interim.*

Per *Walsh, J.*—Whether upon a remand order being wrongly made, the decree and all the proceedings taken under that order, are null and void, depends on the circumstances in each case and on the nature of the invalidity of the remand order. If the remand order is finally set aside and is such an order as ought not to have been passed at all in any case it may be that the proceedings in the court below fall with it. It would be turning the law into absurdity, and would amount to a denial of justice if a proper trial which has taken place under a remand order made by the appellate Court and in obedience to such remand order were held to be invalid where as the result of the High Court's own decision that remand order turned out to have been perfectly justified. (*Piggott and Walsh, JJ.*) RAJKALI *v.* GOPI NATH NAIK. 44 A. 211 : 20 A. L. J. 44 : 66 I. C. 317 : 1922 A 35.

——0. 41, R. 23—*Effect of order—Second appeal—Remand by single Judge—Questioning corrections of the order.*

If a party in Second appeal accepts the order of remand by a single Judge, he cannot impeach it at a later stage. But if subsequently the appeal comes up before another Judge or a Bench differently constituted, the Bench is not bound by the order remitting issues but may consider the propriety of the issues and if of different opinion it may ignore those findings. (*Piggott and Walsh, JJ.*) MASIHUNNISSA *v.* CANIZ SUGHRA.
43 All 377 : 19 A. L. J. 139 : 60 I. C. 975 : 3 U. P. L. R. All. 30.

——0. 41, R. 23—*Effect of order—New plea before the lower Court.*

Tho mortgagees sued on a mortgage but their suit was dismissed on the ground that there was no consideration for the mortgage. On appeal to the High Court the consideration was found to be proved but the case was remanded for the decision on the merits. The defts. did not support the decision of the Lower Court on any other ground before the High Court, but raised the question of invalid attestation under S. 59 of the T. P. Act after remand before the Lower Court. *Held*, that the Lower Court could not frame a fresh preliminary issue where the case is remanded, as the effect of the remand order was to send back the case to the first court to try the remaining issues. The technical plea of attestation ought to be treated as raised for the first time in appeal. The defendants having failed to raise the objection before the High Court, precluded themselves from raising it at the subsequent stage of the same litigation either as *res judicata* or on the general discretion of the Appellate Court in dealing with substantially new pleading taken

C. P. CODE (V OF 1908), O. 41, R. 23—Effect of order.

up in appeal for the first time and incapable of disposal without fresh evidence. (*Piggott and Lindsay, JJ.*) CHUNILAL *v.* HABIB ALI.
35 I. C. 571.

——— O. 41, R. 23—*Effect of order—Whole case open—Second finding different from prior one.*

A suit by plaintiff to recover possession of certain lands on the strength of a Patni Settlement in his favour was dismissed on the ground that the Patni was a *benami* transaction. But the Appellate Court found that the Patni was not Benami. Defendant appealed to High Court which remanded the case for a finding whether the Patni fell within the class of tenures described in S. 71 (*b*) of the Assam Land and Revenue Regulation. The Lower Appellate Court found that the Patni was not *bona fide* and therefore did not come under the foregoing section. The plaintiff objected that that Court, having already found that the Patni was not *benami* had no power to arrive at a contrary finding. *Held*, that the finding was justified, as in arriving at its previous finding, the Court apparently had not considered all the facts. (*Chatterjee and Panton, JJ.*) JITENDRA KUMAR PAL CHOUDHURY *v.* MUKSHODA CHARAN DAS. 56 I. C. 1001.

——— O. 41, R. 23—*Effect of order—Whole case if reopened—High Court's powers of remand.*

A High Court in the exercise of its power of supervision under the Charter can assume in certain cases, an authority to limit the scope of certain appeals remanded to the lower Courts without keeping them in its own file. But in such a case it is absolutely essential that the High Court should lay down clearly that it did intend to limit the scope of the appeal to certain specified questions. In the absence of any limitation, the whole appeal on remand becomes open for decision by the lower Appellate Court. A remand made by an Appellate Court without retaining the appeal on its own file necessarily reopens the whole case and the Lower Court of appeal to which the case is remanded is bound to hear the appeal upon the judgment of the Court of first instance. (*Holmwood and Mullick, JJ.*) KARTICK CHANDRA DAS *v.* SATYA STRI GHOSAL. 32 I. C. 240 : 20 C. W. N. 584.

——— O. 41, R. 23—*Effect of order—What it includes.*

A remand order to find whether a person has a title includes an inquiry as to whether he has lost the title or whether he is precluded from relying upon the title. (*Chatterjee and Roe, JJ.*) KHAGENDRA NATH *v.* SONATAN GUHA.
31 I. C. 987 : 20 C.W.N. 149.

——— O. 41, R. 23—*Effect of order—Jurisdiction to try suit on remand.*

The Jurisdiction of a court trying a remanded case depends entirely on the order of the Appellate Court when remanding the case. (*Krishnan, J.*) UTHUMAN AMMAL *v.* NAINA MAHAMAD.
44 M. L. J. 238 : 72 I. C. 314 :
17 L. W. 355 : (1923) M. W. N. 194 :
32 M. L. T. 276 : 1923 M. 351

——— O. 41, R. 23—*Effect of order—Apteal by some of the defts—Whole case open.*

C. P. CODE (V OF 1908), O. 41, R. 23—Exclusion of Evidence.

Where an Appellate Court remands a case for retrial on the appeal of some defendants who did not join in a reference to arbitration on the ground that the award was not binding on them the whole case is re-opened even in respect of those who did not appeal. (*Sadasiva Aiyar and Spencer, JJ.*) CHENGALRAYA CHETTIAR *v.* RAGHAVA RAMANUJA DASS.
52 I. C 569 : 37 M.L.J. 100.

——— O. 41, R. 23—*Effect of order—Remand to First Appellate Court—Power of.*

Where on Second Appeal, the case is remanded to the Lower Appellate Court, it is not open to that Court, to consider arguments abandoned in Second Appeal or not raised in Second Appeal or to come to fresh findings on points decided by the order of remand. (*Mac Nair, A. J. C.*) GOPAL RAO *v.* NEMICHAND. 61 I. C. 575.

——— O. 41. R 23—*Effect of order—Whole case open.*

When a case is remanded under O. 41, R, 23, the Lower Court can form its own conclusions irrespective of any, arrived at by its predecessor in respect of matters not touched by the Appellate Court. (*Piggot, J. C. and Lindsay, A. J. C.*) AJODHYA PRASAD *v.* JAGADISH SINGH.
13 I C. 813 : 14 O.C. 321.

——— O. 41, Rr. 23 and 25—*Effect of order—Decision on a point of law—Appeal from final decree after remand—Legality of order of remand not to be questioned.*

Where the High Court in Second Appeal differs from the lower Court on an issue of law and remands the case to the Court below, the order of the High Court is binding upon that Court and cannot be questioned in an appeal from the final decree passed after remand. (*Miller, C. J. and Ross, J.*) RAI BRIJ RAJ KRISHNA *v.* CHATHU SINGH. 4 P. L. T. 35 : 1923 P. 226.

Exclusion of Evidence.

——— O. 41, R. 23—*Exclusion of Evidence—Consideration of inadmissible evidence.*

Where the lower court has based its findings on certain inadmissible evidence but there is ample evidence otherwise on the record to sustain the findings, the High Court need not remand the case to the court below for a decision on the admissible evidence in the case. (*Suhrawardy, J.*) FAIJADDIN *v.* AGNI KUMAR SARMA. 71 I. C. 300 : 1924 Cal. 370.

——— O. 41, R. 23— *Exclusion of evidence — Remand.*

The decision of a District Judge in an appeal holding erroneously that a copy of a chitta admitted in the trial Court without objection, was not admissible in evidence was held to be erroneous and the case was remitted for reconsideration. (*Woodroffe and Mookerjee, JJ.*) JAMINI MOHAN BATTACHARJEE *v.* NARENDRA MOHAN CHAKRAVARTHY. 41 I. C. 71.

——— O. 41. R. 23—*Exclusion of evidence—Powers of Appellate Court—New and old—Code compared.*

The powers to remand conferred on Appellate Courts are much wider under the new than

C. P. CODE (V OF 1908), O. 41, R. 23—Exclusion of Evidence.

under the old Code. The power to remand is not only to be used where the trial Court has disposed of a case on a preliminary issue but also where important evidence has been wrongly excluded or important questions wrongly disallowed. 15 C. L. J. 258: 12 C. L. J. 308 : 43 C. 938. Ref. (*N. R. Chatterjee and Newbould, JJ.*) SUSTHIR BALA DUTTA *v.* CHANDRA KUMAR.
36 I. C. 813.

——**O. 41, Rr. 23 and 33**—*Exclusion of evidence—Remand.*

When the ground on which an Appellate Court declares a document admissible has arisen subsequently to disposal of the suit by the Lower Court, the order of remand may be made under O. 41, R. 23 or 33 of the C. P. C. of 1908, (*Abdur Rahim and Ayling, JJ.*) VELLAYAPPA CHETTY *v.* NELLAYYA PILLAI.
10 I. C. 675 : 9 M. L. T. 317.

——**O. 41. Rr. 23 and 27** — *Exclusion of evidence—Procedure.*

Where the Appellate Court finds that certain evidence refused to be recorded by the Lower Court ought to have been recorded, it cannot remand the suit for trial *ab initio* under O. 41, R. 23, C. P. C. but can direct any additional evidence to be recorded under O. 44. R. 27 C.P.C. (*Stuart, A. J. C.*) FIDA ABBAS *v.* RAHIM BAKSH.
45 I. C. 832 : 5 O L. J. 139.

Finality of order.

——**O. 41, Rr. 23 and 25**—*Finality of order—Decision on issues in remand order, if binds Judge or his successor at final hearing—Decision, if preliminary decree or interloculory order — Appeal.*

Where an Appellate Court remands a suit for findings on certain issues and it decides certain issues on receipt of the findings of the first Court on these issues, the Court is not bound to reconsider its findiogs on the merits whether the officer before whom the appeal finally came for hearing was the same or another officer. *Richardson, J.*:— An opinion incidentally, or provisionally, expressed in a remanding judgment would not amount to a final adjudication so as to conclude the parties but an adjudication by the remanding judge would bind him and his successor at the final hearing. One test for determining whether such an adjudication is or is not final and conclusive so far as it goes is whether it does or does not amount to a preliminary decree. *Per Mullick, J.*:— Though a Court can revise after remand, interlocutory decisions made either by itself or by any officer of co-ordinate jurisdiction, yet as a matter of practice a Court will not and ought not to do so. When however, the interlocutory decision amounts to a preliminary decree within S. 2 of the C. P. C. the Court is not competent to revise that decree till it is duly set aside or amended according to law. Authorities reviewed. (*Richardson and Mullick. JJ.*) HARIALAL BAL *v*, ETBARMANDAL.
32 I. C. 866 : 20 C. W. N. 43

——**O. 41, R. 23**—*Finality of order—Order of remand whether final.*

An order of remand is interlocutory and therefore not subject of appeal to His Majesty in Council ; it can be a final order if it decides some cardinal point in the suit but an order of remand which merely decides that a suit is maintainable in the form in which it is brought is not final. (*Scott-Smith and Broadway, JJ.*) MEHRCHAND *v.* LABHURAM.
60 I. C. 522 : 2 Lah. 106.

C. P. CODE (V OF 1908), O. 41, R. 23—Grounds for remand.

——**O. 41, Rr. 23 and 25**—*Finality of order—Order not to be questioned on appeal after remand.*

Where the High Court in its order of remand, decides a certain question it cannot be re-opened on appeal to the High Court after remand. 34 M. 73 Foll. (*Abdur Rahim and Seshagiri Aiyar, JJ.*) SUJJADA SHAH MAHOMED USUF *v.* PEERJADA SYED SHAH HABIB.
53 I. C. 677: (1919) M. W. N. 662.

——**O. 41, Rr. 23 and 25**—*Finality of order—Subordinate Court—Duty of, to follow.*

It is the duty of a subordinate Court to accept a pronouncement made by an Appellate Court which the parties have chosen not to appeal against and have acted upon. (*Seshagiri Aiyar and Napier, JJ.*) PARASU PATTAR *v.* VENKATACHELA PATTAR.
28 I. C. 982.

——**O. 41, R. 23**—*Finality of order—Reopening of issues.*

Under Order 41, R. 23, the issues decided by the order of remand cannot be re-opened between the parties at any subsequent stage of the litigation. (*Daniels and Dalal, JJ.*) JANKI SHAH *v.* MAHOMMED ABBAS.
25 O. C. 245: 70 I. C. 983 : 1923 Oudh 50 (2)

——**O. 41, R. 23**—*Finality of order—Order of single Judge—Power of successor to question the propriety of.*

Where a Single Judge of the High Court hearing a second appeal remands it for fresh decision to the lower court, and the case then comes up on second appeal from the revised decision of the lower court, if is not open to the High Court to question its own earlier judgment remanding the case to the lower court. The remedy of the party was to have appealed against the judgment of the single judge remanding the case. (*Miller, C.J. and Coutts, J.*) MUNSHI LAL *v.* RAMASIS PURI.
1 P. 246 · 65 I. C. 175 : 3 P. L T. 343 : 1922 P. 384.

Grounds for remand.

——**O. 41, R. 23**—*Grounds for remand.*

It is an unusual course to refer back an appeal which has been argued and which ought *prima facie* to be decided upon the materials which were before the courts below. (*Haldane*) GANGA PERSHAD SINGH BAHADUR *v.* ISHRI PERSHAD SINGH.
4 P. L. W. 349: 16 A. L. J. 409: 34 M. L. J. 545 : 27 C. L. J. 548 : 22 C.W.N: 697 : 45 C. 748 : 20 Bom. L. R. 587 : 23 M. L. T. 388 : 8 L. W. 176 : (1918) M. W. N. 382 : 45 I. C. 1 : 45 I. A. 94 (P. C.).

——**O. 41, R. 23, 25**—*Grounds for remand—Propriety of.*

In a suit for possession and damages where the appellate court differs from the trial court on the question of title and possession, but as there was no finding of the trial court as to damages remanded

C. P. CODE (V OF 1908), O. 41, R. 23—Grounds for remand.

the whole suit, *Held* the procedure is improper. The proper course would be to remit an issue under O. 41, R. 25. (*Piggott and Walsh, JJ.*) ABDULLA KHAN *v.* MAHAMMAD MAQBUL HUSAIN. **45 A. 565: L: R. 4 A 260 74 I. C. 822 : 21 A. L. J. 538 : 1923 A. 603 (2).**

——— **O. 41, Rr. 23 and 25**—*Grounds for remand—Evidence on record.*

When issues have been framed and all the evidence has been produced but some of the issues have not been decided, the proper order of the appellate Court is to call for findings under R. 25 and not under R. 23. (*Piggott and Lindsay, JJ.*) KASTURI *v.* PANNA LAL. **38 All. 520: 36 I. C. 245 : 14 A. L. J. 754.**

——— **O. 41, R. 23**—*Grounds for remand—Lower Court deciding all issues—Order of remand—Legality.*

Where the Lower Court has decided all the issues that arise in the case and recorded its findings on them, the order of the Appellate Court remanding the case for a trial on the merits under O. 41, R. 23 is not a proper order even though the appellate Court puts the plaintiff appellant on terms. The Lower Appellate Court could act under O. 41, R. 27 if additional evidence was necessary. (*Knox and Lindsay, JJ.*) RAM SARUP SAHU *v.* RATAN SEN SINGH. **35 I. C. 239.**

——— **O. 41, R. 23**—*Grounds for remand—Error of law.*

If the deft's plea is one of a subsisting tenancy the position created by S. 202 of Agra Tenancy Act arises and the Appellate Court can remand the suit if the Lower Court overlooked it, (*Piggott and Lindsay, JJ.*) BHAGWAN *v.* MADAN MOHAN LAL. **38 All. 533 : 35 I. C. 41 : 14 A. L. J. 734**

——— **O. 41, R. 23**—*Grounds for remand—Strict proof.*

The legislature seems to avoid remands as far as possible and to provide that the Appellate Court should dispose of the case if there is sufficient evidence and should not put the parties to unnecessary expense. A remand, on the ground that a particular piece of land was not proved to be in mortgagee's possession and there is difference of opinion as to certain items of accounts, the suit being one for accounts and redemption, is bad. (*Batchelor and Roe JJ.*) NAROTTAM RAJA RAM *v.* MOHANLAL. **37 Bom. 289: 17 I. C. 891 : 14 Bom. L. R. 1154.**

——— **O. 41, R. 23**—*Grounds for remand—Issue settled and tried—Remand.*

The C. P. Code does not make any provision for an order of remand where all the issues have been framed and tried. (*Sanderson C. J, and Richardson. J.*). INJAD ALI *v.* MOHINI CHANDRA. **27 C. W. N. 1025 : 1924 Cal. 148.**

——— **O. 41, R. 23**—*Grounds for remand.*

Where a book was used by the Lower Court to establish certain facts which a party had no opportunity of meeting and which he desired to rebut, the admission of the book in the Appellate Court might involve a remand. (*Woodroffe and Cuming, JJ.*) SECY. OF STATE *v.* ANANDA MOHAN ROY. **66 I. C. 287: 34 C L. J. 205.**

C. P. CODE (V OF 1908), O. 41, R. 23—Grounds for remand.

——— **O. 41, Rr. 23, 25. and 27**—*Grounds for remand—Case not decided on preliminary point—Procedure.*

If the trial Court has decided a case not upon a preliminary point but after taking all the evidence and trying all the issues, the Appellate Ccurt should not remand the case for trial under O.41, R. 23. In making an order on the rule, however, the Court cannot direct the omission of one of the essential issues in the case. If the Court considers a fresh local investigation or fresh evidence necessary on any point, its order should be one under O. 41, Rr. 25, 27 and 29, C P. C (*Teunon and Beachcroft, JJ.*) SADAK ALI *v.* SAFAR ALI SUFANI. **56 I. C. 984.**

——— **O. 41. Rr. 23 and 25**—*Grounds for remand—New case on appeal—Remand.*

A party who in the trial court fails to establish the case which he set up is not entitled to advance a new case in appeal nor is he entitled to remand to enable him to establish his claim on the new case set up. (*Newbould, J.*) DURGA CHARAN BISWAS *v.* KAILASH CHANDRA DAS. **54 I. C. 645.**

——— **O. 41, Rr. 23 and 25**—*Grounds for remand—Additional evidence—Evidence not given by oversight.*

A suit upon a mortgage alleged to have been executed by the husband of a lady on her behalf under a power of attorney from her cannot be remanded if the plaintiff does not take steps for the production of power or to prove, it or to give secondary evidence of its contents. (*Chaudhuri and Cuming, JJ.*) RAMCHANDRA BAHADUR *v.* ABEDA KHATUN. **53 I. C. 562.**

——— **O. 41, Rr. 23 and 25**—*Grounds for remand—Decision in ignorance of admissions.*

Where the lower appellate court did not realise the legal effect of admission by the pleader of a party and decided the case against a party, the case must be remanded to that court in order that the appeal might be reheard, on the footing that the admission in question was in fact made in the Trial Court. (*Richardson and Beachcroft, JJ.*) JAHADALI *v.* AJINANNESSA BIBI. **44 I. C 18.**

——— **O. 41, R. 23**—*Grounds for remand—Remand on issues already tried and for local investigation—Impropriety of.*

Held, that the order of remand was unnecessary and vexatious as the additional issues framed were covered by some of the issues decided in the judgment of the Original Court and the plffs. having refrained from applying for local investigation in the first Court, should not be given another opportunity of establishing their case. (*Teunon and Newbould, JJ.*) KENARAM MONDAL *v.* ASIMADDI MALLA KARIKA. **43 I. C. 815.**

——— **O. 41, Rr. 23 and 25**—*Ground for remand—Evidence on record—Suit for declaration of title and Possession.*

C. P. CODE (V OF 1908), O. 41, R. 23—Grounds for remand.

Where there is evidence on record on all the material issues an Appellate Court's order of remand is illegal. (*Walmsley and Greaves, JJ.*) AMRITA KAL MANDAL *v.* BHUTNATH MANDAL.
41 I. C. 735.

———O. 41, Rr. 23 and 27—*Grounds for remand—Insufficiency of evidence.*

An Appellate Court could not set aside the decision of the trial court in plaintiff's favour on the ground that the evidence adduced by the deft, in support of his plea was not satisfactory and sufficient. If the suit was decided on the merits and not erroneously disposed of, upon a preliminary point by the trial court, the Appellate Court should have come to a decision itself and should not have allowed the parties to adduce additional evidence as no case was made out under O. 41. R. 27 C.P.C. (*Mookerjee and Cuming, JJ.*) SATISH CHANDRA BOSE *v.* TAKUR DAS MANDAL.
39 I. C. 886 : 25 C. L J. 473.

———O. 41, R. 23 *Grounds for remand--Findings not clear.*

In a suit for possession of land, the lower Appellate Court said on the question of limitation "it does not appear that the plff.'s claim for possession is barred". On appeal a single judge of the High Court held that a mere statement of this sort was not sufficient and remanded the case for a proper finding. On remand it was found that the plff. was not in possession within 12 years of suit. *Held*, the first finding was sufficient and that the order of the remand was wrong. (*Maclean, C. J. and Mittra. J.*) HAITENNESSA BIBI *v.* KAILASH CHANDRA SAHA.
17 I. C. 224 : 16 C. L. J. 259.

———O. 41, R. 23—*Grounds for remand—Determination as to the date of cause of action.*

A remand in order to enable the plaintiff (appellant) to ascertain whether or not a remand was made within three years of the institution of the suit which would save limitation was refused (*Harrison and Zafer Ali, JJ.*) RAM *v.* GAMAN RAM. **1923 Lah. 645.**

———O. 41, Rr. 23 and 25--*Grounds for remand—Evidence on record.*

An Appellate Court can decide a case on the evidence before it when the parties have produced their whole evidence. It is illegal to remand a case when it has been fully tried but if any further enquiry is necessary the proper course is to proceed under O. 41. Rr. 25 and 28. (*Martineau. J.*) KANHAIYALAL *v.* NARAIN SINGH.
50 I. C. 299 : 177 P. W. R. 1918.

———O. 41, Rr. 23 and 25—*Grounds for remand--Absence of issue.*

Where evidence was led and the Court came to a finding on a certain point the fact that no issue was founded thereon is not sufficient for a remand. (*Le Rossignol, J.*) HAMID HUSSAIN *v* BISHEN SARUP. **46 I. C. 659 : 137 P. W. R. 1918.**

———O. 41, Rr 23 and 25—*Grounds for remand—Order under R. 23—Legality.*

C. P. CODE (V OF 1908), O. 41, R. 23—Grounds for remand.

An order on remand under R. 23 must be set aside, when it should have been made under R. 25. (*Le Rossignal, J.*) RAM SINGH. *v.* KUNDAN SINGH. **103 P. L. R, 1916 : 36 I. C. 211 : 96 P. W. R. 1916.**

——— O. 41, R. 23--*Grounds for remand—Disposal by first court on all issues--Order of remand—Legality.*

Where the first Court has framed a number of issues and has decided every one of them, it is not open to an appellate court to remand the case on additional issues. The proper course is to frame the essential issues and to call upon the court to return findings onthem after allowing each side to adduce additional evidence. (*Spencer and Venkatasubba Rao, JJ.*) MALAYANDI GOUNDAN *v.* BOMMAN POOSARI. **17 L. W. 159 : 71 I. C 204 : 1923 Mad. 331 (1).**

———O. 41, R. 23—*Grounds for remand—Evidence taken by first Court fully.*

Where a Court returns the plaint for presentation to a court having pecuniary jurisdiction to entertain it on a consideration of the evidence it is not competent to the Appellate Court to remand the whole case under O. 41, R. 23 of the C. P. C. merely because in its opinion the appointment of an experienced Commissioner is expedient to revalue the properties. (*Kumaraswami Sastri, J.*) MAHARAJA OF BOBBILI *v.* ZAMINDAR OF SALUR. **49 I. C. 750.**

——— O. 41, R. 23—*Grounds for remand—Technical point—Disposal on.*

Where the first Appellate Court decides only on technical grounds, the second Appellate Court can dispose it off on merits or it may remand the case. (*Lindsay, J, C.*) GHANSHYAMDAS *v.* HARDEI. **32 I. C. 380 : 2 O. L. J. 562.**

——— O. 41, R. 23—*Grounds for remand—Decision to be not on pleadings but evidence.*

It the court below fails to take evidence and does not come to a conclusion on this point there ought to be a remand. Decision should be based on evidence and not on pleadings of the parties. (*Das, J.*) MAHARAJA BAHADUR KESHO PRASAD SINGH *v.* BHAGWAT SARAN PANDE.
67 I. C. 710 : 1923 P. 174

———O 41, Rr. 23 and 25—*Grounds for remand—Admission of inadmissible evidence—Remand.*

Where the lower Court has admitted inadmissible evidence the proper procedure for the Appellate Court is to remand the case, as it is not possible to ascertain how far the former was influenced in arriving at its conclusion by that piece of evidence. (*Das, J.*) SARUP RAI *v.* SRIKANT PRASAD. **2 U. P. L. R: (Pat.) 49 : 55 I. C. 922 : 1 P. L, T. 224.**

——— O. 41, Rr. 23 and 25 *Grounds for remand—Issue of fact—No decision by Appellate Court.*

The appellant is entitled to have the opinion of the Appellate Court on an issue of fact and if such Court fails to determine the point the High Court will remand the case for re-decision of the appeal (*Das, J.*) RUPAN RAUT *v.* PITAMBER LAL.
55 I. C. 233.

C. P. CODE (V OF 1908), O. 41, R. 23—Inadmissible Evidence.

Inadmissible Evidence.

——O. 41. R. 23 — *Inadmissible evidence—Admission of.*

O. 41, R. 23 applies where a final decree has been passed upon the report of a Commr. who had been superseded and whose report therefore could not be legally used as the basis of a final decree. (*Piggott and Walsh, JJ.*) ISLAM FATIMA *v.* ZAINUDDIN. 39 I. C. 951

——O 41. Rr. 23 and 25—*Inadmissible evidence—Remand—Appellate Court—Decision on evidence before it.*

It is competent to the Appellate Court to decide a case on the evidence on record after excluding irrelevent or unsatisfactory portions. (*Beachcroft, J.*) GARIBULLA *v.* MODU. 50 I. C. 301.

——O. 41 R. 23 — *Inadmissible evidence—Remand for retrial.*

A case can be remanded in second appeal, where the decision of the Appellate Court is based upon a document inadmissible in evidence. (*Miller, C. J. and Mullick, J.*) SUMITRA KUER *v.* RAM KAIR CHOUBEY. 57 I. C. 561 : 5 Pat. L. J. 410 : 1 Pat. L. T. 702 : 1921 Pat. 17.

Inherent Power.

——O. 41, Rr. 23—*Inherent power.*

An appellate Court has inherent powers to order a remand which can however be made where the justice of the case demands it. (*Walmsley and Ghose, JJ.*) SASHI MUKHI DASI *v.* ABINASH CHANDRA HALDAR. 1922 Cal. 279.

——O. 41, Rr. 23 and 25—*Inherent power—Revision—C. P. Code, S. 115.*

Where instead of passing an order under O.41, R. 25 C. P. C., an Appellate Court remanded for rehearing under O. 41, R. 23, the court cannot be said to have acted without jurisdiction to justify interference in revision under S. 115, C. P. C. The appellate court has inherent power to make a remand. (*Newbould, J.*) ATUL CHANDRA SEAL *v.* SHEIKH KOBADALI. 64 I. C. 436.

——O. 41, R. 23—*Inherent power—When invoked—Remand for fresh decision on further evidence.*

An appellate Court cannot remand a case not disposed of on a preliminary point, for a fresh decision on taking further evidence. It should not exercise its inherent power of remand except for the ends of justice. 44 Cal. 929 dist. (*Richardson and Walmsely, JJ.*) BEJOY KRISHNA *v.* JIBAN KRISHNA GANGULY. 46 I. C. 333 : 27 C. L. J. 596.

——O. 41. R. 23—*Inherent power—Remand.*

The power of the appellate Court as regards remand are not restricted to R. 23 of O. 41 but the Court, by reason of its inherent powers recognised and preserved in the Code, may order a remand in cases other than those specified in R. 23, if it is necessary for the ends of justice, 41 Cal. 108 Diss. Inherent jurisdiction must be exercised with care, subject to general legal principles and to the condition that the matter is not one with which the legislature has so specifically dealt as to preclude the exercise of inherent power. (*Sanderson, C. J., Woodroffe,*

C. P. CODE (V OF 1908), O. 41, R. 23.—Inherent Power.

Mookerjee, Chitty and Teunon, JJ.) GHUZNAVI *v.* THE ALLAHABAD BANK LTD. 44 Cal. 929 : 21 C. W. N. 877 : 41 I. C 598 : 26 C. L. J. 49 (F.B.)

——O. 41, R. 23—*Inherent power—Preliminary point.*

An Appellate Court has no power to remand a case when it was not disposed of on a preliminary point in the Court of First Instance. (*Chatterjee and SheepShanks, JJ.*) SUBHADRASUNDARI *v.* KARIMULLA BEPARI. 38 I. C. 196 :

[But, *See* 41. I. C. 598 : 44 Cal. 929.]

——O. 41, Rr. 23 and 25—*Inherent power.*

The powers of the High Court as to remand are not restricted by the provisions of O. 41, Rr. 23 and 25 and the High Court can always make an order of remand if the exigencies of the case require it. (*Sanderson, C. J. Woodroffe and Mookerjee, JJ.*) J. B. Ross *v.* C. R. SCRIVEN. 43 Cal. 1001 : 34 I. C. 235 : 20 C. W. N 1192 :

[Also 41 I. C. 598 : 44 Cal. 929 (F. B.)]

——O. 41. R. 23—*Inherent power—Reversal and remand of appellate courts—Effect of S. 107 (b).*

A Lower Appellate Court's power of reversal and remand are strictly limited to the position described in O. 41, R. 23. The apparently wide powers contemplated under S. 107 (b) C. P.C. get restricted when due weight is given to the meaning of the proviso to S. 107 C. P. C. (*Jenkins, C. J. and Chatterjee, J.*) MANI MOHAN MANDAL *v.* RAMTARAN MANDAL, 33 I. C. 329 : 43 Cal 148 :

[*But see* 44 Cal. 929 : 41 I. C. 598 (F. B).]

——O. 41, R. 23 and O. 6. Rr. 17 and 18—*Inherent power—Plaint—Amendment of in appeal—Remand—Appellate Court, power of.*

When a plaint is amended in appeal under O 6, Rr. 17 and 18 and a deft. desires to traverse the facts stated in the amendment, the Appellate Court has power to remand the case apart from O. 41 R. 23, 41. C. 108, disappr. 12 C. L. J. 308 appr. (*Holmwood and Imam, JJ.*) MANMATHA NATH BOSE *v.* KRISHNA PRAMADA DASI. 32 I. C. 906.

——O. 41, R. 23—*Inherent power— Amendment of plaint.*

When a plaint is allowed to be amended by addition of parties in appeal, the appellate Court has power to remand the whole case. (*Holmwood and Imam, JJ.*) MEAH UZAR ALI SARDAR *v.* SAVAI BEHARA. 43 Cal. 938 : 32 I. C. 791 : 20 C. W. N. 547.

——O. 41, Rr. 23 and 25—*Inherent power.*

An Appellate Court has no inherent power of remand except under O. 41, Rr. 23 and 25 of the Code. S. 107 (1) (6) is restricted by O. 41, Rr. 23 and 25. C. P. C. (*Stephen and Mullick, JJ.*) NABIN CHANDRA TRIPATI *v.* PRAN KRISHNA DEY. 41 Cal. 108 : 20 I. C. 39 ; 18 C. L. J. 613.

[This is no longer Law *See.* 41 I. C. 598 : 44 Cal. 929 (F. B.)]

C. P. CODE (V OF 1908), O. 41, R. 23—Inherent Power.

———O. 41, R 23 *and* S. 151—*Inherent power—Tenant raising title of third person—Remand—Appellate Court for determination of question of title—Validity.*

In an appeal against a rent decree where the tenant had pleaded the title of a third person though such third person was not an absolutely necessary party, the Appellate Court may remand the case for determination of the question of title to enable it to effectually and completely adjudicate upon the questions involved within O. 1, R. 10 by virtue of the inherent powers conferred under S. 151. (*Coxe and Teunon, JJ.*) UPENDRA CHANDRA *v.* SHAIK SABHAN.
11 I. C. 183 : 15 C. L J. 6

———O. 41, R. 23—*Inherent power—Powers of appellate Court.*

The power of remand under S. 107, Civil Procedure Code is limited to the case described in O. 41, R. 23 but nothing in that section restricts in any manner the application of the principle of inherent power of remand recognised by S. 151 of the Code. (*Abdul Raoof and Moti Sagar, JJ.*) MT. UMRI *v.* SHAH MAHOMAD.
5 Lah. L. J. 269 : 74 I. C. 497 : 1924 Lah. 36.

———O. 41, R. 23—*Inherent power.*

A Court of appeal can remand even in cases not covered by O. 41 R. 23, it the ends of justice require the same. (*Moti Sagar J.*) BHUP SINGH *v.* PREM SINGH. **76 I. C 496: 5 Lah. L. J. 384 : 1924 Lah. 362.**

——— O. 41, R, 23—*Inherent power—Improper exercise of power—Revision.*

An order of remand made not under O. 41, R, 23 of the Civil Procedure Code but in the exercise of the inherent power of the court is not appealable. (*Ayling, O. C, J. and Odgers, J.*) SHEIKH MUHAMMAD *v.* RANGASAMI NAIDU.
31 M, L. T. 182 : 69 I. C. 826 : 16 L. W. 515.

———O. 41, R. 23 and O. 43, R. 1 (u)—*Inherent Power—Appeal.*

An appellate Court has an inherent power to remand a case under conditions other than those referred to in O. 41, R. 23, C. P. Code, 36 Mad. 492 and 44 Cal. 929 foll. Where a case is remanded in the exercise of the Court's inherent jurisdiction no appeal lies from the order of remand. The decision on a preliminary point means a determination not affecting the merits of the case. A remand, in consequence of the opinion that the settlement of accounts by a party as agent is not binding on him as a partner is not a remand on a preliminary point. A reversal of the judgment with a direction to admit evidence said to have been improperly excluded is not a disposal on a preliminary point. (*Seshagiri Iyer and Odgers, JJ.*) ATHAPPA CHETTY *v.* RAMANATHAN CHETTY.
37 M. L. J. 536 : 53 I. C. 417 : 10 L. W, 359.

———O. 41, R. 23—*Inherent power.*

An appellate Court adding a new party has an inherent power to reverse the decree of first Court and remand for retrial which power O. 41, R. 23 does not affect in any way. (*Sadasiva Iyer and Napier, JJ.*) ANTONI JUAS PRABHU *v.* RAMKRISHNAYYA. **31 I. C. 268 : 2 L. W. 1034.**

C. P. CODE (V OF 1908), O. 41, R. 23—Inherent Power.

———O. 41, R. 23—*Inherent power.*

The power to remand is not confined to cases which are decided on a purely preliminary point. (*Abdur Rahim and Ayling, JJ.*) KUPELLAN *v.* KUNUVALLI. **(1911) 1 M W. N. 199 : 9 I. C. 790 : 9 M. L. T. 373.**

———O. 41, R. 23—*Inherent power—Refund of Court fee—Court Fees Act.* S. 13.

Under the new Code a first Appellate Court can order a remand for retrial though the decision of the Court of First Instance was not on a preliminary point but it cannot order a refund of Court fees unless the decision of the Court of First Instance was on a preliminary point. 36 I. C. 241: 26 C. L. J. 49 Rel. (*Mitra, A. J. C.*) VITHOBA *v.* WAMAN. **42 I. C. 304.**

———O. 41, R. 23—*Inherent power—Court Fees Act, S. 13—S. 562 of the Code of 1882, compared—Remand only under R. 23.*

Only O. 41, R. 23 expressly allows a Court of first appeal to remand a case for a second decision by the Original Court Only when a remand is made under this rule, S. 13 of the Court Fees Act, 1870, permits and directs a refund of the Court fee paid on the memo. of appeal. Except under O. 41, R. 23 no case shall be remanded for a second decision which can be disposed of finally by the first Appellate Court. (*Stanyon, A. J. C.*) JAGANATH *v.* MARUTHI.
36 I. C. 241 : 12 N. L. R. 126.

———O. 41, R. 23—*Inherent power.*

An Appellate Court has powers of remand apart from the power conferred by O. 41, R. 23. Such powers are conferred by S. 107 and are also implied by the provisions of S. 100 Sub S. (2) and S. 105 (1) of the C. P. Code. 30 M 54 Ref. Where an order of remand is made under its inherent powers by an Appellate Court, there is appeal from the order but the High Court can interfere in revision with the order. (*Ashworth, J. C.*) FARZAND ALI *v.* EKADASHI. **26 O C. 10 : 10 O. L. J. 36 : 9 O. & A. L. R. 332 : 73 I. C 591 : 1923 Oudh 177.**

———O. 41, Rr 23 and 25—*Inherent power—Powers of Appellate Court—Retrial.*

An Appellate Court has inherent power to order a retrial but that course should not be adopted except in exceptional circumstances and where the Code does not provide an adequate procedure. (*Buckland, J.*) RADHA KANTA DAS NANAK *v.* PRAKASH CHANDRA DUTT. **64 I. C 599.**

———O. 41, Rr. 23 and 25—*Inherent power—Remand.*

S. 151, C. P. C. recognises the inherent power of Courts to make such orders as are necessary for the interest of justice and the inherent power extends to orders for remand outside O. 41, R. 23 C. P. C. (*Mullick and Sultan Ahmed, JJ.*) BIBI AZIZ FATIMA *v.* SYED SHAH KHAIRAT AHMED.
2 U. P. L. R. (Pat.) 48 : 58 I. C. 444 : 1920 Pat, 222.

———O. 41, Rr. 23 and 25—*Inherent power—Appeal.*

An Appellate Court has an inherent power to remand a case though not falling under O. 41,

C. P. CODE (V OF 1908), O. 41, R. 23—New Plea.

Rr. 23 and 25 of the Code But the power is one that must be cautio sly exercised and there is no appeal from an order of remand in such a case. (*Roe and Jwala Prasad, JJ.*) RAGHUNANDAN SINGH *v.* JADUNANDAN SINGH. **3 Pat. L. J. 253 : 43 I. C. 959 : 4 Pat. L. W. 450.**

New Plea.

——— **O. 41, Rr. 23 and 25**—*New plea—Power of High Court on second appeal to remand.*

Even if it be competent to the High Court, on Second appeal to remit a case for rehearing on an issue not raised in the pleadings or even suggested in the courts below, this ought only to be done in exceptional cases for good cause shown and on payment of all costs. In the case on hand, there being no kind of surprise or discovery of fresh facts, the appellant was not entitled to the indulgence and the High Court erred in remanding the case on a totally new issue. (*Lord Parker*) RAMCHANDRA BHANJ DEO *v.* SECRETARY OF STATE. **43 Cal. 1104 : 43 I. A. 172 : 20 M. L. T. 235 : 20 C. W. N. 1245 : (1916) 2 M. W. N. 175 : 4 L. W. 251 : 14 A. L. J. 1009 : 18 Bom. L. R. 838 : 24 C. L. J. 296 : 37 I. C. 223 : 31 M. L. J. 745 (P. C.)**

———— **O. 41, R. 23**—*New plea—Opportunity to plaintiff to supplement his case.*

Where the plaintiff has not come into Court with a definite statement of facts necessary for him to succeed and with all his evidence he cannot in second appeal ask for a remand so as to give him an opportunity to supplement his case in the Court below. (*Sanderson, C. J. and Ghose, J.*) JATINDRA MOHAN CHAKRAVARTHI *v.* BIJOY CHAND MAHATAB, **71 I. C. 284 : 1924 Cal. 396.**

———— **O. 41, R. 23**—*New plea—Implied grant—Easement of necessity—New issues—Inconsistent pleas—Second Appeal.*

If plff. claimed a right of way based on immemorial user and failed to establish such right he could not in Second Appeal obtain a remand for a retrial on issues of an implied grant or an easement of necessity. (*Newbould, J.*) NOOR BIBI *v.* ASHANULLA, **55 I. C. 435.**

——— **O. 41, Rr. 23, 25 and O. 43, R. 1 (u)**—*New plea—Appeal—Remand.*

An Appellate Court is not entitled to raise new points involving fresh evidence in appeal and remand the suit for trial on those questions. Though this was not a case under O. 41, R.23 yet as the order appeared to be in form and substance an order under that rule and not under R. 25, an appeal lay against it. (*Richardson and Beachcroft, JJ.*) TARIT BASANI DASSI *v.* BASSEMATI DASSI. **44 I C. 416.**

———— **O 41, R. 23**—*New plea—Order of remand, if can be made—Where reconsideration of evidence would result.*

The High Court will not make an order of remand in second appeal for the decision of any question if the decision involves not only a reconsideration of evidence on record but also of taking fresh evidence where the point was not raised before. (*Coxe, J.*) GANODANESSA BIBI *v.* MAKSEDDANNESSA BIBI. **11 I. C. 84**

C. P. CODE (V OF 1908), O. 41, R. 23—Powers of Appellate Court.

——— **O. 41, R. 23**—*New plea—Power to allow.*

A new contention, not arising out of the pleadings and not raised in Lower Court is not allowed to be raised on remand. (*Mullick and Atkinson, JJ.*) MUBARAK HUSSAIN *v.* SHAH HAMID HUSSAIN. **1 Pat. L. W. 188 : 2 P. L. J. 8 : 38 I. C. 509 : 1917 Pat. 308.**

Powers of Appellate Court.

——— **O. 41, R. 23**—*Power of Appellate Court—Question of fact fully investigated.*

Where a question of fact has been fully investigated in the court below and the Appellate Court comes to a different conclusion on some portion it ought not to remand the case for working out the result of its decision but should itself uphold or modify the decision of the lower court. (*Piggott and Walsh, JJ.*) SHIAM SARAN *v.* BANARSI DAS. **20 A. L. J. 258 : 4 U. P. L. R. (A) 102 : 66 I. C. 866 : 1922 A. 192.**

——— **O. 41, Rr. 23 and 25**—*Powers of Appellate Court.*

The proper course to follow by an Appellate Court is to proceed under O. 41, R. 25 and not R. 23 when it does not definitely reverse the finding of the Lower Court but is of opinion that upon a certain finding that a person was not in possession, the suit was liable to be dismissed. (*Chamier and Piggott, JJ.*) RAM LAL *v.* TIRBENI SAHAI. **26 I. C. 454.**

——— **O. 41, R. 23**—*Powers of Appellate Court—Case cannot be sent down for reconsideration* denovo *and fresh judgment.*

Where there is ample evidence on the record, the Appellate Court cannot require the Court of First Instance to reconsider the whole case *denovo* and write another judgment ; it should itself reappreciate the evidence allowing necessary amendments of pleadings if necessary consistent with the case set up in the first Court. (*Scott, C. J. and Shah, J.*) NARAYANBHAT BHIMBHAT JOSHI *v.* AKKUBHAI MANOHARBHAT JOSHI. **33 I. C. 576 : 18 Bom. L. R. 27.**

——— **O. 41, R. 23**—*Powers of Appellate Court under—Suit decided not only on preliminary point.*

The power of the Appellate Court to direct a remand is wider than that indicated in O. 41, R. 23. The Appellate Court has inherent power to direct a remand where such remand is needed in the ends of justice. An Order of remand may be valid even though it is not covered by O. 41, R. 23. Assuming for a moment that an order made in the exercise of the inherent powers of High Court has been improperly made ; that is, made under circumstances which do not justify it. Such an order is not without jurisdiction. It is an order made with jurisdiction though the jurisdiction may have beeu erroneously exercised. A remand Order made on second appeal is, unless a review of it be obtained within the prescribed time a conclusive determination of the points of law involved in it; and the correctness of Law laid down upon a remand cannot be questioned on a subsequent second appeal; nor is the fact of the courts adopting a different view of the law after an order has been made in general a good ground for allowing a review of such order after the time

C. P. CODE (V OF 1908), O. 41, R. 23—Powers of Appellate Court.

for a review has elapsed. The policy of the legislature as indicated in the C. P. Code of 1908 is in favour of finality of orders of remand. (*Mookerjee and Rankin, JJ.*) BISAI NATH *v.* TARA NATH DEB. **72 I. C. 588 : 1923 Cal. 385.**

——**O. 41, Rr. 23, 24 and 25**—*Power of Appellate Court—Full trial in Court of first instance.*

Where the trial Court has decided the suit on the evidence on all the issues it is not open to the appellate court to remand the case under O. 41, R. 23, C. P. Code, as though the suit had been decided on a preliminary point. The appellate Court should have taken the course indicated by O. 41, R. 24 or R. 25, C. P. Code. (*Richardson, and Ghose, JJ.*) NURUL GUNI *v.* KAZAMAINI. **66 I. C. 922 : 1923 Cal. 323.**

——**O. 41, R. 23 and S. 151**—*Powers of Appellate Court—Reversal and remand for* de novo *trial—Propriety of.*

Where the lower Appellate Court reversed the decree of the court below, modified one of the issues and remanded the case for a *de novo* trial on the modified issue : *Held*, the procedure was wrong. (*Greaves and Ghose, JJ.*) RADHA KRISHNA SAHA *v.* KANAL KAMINI DEBYA. **35 C. L J. 345 : 70 I. C. 547 : 1922 Cal. 456.**

——**O. 41, R. 23**—*Powers of Appellate Court—Appeal from an order of remand—Findings of fact—Second appeal.*

In an appeal from an order of remand, findings of fact cannot be examined by the Court sitting as a Court of second appeal. But where the findings of the first Appellate Court appear to have been based on misappreciation of the true controversy between the parties, the High Court, in such circumstances, will interfere and direct a re-hearing of the appeal. (*Broadway, J.*) QADIR BAKHSH *v.* SHAMAS DIN. **73 I. C. 756 : 1923 Lah. 206.**

——**O. 41, R. 23**—*Powers of Appellate Court—*Ex parte *decree.*

If the deft. appeals against an *ex parte* decree passed against him without seeking to set it aside, the Appellate Court should not remand the case for re-trial under O. 41, R. 23, but should itself dispose it off on the merits. (*Chevis, J.*) MODI SHAH *v.* DHERA SHAH. **24 P. L. R. 1917 : 39 I. C 749 : 20 P. W. R. 1917.**

——**O. 41, R. 23**—*Powers of Appellate Court—Materials on record sufficient—Remand.*

Where the materials on the record are sufficient the Appellate Court should not remand a case to the original Court for re-trial, but should decide the case itself and give judgment as the circumstances allow. (*Kensington. J.*) RUPA SHAH *v.* IRSHAD ALI. **180 P. L. R. 1912 : 16 I. C. 847 : 234 P. W. R. 1912.**

——**O. 41, R. 23**—*Power of Appellate Court—Decision by trial court on all issues—Appellate Court differing on one issue.*

Where the trial Court decided a suit on all the issues and dismissed the suit and the appellate court being on a contrary opinion on one of the issues, remanded the suit for fresh disposal but without disturbing the findings of the first court on the other issues, *Held*, that the order of

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remand was improper. The appellate court should have dealt with the other issues and disposed of the case or if in its opinion the evidence on record and the findings of trial court were insufficient to dispose of the case the Appellate Court should have called for findings under O.41, R.25, C. P. Code. (*Spencer and Venkatasubba Rao, JJ.*) MUNISAMI NAICKEN *v.* MUNISWAMI NAIKEN. **(1923) M. W. N. 11 : 76 I. C. 1041 : 16 L. W. 979: 1923 Mad. 227.**

——**O. 41, R. 23**—*Powers of Appellate Court—Preliminary decree.*

Where an appellate Court can pass a preliminary decree it is its duty to do so and a remand as to matters which can be the subject-matter of the preliminary decree is not warranted. (*Kumaraswami Sastri and Devadoss, JJ.*) SUBBE GOUNDAN *v.* KRISHNAMACHARI. **45 Mad. 449 : 42 M. L. J. 372 : 30 M. L. T 217 : 15 L. W. 537 : (1922) M. W. N. 269 : 68 I. C. 869 : 1922 Mad. 112.**

——**O. 41, R. 23**—*Powers of Appellate Court—Remand by consent.*

The Appellate Court can pass an order of remand by consent of parties in excess of its powers under the Code. (*Sadasiva Iyer and Spencer, JJ.*) MUTHUSWAMI ODAYAN *v.* KOLANDAVELU ODAYAN. **22 I. C. 41 : (1914) M. W. N. 90.**

——**O. 41, R. 23**—*Power of Appellate Court—*Ex parte *decree—Power of remand otherwise than under the rule—C. P. C., Ss.* 100, 105 *and* 107.

When a suit is decided *ex parte*, an Appellate Court to which an appeal from the decree is preferred has jurisdiction to reverse the decree of the lower Court on the ground that such Court was wrong in proceeding to decide the case *ex parte* and has also power to remand the suit for re-hearing. 30 M. 64 (F. B) Foll. The Code of Civil Procedure must, in view of Ss. 100 (2), 105 (1) and (2) and S. 107, be held to permit a remand by an Appellate Court not in the particular case set forth in O. 41, R. 23, but also in all cases where there has been any error, defect or irregularity which has vitiated the whole decision of the case, provided that procedure under O, 41, Rr. 24 and 25, does not meet the case. 1922 All. 254: 1922 All. 226, Dist. But an order of remand cannot be made under R, 23 of O. 41 unless the case has been disposed of without entering into the full merits by reason of a decision on law or fact which has prevented the case from being tried to the end. (*Ashworth, J. C.*) SHEIKH FARZAND ALI *v.* EKADASHI. **10 O. L. J. 36 : 26 O C. 10 : 9 O. & A, L. R. 332 : 73 I. C. 591 : 1923 Oudh. 177.**

——**O. 41, Rr. 23 and 25**—*Powers of appellate Court—Order of remand—Reconsideration of by appellate Court.*

There is a distinction between an order under O. 41, R. 23, C. P. Code, and an order under O. 41, R. 25, C. P. Code, which merely remands specific issues for decision An order of the former class is a final order which is subject to appeal and cannot be considered by the court which passed it except on review whereas an order under O. 41, R. 25, C. P. Code, is an interlocutory

C. P. CODE (V OF 1908), O. 41, R. 23—Powers of Appellate Court.

order which it is open to the Court to re-consider. 16 A. 306 ; 43 A. 477 Rel. (*Daniels and Lyle, A. J. Cs.*) KUAR NAGESHAR SAHAI *v.* KUAR MATA PRASAD. **25 O. C. 189 : 9 O. L. J. 235 : 69 I. C. 730 : 1922 Oudh 236.**

———O. 41, R 23—*Power of appellate Court—High Court—Decision on issue given by the courts below.*

Where an issue has been raised and determined by the first court and the appellate court on the evidence adduced it is not within the competence of the High Court in second appeal to remand the case for rehearing upon that very issue. (*Miller, C. J. and Mullick, J.*) GUNPAT RAO BANKA PURI *v.* RAJ KUMAR SINGH. **67 I. C. 494 : 1922 P. 575.**

———O. 41, R. 23—*Powers of Appellate Court.*

The Appellate Court can under the rule only frame an issue and send it down to the Lower Court for a finding. It cannot remand the case for further evidence and pass a fresh decree itself. (*Mullick and Atkinson, JJ.*) HARADHAN MANDAL MODAK *v.* ISWARDAS MARWARI. **2 Pat L. J. 61 : 38 I. C. 797 : 3 Pat. L. W. 258.**

———O. 41, R 23—*Powers of Appellate Court —*Ex parte *decree—Power to remand.*

An appellate Court has not only power to reverse an *ex parte* decree passed on plff.'s evidence but it can also remand it for re-trial. (*Pratt, J.C.*) MA ON ME *v.* MA PYA GYI. **56 I. C. 255 : (1919) 3 U. B. R. 198.**

Preliminary Point.

———O. 41, Rr. 23 and 25—*Preliminary point —Decision on some issues.*

Where the appellate Court decides some of the issues in a case and leaves the other issues to be decided by the trial Court, the remand must be made under R. 25 and not under R. 23, which applies only when the order of the First Court is reversed on a preliminary point. (*Richards, C.J. and Bannerjee, J.*) KALLU *v.* BAGIRATH LAL. **40 I. C. 58.**

———O. 41, R. 23—*Preliminary point--Decision — Remand to first Court.*

The Lower Appellate Court having remanded a suit to a Munsiff who after framing four issues disposed of the suit on a decision of the first issue which finally decided the case it was held by the High Court that the decision of the Munsif was only on a preliminary point and that the remand was proper under the Code. (*Walsh and Stuart, JJ.*) KAMTA *v.* PARBHU DAYAL. **39 All. 165 : 37 I. C. 383 : 15 A. L. J. 30.**

———O. 41, R 23—*Preliminary point--Dismissal of suit for default.*

An Appeal from an order dismissing a suit for default under O. 9, R. 8, C. P. C., cannot be entertained nor can the case be remanded as though it had been decided on a preliminary point under O. 41, R. 23, C. P. C. (*Piggott and Walsh, JJ.*) LACHMI NARAIN *v.* DARBARI LAL **38 All. 357 : 83 I. C. 737 : 14 A. L. J. 347.**

———O. 41, R. 23—*Preliminary Point—Remand —Appeal lies.*

C. P. CODE (V OF 1908), O. 41, R. 23—Preliminary point.

An appeal lies from an order remanding a case under O. 41, R. 23 of the Civil Procedure Code even if the suit has been decided on a preliminary point. To say that there is no appeal where the court acts in contravention of the rule and reverses the judgment of the trial Court and remands the case, would be to refuse an appeal in every case where the order of remand is erroneous. (*Walmsley and Ghose, JJ.*) SASHI MUKHI DASI *v.* ABINASH CHANDRA HALDAR. **1922 Cal. 279.**

———O. 41, Rr. 23 and 25—*Preliminary point —Point involving merits of the case.*

Where a suit involved the consideration of the issues whether the plffs. had title to the lands in suit and whether they were entitled to *khas* possession and the first court found against the plffs. on the first point but did not decide the other and the Lower Appellate Court reversed the finding of the first Court and remanded the suit for decision on the second issue. *Held*, per *Chitty, J.*—The decision of the Munsif was not on a preliminary point within O. 41, R. 23, which has not changed the law under the old code. (*Chitty and Coxe, JJ.*) ABDUL KARIM *v.* FAYEZ BUX. **9 I. C. 224 : 15 C. W. N. 575.**

———O. 41, R. 23—*Preliminary point—Remand order—Execution proceedings.*

In an appeal against an order in execution proceedings where the case had not been disposed of upon a preliminary point, an order of remand was made by the lower appellate Court. An order for refund of the Court-fee stamp paid on appeal was also made under S. 13 of the Court Fees Act. *Held*, the order of remand was admittedly illegal as an order for refund of Court-fees can only be passed when remand is made under O. 41, R. 23. (*Campbell, J.*) MIRAN BAKHSH *v.* CHANAN DIN. **70 I. C. 1008 : 1923 Lah. 171.**

———O. 41, R. 23—*Preliminary point—Practice.*

In a redemption suit deft. put in preliminary plea that by foreclosure proceedings there was a sale in his favour and the Lower Appellate Court found against the plea. *Held*, that in the circumstances the Lower Appellate Court ought to have remanded the case for entertaining the further pleas of the deft. on the merits. The practice of allowing pleas piecemeal in original suits is open to objection. (*Chevis, J.*) PARMA NAND *v.* THIKHU. **57 P. L. R. 1916 : 30 I. C. 817 : 121 P. W. R. 1915.**

———O. 41, R. 23 and O. 43, R. 1, cl. 4—*Preliminary point—Meaning of—Order of remand Appealability.*

Where the District Munsif in a suit held that the construction of a service grant was clear and the evidence of the consideration for that grant and of whether services were in fact rendered or not was irrelevant, and on appeal the appellate Judge took a different view of the construction of the grant and held that such evidence was relevant accordingly remanded the case with that direction of to the lower court. *Held*, that the reversal was on a preliminary point within the meaning of O. 41, R. 23, C.P.C., and the order of remand was appealable.

C. P. CODE (V OF 1908), O. 41, R. 23—Preliminary Point.

The expression "preliminary point" is not confined to such legal points only as may be pleaded in bar of suit but comprehend all such points as may have prevented the Court disposing of the case on the merits, whether such points are pure questions of law or pure questions of fact. There are many instances of such point such as, that a suit is barred by limitation; that the Court has no jurisdiction under the Estates Land Act; that evidence tendered was not admissible, that on the plaintiff's evidence there is no evidence for the defendant to answer ; in a libel suit that there is no proof of publication. (*Sohwabe, C.J., Oldfield and Coutts Trotter, JJ.*) MALAYATH VEETHIL RAMAN *v.* KRISHNAN NAMBUDRIPAD.

43 M. L. J. 354 : 31 M. L. T. 208 (H. C.): 45 M. 900 : 16 L. W. 425 : (1922) M. W. N. 589 : 69 I.C. 828 : 1922 Mad. 505. (F. B.)

——0. 41, R. 23—*Preliminary point—Meaning of.*

" The expression preliminary point " in O. 41 R. 23, means some point either collateral to the merits which precludes their determination altogether or some particular question which though relating to the merits, precludes their general determination, 37 M. L. J. 536 Fol. (*Abdur Rahim and Odgers, JJ.*) FERNANDEZ *v.* SYLVESTER SOUZA. **13 L. W. 54 : 61 I. C. 829 : 29 M. L. T. 56.**

——0. 41, R. 23— *Preliminary point—What is.*

The expression "disposed of the suit on a preliminary point " in O. 41, R. 23, C. P. C., means disposed of the whole suit on the preliminary point only. (*Sadasiva Aiyar and Spencer, JJ.*) VEMI REDDI *v.* NALLAPPA REDDI.

57 I. C. 800 : 11 L. W. 611.

——0. 41, R. 23—*Preliminary point.*

When the question on which a case is disposed of involves an important issue relative to the merits of the case it is not a preliminary question. (*Abdur Rahim and Ayling, JJ.*) KUPPELAN *v.* KUNJUVALLI. **9 M. L. T. 373 : 9 I. C. 790 : (1911) 1 M. W. N. 199.**

——0. 41, R. 23— *Preliminary point—Inherent power of remand—Appeal—Revision.*

An appellate Court has power to remand a case under O. 41, R. 23, C. P. Code, only when the lower court has disposed of it on a preliminary point. No order of remand can be regarded as made under O. 41, R. 23, C. P. C. unless the case has been disposed of without entering into the full merits by reason of a decision on law or fact which has prevented the case being tried to the end. 19 A. L. J. 971 : 20 A. L. J. 321 Ref. (*Ashworth, J. C.*) FARZAND ALI *v.* EKADASHI.

26 O. C. 10 : 10 O.L.J. 36 ; 9 O. & A. L.R. 332 : 73 I.C. 591 : 1923 Oudh 177.

——0. 41, R. 23—*Preliminary point—Disposal on—Decision on the whole cash—Suit not maintainable.*

Where the court goes into the evidence and records findings on all the issues but dismisses the suit as not maintainable, the disposal is on a preliminary point. An Appellate Court remanding the suit for retrial acts under O. 41, R. 23, though

C. P. CODE (V OF 1908), O. 41, R. 24.

the Appellate Court might frame certain additional issue and send them also for trial. Such an order of remand if not appealed against under S. 105 becomes final. (*Mullick and Jwala Prasad, JJ.*) BHADAI SAHU *v.* MANOWAR ALI.

4 P. L. J 645 : 52 I. C. 125 : (1920) Pat 91.

——0. 41, R. 23—*Preliminary point—What is.*

Decision on a preliminary point, whether, of law or of fact, which dispenses with the decision of other issues, is a disposal on a preliminary point. (*Chapman and Jwala Prasad, JJ.*) RACHU GIR *v.* RAGHUNATH GIR. **2 P. L. W. 23 : 41 I.C. 202 : 2 P. L. J. 398.**

Transfer of Case.

——0 41, Rr. 23 and 25—*Transfer of case—Order of remand—Procedure irregular.*

When a case is remanded on account of illegality of the Appellate Court in receiving documents very late without assigning any reasons the case may be sent to another court for hearing. (*Sanderson, C. J. and Mookerjee, J.*) GAJADHAR PRASAD *v.* LOHIA. **35 I.C. 698 : 24 C. L. J. 457.**

——0. 41, R. 23—*Transfer of case—Appellate Court, if can direct trial by other than original Court.*

O. 41, R. 23, C. P. C. contemplates that the remand should be to that Court from whose decree the appeal is prepared, but if the Appellate Court has power to transfer a case from one Court to another, there is nothing illegal in remanding the case to another Court. 279 P. L. R. 1913 Rel. Where the person who heard the appeal was an Additional Judge who had no power under the C.P. Code or the Punjab Courts Act to transfer a case from one Subordinate Court to another, his order remanding the case to another Court from that which tried it, is to that extent, illegal. (*Scott-Smith, J.*) CHAJJU *v.* SHAM LAL.

66 I. C. 113 : 1922 Lah. 239.

——0. 41, Rr. 23 and 25—*Transfer of case—Power of lower Appellate Court to send the case for trial to first Court.*

Where the Chief Court remanded the case to the lower Appellate Court for further inquiry it was not the intention of the Chief Court when issuing the remand order, that the lower Appellate Court should be precluded from directing the first Court to record any additional evidence if necessary. (*Le Rossignol J.*) PARTAB SINGH *v.* PARTABI. **44 I. C. 907 : 147 P. L. R. 1917.**

——0. 41, R 23—*Transfer of case—Remand to another Court when permissible.*

Except when it has power to transfer the case from one Court to another the Appellate Court can remand the case under O. 41, R. 23 only to the Court from whose decree the appeal is preferred. (*Smith, J.*) FATI *v.* GADDI.

158 P. W. R. 1913 : 20 I. C. 788 : 279 P. L. R. 1913.

——0. 41, R, 24—*Powers of Appellate Court.*

An Appellate Court has full power to decide with reference to evidence on record the issues left undetermined by the Court of first instance without sending the case to Lower Court, under

C. P. CODE (V OF 1908), O. 41, R. 24.

O. 41, R. 24. (*Karamat Hussain, J.*) BADLI DAS v. DAJAM. 10 I. C. 225.

———O. 41, R. 24—*Second Appeal--High Court —Power of.*

The High Court has jurisdiction to record its finding in the second appeal on a question of fact left undetermined by the lower Court, though it arises from the admitted facts. (*Chandavarkar and Batchelor, JJ.*) DEVIDAS *v.* VITHALDAS.

36 Bom. 183 : 12 I. C. 925 : 13 Bom. L. R. 1183.

———O. 41, Rr. 24 and 25—*Framing new issue.*

Where the Court of first instance had an issue "have the plffs. their alleged right of way by necessity, grant or prescription," to which the Lower Appellate Court added the issue. " Has the plff. acquired the right of user by custom" and then purporting to act under O. 41, R. 24 C.P.C. dealt with the case on the evidence as it stood without taking evidence or remanding the case for fresh evidence. *Held*, that the Judge acted wrongly in that he was not re-settling the issues but framed an entirely new issue and that he should have proceeded under O. 41, R. 25 C.P.C. (*Sanderson, C.J. and Mookerjee, J.*) LASKARI *v.* ABBAS BEPARI. 40 I. C. 411 : 25 C. L. J. 527.

———O. 41, R. 24—*Power of Court—Decision on the evidence on record—Amendment of pleadings—Title and possession—Adverse possession.*

When an alternative case is pleaded in the Appellate Court, it will not act under this rule, unless the case arises on the facts stated in the plaint and deft. is not taken by surprise. (*Sanderson, C. J., Woodroffe and Mookerjee, JJ.*) RAM CHANDRA SIL *v.* RAMANMANI DASI.

36 I. C. 890 : 20 C. W. N. 773.

———O. 41, R. 24—*Second appeal—High Court —Decision on merits.*

When a judgment is reversed in second appeal on a point of law the High Court is competent to decide the case on the merits under O. 41, R. 24 and O. 42, R. 1 C. P. C. (*Chevis, J.*) CHANDA SINGH *v.* WARAWA SINGH. 108 P. W. R. 1914 : 25 I. C. 144 : 202 P. L. R. 1914.

———O. 41, R. 24—*Pleadings--No specific issue raised—Disposal by Appellate Court.*

The absence of a specific issue on a point does not debar an Appellate Court from disposing of the appeal on a finding on that point where it is raised in the pleadings and no prejudice is caused to the other side thereby. (*Twomey, J.*) MAUNG PO HAU *v.* MA. TA LOK. 6 Bur. L. T. 134 : 20 I. C. 674 : 7 L. B. R. 79.

———O. 41, R. 25—*Power to remit fresh issues*

If the Lower Appellate Court has omitted to determine a question of fact essential to the right decision of the suit on merits the High Court can frame the necessary issues and refer them for trial. (*Sir Lawrence Jenkins.*) SETHURAMUM IYER *v.* VENKATACHALLA GOUNDAN.

38 M. L. J. 476 : 43 Mad. 567 : 47 I. A. 76 . 18 A. L. J. 707 : 27 M. L. T. 102 : 11 L. W. 399 : 22 Bom. L. R. 578 : 25 C. W. N. 485 : 56 I. C. 117 : (1920) M. W. N. 61 (P. C) [On appeal from 24 M. L. J. 571 : 13 M.L.T. 450 : 20 I. C. 374 : (1913) M. W. N. 434.

C. P. CODE (V OF 1908), O. 41, R. 25.

———O. 41, Rr. 25 and 26—*Issues sent to Lower Court—Findings—No objections—Acceptance by Appellate Court.*

The lower Appellate Court referred certain issues for trial to the court of first instance. After the findings, which were against the defendant had been received, the defendant failed to prefer objections to the findings within the ten days' time allowed. The lower Appellate Court thereupon without considering the finding on the merits decided the appeal, considering those findings to be final and dismissed the appeal. The defendant preferred a second appeal urging that the action of the District Judge was not warranted by law, and that he ought to have himself considered whether the findings were good or bad findings and should have decided the case. *Held* that the Lower Appellate Court ought to have itself considered the correctness or otherwise of the findings returned by the trial Court before deciding the appeal, 6 A. 391 referred to. (*Gokul Prasad, J.*) MUKHTARA *v.* SARDARA. 71 I. C. 444 : 1923 A 417 (1).

———O. 41, R. 25—*Finality of order determining issues.*

Where a Court at the first hearing does not decide the case but merely remits certain specific issues it is open to the Court before which the case ultimately comes to disregard the findings on those issues and equally to form its own opinion on the whole case irrespective of anything that is said in the remand order. An order remanding issues under O. 41, R, 25 is not a final order. No appeal lies against it. The responsibility for the decree ultimately passed is entirely that of the Court before which the case comes after remand. It is quite otherwise with an order of remand passed under O. 41, R. 23 for this is an order which does finally determine subject to any right of appeal the issues which it decides. (*Daniels, J.*) GOPAL NATH SHUKUL *v.* SAT NARAIN SHUKUL.

74 I. C. 1014 : 1923 A. 384.

——— O. 41, R. 25—*Duty of Court—Opportunity to both parties to give evidence must be given.*

If the Court, to which an issue has been remitted for submitting a finding thereon, records evidence of one party and gives its finding without informing the other the date of recording the evidence, it can restore the case and take further evidence if the other party applies for restoration and an opportunity to produce further evidence. (*Ryves, J.*) AJODHIA PRASAD *v.* RAM NARAIN.

19 A. L. J. 79 : 62 I. C. 447 : L. R. 2 A. 1.

———O. 41, R. 25—*Second appeal—Findings on issues referred to Lower Appellate Court—High Court, interference by.*

Findings on issues referred to a Lower Appellate Court are findings of fact and cannot be disturbed by the High Court in second appeal. 16 A. 306 Expl. (*Walsh and Stuart, JJ.*) NEHAL SINGH *v.* SEWA RAM. 40 I. C. 128.

———O 41, Rr. 25 and 26—*Transfer of case after remand.*

A District Judge is not competent to transfer a case from his own file to his subordinate, when he remitted certain issues on appeal, to be determined by the Court of first instance, until the case

is returned with its findings thereon. (*Banerji, J.*) THAKUR PRASAD *v.* NARENDRA BAHADUR SINGH.
15 I. C. 862 : 10 A. L. J. 89.

——O. 41, R. 25—*Fresh evidence—Direction to take further evidence, if necessary or discretionary.*

It is discretionary with the Appellate Court not to direct the Lower Court to take further evidence when it remands a case for a finding on a specific issue on a consideration of the evidence in the case. (*Piggott, J.*) BHAGWAN DIN *v.* MATA DAYAL.
15 I. C. 670.

——O. 41, Rr. 25 and 26—*Scope of—Remand—Calling for findings—Distinction.*

It cannot as a matter of principle be affirmed broadly that when an order has been made under O. 41, R. 25, the Court called upon to determine the appeal finally under O. 41, R 26, is competent to treat the order as erroneously made, when an order has been made under O. 41, R. 25, the appeal remains pending and undisposed of on the file of the Court. The order, however, whether rightly or wrongly made, is an order made with jurisdiction, its validity may be attacked on review but till it has been set aside in an appropriate proceeding, it must be treated as an interlocutory one which is operative in law. If the order had been made under O. 41, R 23, its propriety would not have been challenged in an appeal against the final decree made after remand. The same principle is applicable to order under O 41, R. 25, subject to the reservation that as the appeal remains pending, the ultimate decision must be based upon a consideration of all the findings before and after the order under O. 41, R 25. This, indeed, is plain from the language used by the legislature in O. 41, R. 26. The evidence and findings become part of the record in the suit and when the Court proceeds to determine the appeal such determination must be based upon all the materials on the record; these include whatever was part of the record as it stood before the order under O. 41, R. 25 was made, as also what has been added in the Court of appeal namely, the order together with the evidence taken pursuant thereto and the reasoned findings thereon. No portion of the record can be disregarded and neither the order nor the materials placed on the record on the basis thereof can be rejected as if brought in without lawful authority. (*Mookerjee and Rankin, JJ.*) KAMINI KUMAR DEB *v.* DURGA CHARAN NAG. 37 C L. J. 122 : 74 I. C. 392 : 1923 Cal. 521.

——O. 41, R 25—*Remand should not be made on issue not raised in the pleadings.*

An Appellate Court should not ordinarily frame a new issue not raised in the pleadings or even suggested in the Trial Court and then remand the case. It ought only to be done in exceptional cases on good cause shown and payment of costs. (*Mookerjee and Panton, JJ.*) GOPAL *v.* ABDUL.
66 I. C. 640 : 34 C. L. J. 319.

——O 41, R. 25—*Effect of order—Entire appeal if open for consideration at the final hearing.*

Even after a remand by the High Court on certain issues and the submission of findings thereon the entire appeal was open for consideration by

the High Court at the final disposal. On the evidence it was held that the first transaction was fictitious and the second real. (*Mookerjee and Panton, JJ.*) OFFICIAL ASSIGNEE OF BENGAL *v.* BIDYASUNDARI DASI. 24 C. W. N. 145 : 54 I. C. 700 : 30 C L. J. 428.

——O. 41, R. 25—*Issue not raised below—Question of fact involving evidence—Proper procedure.*

In a suit for possession on declaration of the plff's. title the plff. did definitely set up the case of adverse possession but no issue was framed or evidence adduced on the question. *Held*, that the Appellate Court could not decide in favour of the plff.'s title by adverse possession without framing an issue on the question. (*Fletcher and Walmsley, JJ.*) RAY CHANDRA DEB *v.* GOUR CHANDRA DAS. 49 I. C. 475.

——O 41, Rr. 25 and 27—*Re-trial — Issues already tried and decided upon by trial Court—Remand—Limits of.*

O. 41, R. 25 of the C. P. C. does not contemplate an order by the Appellate Court directing a re-trial by the Primary Court of the issues tried and determined by that Court. If an Appellate Court considers that any question of fact essential to the right decision of the suit has not been tried and determined by the trial Court it may frame issues and direct the trial of such issues in the manner provided by O. 41, R. 15 of the Code, or it may proceed in the manner provided in O. 41, R. 27. (*Teunon and Cuming, JJ.*) CHANDRA KUMAR BISWAS *v.* NABI BUX. 48 I. C. 959.

——O. 41, R. 25—*Effect of remand—High Court—Issue sent down—Whole appeal if open for consideration.*

When an issue is sent down by the High Court and the appeal remains pending there the whole appeal could be considered on return of finding. 16 C. L. J. 259 Foll. (*Mookerjee and Richardson, JJ.*) HANUMAN DAS *v.* GURSAHAY SINGH.
21 I. C. 700 : 18 C. L. J. 181.

——O. 41, R. 25—*Effect of remand—Finding called for Judge, sitting singly — Expression of opinion—Appeal heard by two Judges.*

If it appears to the Bench, at the time of the final decision of the appeal that the opinion of the Judge called for the findings is not correct, it is open to that Court to consider the whole appeal and decide according to the correct view of the matter. (*Mookerjee and Beachcroft, JJ.*) ACHYUTANANDA BHATTACHARYA *v.* RAM NATH BHATTACHARYA. 21 I. C. 79 : 18 C. L. J. 354.

——O. 41, R 25 and O. 42, R. 1—*Additional evidence—Remand — Lower Appellate Court—Additional Evidence.*

Where a case is remanded, under O. 41, R. 25 to the Lower Appellate Court for findings upon an issue, without any direction as to the taking of additional evidence, the Court does not err in law in assuming that the order of remand does not contemplate its taking additional evidence. Where there are sufficient materials on the record to enable the Lower Appellate Court to give a finding on the issue, it would be wrong to allow the

parties to give more evidence. 10 W. R. 491 Dist. (*Richardson and Newbould, JJ.*) MATHUR MOHAN NASKAR *v.* RAMANATH NASKAR.
20 I. C. 35.

——O. 41, R. 25—*Effect of order—Expression of opinion by Appellate Court—If binding after return of finding.*

When a case is remanded under O. 41, R. 25, it remains pending and undisposed of on the Appellate Court's file, and as the judge recording any expression of opinion does not intend to express the same finally, he is not bound by it after return of the findings, and may change his mind at any time before he has pronounced judgment. 10 A. 162, 18 A. 806 Foll. But the Appellate Court is not bound to reconsider after return of the findings any question which he had already dealt with and upon which a final opinion had been expressed before the remand. (*Carnduff and N. R. Chatterjee, JJ.*) GANENDRA NATH ROY *v.* SURJA KANTA ROY. **15 I. C. 39 : 17 C. W. N. 462.**

——O. 41, R. 25—*Revision—Remand of case to the lower court for findings—Power of the High Court.*

The High Court can on second appeal remand a case for findings even on the points not taken in the grounds of appeal. The finding of the lower appellate court on a question of fact which has not been put in issue can be contested in second appeal. (*Shadi Lal and Martineau, JJ.*) CHANDU LAL *v.* FIRM OF LAKHMI CHAND JOWALA DAT.
5 Lah. L. J. 49.

——O. 41, R. 25—*Case remitted for trial to lower appellate court—Lower appellate Court cannot send the case to the first Court.*

Where the High Court has remitted certain issues for trial to the lower appellate Court, that court has no power to delegate its duties to the Munsif and the Munsif has no authority to record additional evidence in the case or express any opinion upon it, 105 P. R. 1903 ; 14 A. 23 referred to. (*Abdul Raoof, J.*) UTTAMCHAND MUHAMMAD BAKSH. **71 I. C. 896 : 1924 Lah. 354.**

——O. 41, R. 25—*No revision except in exceptional cases.*

It is only in exceptional cases that revisional powers are exercised in the case of orders of an interlocutory nature and even when the order is not of an interlocutory nature the High Court should not interfere except in cases where the order is not a final order such as one under O. 41, R. 25 of the C, P. C. (*Broadway, J.*) ALLAH BAKSH *v.* LAL KHAN.
67 I. C. 269 : 2 Lah. L. J. 662.

——O. 41, R. 25—*Partition—Decree — Remand on appeal—Effect of—Dismissal of suit, if proper.*

Where on an appeal from a decree in a partition suit the Appellate Court remanded the suit for fresh disposal as regards the appellant, the Appellate Court has no jurisdiction to dismiss the whole suit. The original decree stood between the plff. and such of the defts. as did not appeal, and cannot be held as wholly set aside. (*Shah Din and Scott Smith, JJ.*) DEBI SHAHAI *v.* TARACHANDA. **22 P. L. R. 1918 : 44 I. C. 135 : 44 P. W. R. 1918.**

——O. 41, Rr. 25 and 28—*Transfer of case—Delegation by Court—Remand.*

R. 25 does not give the court to which a case has been remanded, power to delegate its duties or make a further remand to any other Court. Mere absence of objection does not confer jurisdiction on a Court which does not otherwise possess it. (*Rattigan and Scott-Smith, JJ.*) LAHORE BANK, LTD. *v.* LAKHI RAM. **242 P. L. R. 1913 : 144 and 215 P. W. R. 1913 : 19 I. C. 970 : 105 P. R. 1913.**

——O. 41, R 25—*Decision by trial Court on all issues—Appellate Court differing on one issue and remanding the case—Propriety of remand.*

Where the trial court decided a suit on all the issues and dismissed the suit and the appellate court being of a contrary opinion on one of the issues, remanded the suit for fresh disposal but without disturbing the findings of the first court on the other issues. *Held*, that the order of remand was improper. The appellate court should have dealt with the other issues and disposed of the case or if in its opinion the evidence on record and the findings of trial court were insufficient to dispose of the case, the appellate court should have called for findings under O. 41, R 25, C. P. Code. (*Spencer and Venkatasubba Rao, JJ.*) MUNISWAMI NAICKEN *v.* MUNISWAMI NAICKEN.
16 L.W. 979 : 76 I. C. 1041 : (1923) M.W.N. 11 : 1923 Mad. 227.

——O. 41, R. 25—*Effect of order—Case pending on Appellate Court's file.*

In a remand under O. 41, R. 25, the case remains pending on the Appellate Court's file and the Judge may change his mind before final judgment. (*Prideaux and Kotwal, A. J. Cs.*) SULTAN BEG *v.* CHUNNILAL MALURAM. **46 I. C 922.**

——O. 41, R. 25—*Remand of specific issues—Re-consideration.*

An order under O. 41, R. 25 which merely remands specific issues for decision is interlocutory which it is open to the court to reconsider. (*Daniels and Lyle A. J. Cs.*) KUAR NAGESHAR SAHAI *v.* KUAR MATA PRASAD. **25 O. C. 189 : 69 I. C. 730 : 9 O. L. J. 235 : 1922 Oudh 236.**

——O. 41, R. 25—*Order of remand—Reconsideration on further hearing.*

Where a case has been remanded under O. 41, R. 25, the appellate court on receipt of the finding of the court below can reconsider the view of the law on which the remand was based. 43 All. 377, foll. (*Daniels, J C.*) SHYAM NARAIN *v.* JADUNATH SINGH. **25 O. C. 41 : 68 I C. 242 : 1922 Oudh 118.**

——O. 41, Rr. 25 and 27—*Omission to prove case—Additional evidence—Opportunity.*

In a mortgage suit, a person claiming to be a prior mortgagee must prove his claim in the suit and if he fails to do so he cannot ask for a fresh opportunity to prove it on appeal. (*Daniel, A. J. C.*) DEBI DYAL *v.* GANESH PRASAD.
50 I. C. 933.

——O. 41, R 25—*Power of Appellate Court—Calling for particular kind of evidence.*

C. P. CODE (V OF 1908), O. 41, R. 25.

An Appellate court cannot remand a case for trial on issues on which the Original Cou t has arrived at clear findings, or define the particular kind of evidence required f r their determination. (*Lindsay, J. C.*) RAGHUNATH DASS *v.* RANDHIR SINGH. **22 I. C. 128.**

——**O. 41, Rr. 25 and 27**—*Additional evidence—Record of right published subsequent to decision—Consideration of.*

A second appeal cannot be remanded for hearing in order that record of right published after the decision of the first court may be taken into consideration. Where the judgment of the lower appellate Court, shows that the Court applied its mind to the case and understood the evidence regarding the points in the suit a remand is unjustifiable. (*Chamier, C. J. and Mullick, J.*) IMTIAZ HUSSAIN KHAN *v.* BENGALI NONIA. **43 I. C. 750 : 2 P. L. J. 564.**

——**O. 41, R. 25**—*Partial remand—Appeal.*

There is no appeal against an order of partial remand under O. 41, R. 25. (*Po Han, J.*) MAUNG SHWE ON *v.* N. K. R. P. MUDALIAR. **76 I. C. 816 : 2 Bur. L. J. 216: 1924 Ran. 131.**

——**O. 41, R. 25**—*New issue—Raising of.*

Where the questions—Was the purchase by the plaintiff was *bona fide* ? Was it invalid by reason of fraud or other cause ?—Were not raised in the pleadings, *Held* the Lower Appellate Court was right in framing issues on the questions which though not raised in the pleadings had governed the case from the first. (*Moore, J. C.*) MA LUGALE *v.* VENKATTACHELLAM CHETTY. **10 I. C. 922 : 4 Bur. L. T. 118.**

——**O. 41, R. 25**—*Issues—Power of appellate court to remand.*

Where the appellate court finds that the parties failed to grasp the essential questions arising in the case and to adduce evidence adequately, the appellate court is entitled to frame new issues and remand them for trial. 31 B. 381 Ref. (*Fawcett, J. C and Kemp, A. J. C.*) SHAH MAHOMED *v*, RAMZAN. **66 I. C. 833.**

——**O. 41, R. 25**—*Transfer of case—Delegation of authority.*

When issues are remanded to the Lower Appellate Court, then it must give its own finding though it may ask the original court to record evidence. (*Pratt, J. C. and Boyd, A. J. C.*) MOTI SINGH *v.* SOBHAMAL. **32 I. C 634: 9 S. L. R. 148.**

——**O. 41, R. 25**—*Grounds for remand.*

Under R. 25 remand can only be made when the Lower Court has omitted to frame or try an issue or to determine an important question of fact. (*Pratt, J. C. and Crouch, A. J. C.*) MUSSAMMAT ASSAT *v.* DHAMANMAL. **19 I. C. 368 : 6 S. L. R. 185.**

——**O. 41, R. 26**—*Power of Appellate Court to go behind finding—No objections filed.*

The Appellate Court can go behind the findings submitted by a Lower Court even though no objections ar filed by parties within the time limited for the purpose. (*Knox, J.*) DODRAJ *v.* NATHO. **28 I. C. 597.**

C. P. CODE (V OF 1908). O. 41, R. 27 –Additional evidence.

——**O. 41, R. 26**—*Finding—Objections not filed—Court's discretion.*

Where no objections have been filed under O. 41, R. 26, C. P. Code, the Court may in its discretion decline to hear objections at the hearing. (*Scott Smith and Leslie Jones, JJ.*) PARTAB SINGH *v.* ACHAR SINGH. **67 I. C. 846 : 3 Lah. L. J. 230.**

——**O. 41, R. 26**—*Omission of time for filing objections.*

The omission of an Appellate Court to fix a time as required by O. 41, R. 26 for the filing of a memo. of objections, is a mere technical irregularity and may be ignored if no party is prejudiced by it. (*Baille, S.M.*) SURAJ BALI *v.* DAN BAHADUR SINGH. **26 I. C 736 : 1 O. L. J. 681.**

——**O. 41, Rr. 26 and 31**—*Failure to object to finding.*

The omission of a party to file objections under O. 41, R. 26 of C. P. C. does not relieve an Appellate Court from the duty imposed upon it by R, 31 to give its decision on the issue. 6 A. 391, 22 M. 344 Rel. (*Pratt and Hayward, A.J.Cs.*) JERAMDAS *v.* WADERO SHAH ALI. **40 I. C. 405 : 10 S.L R, 203.**

——**O. 41, R. 27**

Additional evidence.
Attestation.
Defect in Evidence.
Discovery of Evidence.
Discretion.
Documents.
Evidence on record.
Exclusion of evidence.
Expert Evidence.
Late stage.
Mistake.
Negligence.
New plea.
Object of.
Opportunity to rebut.
Procedure.
Record of Reasons.
Second Appeal.
Shifting of onus.
Subsequent events.
Substantial cause.
Sufficient cause.
Waiver of objections.

Additional Evidence.

——**O, 41, R. 27**—*Additional evidence--Application for, in appeal.*

The ordinary way of bringing new and important matter to the notice of the court, which was not within knowledge at the time of decree is by way of review. (*Fremantle, J. M.*) SWAMI DIN *v.* QAMAR JABAN SINGH **L. R. 3 All. 12 (Rev).**

——**O. 41, R. 27, and O. 47, R. 1**—*Additional evidence—Admission of—Discovery of evidence on appeal—Review.*

Even where a party having satisfied the Court that since the filing of the appeal he has discovered further evidence being unknown and not available to him and could not have been discovered with due diligence during the pendency

C. P. CODE (V OF 1908), O. 41, R. 27—Additional evidence.

of the appeal even up to the date of the judgment, that is no sufficient cause for an appellate Court to admit that evidence under O. 41, R. 27, C.P.C. It is a ground for review under O. 47, R. 1, C.P. Code. (*Macleod, C.J. and Crump, J.*) THE BOMBAY SIZING & STORES SUPPLYING CO. *v.* KUSUMGAR & CO. **47 Bom. 674 : 25 Bom. L. R. 310 : 1924 Bom 227.**

——0. 41, R. 27—*Additional evidence—Admission of.*

The legitimate occasion for admission of additional evidence on appeal is when on examining the record as it stands, there is an inherent lacuna or defect. If evidence is improperly admitted on appeal, the second appellate Court will not consider it, (*Mukerjee and Holmwood, JJ.*) MIDNAPORE ZEMINDARI CO., LTD. *v.* MUKTAKESHI DASI. **40 Cal. 402: 16 I. C. 776 : 17 C. W. N. 615.**

——0. 41, R. 27—*Additional evidence—Admission of—Powers of appellate Court.*

Evidence tendered after the close of the case in the trial court and during the arguments and for that reason rejected by the trial Court, should not be admitted by the appellate Court. (*Chevis and Le Rossignol, JJ.*) VAISHNO DAS *v.* HEM RAJ. **4 Lah. L. J. 371.**

——0. 41, R. 27—*Additional evidence—Direction of appellate Court.*

A party cannot claim admission of additional evidence, oral or documentary, as a matter of right. The rule however gives a discretion to the court of appeal to allow the production of such evidence. Rule 27 of Order 41 lays down definite limits within which additional evidence may be produced in appellate court. The words 'any other substantial cause' mean a cause *ejusdem generis* to the grounds already mentioned or, in other words, as meaning a case at least analogous to those specified previously. It is not open to a court of second appeal to interfere with discretion exercised by lower appellate court. (*Wazir Hasan, A. J. C.*) BADRI PRASAD *v.* MUKANDI. **9 O. L. J. 505 : 75 I. C. 331 : 26 O. C. 66 : 1923 Oudh 109.**

——0. 41, R. 27—*Additional evidence—Procedure.*

When additional evidence is tendered and admitted in the Appellate Court the judge should, in the exercise of his discretion, have allowed an opportunity to tender rebutting evidence and failure to do so, is unsatisfactory. (*Mullick and Atkinson, JJ.*) KANDHDEO NARAIN SINGH *v.* DEWA SINGH. **36 I. C. 955.**

Attestation.

——0. 41, R. 27—*Attestation—Additional evidence—Proof of.*

Where the only attesting witness cited to prove a mortgage document did not see the executant sign, the plff. was allowed a further opportunity of producing evidence to prove the mortgage, having regard to the fact that the Privy Council decision in 35 M. 607 as to the requisites of a valid attestation was recent (*Griffin and Chamier. JJ.*) BAKSHI RAM *v.* HILADHAR. **11 A. L. J. 371: 21 I. C. 619: 35 All. 353.**

C. P. CODE (V OF 1908), O. 41, R. 27—Defect in evidence.

——0. 41, R. 27—*Attestation—Proof of—Additional evidence—Obiter.*

An Appellate Court is not competent to examine an attesting witness who by inadvertence has not been called in the first Court. (*Mullick and Sultan Ahmed, JJ.*) GAYA SINGH *v.* NAME SINGH. **5 P. L. J. 263: 56 I. C. 983.**

Defect in Evidence.

——0. 41, R. 27—*Defect in evidence—Additional evidence.*

The legitimate occasion for the admission of additional evidence by an Appellate Court arises when on examining the evidence as it stands some inherent defect or *lacuna* becomes apparent. The Court has no jurisdiction to order additional evidence when it does not consider the evidence before remanding the case. (*Mookerjee and Teunon, JJ.*) JANKI KOER *v.* JAN ROY. **10 I. C. 332.**

——0. 41, R. 27—*Defect in evidence—Additional evidence—Admission of, by appellate Court, when justified.*

As pointed out by the Privy Council in 31 B. 381 (P. C.) the legitimate occasion for the admission of additional evidence by the appellate court under O. 41, R. 27, C. P. Code, is when, on examining the evidence as it stands, some inherent *lacuna* or defect becomes apparent or where a discovery is made, outside the court, of fresh evidence, and an application is made to import it, 31 M. 114: 42 C. 675, Foll. (*Scott-Smith and Abdul Quadir, JJ.*) FIRM OF RAM RICHHPAL SHAM LAL *v.* FIRM OF BANSI DHAR & SONS. **66 I. C. 370.**

——0. 41, R. 27—*Defect in evidence—Party not negligent—Indulgence.*

An Appellate Court can admit fresh evidence under O. 41, R. 27 if the party adducing the evidence was through no fault of his unable to produce it at the trial. The rule of admitting fresh evidence is not confined to cases where the Court *suo moto* desires to call for fresh evidence. (*Chamier, J. C.*) KALKA *v.* BHARAT. **12 I. C. 332: 14 O. C. 327.**

——0. 41, R. 27—*Defect in evidence—Powers of Appellate Court.*

An appellate court has no power to admit additional evidence unless upon examining the evidence as it stands some inherent *laouna* or defect becomes apparent. 31 B. 381 P. C., followed. (*Das and Buoknill, JJ.*) JAI KRISHNA *v.* BIBI SOGHRA. **4 P. L. T. 418: 71 I. C. 881: 1923 P. 446.**

——0. 41, R. 27 (1) (6)—*Defect in evidence.*

Additional evidence should be adduced in Appellate Court not to enable the Court to pronounce judgment in favour of a particular party. But such evidence is to be given only when the original one is defective. (*Coutts and Sultan Ahmed, JJ.*) BAIJNATH MANHJI *v.* DIP LAL MANDER. **57 I. C. 843.**

——0. 41, R. 27—*Defect in evidence—Admission on appeal.*

The Appellate Court cannot admit additional evidence except to cure inherent defect in the existing evidence. (*Mullick and Imam, JJ.*) TEJU BHAGAT *v.* DEOK NANDAN PRASAD. **47 I. C. 141.**

C. P. CODE (V OF 1908), O. 41, R. 27.—Discovery of Evidence.

Discovery of evidence.

———O. 41, R. 27—*Discovery of evidence—Dismissal of suit for partition — Fresh evidence—Available after dismissal—If admissible in appeal.*

When a suit for partition of land is dismissed and the plaintiff applies to the Appellate Court for leave to adduce the fresh evidence which has become available long after the dismissal, he is entitled to adduce such evidence. (*Mookerjee and Chotzner, JJ.*) BHAIRAL CHANDRA DUTT *v.* KALI KUMAR DUTT. **71 I. C. 453 : 37 C. L. J. 491 : 1923 Cal. 606.**

———O. 41, R. 27—*Discovery of fresh evidence—Admission when proper.*

Evidence ought not to be admitted for the first time by the Appellate Court unless on examining the evidence as it stands, some *locuna* or inherent defect becomes apparent and not merely a discovery is made outside the Court of fresh evidence and the application is made to import it. 31 B. 381 Rel. (*Newbould, J.*) APARNA CHARAN CHABRI *v.* GOPI NATH SAMANTHA. **53 I. C. 567.**

———O. 41, R. 27 and O. 47, R 1—*Discovery of fresh evidence—Judgment subsequently delivered in connected suit.*

A suit for rent in which the rate of rent was in dispute was decided by the Lower Appellate court, in ignorance of a judgment in a former suit between the same parties delivered by the High Court on the day previous. *Held*, that the proper course for the plff. was to apply to the Judge of the lower Appellate Court for a review of his judgment on the ground of discovery of new and important matter but that he could not have the whole proceedings set aside and get additional evidence of the High Court's judgment admitted in second appeal. (*Fletcher and Walmsley, JJ.*) JADAV CHANDRA MOULIK *v.* MANIK SARKAR. **51 I.C. 652 : 29 C. L. J. 313.**

———O. 41, R. 27 and O. 42, R. 1—*Discovery of fresh evidence—Second appeal—Additional evidence—Admission of.*

There is no objection to the admission in second appeal of a document such as the Judgment of a High Court which could not be produced earlier because it was not in existence and which requires no further evidence to explain it. (*Oldfield and Phillips, JJ.*) GADDAM PARAMASAVADU *v.* MULAKALA SUBBANNA. **52 I. C. 625 : (1919) M. W. N. 455.**

———O. 41, R. 27—*Discovery of evidence—Admissibility of document.*

If the plff. subsequently got the document of which he gave secondary evidence as being lost, it can be admitted in appeal. (*Coutts Trotter and Moore, JJ.*) MANCHALA NARAYANA MURTHI *v.* PENUMETEHA VENKATAPATIRAJU. **32 I. C. 711.**

———O. 41, R. 27—*Discovery of fresh evidence.*

Fresh evidence will not be allowed in appeal on the ground that it was discovered after the filing of the appeal. 31 M. 114 Ref. (*White, C. J. and Sankaran Nair, J.*) GURU MURTHI CHETTY *v.* ARCHIBALD READ. **9 I. C. 251 : 9 M.L.T. 323: 12 Cr.L.J. 40: (1911) 1 M.W.N. 136.**

C. P. CODE (V OF 1908), O. 41, R. 27—Discretion.

———O. 41, R. 27—*Discovery of fresh evidence—Admission on appeal—Consent—Waiver.*

The legitimate occasion for the use of the provision contained in O 41, R. 27, C.P. C. is when on examining the evidence as it stands, some inherent defect becomes apparent and not where a discovery is made outside the Court of fresh evidence and the application is made to import it. The mere fact that when one party applies for additional evidence being received, the other side also requests permission to let in additional evidence, does not amount to waiver of his right to object in second appeal, to the procedure of the Appellate Court. (*Das, J.*) UCHANT AHIR *v.* BASAWAN AHIR. **55 I. C. 226.**

Discretion.

———O. 41, R. 27—*Discretion—Interference.*

The Appellate Court has a discretion in the matter of admission of additional evidence. It is better for the Appellate Court to read the evidenc in the Court below, in order to consider the desirability of admitting additional evidence. (*Walsh and Stuart, JJ.*) KANIZ MUSTAFA *v.* MUSI IMRAN. **38 I. C. 669: 15 A. L. J. 21.**

———O. 41, R. 27—*Discretion—High Court powers—Evidence taken on remand.*

A High Court is not justified in second appeal in interfering with the discretion of the lower Appellate Court to the extent of refusing to recognise the additional evidence taken on remand. (*Piggott, J.*) BHULAN *v.* WAZIR. **27 I.C. 827.**

———O. 41, R. 27—*Discretion— Additional evidence.*

The admission of additional evidence is at the discretion of the Appellate Court and not as of right. (*Stanley, C. J. and Banerjee, J.*) DURGA PRASAD *v.* JAI NARAIN. **9 I. C. 265: 8 A. L. J. 175 : 33 All 379.**

———O. 41, R. 27—*Discretion—Admission on appeal.*

It is largely discretionary with an appellate court to admit additional evidence on appeal and a party cannot claim it as a matter of right. (*Greaves, J.*) NAYAJAN ALI *v.* MIDNAPORE ZAMINDARY COMPANY. **1923 Cal. 285.**

———O. 41, R. 27—*Discretion—Appellate Court should sparingly use its discretion.*

The appellate court should exercise its power allowing additional evidence very cautiously and sparingly and only in the interests of justice. (*Mookerjee and Chotzner, JJ.*) RAJA SREENATH ROY *v.* SECRETARY OF STATE FOR INDIA. **50 C. 276 : 36 C. L. J. 345 : 1923 C. 233.**

———O. 41, R. 27—*Discretion—Power to direct to amend grounds of appeal.*

An appellate court can issue a commission for the purpose of examining the accounts and remedying certain mistakes and omissions made by the previous commissioner and it would be perfectly justified in passing an order for the production of additional evidence if it found itself unable to decide the appeal on the record as it stood at the time. It has full discretion to direct an appellant at any stage to amend his grounds

C. P. CODE (V OF 1908), O. 41, R. 27.—Discretion.

of appeal if they are not sufficiently clear. (*Scott-Smith and Abdul Raoof, JJ.*) MT. RAM PIARI *v.* SULTAN BAKSH. 3 L. 382 : 1923 Lah. 115.

——O. 41, R. 27—*Discretion—Interference by High Court.*

The Appellate Court has a discretion to admit or reject additional evidence tendered for the first time before it and the High Court will interfere only if the discretion has been improperly exercised. (*Scott-Smith and Broadway, JJ.*) SEWA SINGH *v.* BHOLI. 129 P. R. 1916 : 36 I. C. 382 : 83 P. L. R. 1917.

——O. 41, R. 27—*Discretion—Considerations governing.*

A party cannot claim admission of additional evidence oral or documentary, as a matter of right. O. 41, R. 27, C. P. Code gives a discretion of the court of appeal to allow the production of such evidence and lays down definite limits within which additional evidence may be produced in an appellate court. The words "any other substantial cause" mean a *causa ejusdem generis* to the grounds already mentioned in O. 41, R. 27, C. P. Code or in other words as meaning a case at least analogous to those specified previously. Further the appellate court has a discretion in the matter and when it has exercised its discretion in one way it is not open to a court of second appeal to interfere with that discretion. 42 M. 737 Rel. (*Wazir Husan, A. J. C.*) BADRI PRASAD *v.* MUKANDI. 9 O. L. J. 505 : 26 O. C. 66 : 1923 Oudh 109.

——O. 41, R. 27—*Discretion to be sparingly exercised.*

The words "substantial cause" used in the rule confer a wide discretion which should be sparingly exericsed, otherwise it may open a wide door to the admission of evidence in the Appellate Court. (*Raymond and Madgaokar, A. J. C.*) NARAINDAS *v.* TEK CHAND. 1923 S. 42.

Documents.

——O. 41, R. 27—*Documents—Public documents—Judgment — Admission of evidence in appeal.*

It is not proper to admit as evidence in appeal, a judgment which is not *inter parties*, not conclusive, and is simply an addition of a disputable point to the already existing evidence. (*Richardson and Walmsley, JJ.*) KUMAR SARAT KUMAR ROY *v.* SRIPATHI CHATTERJEE. 50 I. C. 119 : 23 C. W. N. 242.

——O. 41, R. 27—*Documents—Public documents—Settlement papers—Appellate Court.*

Settlement papers cannot be admitted by the Appellate Court after the first Courts' decision in the case. 31 B. 381 P. C. Foll. (*Holmwood and Mullick, JJ.*) BAID NATH SAHAY *v.* NANKU MAHTON. 29 I. C 219.

——O. 41, R. 27—*Documents—Admission of —Oral evidence.*

Where a Court permits the adducing of documentary evidence under O. 41, R. 27, it should also permit oral evidence to be adduced in order to prove those documents as otherwise the document will be of no value at all as evidence. (*Lindsay A.J.C.*) SUKHDAI *v.* BHAGWAN PERSHAD. 20 I. C. 542.

C. P. CODE (V OF 1908), O. 41, R. 27.—Expert Evidence.

Evidence on record.

——O. 41, R. 27—*Evidence on record—Statements referred to by trial Court.*

An appellate Court can refer to statements not on record but referred to by the trial Court and continued in the record of a connected case. (*Johnstone, C. J.*) ARJUN SINGH *v.* DARBARA SINGH. 32 I. C. 312 : 193 P. L. R. 1915 : 140 P. W. R. 1915.

Exclusion of evidence.

——O. 41, Rr. 27 (1) (a) 28, 29—*Exclusion of evidence by Trial Court—Appellate Court, duty of.*

The improper exclusion of evidence by the Trial Court does not justify a reversal of decree of that Court. It is only open to the Appellate Court, either to take that evidence itself or direct the Lower Court to take the evidence and send it to the Appellate Court for consideration. (*Mookerjee and Panton, JJ.*) RAJA JYOT KUMAR *v.* JADU. 34 C. L. J. 160 : 64 I. C. 693 : 26 C. W. N. 1022.

——O. 41, R. 27—*Exclusion of evidence—Consideration of.*

Where a Trial Court refuses to admit documents tendered to it in evidence it is open to the Appellate Court to admit them after proof. Such admission does not amount to receiving additional evidence. (*Fletcher and Cuming, JJ.*) KADER BUX *v.* BENI MADHAB SEN. 52 I. C. 327.

——O. 41, R. 27—*Exclusion of evidence—Party not applying for admission on appeal—Effect.*

Where on objection taken by a party, certain documents were excluded as being inadmissible and no application was made to the Appellate Court to admit the document or to take fresh evidence as to its admissibility. *Held*, that the action of the Lower Court in refusing to consider the document is not illegal. (*Ayling and Tyabji, JJ.*) PERUMAL GOUNDAN *v.* RAMA GOUNDAN. 28 I. C. 378 : 28 M. L. J. 115.

——O. 41, R. 27—*Exclusion of evidence—Appellate Court—Discretion of.*

Where the Lower Court ought to have received the documents tendered by deft. in order to dispose of, completely, the matter in dispute they were admitted in the Appellate Court under O. 41, R. 27, C.P.C. (*Lindsay, J. C. and Stuart, A. J. C.*) HANWANT RAM *v.* BHAGWATI PRASAD SINGH. 27 I. C. 516 : 2 O. L. J. 27.

Expert evidence.

——O. 41, R. 27—*Expert evidence—Appellate Court—Acting on opinion taken by it from expert.*

Where in a suit on a promissory-note, the Appellate Court being unable to believe evidence on either side acted upon the report of the thumb impression bureau, to whom the document was sent. *Held*, that the procedure was unwarranted by law. (*Rafique, J.*) CHAJJU *v.* AYUB AHAMAD. 28 I. C 321.

C. P. CODE (V OF 1908), O. 41, R. 27.—Late Stage.

Late stage.

———O, 41, R. 27— *Late stage—Admission after arguments.*

An Appellate Court, cannot admit additional evidence, without recording reasons therefor, after the arguments are closed and a date is fixed for judgment. (*Gokul Prasad and Stuart, JJ.*) HANSRAJ *v.* SHIAM SUNDAR. 63 I.C. 423 : 19 A. L. J. 407.

———O. 41, R. 27—*Late stage—Dcouments received after close of the arguments.*

Arguments in the Lower Appellate Court were finished and the judgment was reserved on the 24th March. On the next day 25th March, the defendants filed a copy of the deposition of a person in a claim case and that was accepted by the appellate Judge. There was nothing to show that the plaintiff had any notice of the document having been filed, or having been used in evidence. *Held*, that the Appellate Judge ought not to have admitted this document in evidence after arguments had been finished on both sides and judgment was reserved. An opportunity should have been given to the plaintiff to raise any objection which he might have to the admissibility of the document in evidence. (*Chatterjee and Cuming, JJ.*) MANJURI DASSI *v.* KHETRAMANI DASSI. 1924 Cal. 403.

———O. 41, R. 27 -- *Late stage — Admission after arguments.*

An Appellate Court acts improperly in admitting additional evidence after the close of the arguments in the case. Even if it does admit such evidence, it should record its reasons for so doing under O. 41, R. 27, C. P. C. (*Suhrawardy and Cuming, JJ.*) ISAP ALI *v.* SATIS CHANDRA ROY. 65 I. C. 504.

———O. 41, R, 27--*Late stage—Admission of document—After closing of the case.*

It is illegal for a Court to admit documents after the case has been closed without giving opportunity to the opposite party to rebut or without assigning any reason for admission. (*Sanderson, C. J. and Mookerjee, J.*) GAJADHAR PRASAD *v.* LOHIA. 35 I. C. 698 : 24 C. L. J. 457.

Mistake.

———O. 41, R. 27—*Mistake—Power of admitting evidence omitted by mistake—Documents.*

The Appellate Court has power to allow additional evidence to be taken where the omission is due to inadvertance or mistake, especially when it consists of documents, the genuineness of which cannot be impeached. (*Chevis and Shadi Lal, JJ.*) WISANDA MAL *v*, GANESHA MAL.
14 P. R 1916 : 33 I. C. 813 : 195 P. W. R. 1915.

Negligence.

———O. 41, R.27—*Negligence—Additional evidence—Indulgence.*

A litigant is not entitled to the indulgence of being allowed to adduce additional evidence if he was remiss, in spite of objections to the defect in the record in the Courts below. (*Jenkins, C. J.*) RADHA KISHUN *v.* KHURSHED.
47 Cal. 662 : 47 I. A. 11: 38 M. L. J. 424 : 11 L. W. 518 : 22 Bom. L. R. 557: 18 A. L. J. 401 : 55 I. C. 959 (P.C.) : 25 C.W.N. 417 : (1920) M. W. N. 308.

C. P. CODE (V OF 1908), O. 41, R. 27.—Opportunity to rebut.

———O. 41, R. 27 (*b*)—*Negligence--Additional evidence—Grounds for.*

An Appellate Court has no power to call for fresh evidence when a party has deliberately declared in the Lower Court that he has no evidence. 37 B. 381 P. C.: 36 M. 477, Foll. (*Spencer and Hannay, JJ.*) ARASAPPA PILLAI *v.* MANICKA MUDALIAR. 25 I. C. 587: 16 M. L. T. 301.

———O. 41, R. 27—*Negligence—Additional evidence—Power to take.*

An Appellate Court has no power to call for evidence which could have been produced by the parties if he had been more diligent.(*Mullick and Sultan Ahmed, JJ.*) GANGA SINGH *v*, NEMO SINGH. 56 I. C. 983 : 1 Pat. L. T 701.

New plea.

———O. 41, R 27—*New plea—Additional evidence—Power of Appellate Court to admit—Point not pressed in Court below allowed to be raised on appeal.*

Where an Appellate Court allows the appellant to raise a point which was not pressed in the Court below, the other side must be given opportunity of meeting the point by adducing additional evidence on appeal. (*Das and Kulwant Sahay, JJ.*) MAN SINGH *v.* NAWLAKHBATI.
72 I. C. 239 : 2 Pat. 607.

Object of.

———O. 41, R. 27—*Object of—New case.*

O. 41, R. 27, C.P.C. is intended to supply a defect in the existing evidence on the record but not for proving a case in appeal a second time. (*Karamat Hussain and Chamier, JJ.*) KHAZAN SINGH *v*, PANNA LAL
13 I. C. 131 : 9 A. L. J. 59.

Opportunity to rebut.

———O.41, R.27 (1) (b)—*Opportunity to rebut—Additional evidence—Admission of, by Appellate Court to contradict testimony of witness at the trial—Improper.*

An Appellate Court should not allow additional evidence which impeaches the testimony of a witness examined in the Court below, at least without that witness being also called and being given an opportunity to contradict or explain the additional evidence so admitted (*Lord Shah.*) MUSAMMAT JAGRANI KOER *v.* KUAR DURGA PRASHAD. 36 All. 93 : 1 O. L. J. 57 : 41 I. A. 76 : 16 O. C. 386 : 12 A. L. J. 125 : 26 M. L. J. 153 : 15 M. L. T. 125 . 19 C. L. J. 165 : 18 C. W. N. 521 : 22 I. C. 103 : 16 Bom. L. R, 141. (1914) M. W. N. 137. (P. C.).

———O. 41, R. 27—*Opportunity to rebut.*

An Appellate Court can admit additional evidence only under the provisions of O. 41, R. 27, C. P. C. and if it admits additional evidence, the

C.P. CODE (V OF 1908), O. 41, R. 27—Opportunity to rebut.

other side must have an opportunity of rebutting it, 31 B. 581 ; 24 C. L. J. 457 Ref. (*Ghose, J.*) HRIDAY KRISHNA PAL *v.* RAJANIKANTA PAL.
1923 Cal. 300.

——— **O. 41, R. 27**—*Opportunity to rebut to be given to the other side.*

Additional evidence cannot be admitted by the Appellate Court contrary to O. 41, R. 27, and without giving the party against whom it is admitted an opportunity of producing rebutting evidence. (*Shah Din, J.*) MAHOMED *v.* RAMDIAL.
25 P. L. R. 1915 : 28 I. C. 14: 241 P. W. R. 1915.

———**O. 41, R 27**—*Opportunity to rebut to be given to other side.*

Where an Appellate Court allows one party to produce additional evidence, the other party must be given an opportunity to adduce evidence in rebuttal and if such permission is refused the procedure is illegal. (*Chapman and Atkinson, JJ.*) MUHAMMAD SADIQ *v.* MALIK WAIZUL HUQ.
43 I. C. 820 : 1917 Pat. 269.

Procedure.

—— ——**O. 41, R. 27**—*Procedure—Rules as regards procedure to be followed.*

Courts of first appeal should strictly follow the procedure laid down in O. 41, R. 27, and specially by the second clause of the said rule ; but if it exercises a judicial discretion in the admission of evidence pertaining to the record of a litigation that had taken place in its own court, it is not a departure so as to justify the interference in second appeal. (*Piggott, J.*) GAURI RAI *v.* BHAGGINA.
31 I. C. 873.

——— ——**O. 41, R. 27**—*Procedure—Admission of—Additional evidence—Appellate Court—Powers of.*

A preliminary application to admit fresh evidence before the appeal is heard is not warranted by the language of R. 27. The rule does not authorise an Appellate Court to admit fresh evidence documentary or oral and whether or not it was in existence at the time of judgment of the Lower Court or at the time the appeal was preferred, unless the Appellate Court after examining the evidence on record comes to the conclusion that additional evidence is required in order to enable it to pronounce judgment namely that there is a *lacuna* in the evidence on record. (*Fletcher and Richardson, JJ.*) GARDEN REACH SPINNING AND MANUFACTURING CO. *v.* SECRETARY OF STATE.
42 Cal. 675 : 28 I. C. 865 : 19 C. W. N. 401.

———**O. 41, R. 27**—*Procedure—Admission of documents—Documents filed with memorandum of appeal—Admission of.*

An Appellate Court is not entitled to admit and consider additional documentary evidence in contention of O. 41, R. 27, C. P. C. the provisions of which are mandatory. An appellant attached certain documents to his memorandum of appeal and the appellate Court passed an order that they should remain in the record. *Held*, that the Court erred in admitting this evidence and its findings being passed on evidence wrongly admitted were liable to be set aside 31. Bom. 381, Foll. (*Scott-Smith and Broadway, JJ.*) RATNA *v.* HARNAM SINGH.
47 I. C. 12 : 150 P. W. R. 1918.

C. P. CODE (V OF 1908), O. 41, R. 27—Record of reasons.

Record of reasons.

———**O. 41, R. 27**—*Record of reasons—Not made—Effect.*

Where the First Appellate Court issued a commission for the measurement of the plot in dispute and considered the report of the Commissioner along with other evidence on record without stating reasons for admitting the additional evidence and to give a finding. *Held*, that the finding cannot be accepted as binding as it is partly based on inadmissible evidence. (*Gokul Prasad, J.*) KABUL *v.* KABOOL SINGH.
1923 A. 413.

———**O. 41, R. 27**—*Record of reasons—Sufficient cause—Additional evidence—Admission of.*

Before taking additional evidence the Appellate Court should comply with O. 41, R 27, C.P.C. and if it thinks either with the consent of the parties or on the application of any one of them that there is sufficient ground to admit fresh evidence, the reasons for admitting it, should be stated and the papers should be formally admitted in evidence.(*Heaton and Shah, JJ.*) DAJI ABAJI SAWANT *v.* SAKHARAM KRISHNA KULKARNI.
38 Bom. 665 : 27 I. C. 33 : 16 Bom. L. R. 641.

———**O. 41, R. 27**—*Record of reasons.*

Non-recording of reasons is an irregularity and fresh trial was ordered in the circumstances of the case. (*Sanderson, C. J and Richardson, J.*) AFSAR KHAN *v.* SHABU MONDAL.
1922 Cal. 148.

——— ——**O. 41, R. 27 (2)**—*Record of reasons—Admission of fresh evidence.*

Where a document is admitted in evidence for the first time in the appellate court, the Court ought to record its reasons for the same. (*Chatterjee and Suhrawardy, JJ.*) AMBIKA CHARAN SEN *v.* GIRISH CHANDRA SEN.
68 I. C. 719.

———**O. 41, R. 27**—*Record of reasons—Omission to record reasons—Effect.*

Where an appellate court admits in evidence a khatian from the Record of Rights without recording reasons for the admission of such evidence, the defect is not fatal to its decision. O. 41, R. 27, C.P.C. is only directory and not mandatory.(*Walmsley and Greaves, JJ.*)RAHIMUDDIN KAZI *v.* RADHA GOVINDA BHOUMIK.
64 I. C. 238.

———**O. 41, R. 27 (2)**—*Record of reasons—Omission—Irregularity only.*

Where an appellant produced a public document to clear up doubts as to when the cause of action for the suit arose and the Appellate Court admitted the document but recorded no reasons, the Appellate Court was held to be right in admitting the additional evidence and its omission to record reasons was an irregularity cured by S. 99, C. P. C. (*Walmsley and Newbould, JJ.*) MURALI DHAR ADITYA *v.* THAKUR DAS MONDAL. **51 I. C. 50.**

———**O. 41, R. 27**—*Record of reasons.*

O. 41, R 27, of the C. P. C. is the only provision under which additional evidence is allowed to be

C. P. CODE (V OF 1908), O. 41, R. 27—Record of reasons.

received by an Appellate Court and the court must record the reasons for its admission. The omission to do so renders the order without jurisdiction and the consent of the parties does not validate such an order. (*Newbould and Panton, JJ.*) MOHESH CHANDRA SHAW *v.* BEPIN BEHARY KHAN. **49 I. C. 510.**

———O. 41, R. 27—*Record of reasons—Admission of new evidence—Validity.*

An Appellate Court should not admit new evidence except to supply a defect in evidence without which the suit cannot be decided. Moreover it must give reasons, the peculiar circumstances of the case being no reason. (*Holmwood and Chapman, JJ.*) RAHIM UDDIN MUNSHI *v.* BHABANGANA DEBYA. **19 I. C. 572.**

———O. 41, R. 27—*Record of reasons—Necessity for.*

An Appellate Court cannot admit additional evidence, without the reasons, allowed by law being recorded. (*Shadi Lal, J.*) KHEMCHAND *v.* MOHAMMAD YAR. **50 I. C. 805 :22 P. L. R. 1919.**

———O. 41, R. 27—*Record of reasons--Imperative—Admission of document in appeal.*

Admission of a document in appeal without recording the reasons and without any application by the parties is illegal. (*Ayling and Phillips, JJ.*) KAKI MUTYALU *v.* KANIGOLLA SIVA RAGHAVAYYA. **32 I. C. 826 : 3 L. W. 163.**

———O. 41, R. 27—*Record of reasons—None—Legality of.*

When the Appellate Court, during the hearing of an appeal admitted fresh evidence, for some of which there was no petition and without recording reasons, and disposed of the appeal on a consideration very largely of the evidence thus admitted, the decree will be set aside, being based on evidence, the admission of which was opposed to R. 27. (*Ayling and Oldfield, JJ.*) ARIYAMUTHU PILLAI *v.* SINNAYA PILLAI. **1 L. W. 771, 28 I. C. 11 : (1914) M. W. N. 795.**

———O. 41, R. 27—*Record of reasons—Necessity for.*

When the reasons for admitting additional evidence are apparent in the Judgment, they need not be separately recorded. (*Per Phillips, J.*) Where on the oral evidence there are grounds to suppose that an account was open, current and mutual, but the question was not raised in the Lower Court because there was no plea of limitation, the Appellate Court should admit the evidence in appeal when there is no documentary evidence to rebut the oral evidence. (*Abdur Rahim and Phillips, JJ.*) SUBBA NAIDU *v.* ETHIRAJAMMAL. **10 M. L. T. 409 : 22 M. L. J. 14 : 12 I. C 673 : (1911) 2 M. W. N. 440.**

———O. 41, R 27—*Record of reasons—Duty of Court.*

To allow an additional evidence by a Court of appeal it must record, separately its reasons to do so, as, generally, excepting in special cases additional evidence is not admissible even though it might prove an important point. (*Lindsay, A. J. C.*) IMDAD ALI *v.* HABIBUNNISSA **15 I. C. 250 : 15 O. C. 253.**

C. P. CODE (V OF 1908), O. 41, R. 27—Subsequent events.

Second Appeal.

———O. 41, R.27—*Second appeal—Powers of High Court.*

Where a lower Appellate Court refuses to admit a certain material document as additional evidence in the appeal unper O. 41, R 27, C.P.C. the High Court cannot interfere in second appeal and hold that such additional evidence ought to have been admitted by the lower Appellate Court. 42 Mad. 737 (F. B.): 9 I C 265 Foll. (*Broadway, J.*) SANTA SINGH *v.* BHAN SINGH. **1923 Lah. 30.**

———O, 41, R. 27—*Second appeal--Additional evidence—Admission of--Refusal by Lower Appellate Court.*

Where a Lower Appellate Court refuses to admit a certain material document as additional evidence under O. 41, R. 27, of the C. P. C, the High Court cannot interfere in second appeal and hold that such additional evidence ought to have been admitted by the Lower Appellate Court. It has long been the practice of the High Courts not to entertain second appeals from refusals of the Lower Appellate Court to admit fresh evidence under O, 41, R. 27, of the C.P.C. and such practice should not departed from. Per *Sadasiva Aiyar, J. Contra*—The High Court has power in second appeal to consider the propriety of the exercise of discretion by the LowerAppellate Court as regards the admission of additional evidence. (*Wallis, C. J., Ayling and Sadasiva Aiyar, JJ.*) VAITHINATHA PILLAI *v.* KUPPA THEVAR. **42 Mad. 737 : 37 M. L. J. 125 : 10 L. W. 122 : 53 I.C. 274 (F. B.) : 26 M: L. T. 246 : (1919) M. W. N. 525.**

———O. 41, R. 27—*Second appeal—Admission of fresh evidence.*

It is open to the High Court in second appeal to admit fresh evidence if necessary for the decision of the appeal. (*Oldfield and Phillips, JJ.*) GADDAN PARAMASIVUDU *v.* MULAKALA SUBBANNA. **52 I. C. 625 : (1919) M. W. N. 455.**

———O. 41, R. 27—*Second appeal--Additional evidence.*

Where a party has failed to support his position in the original court he will not be permitted to produce further evidence in second appeal. (*Stuart, A. J. C.*) GAURI SHANKAR *v.* MADHO CHARAN. **16 I. C. 887.**

Shifting of onus.

———O. 41. R. 27—*Shifting of onus—Additional evidence—Onus shifted on appeal.*

A party to whom the onus is shifted on by an Appellate Court is not entitled to adduce fresh evidence, if he is not taken by surprise or put to disadvantage thereby. 29 A. 184. P. C. Ref. (*Lindsay and Rafique, JJ.*) MUHAMMAD HUSAIN *v.* LALJI SINGH. **25 I. C. 648 : 1 O. L. J. 366.**

Subsequent events.

———O. 41, R. 27—*Subsequent events—Decree passed pending appeal.*

Where pending an appeal from a decree in a rent suit, a decree is passed in favour of the

C. P. CODE (V OF 1908), O. 41, R. 27—Subsequent events.

appellant in a title suit, the appellate court should receive the decree in evidence and act upon it. 31 B. 381 : 31 M. 114 : 36 A 93 Ref. (*Tcunon and Newbould, JJ.*) SASHI BHUSHAN BOSE *v.* PRASULLA MULLICK. **64 I. C. 721.**

——0. 41, R, 27 (1) (2)—*Subsequent events—Omission to record reasons.*

Where subsequent events happen after the institution of the suit which make the reliefs granted by the first court's decree, inappropriate, the proper course, is to apply for additional evidence being given of these facts under O. 41, R. 27, C. P. C. A mere omission to comply with O, 41, R. 27, (2) C.P.C. does not render the additional evidence taken inadmissible especially when no objection was raised at the time by the opposite party. (*Scott-Smith and Wilberforce, JJ.*) NEKI *v.* CHAJJU RAM. **48 I. C. 137 : 111 P. W. R. 1918.**

——0. 41, R. 27—*Subsequent events.*

If the Lower Appellate Court does not call record of rights in evidence which was published after the munsif gave decision but before an appeal was made, the High Court will decide on an entry and may not call for record. (*Adami and Bucknill, JJ.*) RAJNATH SINGH *v.* WAHID KHAN. **(1921) Pat. 296 : 3 Pat. L. T. 107 : 1922 P. 28.**

——0. 41, R. 27—*Subsequent events—Appellate Court.*

Public documents coming into existence after the filing of second appeals may be admitted in evidence in the High Court. A Court cannot neglect the events that came into existence while a suit or proceeding is pending. (*Mullick and Jwala Prasad, JJ.*) JAMES HENRY GEORGE HILL *v.* SATAN SINGH. **4 Pat. L. J. 312 : 50 I. C. 857 : (1920) Pat. 4.**

Substantial cause.

——0, 41, R. 27—*Substantial cause.*

Where an appeal has been preferred, a review is out of question and the party's proper course is to apply to the appellate court, which is in possession of the case, to admit the additional evidence either under the general principles of law or under the specific provisions of Rule 27, which lays down that the appellate court may for any other substantial cause, viz., other than those particularly specified, allow such evidence or documents to be produced or witnesses to be examined. Rules of procedure are not made for the purpose of hindering justice. 11 Moo. I A. 28 : 34 I. A. 115 Dist, (*Mr. Ameer Ali*). RAJA INDRAJIT PRATAP BAHADUR SAHI *v.* AMAR SINGH. **4 P. L. T. 447 : 1 Pat. L. R. 345 : 21 A. L. J. 554 : 2 Pat. 676 : 50 I. A. 186 : 33 M. L. T. 233 : L. R. 4 (P. C.) 123 : 5 L. R. P. C. 8 : 28 C. W. N. 277 : 45 M. L. J. 578 : 18 L. W. 728 : 25 B. L. R. 1259 : 39 C. L. J. 318 : 1923 P. C. 128.**

——0. 41,R. 27—*Substantial cause--Adjournment, refusal to grant.*

An Appellate Court can allow additional evidence under O. 41, R. 27, where there has been a wrongful refusal by a Lower Court, to grant an

C. P. CODE (V OF 1908), O. 41, R. 27—Substantial cause.

adjournment. (*Macleod, C. J. and Shah, J.*) JETHALAL *v.* VARAJLAL. **23 Bom. L. R. 769 : 46 Bom. 184 : 1922 Bom. 267.**

——0. 41 R. 27—*"Substantial cause"—Meaning.*

The expression "substantial cause" does not include a case where the only ground assigned is that the evidence already adduced by the aggrieved party is unsatisfactory and insufficient. (*Mookerjee and Cuming, JJ.*) SATISH CHANDRA GHOSE *v.* THAKURDAS MANDAL. **39 I. C. 886 : 25 C. L. J. 473.**

——0, 41, R, 27—*Substantial cause.*

There is ample authority for holding that the cause in O. 41, R. 27, C. P. Code, need not be *ejusdem generis* with the causes stated in the earlier part of the rule, and the expression any other substantial cause confers a wide discretion on the appellate court to admit additional evidence when the ends of justice require it. (*Moti Sagar, J.*) PRABHU LAL *v.* GULZARI MAL. **1923 Lah. 564.**

——0. 41, R. 27—*"Substantial cause"—Interpretation of—Necessity—Recitals in document whether enough.*

Fresh evidence cannot be called in cases where no evidence has been adduced in the lower Court in respect of any issue and where there is consequently no inherent *locuna* or defect. *Per Phillips, J.*—In interpreting the words, "for other substantial cause" in O. 41, R 27, the facts of each case must be taken into account and an answer supplied accordingly, subject to the principles governing the case. (*Kumaraswamy Sastri and Phillips, JJ.*) MARIMUTHU PILLAI *v.* VELU PILLAI. **32 I. C. 908.**

——0. 41, R. 27--*Substantial cause--Meaning of,*

The word "any other substantial cause" give wide discretion to the Appellate Court and it can admit additional evidence if justice requires so to be done. (*Sundara Iyer and Sadasiva Iyer, JJ.*) AMBUJA AMMAL *v.* APPADURAI MUDALI. **30 I. C. 402 : 38 Mad. 414.**

——0. 41, Rr. 27 and 33—*Substantial cause—Meaning of.*

An Appellate Court can receive additional evidence if it thinks necessary to do so in the interests of justice. The discovery of fresh evidence and inability to produce it through no fault or negligence of the party producing it in the Appellate Court, is 'substantial cause' within the meaning of the rule for admission of such evidence. (*Ayling and Sadasiva Iyer, JJ.*) VENKATACHALA PILLAI *v.* RANGA PILLAI. **28 I. C. 694 : 17 M. L. T. 220 : 28 M. L. J. 334.**

——0, 41, R. 27—*Substantial cause—Meaning of.*

The words 'any other substantial cause' in O. 41, R. 27, of the Code should not be construed narrowly as suggested by the doctrine of *Ejusdem Generis*, so as to confine them to causes of the same kind as those stated in the earlier part of the section. (*Per Sundara Airar, J.*) The expression "to enable it to pronounce judgment" cannot

C. P. CODE (V OF 1908), O. 41, R. 27—Substantial cause.

mean pronounce some judgment whether it satisfies the mind and conscience of the court or not, 31 B. 381 Dist. Where the finding of the Lower Court is based on a doubtful or a difficult question, the Appellate Court can take additional evidence. (*Benson and Sundara Aiyar, JJ.*) ANDIAPPA PILLAY *v.* MUTHUKUMARA THEVAN.
11 M. L. T. 241 : 14. I. C. 140 : 36 Mad. 477 : (1912) M. W. N. 450.

——O. 41, R. 27—*Substantial cause—Meaning of.*

Per Abdur Rahim, J.—The words "any other substantial cause" should not be construed in a wide and unrestricted sense but they refer to the same class of cases as the one sepecifically named; evidence should be allowed when on looking to the record as it stands, some inherent defect becomes evident. The rule does not cover cases where the evidence on record suggests that a certain plea, which one of the parties might have relied upon, but did not, is open and proceeds to take additional evidence which is not necessary to enable the Appellate Court to pronounce judgment. (*Abdur Rahim and Phillips, JJ.*) SUBBA NAIDU *v.* ETHIKAJAMMAL.
10 M. L. T. 409 : 22 M. L. J. 14 : 12 I. C. 673 : (1911) 2 M. W. N. 440.

——O. 41, R. 27—*Substantial cause—C. P. C. S. 151—Inherent power.*

During the course of a trial, plff. having reason to suppose that the execution of the deeds on which the suit was based would not be seriously challenged, refrained from adducing all available evidence. The plff. then produced formal evidence by examining a witness to prove the signature of one of the attesting witnesses to the deeds. *Held*, that under these circumstances there was substantial cause to justify the Appellate Court under S. 151 and O. 41, R. 27, of the C. P. C. in permitting the plffs. to produce additional evidence as to the execution of the deeds. (*Stuart and Kanhaiya Lal, A. J. C.*) MANGAL *v.* RANI INDAR.
48 I. C. 1007: 5 O. L. J. 745.

Sufficient cause.

——O. 41, R. 27—*Sufficient cause—Reception of new evidence.*

Where an application for the reception of new evidence was made to the High Court in a case lasting for over three years after a final judgment had been made in the case by that Court and no sufficient reason was shown why the proposed new evidence was not timeously submitted, and the High Court rejected that application. *Held*, that the rejection of the application by the High Court was correct. (*Lord Shaw*). SHINTRE *v.* REVAPPA.
19 C. W. N. 762 : 29 I. C. 717: (1915) M. W. N. 787 (P.C.)

——O. 41, R 27—*Sufficient cause—Examination of parties.*

An Appellate Court can examine any of the parties if, for the sake of doing justice and for the purpose of making sure of facts, it is considered necessary. (*Bannerji and Wallach, JJ.*) JANG BAHADUR *v.* RAJ KUMAR. 42 All. 48 : 52 I. C. 289 : 17 A. L. J. 945.

C. P. CODE (V OF 1908), O. 41, R. 27—Sufficient cause.

——O. 41, R. 27—*Sufficient cause—Re-examination of witnesses.*

O. 41, R. 27, is not intended for enabling an appellate court to re-examine before it witnesses already examined and cross-examined in the court of first instance. (*Richards, C. J. and Tudball, J.*) MUHAMMAD SIDDIQ *v.* MAHMUD-UN-NISSA BIBI.
38 All. 191 : 33 I. C. 334 : 14 A. L. J. 121.

——O. 41, R. 27—*Sufficient cause—Additional Evidence—Admission by Appellate Court—Grounds for.*

The mere fact that a litigant was not aware of the existence of documentary evidence in the case, is no ground for admission of such evidence for the first time on appeal. 31 B. 381 ; 42 C. 675 Rel. (*Newbould, J.*) SRIMATI MANMOHINI DEBI *v.* RAMKISHORE. 68 I. C. 334.

——O. 41, R. 27—*Sufficient cause—Defect in evidence.*

An Appellate Court can admit additional evidence already in order to enable it to dispose of the appeal to his own satisfaction. (*Benson, O. C. J. and Sankaran Nair, J.*) SUBBA NAIDU *v.* ETHIRAJAMMAL. 28 I. C. 640.

——O. 41, R. 27—*Sufficient cause—Further evidenc—Appellate Court.*

A party cannot advance further evidence on appeal unless he has been prevented by the action of the court from adducing all the evidence he could. (*Sundara Aiyar and Spencer, JJ.*) RAMIEN *v.* VEERAPPUDIAN. 37 Mad. 455 : 11 M. L. T. 69: 22 M. L. J. 217 : 14 I. C. 394 : (1912) M. W. N 117 and 530.

——O. 41, R. 27—*Sufficient cause—Additional evidence—Appellate Court when entitled to admit.*

Where a point is sufficiently covered by the issues framed by the Court of first instance and the parties had every opportunity of producing evidence upon that point, the Appellate Court must refuse to admit fresh evidence when the appeal comes before it. (*Lindsay, J. C. and Stuart, A. J. C.*) MOHARBAN SINGH *v.* RAGHUNATH SINGH. 49 I. C. 115: 5 O. L. J. 768.

——O. 41, R. 27—*Sufficient cause—Power of Appellate Court to take—Additional evidence.*

O. 41, R. 27 (*b*), C. P. C. does not mean that in order to enable an Appellate Court to pronounce judgment in favour of a particular party additional evidence could be admitted in appeal but it means only that where it is impossible to pronounce judgments at all on the evidence, the court may call for witnesses. (*Adami, J.*) JINGUR JHA *v.* BADRI SAHU. 54 I. C. 666.

——O. 41, R. 27—*Sufficient cause—Additional evidence—Admission of, when justified.*

O. 41, R. 27, C. P. Code, does not provide that in order to enable the Appellate Court to pronounce judgment in favour of a particular party additional evidence may be admitted in appeal. The legitimate occasion for the use of the power conferred by O. 41, R. 27, C.P.C. on Appellate Court is, when, on examining the evidence as it stands, an inherent defect or *locuna* becomes

C. P. CODE (V OF 1908), O. 41, R. 27—Sufficient cause.

apparent. (31 B. 38 Foll.) (*Das, J.*) JAGDEO LAL *v.* RAM LAGAN SINGH.
53 I. C. 826 : 20 Cr. L. J. 826

——O. 41, R. 27—*Sufficient cause—Limits of the discretion.*

The object of O. 41, R. 27, of C. P. C. is not to enable the court to supplement the evidence that a party is bound to produce and it should not be used with a view to supply defects and loopholes that a vigilant litigant is required to guard against in the conduct of his case. It is strictly prohibited for an Appellate Court to admit evidence in appeal solely at the instance of a party without having satisfied itself that there is any difficulty in deciding the case upon the evidence already on the record. (*Jwala Prasad, JJ.*) JAGANNATH GIR *v.* RAJMAN GIR. 49 I. C. 868.

——O. 41, R. 27—*Sufficient cause—What is.*

O. 41, R. 27, of the C. P. C. does not empower the Court to pronounce the judgment in favour of a particular party and for that reason admit additional evidence on appeal. It only means that where it is not possible to pronounce judgment at all on the evidence as it stands the Court may admit additional evidence to enable it do so. (*Roe and Jwala Peasad, JJ.*) KULIKA DUTT MANDAR *v.* TULSI MANDAR. 44 I. C. 670: 3 Pat. L. W. 385.

——O. 41, R. 27 (b)—*Sufficient cause—Addition of evidence.*

O. 41, R. 27 (*b*), authorises an Appellate Court to call for a document only in the extreme case of the judgment being impossible on the evidence before it, and does not require additional evidence to be admitted in appeal for the purpose of pronouncing decision in favour of any particular party. (*Roe and Jwala Prasad, JJ.*) KULIKA DUTT MANDAR *v.* TULSI MANDAR.
37 I. C. 1008 : 1 Pat. L. J. 435.

——O. 41, R. 27—*Sufficient cause—Inherent defect.*

Under R. 27, the Appellate Court will not be justified in permitting the respondent to adduce fresh evidence except for some substantial cause. The rule refers primarily to some inherent *locuna* or defect in the evidence before the Court. (*Pratt, J. C. and Crouch, A. J. C.*) MUSAMMAT ASSAT *v.* DHAMANMAL. 19 I. C. 368 : 6 S. L. R. 135.

Waiver of objections.

——O. 41, R. 27—*Waiver of objections—Party objecting relying on a portion of that evidence.*

Fresh evidence should not be admitted by an Appellate Court in order to enable it to decide the case in favour of one of the parties to the suit. 31 Bom. 381 : 1 Pat. L. J. 435 : 31 Mad. 114 ref. Where, however, such evidence had been admitted in the Lower Appellate Court and the party objecting to the admission himself relies upon a portion of such evidence, he cannot object to the remainder being placed on the record. (*Batten, J. C.*) BHAIRON SINGH *v.* HINDU SINGH.
1922 Nag. 119.

——O. 41, R. 30—*Judgment without notice to parties and not in open Court—Appeal—Delay—(Lim. Act, S. 5).*

C. P. CODE (V OF 1908), O. 41, R. 31—Affirming or reversing judgment.

The judgment of the Lower Appellate Court was not pronounced in open Court, nor had any intimation been sent to the parties of any date for its pronouncement. The appellant did not discover what the decision who till after the expiry of the period prescribed for appeal. *Held*, that an appeal to the Chief Court was within time being presented within 90 days after the appellant became aware of the decision of the Lower Appellate Court. There was also sufficient cause for excusing the delay within S. 5 of the Lim. Act. (*Scott-Smith and Broadway, JJ.*) LALLI *v.* SAIN DITTAR.
51 I. C. 239 : 27 P. R. 1919.

——O. 41, R. 31.

Affirming or reversing judgment.
Consideration of evidence.
Contents of judgment.
Defective judgment.
Mandatory provision.
Statement of reasons.

Affirming or reversing judgment.

——O. 41, R. 31—*Affirming judgment—Contents of.*

Whether or not a judgment is according to law must depend on the facts and circumstances of each case. There is firstly the difference which exists between cases of affirmance of judgments and cases of reversal of judgments of the first court. Where the judgment of the first court has fully discussed all the matters placed before it and the appellate court has appreciated the main facts in the case but has dismissed the appeal in a short judgment the appellate judgment is not vitiated by any irregularity. (*Woodroffe and Ghose, JJ.*) MAHOMED HUSAIN CHOUDHURY *v.* RABIA KHATUN. 1923 C. 113.

——O. 41, R. 31—*Reversing judgment—Reasons for reversal to be stated.*

The Appellate Court in arriving at a conclusion different from that of the first Court should state its reasons for doing, so as to enable the court of second appeal to see whether the conclusion has been legally arrived at. (*Woodroffe and Chatterjee, JJ.*) RAJ MOHAN DHUPI *v.* HARENDRA CHANDRA MUKHO PADYA. 56 I. C. 816.

——O. 41, R. 31—*Affirming judgment—How should be made.*

Where a Lower Court's judgment is exhaustive and well-written, an Appellate Court, if it confirms that judgment, may express concurrence with it without more, but there should be enough to show that the Court of appeal has considered it fully and formed its own opinion. (*Carnduff, J.*) RAJENDRA NARAIN SAHA *v.* ASUTOSH SANYAL.
13 I C. 194.

——O. 41, R. 31—*Affirming judgment—Wholesale concurrence with Lower Court.*

A judgment of a Dt. Judge merely stated that the findings of the Lower Court were perused, that both sides were heard and the findings accepted, without dealing with or stating certain objections against the findings. *Held*, the judgment is not a judgment within the meaning of the law. (*Abdur Rahim and Sadasiva Iyer, JJ.*) CHIKKANNA CHETTI *v.* CHINNATH OYEAMMAL. 16 I. C. 354.

C. P. CODE (V OF 1908), O. 41, R. 31—Affirming or Reversing judgment.

———O. 41, R. 31—*Affirming judgment—Contents of.*

Where a judgment of a court of first appeal consisted only of a general statement by the judge that he had carefully considered the record and found no reason to interfere with the conclusions arrived at by the trial Court the judgment is not in accordance with law. (*Kanhaiya Lal, A. J. C.*) BAIJ NATH *v.* THE KAYASTHA PATSHALA.
49 I. C. 56 : 21 O. C, 309.

——— O. 41, R. 31—*Affirming judgment—Contents of.*

A judgment in affirmance of a decree must be precise and definite, and it must show with reasonable clearness that the mind of the Appellate Court has been brought to bear sufficiently upon every aspect of the case requiring his decision. (*Atkinson and Manuk, JJ.*) JAGADAMBA PRASAD LALA *v.* A. V. SHAM
49 I. C. 504: 1919 Pat. 88.

———O. 41, R. 31—*Reversing judgment—Statement of reasons.*

Where a court of appeal reverses the decision of the primary court the law imposes upon the Court of Appeal the imperative duty and obligation of giving an adequate and satisfactory judgment such as is required by law. 1 Pat. L. W. 193 ; 38 I. C. 509 ; 36 C. 927 Ref. (*Atkinson, J.*) BIBI SALEHA *v.* ANTU RAM. 43 I. C. 973.

———O. 41, R. 31—*Reversing judgment—Discussion of evidence.*

When the judgment of an appellate Court is one of reversal the aggrieved party can demand a consideration of the points on which the Lower Court relied for the purpose of giving the successful party a decree (*Mullick. J.*) GANGARAM RAI *v.* MOULA BAKSH, 34 I. C. 185.

Consideration of Evidence.

———O. 41, R. 31—*Consideration of evidence—Appellate Court—Judgment of.*

A judgment of the First Appellate Court, omitting to set out the evidence on which the judgment is based, is not one in accordance with law. (*Teunon and Majid, JJ.*) UPENDRA NATH *v.* ADHAR CHANDRA. 63 I. C. 436.

———O. 41, R. 31—*Consideration of evidence.*

It is the duty of an Appellate Court to consider the evidence on the record and where this is not done, the judgment can be set aside in second appeal. (*Scott-Smith and Martineau, JJ.*) MAULA DAD *v.* BEGAM. 51 I. C. 751.

———O. 41, R. 31—*Consideration of evidence.*

A judgment of an Appellate Court should show that the Court has considered the evidence on record and the various grounds of appeal. (*Scott-Smith, J.*) LADHA RAM *v.* GURDAS.
108 P. L. R. 1916 : 36 I. C. 6 : 132 P. W. R. 1916.

———O. 41, R. 31—*Consideration of evidence—By Lower Appellate Court.*

The omission of the Court of first hearing to mention a document of obvious importance in its judgment is proof that it failed to consider the document inasmuch as it may be presumed that the document if duly considered would have been mentioned. Where the omission of reference to a document by a first Appellate Court is urged in second appeal as proof that the first Appellate Court failed to consider the document he must either prove that he relied on the document in argument in first appeal or that he relied on the particular part of the judgment of the first Court treating the document as supporting its decision. (*Lyle and Ashworth, J C*) RAM UDIT *v.* BISHESHWAR. 22 O. C. 312 : 6 O. L. J. 551 : 54 I. C. 353 : 2 U. P. L. R. (J. C.) 22.

C. P. CODE (V OF 1908), O. 41, R. 31—Consideration of evidence.

———O. 41, R. 31—*Consideration of evidence.*

A Judge should not quote the judgment of another Court and refer to that other Court's opinion as his own, but should show in the judgment his own appreciation of the evidence in the case and support his findings by giving his own reasons. (*Lindsay, J. C.*) JAGAN NATH *v.* BINDESHWARI PRASAD.
37 I. C. 435 : 3 O. L. J. 620.

———O. 41, R. 31—*Consideration of evidence—Judgment—Contents of.*

A mere general statement that on a perusal of all the evidence in the case the Court is satisfied as to a certain set of facts is insufficient for a judgment as required by law. (*Das, J.*) MANAGR SINGH *v.* BABU BHARAT PRASAD. 51 I. C. 46.

———O. 41, R. 31—*Consideration of evidence.*

The failure of an Appellate Court to weigh all the evidence and to come to a satisfactory conclusion on the evidence before it, is an error of procedure which vitiates the judgment. (*Das, J.*) RANGU MANDAL *v.* CHATERNATH CHOWDHURY,
51 I. C. 11.

———O. 41, R. 31—*Consideration of evidence,*

Omission to consider an important piece of evidence is an error in procedure and vitiates the whole trial. (*Jwala Prasad, J.*) HARADHAN MAHTO *v.* LITTO MANGHI. 49 I. C. 832.

———O. 41, R. 31—*Consideration of evidence.*

The judgment of an Appellate Court must show that the Judge has considered the evidence in the case himself and has arrived at a finding upon an independent consideration of the facts and circumstances and the evidence. (*Jwala Prasad, J.*) SAKALBATI MISRAIN *v.* MUNSHI MANDER.
49 I. C. 733.

———O. 41, R. 31—*Consideration of evidence.*

The Appellate judgment should state the questions for determination, the nature of the evidence and should show that the evidence has been considered by the Court. (*Chapman and Roe, JJ.*) LALLOO SINGH *v.* TAHBAL GOPE.
38 I. C. 814 : 1 P. L. W. 193.

———O. 41, R. 31—*Consideration of evidence—General statement.*

A general statement that on perusal of all the evidence in the case, the court is satisfied as to certain facts is not a sufficient judgment within the meaning of the law and the High Court may interfere, if there is a miscarriage of justice by the Court's failure to consider all the evidence. (*Mullick and Atkinson, JJ.*) MUBARAK HUSSAIN *v.* SHAH AHMID HUSSAIN. 1 P. L. W. 188 : 38 I C. 509 : 2 P. L. J. 8; : 1917 Pat. 308.

C. P. CODE (V OF 1908), O. 41, R. 31—Consideration of evidence.

——O. 41, R. 31—*Consideration of evidence.*
The Appellate Court must weigh and discuss conflicting evidence and come to its own conclusion on it and give reasons for coming to that conclusion. Where an Appellate Court refers to only one of the seven grounds of appeal and says that it finds no sufficient reason to differ from the Lower Court and where the evidence is conflicting, the appeal is not disposed of according to law, and the judgment and decree should be set aside. The Court should be ordered to consider all the seven grounds. (*Parlett, J.*) MAUNG PO *v.* MA GYAUK THAY. **17 I. C. 898 : 5 Bur. L. T. 269.**

Contents of Judgment.

——O. 41, R. 31—*Contents of judgment.*
Where a judgment ran thus: "Counsel for the respondents admits that the evidence of the Naib Tahsildar recorded in this court is the best evidence available on either side. The appeal is, therefore, decreed with costs." *Held*, that the judgment does not comply with the requirements of the law as not setting forth the matters in dispute between the parties and as not recording any findings thereon. (*Bannerji, J.*) KUBER SAITHWAR RAMTAHAL UPADHIA *v.* GUPTAI SAITHWAR. **35 I. C. 237.**

——O. 41, R. 31—*Contents of judgment.*
An Appellate judgment should state the reasons for the decision on all the points for determination and must show that the Appellate Judge has exercised his own mind independently on the questions involved, and not relied *en bloc* on the reasoning of the trial Court. 22 M. 12 Rel. (*Batchelor, C. J. and Kemp, J.*) GANAPATI RAM *v.* SEVAKRAM MANSUKHRAM.
46 I. C. 161 : 20 Bom. L. R. 461.

——O. 41, R. 31—*Contents of judgment—Duty to consider all points raised.*
If a point was distinctly raised by the parties and dealt with by the Court of first instance and was not abandoned at the hearing before the Appellate Court, the latter court is bound to consider it and dispose of it. (*Chandavarkar and Heaton, JJ.*) NATHER BAI *v.* BAI HONSGAVRI.
36 Bom. 379 : 15 I. C. 818 : 14 Bom. L. R. 418

——O. 41, Rr. 31 and 11—*Contents of judgment—Summary dismissal of appeal.*
O. 41, R. 31 of the C. P. Code controls O. 41, R. 11 and an appellate court dismissing a second appeal under the latter provision must state the points for decision and the decision thereon with reasons. (*Chatterjee and Panton, JJ.*) BIPIN BEHARI CHATTOPADHYA *v.* JOGENDRA NATH BANDOPADHYA. **65 I. C. 479.**

——O. 41, R. 31—*Contents of judgment—No proper trial.*
Where in the suit for confirmation of possession and declaration of title, the trial Court went into both the questions of title and possession, but the Appellate Court did not consider the question of possession, holding that the title was not proved, *held* that the Appellate judgment could not stand as being founded on a partial view of the case. (*Fletcher and Smither, JJ.*) RAM NATH *v.* NATABAR MAITI. **46 I. C. 328.**

C. P. CODE (V OF 1908), O. 41, R. 31—Contents of judgment.

——O. 41, R. 31—*Contents of judgment—Revision.*
Where an Appellate Court passed a judgment in a cursory manner and the judgment did not show that the evidence on the record had been fully weighed, and considered, it is liable to be set aside in revision. (*Chevis, J.*) MATHRA DASS *v.* MUHARRAM DIN. **4 P. W. R. 1915 : 27 I. C. 561 : 36 P. L. R. 1915.**

——O. 41, R. 31—*Contents of judgment.*
The judgment of the Appellate Court should set out the points for determination, its decision thereon, and its reasons for so deciding. If it is otherwise, the judgment will not be upheld. (*Spencer and Tyabji, JJ.*) PERIYAMMAL *v.* VAITHILINGA UDAYAR. **28 I. C. 354.**

——O. 41, R. 31—*Contents of judgment—Defect in.*
The judgment of an appellate court was—"The conduct of H has been throughout tortuous and I am satisfied that the view taken by the Lower Court is correct. The appeal is dismissed with costs." *Held* that this was not a judgment according to law as it cannot be said to satisfy the provisions of O. 41, R. 31, C. P. C. (*White, C. J. and Wallis, J.*) ABBAS ALI *v.* KALIKI RUNGA REDDI. **16 I. C. 382.**

——O. 41, R. 31—*Contents of judgment.*
A first appellate judgment should contain such a statement of the case as would show that the Court has understood the real issues, tried those issues, and considered the evidence. (*Kendall, A. J. C.*) BENI MADHO *v.* RAM HARAKA.
25 I. C. 596 : 1 O. L. J. 334.

——O. 41, R. 31—*Contents of judgment—Inconclusive statement.*
A judgment which is based on an indefinite conclusion *i. e.*, "there is much force in the contention" is not in accordance with law and is liable to be set aside. (*Coutts and Sultan Ahmad, JJ.*) JUGDEO NARAIN SINGH *v.* BHAGWAN MAHTO, **54 I. C. 672 : 1 P. L. T. 27.**

——O. 41, R. 31—*Contents of judgment—Issues discussed.*
An Appellate Court is bound to give judgment on all issues discussed in the first Court. (*Sharfuddin and Roe, JJ.*) NARAYAN PROSAD *v.* GAJO MAHTON. **2 P. L. W. 181 : 42 I. C. 838 : 3 P. L. J. 701.**

——O. 41, Rr. 31 and 11—*Contents of judgment.*
The provisions of O. 41, R. 31 are not applicable in their entirety to the dismissal of an appeal under O. 41, R. 11. (*McColl, J. C.*) NGA SAN BAW *v.* NGA LU E. **33 I C. 666 : U. B. R. (1915) II, 92.**

——O. 41, R. 31—*Contents of judgment.*
The judgment of an Appellate Court must conform strictly to the provisions of O. 41, R. 31, C. P. C., and must contain the points raised for determination and the reasons for its decision thereon. (*Maung Kin, J.*) MI NYIN THA ME *v.* MI NGO WUN ME. **31 I. C. 896 : 9 Bur. L. T. 59.**

C. P. CODE (V OF 1908), O. 41, R. 31—Contents of judgment.

——O. 41, R. 31—*Contents of judgment—Interference by High Court.*

An Appellate judgment not complying with the provisions of O 41, R. 31, C. P. C., is liable to be interfered with by the High Court under S. 100 of C.P.C. An appellate judgment, specially one that concerns with the finding of the Lower Court, should contain the points for determination and the reasons for the decision. (*Twomey, J.*) MG. PO GAING *v.* RAMANATHAN CHETTY.

11 I. C. 915 : 4 Bur. L. T. 201.

Defective Judgment.

——O. 41, R. 31—*Defective judgment—Findings of fact.*

(*Obiter*) The first Appellate Court should necessarily give its findings of fact (which are conclusive in second appeals) clearly and decisively on each material point ; otherwise its decision is liable to be set aside in second appeal, though the litigation may have gone on for a long time and the amount involved is small. (*Sanderson, C. J. and Mookerjee, J.*) HASMATULLAH *v.* HARIMOHAN SARMA. **34 I. C. 942.**

——O. 41, R. 31—*Defective judgment—Adoption of judgment of lower Court.*

There is abundant authority for holding that the Judge of an appellate Court should state his own reasons and should not confine himself to approving reasons of the Court of the first instance. A general and wholesale adoption of the judgment of the Court of first instance cannot be considered as a sufficient compliance with the law. (*Moti Sagar, J.*) MT. AISHA BIBI *v.* MT. SUGHRA JAN. **1923 Lah. 658.**

——O. 41, R. 31 — *Defective judgment—Reasons for finding—Statement of.*

The judgment is not illegal when the appellate court decides cursorily on the basis of the issues discussed in the lower court. (*Pearson, J.*) SHEO BAKSH SHAH *v.* MANNU SINGH. **L. R. 3 A. 454.**

——O. 41, R. 31—*Defective judgment.*

It is improper for a court to dismiss a suit to contest an alienation on the ground that it referred to a small plot of useless land, and a court is not justified in refusing to administer the justice according to the law of the land. (*Shah Din, C. J.*) MEHNGOA *v.* MIHAN SINGH. **87 P. L. R. 1917 : 42 I. C. 244 : 88 P. W. R. 1917.**

——O. 41, R. 31, and S. 99—*Defective judgment.*

The omission of an Appellate Court to comply with the provisions of O. 41, R. 31, is mere irregularity and is curable by S. 99 of the Code. (*Kincaid and Raymond, A. J. C.*) LAKHAMBAI *v.* DEVIBAI. **59 I. C. 673: 14 S. L. R. 132.**

Mandatory Provision.

——O. 41, R. 31—*Mandatory provision.*

The provisions of O. 41, R. 31, C. P. Code, are mandatory. A Judge is bound to give the points for decision and the reason for the decision thereon in order to enable the Court of second appeal to see that the Judge whose findings on facts are binding as the High Court has put properly before him the points at issue and has decided them. 9 A. 26 Rel. on. (*Gokul Prasad, J.*) GUPTA NAND *v.* BEHARI LAL. **21 A. L. J. 567 : L. R. 5 A. 21 : 1924 A. 100.**

C. P. CODE (V OF 1908), O. 41, R. 33—Amendment.

——O. 41, R. 31—*Mandatory provision—Contents of Appellate Court's judgment.*

The provision, that the Appellate Court's judgment should contain the points for determination, the decision thereon and the reasons for the decision, is imperative. (*Richards, J.*) HABIBULLAH KHAN *v.* ABDULLAH KHAN. **9 I. C. 804.**

Statement of Reasons.

——O. 41, R. 31—*Statement of reasons.*

A Lower Appellate Court is not bound to dispose of all the reasons given by the first Court, if it gives special reasons for holding differently. 12 W. R. 361 at P. 362 Foll. (*Jenkins, C. J. and Mookerjee, J.*) JATRA MOHAN NANDI *v.* PITAMBAR MISTRI. **25 I. C. 543 : 19 C. L. J. 385.**

——O. 41, R. 33.

Amendment.
Connected Suits.
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Correction of Error.
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Amendment.

——O. 41, R. 33—*Amendment— Error in decree— Correction of, by Appellate Court in favour of party not appealing.*

Three of four trustees brought a suit for rent against the lessee, the first deft. making the other trustee the second deft. in the suit. The trial judge passed a decree for three-fourths of the rent in favour of the plfs. and a decree in favour of the second deft. for one-fourth less the sum received by him on account. The first deft. alone appealed to the High Court which in dismising his appeal modified the decree of the first court by awarding to the plff. the entire amount and declaring that as to a portion, it was for the second deft.'s share. *Held*, that the decree of the trial judge was erroneous and the High Court had power to make the decree they did, as the appellant had brought the entire decree on appeal. (*Lord Sumner.*) TRICOMDAS COOVERJI BHOJA *v.* GOPI NATHJI THAKUR.

44 Cal. 759 : 44 I. A. 65 : 1 P. L. J. 262 : 15 A. L. J. 217 : 25 C. L. J. 279 : 32 M L. J. 357 : 21 M. L. T. 262 : 21 C. W. N. 577 : (1917) M. W. N. 363 : 5 L. W. 654: 39 I. C. 156: 19 Bom. L. R. 450 (P.C.).

——O. 41, R. 33— *Amendment— Decree—Powers of Appellate Court.*

The High Court can correct errors in the decree of the lower court even if some of the parties are

C. P. CODE (V OF 1908), O. 41, R. 33—Amendment.

absent before it in appeal. (*Ayling and Sadasiva Iyer, JJ.*) VENKATACHELLA PILLAI *v.* RANGA PILLAI. **17 M. L. T. 220 : 28 I. C. 694 : 28 M. L. J. 334.**

——O. 41, Rr. 33 and 22—*Amendment—Decree—Cross-objections not necessary.*

The C. P. C. gives an Appellate Court full discretion in the matter of altering and amending decrees so as to give a just judgment between the parties and failure of the respts. to file cross-obejections does not bar the Court from granting appropriate relief. (*Lindsay, J. C.*) KIDAR SINGH *v.* GANESH. **42 I. C. 411 : 4 O. L. J. 532.**

Connected Suits.

——O. 41, R. 33—*Connected suits—Appeal filed in one—Conflicting findings.*

Where a plaintiff instituted a suit for rent and also a title suit and an appeal was preferred against the decision in the rent suit only and the Judge came to certain findings different from those arrived at by the Munsif in the title suit. *Held*, though no appeal was preferred from the decision in the title suit the Judge could deal with the appeal before him and go into questions necessary for the decision of the appeal. (*Huda, J.*) NALINAKSHYA DATTA *v.* DHAN KRISHNA. **56 I. C. 282.**

Co-Respondents.

——O. 41, Rr. 33 and 22—*Co-respdts.—Appeal by one defendant against plaintiff—Cross-appeal by defendant-respondent—Relief.*

Where one of several defendants against whom a decree is passed has allowed the period for appealing to elapse, O. 41, R, 22, C. P. C., is not intended to revive his right merely because a co-defendant has instituted an appeal against the plaintiff on entirely different grounds. O. 41, R. 22 (1) in so far as it related to a cross-objection provides for a case where a respondent, although the decree is not entirely in his favour, is content to let the matter rest provided his opponent does not appeal, but who may not be willing to run the risk of having the findings in his favour varied or reversed without an opportunity of appealing against the findings which are adverse to him. The rule should ordinarily be confined to cases of cross-objection urged against the appellant but O. 41, R. 33 gives the Court a wide discretion where justice requires it, that cross-objections against a co-respondent should be heard. 33 Mad. 705, not foll.; 43 Cal. 790; 28 C. L. J. 123: 15 C. L. J. 61 referred to. (*Miller, C. J, and Coutts, J.*) THE OFFICIAL TRUSTEE OF BENGAL *v.* CHARLES JOSEPH SMITH. **5 P. L. J. 328: 1 P. L. T. 434 : 1920 Pat. 161.**

Correction of Error.

——O. 41, R. 33—*Correction of error—Appellate Court—Powers of.*

An Appellate Court has power under O. 41, R. 33 of the C. P. C. to correct accidental slips in the judgment or decree of the lower Court even without an application under S. 152 of the C.P.C. (*Miltra, A. J. C.*) DILESHWAR RAM BRAHMIN *v.* NOHAR SINGH. **48 I. C. 193.**

C. P. CODE (V OF 1908), O. 41, R. 33—Ex parte Decree.

Discretionary Matter.

——O. 41, R. 33 and O. 7, R. 7—*Discretionary matter.*

The discretion allowed to the Judge by O. 7, R. 7 and O. 41, R. 33 is wide and covers the granting of a declaratory decree in a suit for possession where alternative relief is claimed therein. (*Campbell, J.*) ARJUN *v.* JUG LAL. **1923 Lah. 422.**

——O. 41, R. 33—*Discretionary matter—Power of Appellate Court.*

When a lower Court vested with discretion has exercised it upon an immaterial ground it is a case of no real exercise of discretion and the appellate Court can freely interfere. (*Chaudhuri, J.*) G. C. SETT *v.* MADHORAM HARADEO DOSS. **33 I. C. 540.**

Exonerated Party.

——O. 41, R. 33—*Exonerated defendant—Power to decree—Power to decree against defendant exempted by Lower Court.*

An Appellate Court can decree the suit against a person who had been exempted from liability by the Lower Court's decree, under O. 41, R, 33, C. P. C. (1913) M. W. N. 1024 Ref. (*Sunder Lal, J.*) BHAWANI DAS *v.* BABU SINGH. **25 I. C. 273.**

——O. 41, R. 33—*Exonerated party—Decree—Appellate Court's powers.*

The Appellate Court is competent make a decree in favour of a party in second appeal though such person was not a party to the first appeal. (*Chitty and Chatterjee, JJ.*) ABDUL AZIZ *v.* MOMIN. **9 I. C. 815.**

——O. 41, R. 33—*Exonerated defendant—Decree—Plaintiff not appealing against one of several defendants—Whether decree can be given against that defendant.*

The respondent in an appeal prayed in his cross-objections that one of the defendants against whom the suit was dismissed should be made jointly liable for the decree. It was held, that the court under O. 41, R 33 had power to decree the claim against that defendant even though there has been no appeal against him. (*Scott Smith, J.*) RANGILA MAL *v.* PHERU. **93 P. L. R. 1914: 23 I. C. 410: 37 P. W. R. 1914.**

——O. 41, R. 33—*Exonerated defendant—It can be made party in appeal--Interlocutory order—Revision—C. P. C., S. 115.*

An Appellate Court can add as party a person who was exonerated by the trial Court, but where there is already a memo of objections seeking to make him liable and the appeal is pending, the order making him a party is in its nature interlocutory, and a High Court will not interfere. 31 M. 442 Dist.; 16 C. W. N. 612; 38 M. 705: 21 I. C. 767 Foll. (*Sadasiva Aiyar, J.*) REBALLA BABU REDDY *v.* DODLA RAMI REDDY. **31 I. C. 978**

Ex parte Decree.

——O. 41, Rr. 33 and 4 and O. 9, R. 13—*Ex-parte decree—Application to set aside.*

Where an *ex parte* decree imposes a separate liability on the absent defendant, who is no party

C. P. CODE (V OF 1908), O. 41, R. 33—Leave to withdraw.

to the appeal from the total decree, the application to set aside the *ex parte* decree should not be disposed of so as to affect the interests of the co-defendants. (*Abdul Rahim and Kumaraswami Sastri, JJ.*) RAMACHANDRA MALLAYA *v.* NARAYANA HEGADE. (1917) M. W. N. 808: 22 M. L. T. 480 : 42 I. C. 972: 7 L. W. 10.

Leave to withdraw.

——0. 41, R. 33 and O. 23, R. 1—*Leave to withdraw—Appeal from a part of a decree by defendant—No cross-appeal or cross-objection by the plaintiff—Power of Appellate Court to grant leave.*

The power given to the Appellate Court by O 41, R. 33 is to be cautiously exercised and is not to be invoked in favour of a litigant so as to enable him to evade the provisions of other statutes like the Lim. Act and the Court Fees Act. The defendants appealed against the partial decree in so far as it was adverse to them. The plaintiff did not prefer a cross-appeal, nor did he present a memorandum of cross-objections. An application made to the Appellate Court on behalf of the plaintiff during his argument, for leave to withdraw from the suit with liberty to bring fresh suit upon the same cause of action. *Held*, that the Appellate Court had power under O. 41, R. 33 to do so. (*Mookerjee and Chatterjee, JJ.*) AKIMAN NISSA *v.* BEPIN BEHARI. 20 C. W. N. 544: 32 I. C. 499: 22 C. L. J. 397.

New Reliefs.

——0. 41, R. 33 and O. 7, R. 7—*New reliefs——Reliefs not claimed not to be granted.*

An usufructuary mortgagee who sues the purchasers of the equity of redemption and prays for a decree for possession or for a money decree, is not entitled to a decree for the usufruct of the property accumulated in the hands of the Dt. Magistrate while the property was under attachment in proceedings under S. 145 of the Cr. P.C. An Appellate Court ought not to give a decree for a relief not claimed in the plaint. (*Sharfuddin and Roe, JJ.*) CHEBANI OJA *v.* GULAB OJA. 43 I. C. 463 : 2 P. L. J. 698.

Non-appealing defendants.

——0. 41, R. 33—*Non-appealing defendant—Appeal by one defendant only—Others not impleaded—Decree in favour of defendant not a party.*

A suit for profits was decreed partly against K and partly against J and J and B preferred an appeal, without impleading K as a party to it. K. did not appeal, and no appeal or cross-objection was filed by the plaintiffs against J and B. The Appellate Court held that K was not liable at all for any sum. It dismissed the appeal and at the same time modified the decree by exempting K., and decreeing the whole amount as against J. On second appeal by and B., *Held* that the Lower Court had jurisdiction to modify the decree as it did. 34 All, 32 (F. B.) Ref. (*Sulaiman and Gokul Prasad, JJ.*) JAWAHAR BANO *v.* SHUJAT HUSAIN BEGAM. 18 A. L. J. 925 : 58 I. C. 114 : 43 A. 85 : 2 U. P. L R, (A.) 309.

——0. 41, R. 33—*Non-appealing defl.--Decree in favour of.*

C. P. CODE (V OF 1908), O. 41, R. 33—Non-appealing defendants.

An Appellate Court has powers to set aside decree of the first Court in respect of a portion which is against the respdt. and even though respdt. has not appealed, in that respect. (*Chamier and Piggott, JJ.*) MORDHAJ SINGH *v.* JAHANGIRMAL. 28 I. C. 428.

——0. 41, R. 33—*Non-appealing deft.—Power of Appellate Court.*

An Appellate Court cannot vary a decree in favour of a party not appealing, so that where plff. obtained a mortgage decree subject to paying a certain amount to a prior mortgagee and in an appeal by the deft. the sum was reduced. *Held* that the amount could not be so reduced. (*Richards, C. J. and Bannerji, J.*) PITAM *v.* GAYA PRASHAD. 23 I. C. 886.

——0. 41, R. 33—*Non-appealing deft.—Power to modify decree in favour of.*

Where one only of three defts. appealed to the lower court which modified the decree of the Court of first instance in so far as the other defts. also were concerned. *Held*, it was wrong in modifying the decree appealed against in favour of the absent defts. without making them parties to the appeal. (*Fletcher and Huda, JJ.*) JOGESH CHANDRA BANERJEE *v.* SARADA KUMAR CHAKRAVARTHI. 49 I. C. 834 : 23 C. W. N. 223.

——0. 41, R. 33—*Non-appealing defts.—Decree against persons not parties to appeal.*

Where some of several defts. appeal without impleading their co-defts. as respdts., the Appellate Court has no jurisdiction to pass any decree against those co-defts. without adding them as parties to the appeal. (*Chitty and Walmsley, JJ.*) DURGA CHARAN BOSE *v.* LAKHI NARAIN BERA. 47 I. C. 917.

——0. 41, R. 33—*Non-appealing defts.—Dismissal of entire suit.*

An Appellate Court cannot dismiss a suit, when some of the defts. only come before it as appellants. (*Fletcher and Richardson, JJ.*) RASMAT ALI *v.* ASABALI. 38 I. C. 140.

——0. 41, R 33—*Non-appealing defendant—Decree against.*

The powers given by O. 41, R. 33 are discretionary and no Court would pass a decree in favour of a litigant who has failed to avail himself of the ordinary remedy by way of appeal, nor against persons not impleaded as parties to the appeal. (*Abdul Raoof, J.*) ILAHI BAKSH *v.* JAVINDRA MAL. 54 I. C. 971 : 1 Lah. 396.

——0. 41, Rr. 33 and 22—*Non-appealing defl.—Power to modify decree.*

An Appellate Court has power to modify the decree in the respdt.'s favour though no cross-objections had been filed by him. (*Scott-Smith and Leslie Jones, JJ.*). BALRAM SINGH *v.* BAL DEO SINGH. 42 I. C. 443. : 168 P. W. R, 1917.

——0. 41, R. 33—*Non-appealing deft.—Appeal by some defts.—If court can rescind against other defts.*

An Appellate Court is generally not justified in rescinding a declaratory decree given by the Lower Court, as against those defts. who have

C. P. CODE (V OF 1908), O. 41, R. 33—Non-appealing defendant.

accepted it upon an appeal by other defts. (*Rattigan and Chevis, JJ.*) FATEH MUHAMMAD *v.* FATEH MUHAMMAD KHAN. **80 P.L.R. 1913 : 18 I. C. 758 : 109 P. W. R. 1913.**

——0. 41, R. 33—*Non-appealing deft.—Power to modify decree in favour of deft. not party to the appeal.*

It is competent to a Court under O. 41, R. 33 to modify the decree of the Lower Court in favour of parties to the suit even though they have not been impleaded as respdts. in the Court of appeal. As a rule where interference with a decree in favour of a person not before the Court of appeal is deemed necessary, the Court should implead him in the exercise of its plenary powers. (*Seshagiri Aiyar and Phillips, JJ.*) MUKKU VENKATRAMAYYA *v.* MUKKU CHINNIAH. **(1919) M.W.N. 807 : 53 I. C. 201 : 10 L. W. 357.**

——0. 41, R. 33—*Non-appealing deft.—Power to vary decree.*

Where a decree makes a minor personally liable on a guardian's contract, the Appellate Court has jurisdiction to see that a proper decree is passed even in the absence of a memorandum of appeal or cross-objections by the minor. (*Seshagiri Aiyar and Napier JJ.*) VENKATASAMI NAICKER *v.* MUTHUSAMI PILLAI. **34 M. L. J. 177 : 45 I. C. 949 : 23 M. L. T. 280.**

——0. 41, R. 33—*Non-appealing deft.—Relief.*

Where the Lower Appellate Court set aside a mortgage decree against non-appealing defts. though the grounds of their defence were not common, the High Court upset the decree. (*Seshagiri Aiyar and Phillips, JJ.*) MAYANDI CHETTIAR *v.* TIRUMALAI IYANGAR. **31 I. C. 986.**

——0. 41, R. 33—*Non-appealing defendant—Dismissal of suit against one defendant—Dismissal against other defendants not impleaded—Power of High Court.*

Where a suit is dismissed against one of the defendants as time barred, the High Court can dismiss it against the other defendants who did not appeal. 24 I.C. 924 ; 28 I.C. 694, Foll. (*Ayling and Tyabji, JJ.*) SUBBARAYALU NAIDU *v.* PAPAMMAL. **29 I. C. 579.**

——0. 41, R. 33— *Non-appealing defendants — Reversal in favour of.*

Reversal in favour of non-appealing mortgagor can be effected by an appellate Court by O. 41, R. 33. C.P.C. (*Miller, C. J. and Mullick, J.*) AJTI CHAUDHURI *v.* JANAK LAL CHAUDHURI. **1923 Pat. 332 : 1924 P. 336.**

——0. 41, Rr. 33 and 22—*Non-appealing deft. —Relief*—Ijara *in record of rights—Onus.*

In a suit for arrears of rent against tenants and co-sharers the latter pleaded their right to *ijara* interest, which would bar the plaintiff's suit. *Held*, that the onus was on the co-sharers to prove that the *ijara* was valid, subsisting and operative at the time of suit. Though respdt. does not file a memorandum of cross-objections relief can be given to him under O. 41, R. 33, C. P. C. (*Mullick, J.*) BIBI KAINLY *v.* SARBAN LAL. **42 I. C. 414.**

C. P. CODE (V OF 1908), O. 41, R. 33—Powers of Appellate Court.

——0. 41, R. 33—*Non-appealing deft.—Power of Appellate Court to vary decree of Lower Court without there being cross-appeal.*

O. 41, R. 33, applies only to cases in which for the ends of justice and for the equitable execution of a decree, the Appellate Court considers it necessary to make a material variation in the decree. Under it the appellate court cannot wipe off the decree of the Court below even in respect of that portion of the decree which is against the respdts. who did not file cross-appeal. (*Sharfuddin and Roe, JJ.*) RAM CHANDRA CHOWDHURY *v.* MADHE PRASAD CHATTERJI. **(1918) Pat. 26: 36 I. C. 537 : 5 P. L. W. 213.**

——0. 41, Rr. 33 and 22—*Non-appealing deft. —Power of Appellate Court to vary decree of Lower Court—Cross-objections.*

If a party appeals against that portion of the decree in which he has been unsuccessful, the Appellate Court cannot in general set aside so much of the decree as has been in favour of the appellant, without any formal cross-objections. 34 M. 32 Ref. (*Saunders, J. C.*) MAUNG CHIT PU *v.* MAUNG PYAUNG. **2 U.B.R. (1916) 144: 39 I. C. 380 : 11 Bur. L. T. 19.**

Non-appealing Plaintiffs.

——0, 41, R. 33—*Non-appealing plffs.—Appeal by one—If decree in favour of all can be passed.*

Under O. 41, R. 33 an appellate Court can pass a decree in favour of all the plaintiff's though only one of them has appealed. (*Reid, C. J.*) BHAGTU *v.* BUA DITTA. **26 P. W. R. 1912: 13 I. C. 957 : 34 P. L. R. 1912.**

Powers of Appellate Court.

——0. 41, R. 33—*Powers of Appellate Court —Power to make order to do justice.*

If in a suit by certain reversioners for recovery of possession of the properties of the last male owner one or other of the plaintiffs is entitled to the property by succession, the suit should not be dismissed because one of the plaintiffs alone has failed to make out a title, particularly, when as a result of the dismissal of the suit the right of the co-plaintiffs would be barred. In such a case the Appellate Court should act under O. 41, R. 33, C. P. C. (*Viscount Haldane Lord Parmoor, Lord, Wrenbury, Sir John Edge and Ameer Ali.*) RAVANESHWAR PRASAD SINGH *v.* CHANDI PRASAD SINGH. **36 I. C. 499 : 43 C. 417 (P. C.).**

——0. 41, Rr. 33 and 4—*Power of Appellate Court—Co-sharers, suit by some, impleading others as defts.—Decree in favour of all.*

Where some of the co-sharers bring a suit for recovery of their share of the common properties impleading the others as defts. and the first court granted a decree in favour of all of them. *Held*, that it was the duty of the Appellate Court to transpose the co-sharer defts. as plffs. and maintain the decree in their favour and that it was not proper to dismiss the suit so far as the co-sharers were concerned. (*Mr. Ameer Ali.*) SRIMATI NRITYAMONI DASI *v.* LAKHAN CHUNDER SEN. **43 Cal. 660 : 20 C. W. N. 522 : 30 M. L. J. 529 : (1916) 1 M. W. N. 332 : 3 L. W. 471 : 18 Bom. L. R. 418 : 33 I. C. 452 : 24 C. L. J. 1 : 20 M. L. T. 10 (P. C.).**

C. P. CODE (V OF 1908), O. 41, R. 33—Powers of Appellate Court.

———**O. 41, R. 33**—*Powers of Appellate Court Transposition of respondent as appellant—Procedure.*

An appellate court acts without jurisdiction in ordering by its judgment that a respondent who had not been formally transposed as appellant, should be shown as appellant. Such an order deprives the respondent of his costs and ought to have been made during the pendency of the appeal and not as part of the judgment. (*Piggott and Walsh, JJ.*) HARDEO PRASAD *v.* DAMODAR PRASAD.

L. R. 4 A. 536 : 71 I. C. 424 : 20 A. L. J. 980 : 1923 A. 119.

———**O. 41, R. 33**—*Powers of Appellate Court.*

Where an appellate court is seized of the whole case on appeal, it can make such orders as are necessary to terminate the controversies and to do justice between the parties by making the necessary alterations in the decree of the lower court. (*Piggott and Walsh, JJ.*) GOVIND DASS *v.* RAM CHARAN LONIA.

68 I. C. 307 : 4 U. P. L. R. 25 (A).

———**O. 41, R. 33**—*Powers of Appellate Court—Appeal not from whole decree.*

An Appellate Court should not set aside the decree as a whole where the appeal is not against the whole decree. (*Griffin and Tudball, JJ.*) BAKHT BAHADUR *v.* KISHEN NARAIN

18 I. C. 543.

———**O. 41, R. 33**—*Power of Appellate Court—Appeal not against the whole decree.*

An appellate Court should not disturb the decree of the lower court so as to affect the decrees against those defendants who had submitted to it. (*Tudball, J.*) BASANT LAL *v.* NURUL HASAN.

18 I. C. 530.

———**O. 41, R. 33**—*Powers of Appellate Court—Limits to.*

R. 33 is very wide but care and discretion must be used by Appellate Courts in exercising the powers conferred by the rule, and they should not lose sight of the other provisions of the Code itself nor of the Court Fees Act nor the law of Limitation. R. sued J. for rents. The first Court partly decreed and partly dismissed the suit. R. appealed but J. neither appealed nor filed any objections. The Appellate Court referred certain issues to the lower court and on return of the findings dismissed R's suit entirely. *Held*, the dismissal of the entire suit was not a proper exercise of the discretion, (*Richards, C.J., Banerjee and Tudball, JJ.*) RANGAM LAL *v.* JHANDU.

11 I. C. 640 : 8 A. L. J. 1111 : 34 All. 32 (F. B.)

———**O. 41, R. 33**—*Powers of Appellate Court—Partition suit.*

The appellate court has power to exercise the powers conferred upon it by O. 41, R. 33 in partition suits. There is no restriction of the powers as to any class of suit under that rule. (*Chatterjee and Panton, JJ.*) PROBHAT CHANDRA BISWAS *v.* GOPAL CHANDRA,

49 C. 379 : 1922 Cal. 398.

———**O. 41, R. 33**—*Powers of appellate court—Grant of relief against defendant not impleaded as a party to the appeal.*

C. P. CODE (V OF 1908), O. 41, R. 33—Powers of Appellate Court.

An appellate court can grant relief to an appellant as against a defendant against whom there is no appeal. The powers conferred by O. 41, R. 33, should be exercised in cases where, as the result of an Appellate Court's interference in favour of the appellant, further interference is required to adjust the rights of the parties in accordance with justice, equity and good conscience. 22 C. L. J. 390 foll. (*N. R. Chatterjee and Panton, JJ.*) BIKRAM KUMAR BOSE *v.* MOHIT KRISHNA BOSE.

64 I. C. 178.

———**O. 41, R. 33**—*Powers of Appellate Court.*

The first Court passed a decree in a rent suit for a proportionate amount of rent, payable in respect of land included in the plaint, and held that the holding covered more land. In an appeal by the plff., the Appellate Court held that no relief should be granted to the plff. and thus dismissed the suit. *Held* that having regard to R. 33, the Appellate Court's decision was not without jurisdiction and that no Second Appeal lay as the value of the suit was not above Rs. 100, and no question of law was involved. (*Huda, J.*) JOGENDRA KISHORE *v.* NASIMUDDIN SARKAR.

62 I. C. 623.

———**O. 41, R. 33**—*Powers of Appellate Court—Remand of whole case on the merits—Practice.*

Where a suit had been partly decreed in appeal and no second appeal had been preferred to the High Court against the portion allowed, the High Court has ample jurisdiction to make an order remanding the whole case for determination on the merits. (1901) 2 Ch. 720, Ref. (*Fletcher and Walmsley, JJ.*) SARADA SUNDARI DASYA *v.* GANGAHARI SAHA.

52 I. C. 801 : 46 Cal. 738.

———**O. 41, R. 33**—*Powers of Appellate Court—Limits to.*

O. 41, R. 33 of the C. P. C. must be cautiously applied, generally in cases where but for recourse to it the ends of justice would be defeated. Thus the rule should not be invoked in favour of a litigant so as to enable him to evade the provisions of other statutes like the Limitation Act and the Court Fees Act. (*Sanderson, C. J., Woodroffe and Mukerjee, JJ.*) SHIB CHANDRA KAR *v.* DULCKEN.

48 I. C 78 : 28 C. L. J. 123.

———**O. 41, R 33**—*Power of Appellate Court—Limits of.*

The rule is widely expressed and should be limited to cases when the interference is required to adjust the rights of the parties in accordance with justice, equity and good conscience. Where a plff. obtained a decree for a portion of the claim and appealed against the part disallowed and the deft. did not prefer any cross appeal nor take objections, the court of appeal had no power in the proper exercise of discretion to dismiss plff.'s suit. (*Chatterjee and Richardson, JJ.*) KSHUM CHAND BHUTARIA *v.* GHANI MUHAMMAD SHAH.

38 I. C. 361.

———**O. 41, R. 33**—*Powers of Appellate Court—Appeal by plff. from partial decree—No cross-appeal or cross-objection—Suit if can be dismissed.*

O. 41, R. 33 though very widely expressed, is not to be applied to enable a party litigant to

C. P. CODE (V OF 1908), O. 41, R. 33—Powers of Appellate Court.

ignore the other provisions of the Code or the provisions of other statutes, such as Lim. Act or Court Fees Act, etc. Ordinarily, O. 41, R. 33 is limited to those cases where as a result of the Appellate Court's interference with the decree in favour of the appellant, further interference is required in order to adjust the rights of the parties in accordance with justice, equity and good conscience. On an appeal by plff. against a partial decree for rent the whole suit could not be dismissed. Even if it could be, the discretion is not properly exercised in dismissing it, (*Mookerjee and Richardson, JJ.*) ABJAL MAJHI *v.* INTU BEPARI. **22 C. L. J. 394 : 32 I. C. 494 : 20 C. W N. 542.**

——0. 41, R. 33—*Powers of Appellate Court —Alternative decree—No appeal by plff.*

Where plff. succeeded against one of the two defts. against whom relief was claimed in the alternative on an appeal by one deft. only the decree can be passed against the other deft. (*Chatterjee and Mullick, JJ.*) ANANGA MOHAN CHAKRAVERTY *v.* BEJOY CHANDRA DUTTA. **32 I. C. 491 : 22 C. L. J. 391.**

——0. 41, R. 33—*Power of Appellate Court—Extent of interference—Discretion.*

The power contained in the rule must be used with discretion and is ordinarily limited to cases where as a result of the Appellate Court's interference with the decree in favour of the appellant, further interference is required to adjust the rights of the parties according to justice, equity and good conscience. (*Jenkins, C. J. and Chatterjee, J.*) GANGADHAR MURADI *v.* BANABASHI PACHIHARI. **24 I. C. 208 : 22 C. L. J. 390.**

——0. 41, R. 33—*Powers of Appellate Court —Decree.*

Where a suit by co-plffs, of whom one or the other is entitled to the property, is dismissed as one of them failed to establish the title if the dismissal bars the right of co-plffs. the Appellate Court should act under O. 41, R. 33 (a) and pass a decree. (*Woodroffe and Carnduff, JJ.*) RAVANESWAR PROSAD SINGH *v.* CHANDI PROSAD SINGH. **12 I. C. 931 : 38 C. 721.**

——0, 41, R. 33—*Powers of Appellate Court —Decree not challenged by the respondents.*

The Appellate Court cannot, while acting under R. 33, interfere with the decree obtained by the appellant so far as it is not challenged by the respondent in the form of cross-objections or appeal. (*Martineau, J.*) RAMLAL *v.* DIP CHAND. **60 I. C. 705 : 3 Lah. L. J. 231.**

——0. 41, R. 33—*Powers of Appellate Court —Power to pass proper decree.*

The High Court had power to pass a proper decree by expunging, from the decree of the lower court the direction of the lower court with regard to the manner of the realisation of the decretal amount which is not justified by law. (*Broadway and Abdul Raoof, JJ.*) AFZAL KHAN *v.* MUSSAMAT MAHTAB BIBI. **51 I. C. 819 : 59 P. W. R. 1919.**

C. P. CODE (V OF 1908), O. 41, R. 33—Powers of Appellate Court.

——0. 41, R. 33—*Powers of Appellate Court.*

The discretion given to an appellate Court under O. 41, R. 33 is very wide and empowers the Court to act in such a manner as will seem equitable to all parties. (*Kensington, J.*) HARINAL *v.* AYASINGH. **65 P. W. R. 1911 : 9 I. C. 825 : 103 P. L. R. 1911.**

——0. 41, R. 33—*Powers of Appellate Court.*

Powers of Court under O. 41, R. 33 can be exercised in revision for consistency in the decree. (*Spencer and Devadoss, JJ.*) GOPALA IYENGAR *v.* MUMMACHI REDDIAR. **17 L. W. 254 : 1923 M 392.**

——0. 41, R. 33—*Powers of Appellate Court —Proper decree.*

Under O. 41, R. 33, C P.C., the High Court is entitled to pass any decree which is in accordance with justice, whatever the decision of the first Court or the Lower Appellate Court may have been. (*Sadasiva Aiyar and Napier, JJ.*) RAMA AIYAR *v.* VANAMAMALAI AIYAR. **27 I. C. 336.**

——0. 41, R. 33—*Powers of Appellate Court Trusts Act (I of 1882), S. 91—Vendor and purchaser—Breach of contract—Suit by first contracting party—Form of decree.*

Where a vendor agreed to sell a certain property to a certain person, but afterwards sold the property to another and the first contracting party brought a suit for specific performance. *Held*, that the proper decree to be passed was not to declare the second sale void but to direct the subsequent purchasers to execute a conveyance to the plaintiff. The Court has power under O. 41, R. 33 to pass such a decree. The purchaser can only be considered as a trustee for the first contracting party. (*Benson and Sundara Iyer, JJ.*) SUBIHA PILLAI *v.* VELLAPPA NAICKEN. **10 M. L. T. 524 : (1911) 2 M. W. N. 560 : 13 I. C. 176 : 22 M. L. J. 124.**

——0. 41, R. 33—*Power of Appellate Court.*

The object of O. 41, R. 33, C.P.C., is to enable the Court to do complete justice between the parties to the appeal. It was not intended to enable a deft. to obtain for a plff. not a party to the appeal a relief which the latter never asked for. (*Drake Brockman, J. C.*) RAO VINAYAK *v.* LAXMAN. **44 I. C, 51 : 14 N. L. R. 56.**

——0. 41, R. 33—*Powers of Appellate Court —Portion of decree not appealed against.*

O. 41, R. 33 of the C.P.C. empowers an appellate Court to interfere with a portion of the decree of the Trial Court which has not been appealed against in a case where the appellate Court adopts the ground of decision of the trial court and tries to give complete effect to it. 34 All. 32 dist.; 43 A. 85 relied on. (*Foster, J.*) GOBIND SINGH *v.* JAI GOPAL SINGH. **1924 P. 322.**

——0. 41, R. 33—*Powers of Appellate Court —Limits to.*

The rule should not be invoked to enable a litigant to avoid the provisions of other statutes

C. P. CODE (V OF 1908), O. 41, R. 33—Powers of appellate court.

such as the Lim. Act or the Court Fees Act. (*Dawson Miller, C. J. and Coutts, J.*) THE OFFICIAL TRUSTEE OF BENGAL *v.* CHARLES JOSEPH SMITH.
5 P. L. J. 328 : 1 Pat. L. T. 434 : 56 I. C. 262 : 1920 Pat. 161.

——0. 41, R. 33—*Powers of Appellate Court.*

An Appellate Court can pass any decree which ought to have been passed or to make any further decree as the case may require in favour of any of the parties. (*Miller, C. J. and Adami, J.*) RAGHUNA KURMI *v.* DEO NARAIN RAI.
51 I. C. 981 : 1919 Pat. 393.

——0. 41, R. 33—*Powers of Appellate Court —To pass decree against any or all of co-defts.*

O. 41, R. 33 empowers an Appellate Court to pass in appeal a decree against any or all of the co-defts. against one or more of whom the Lower Court passed the decree under appeal. (*Jwala Prasad, J.*) SURAJ NARAIN SINGH *v.* SUGRA.
37 I. C. 842.

——0. 41, R. 33—*Powers of Appellate Court.*

The powers of appellate court under O. 41, R. 33 can only be exercised in favour of a person who is a party to the appeal. (*Maung Kin, J.*) A C. T. R. M. CHETTY *v.* PO U.
63 I. C. 973 : 13 Bur. L. T. 163.

——0. 41, R. 33—*Power of Appellate Court.*

Where A. a broker, purchased paddy from the plff. for B, and C. and the plff. sued A. B. and C. for recovery of the price and the trial Court granted a decree against A. alone, but on appeal by the plff. the Divisional Court decreed the plff.'s claim against B. and C. making no order as to the decree against A, for the reason that he had not appealed at all. *Held* by the Chief Court that the Divisional Court was wrong in not cancelling the decree against A. and under O. 41, R. 33 it set aside the decree of the Court of first instance passed against A. (*Maung Kin, J.*) MAUNG PO THU *v.* MAUNG PO. MIN.
39 I. C. 149.

——0. 41, R. 33—*Powers of Appellate Court —Point not taken in Lower Court.*

In spite of the defective pleadings of the parties, an Appellate Court is right in determining their legal rights on the evidence adduced in the case. A new plea which might be rebutted by evidence could not be raised for the first time on appeal. (*Twomey, J.*) MAUNG SEIN *v.* NGEE NU.
6 L. B. R. 144 : 19 I. C. 2 : 6 Bur. L. T. 72.

——0. 41, R. 33—*Powers of Appellate Court —Portion not appealed against.*

An Appellate Court has no power to interfere with the decree of the first court with regard to matters regarding which there was no appeal preferred to the Appellate Court. (*Hayward, J. C.*) ABDUL JABAR *v.* SHEIKH KARIM. **9 I. C. 121.**

Subsequent events.

——0. 41, R. 33—*Subsequent events—Appellate Court.*

A decision that a gift to unborn persons is invalid before the passing of Madras Hindu Transfers and Bequests Act (1914) can be set aside by the Appellate Court after the Act. The Appellate Court can pass such further decree or order that

C. P. CODE (V OF 1908), O. 43, R. 1.

may be necessitated by the introduction of new law during pendency of appeal (*Spencer and Phillips, JJ.*) THENIRKULAM MUTHUSAMI IYER *v.* KALYANI AMMAL.
21 M. L. T. 93 : 5 L. W. 834 : 38 I. C. 223 : 40 Mad. 818.

——0. 41, R. 33—*Subsequent events—Powers of Appellate Court.*

An Appellate Court can take cognizance of matters which may have happened after the institution of the suit for the purpose of moulding the relief that a party is entitled to, provided it is not based on a new title which accrued after the action, so as to prevent injustice or avoid multiplicity of proceedings. 11 C. W. N. 732 Ref. Where owing to a mistake in the construction of a mortgage deed, the Lower Court decides that interest as well as the principal sum was due on the date of default in payment of interest, the decree for the entire amount need not be disturbed if at the time of the decision of the appeal, the date for re-payment of the principal sum due had passed. (*Abdur Rahim and Srinivasa Aiyangar, JJ.*) SETHRU CHERLA RAMA CHENDRA *v.* MAHARAJAH OF JEYPORE.
34 I. C. 411 : 19 M. L. T. 360 : (1916) 1 M. W. N. 354.

——0. 41, R. 33—*Subsequent events—Duty of Court to take note.*

An Appellate Court should not shut its eyes to events occurring during the pendency of suit. (*Mullick and Jwala Prasad, JJ.*) HILL *v.* SATAN SINGH. **50 I. C. 857 : 4 P. L. J. 312.**

—— 0 42, R. 27—*Record of reasons—Admission of evidence.*

Where an appellate Court admits additional evidence on appeal without stating sufficient reasons therefor its findings are vitiated thereby and the case will have to be remanded for retrial. 19 A. L. J. 407 Foll. (*Gokul Prasad, J.*) ALI AHMAD *v.* KISHAN PRASAD. **71 I. C. 289 : 1924 A. 303.**

—— 0. 43 and S. 104 and O. 9, R. 3—*Appeal order.*

There is no appeal from an order under O. 43, R. 3. (*Shah Din and Chevis, JJ.*) SHADI LAL *v.* KARAMDIN. **9 I. C. 238 : 250 P. W. R. 1911.**

——0. 43, R. 1—*Order—Returning plaint is appealable.*

An order of Appellate Court returning a plaint for want of jurisdiction in the Court in which the suit is brought is appealable. (*Walsh and Ryves, JJ.*) LACHHA RAM *v.* VIRJI. **19 A. L. J. 305 : 62 I. C. 399 : 3 U. P. L. R. (All.) 9.**

——0. 43, R. 1, and O. 47, R. 7—*Order granting review—No second appeal.*

There is no second appeal against an order granting a review. (*Chatterjee and Pearson, JJ.*) BARADA KISHORE ACHARJYA CHOUDHRY *v.* JAGAT CHANDRA DAS. **64 I. C. 568 : 1922 Bom. 292.**

——0. 43, R. 1 and S. 104—*Order granting leave to sue a receiver is not appealable.*

An order granting leave to sue a receiver for damages caused by his negligence, laches, etc., is

C. P. CODE (V OF 1908), O. 43, R. 1.

not appealable. (*Macleod, C. J. and Heaton, J.*) SRINIWAS *v.* M. C. WAZ. **22 Bom. L. R. 1126 : 59 I. C. 421 : 45 Bom. 99.**

——0. 43, R. 1—*Appeal from order of remand—Findings of fact cannot be questioned.*

An appellant, in an appeal from an order of remand, cannot question findings of fact in the Second Appeal. (*LeRossignol and Raoof, JJ.*) HONDA RAM *v.* HOTU RAM. **2 Lah. 25 : 59 I. C. 715 : 31 P. W. R. 1921.**

——0. 43, R. 1 (l) and O. 22, Rr. 3 and 10—*Appeal—Order adding legal representative.*

An application to be brought on record as legal representative of a deceased testator by his widow on the death of his executors, who had instituted the suit could be made only under O. 22, R. 3, and orders on such applications are not appealable as they are not made appealable under O. 43, R. 1 (l). (*Seshagiri Aiyar and Napier, JJ.*) LAKSHMI ACHI *v.* SUBBARAMA AIYAR. **39 M. 488 : 2 L. W. 403 : 28 M. L. J. 491 : 29 I. C. 142 : 17 M. L. T. 385 : (1915) M. W. N. 327.**

——0. 43, R. 1—*Dismissal for default—Application for restoration.*

An appeal lies against an order of dismissal of an application for restoration of the application dismissed in default (*Hallifax, A. J. C.*) KALICHARAN *v.* RATANSINGH. **19 N. L. R. 119: 75 I. C. 589 : 1923 N. 293.**

——0. 43, R. 1—*Appeal—Order not a decree.*

Orders appealable under O. 43, R. 1 are not decrees, though coming under S. 47 or the definition of decree in S. 2. (*Stanyon, A. J. C.*) WASUDEO *v.* HIRALAL. **17 I. C. 884 : 8 N.L.R. 177.**

——0. 43, R. 1—*Appeal—Formalities of—Revenue Court.*

A second appeal preferred to a Rev. Court under the provisions of a special enactment like the Oudh Rent Act should not be dismissed on the ground that it is unaccompanied by a copy of the Lower Court's judgment or on the ground that it is accompanied by a copy of the lower judgment which is incomplete in a suit as it refers to another main judgment not filed with the memo of appeal, inasmuch as he is not required by law to file such a copy. (*Holms, S.M.*) MUHAMAD ABUL HUSAIN KHAN *v.* RAJ KUMARI. **34 I. C. 706 : 3 O. L. J. 209.**

——0. 43, R. 1—*Dismissal of application under O. 9, R. 9 on ground of previous dismissal under O. 17, R. 3—Appeal.*

When the plaintiff's application under O. 9, R. 9, C. P. C., is rejected on the ground that the previous order of dismissal was under O. 17, R. 3 and not under O. 17, R. 2, the plaintiff is entitled to appeal against it under O. 43, R. 1. (*Mullick and Kulwant Sahay, JJ.*) SYED BAKAR HUSSAIN *v.* MIRZA HUSSAIN MIRZA. **4 P. L. T. 46 : 73 I. C. 373 : 1923 P. 223.**

C. P. CODE (V OF 1908), O. 43, R. 1 (a)

——0. 43, R. 1 (a)—*Order of remand.*

Remanding of a case without the exercise of inherent jurisdiction by District Judge is not competent and there can be an appeal against it. (*Piggott and Walsh, JJ.*) GOKUL PRASAD HAR PRASAD *v.* RAM KUMAR. **44 A. 176 : 19 A. L. J. 971 : 64 I. C. 878 : 1922 A. 254.**

——0. 43, R. 1 (a)—*Order returning memo. of appeal for presentation to proper Court—Appeal.*

No appeal lies against the order of an Appellate Court returning a memo. of appeal to be presented to the proper Court. (*Banerjee and Ryves, JJ.*) NURUDIN *v.* PRAN KISHEN CHAKKRAVARTHI. **16 A. L. J. 630 : 47 I. C. 16 : 40 All. 659.**

——0. 43, R. 1 (a)—*Order for return of plaint—Confirmed on appeal—Second appeal—Revision if lies.*

No second appeal lies against an appellate order confirming the order of the trial court returning a plaint for presentation to the proper Court. The fact that in the exercise of his jurisdiction, the Dt. Judge commits an error does not give any right of revision of the order. (*Banerji and Ryves, JJ.*) JWALA PRASAD *v.* EAST INDIAN RAILWAY CO. **46 I. C. 99 : 16 A. L. J. 535.**

——0. 43, R. 1 (a)—*Appellate Court—Returning plaint for presentation to proper court.*

An order of a first Appellate Court returning a plaint for presentation to the proper court is appealable. (*Richards, C. J. and Tudball, J.*) DALIP SINGH *v.* KUNDAN SINGH. **12 A. L. J. 21 : 22 I. C. 614 : 36 All. 58.**

——0. 43, R. 1 (a) (4)—*Order of remand by Special Judge under the Bengal Tenancy Act—No appeal lies.*

There is no appeal against an order of remand passed by a Special Judge under the provisions of the Bengal Tenancy Act. (*Ghose and Cholzner, JJ.*) DEBI PRASAD BHAKAT *v.* OFFICIAL TRUSTEE OF BENGAL. **72 I. C. 1013 : 37 C. L. J. 314 : 1923 Cal. 333.**

——0. 43, R. 1 (a) and O. 7, R. 10—*Appeal—Forum—Order retaining plaint—Compliance with, effect of.*

Where a Sub-Judge returns a plaint for over Rs. 5,000 for presentation to the Court of the Dt. Munsif holding it to be grossly overvalued, an appeal against the order lies to the High Court and not to the Dt. Court. The forum of appeal depends not upon the value as adjudged but upon the value as accepted by the plff. after adjudication. 34 Cal. 954 Foll. The mere fact that the plff. obeyed the order of the Sub Judge by presenting the plaint in the Munsif's Court did

C. P. CODE (V OF 1908), O. 43, R. 1 (a).

not deprive him of his right of appeal. (*Walmsley and Huda, JJ.*) TARA KANTA DASS CHOWDHURY v. KALI PROSAD DAS GHORAI. 53 I. C. 1001 : 23 C. W. N. 942.

——0. 43, R. 1 (a), O. 41, R. 33 and O. 7, R. 10—*Return of plaint—For presentation to proper court—Appeal.*

An order passed by an Appellate Court directing the plaint filed in the case to be returned for presentation to the proper Court is appealable to the High Court. (*Fletcher and Walmsley, JJ.*) SARADA SUNDARI DASYA v. GANGA HARI SAHA. 52 I. C. 801 : 46 Cal 738.

——0. 43, R. 1 (a) and O. 41, R. 23—*Order of remand—Appealability.*

Per Shadi Lal, C. J. and Martineau, J.—In order to determine whether an order of remand is appealable or not, the test is this: suppose, the Court instead of making an order of remand passed a decree on the strength of the adjudication constituting the order of remand, would there be a second appeal from that decree ? If a second appeal would lie from the decree, the order of remand is appealable, otherwise not.

Per Raoof, J.— An appeal from an order of an Appellate Court remanding a case under O. 41, R. 23, C.P. Code, does lie in all cases except those in which absolutely no right of second appeal against the appellate decree is given in the body of the Code or by any other law. 50 P. R. 1911 ; 85 P.R. 1914 Diss, ; 20 I. C. 788 foll. (*Shadi Lal, C. J., Abdul Raoof and Martineau, JJ.*) MUSST. UMRI v. SHAH MAHOMED. 3 Lah. 218 : 4 Lah. L. J. 359 : 1922 Lah. 178 (F. B.)

——0. 43, R. 1 (a), (4)—*Order returning plaint—Appeal—Remand—Order is not applicable.*

No appeal lies from an order passed in appeal under O 43, R. 1 (*a*), setting aside an order under R. 10 of O. 7 and remanding the case for trial on merits. (*Broadway, J.*) THE FIRM OF BHAWANI RAM SARAI KANHI RAM v. THE FIRM OF HARBANS SINGH GOPAL DAS. 2 Lah. L. J. 587.

——0. 43, R. 1 (a)—"*Plaint*"—*Memo. of appeal.*

The word "plaint" in R. 1 (*a*) of O. 43 of C. P Code does not include a memo of appeal. No appeal lies against an order returning the memo. of appeal for presentation to proper Court ; revision however is competent. (*Smith, J.*) KARM ILAHI v. HAKIM SHAH. 56 I. C. 865 : 2 Lah. L.J. 366.

——0. 43, R. 1 (a) and O. 41, R. 23—*Remand under inherent power—No appeal from order.*

There is no appeal for an order of remand under the inherent powers of an appellate court, and not falling under O. 41, R. 23, C. P. C., and under O. 43, R. 1 (*a*), C.P.C. (*Ayling, O.C. J. and Odgers, J.*) SHEIK MAHOMED MARAKAYAR v. RANGASAMI NAIDU. 31 M. L. T. 182 (H. C.) : 69 I. C. 826 : 16 L. W. 515.

——0. 43, R. 1 (a)—*Right to appeal—Not lost by presentation to the Court directed.*

Plff. does not lose his right to appeal against order of a Munsiff returning the plaint, by electing

C. P. CODE (V OF 1908), O. 43, R. 1 (c).

to file the plaint in the Court to which he is directed. (*Oldfield and Sadasiva Iyer, JJ.*) NARAIN NAIR v. CHERIA KATHRI KUTTY. 34 M. L. J. 397 : 45 I. C. 89 : 41 Mad. 721.

——0, 43, R. 1 (a) and (w) and O. 7, R. 11—*Order rejecting plaint—Incidental decision—Valuation—Question of jurisdiction—Court Fees Act, S 12—Review of—C. P. C., S. 115—Govt. of India Act, S. 107.*

An order rejecting a plaint under O. 7, R. 11 is not appealable when such order is based on a question of valuation pure and simple. When the order necessarily involves a decision of the category or class under which a suit falls even though it incidentally decides a question of calculation the order is appealable. In cases where the order involves a question of jurisdiction, the High Court may interfere either under S. 115 of the C.P.C. or under S. 107 of the Govt. of India Act. Before or after an order of remand fructifies by non-compliance into a recorded order of rejection, the Court contemplated in S 12 of the Court Fees Act may, for good and sufficient reasons, review its own order. 7 B. L. R, 663 : 6 C. 249: 27 A. 406: 2 B, 146: 12 A. 129 Rel, (*Atkinson and Manuk, JJ.*) CHANDRA MANI KOER v. BASDEO NARAIN SINGH. 49 I. C. 442 : 4 P. L. J. 57.

——0. 43, R. 1 (c)—*Execution application Dismissal for non-prosecution — Appeal from order refusing to restore does not lie.*

Where the Court dismissed an application for execution for want of prosecution and subsequently refused to restore the application there is no appeal from the order refusing to restore the application. (*Piggott and Walsh, JJ.*) BHARAT INDU v. ASGHAR ALI KHAN. 45 A. 148 : 73 I. C. 453 : 21 A. L. J. 135: L R. 3 A 622: 1923 A. 460 (1).

——0. 43, R. 1 (c)—*Dismissal of application for restoration.*

A dismissal of suit for default is under O. 9, R. 8 and the dismissal of application for restoration is appealable under O. 43, R. 1 (c). (*Piggott and Kanhaiya Lal, JJ.*) MAHARAJ SHIB CHARAN DASS v. MAHAMMAD ZAHUR. 57 I. C. 245 : 2 U. P. L. R. (A.) 288.

——0. 43, R. 1 (c)—*Second appeal—Order of Appellate Court setting aside order of first Court dismissing suit for default.*

An order of the Appellate Court setting aside the order of the first Court dismissing the suit for default of appearance of parties is not appealable. (*Tudball and Rafique, JJ.*) WAHIDULNISA v. KUNDUNLAL. 20 I. C. 145 : 11 A. L. J. 615 : 35 All. 427.

——0. 43, R. 1 (c)—*Order rejecting application for restoration—Appeal.*

Where an application for restoration is returned for presentation to proper Court owing to want of jurisdiction, the order is one rejecting the application and is appealable. (*Tudball, J.*) SHEOTAHAL v QASIM. 15 I. C. 34 : 10 A. L. J. 41.

——0. 43, R. 1 (c)— *Application to set aside dismissal for default—Dismissal of that application for default—Appeal.*

C. P. CODE (V OF 1908), O. 43, R. 1 (c).

Where a second application to set aside the dismissal of a prior application to set aside the dismissal of a suit for default, is itself dismissed, there is no appeal against the order of dismissal. 19 C. W. N. 25 Ref. (*Sanderson, C. J. and Richardson, J.*) HARA KUMAR MITTER *v.* MURARI MOHAN BOSE.

36 C. L. J. 184 : 1922 C. 572.

———O. 43, R. 1 (c)—*Appeal—Single Judge of High Court.*

Per Curiam.—An order of a Judge of the High Court in original jurisdiction rejecting an application under O. 9, R. 9, C. P. C., for the restoration of a suit dismissed for default, is appealable under O. 43, R. 1, cl. (c), as the Code and rules made under it apply to an appeal from a decision of a Judge of the High Court on the Original Side (*Sanderson, C. J., Woodroffe and Mookerjee, JJ.*) MATHURA SUNDARI DASSI *v.* HARAN CHANDRA SHAH, **20 C. W. N. 594 : 23 C. L. J. 448 : 34 I. C. 634 : 43 C. 857.**

———O. 43, R. 1 (c)—*Execution sale—Setting aside.*

An application to set aside a sale is a proceeding leading to an adjudication such as referred to in S. 2 and so it is a suit within O. 43, R. 1 (*c*) (*Teunon and Newbould, JJ.*) BHUBEN BEHARI NAG *v.* DHIRENDRA NATH. **33 I C. 581 : 20 C. W. N. 1203.**

———O. 43, R. 1 (c)—*Dismissal for default of both parties—Appeal.*

No appeal lies from an order rejecting an application to restore a suit dismissed for default of both parties. (*Drake Brockman, J.C.*) FARIDBI *v.* MOHAMAD AMIN. **19 I. C. 97 : 9 N. L. R. 33.**

———O. 43, R. 1 (c)—*Setting aside* ex parte *decree.*

An order setting aside an *ex parte* decree passed in a resumption suit, although not appealable under O. 43, R. 1 of the C. P. C. is however appealable in view of the provisions of the Oudh Rent Act. (*Holms, S. M.*) MAHOMED ALI *v.* SHAUKUT ALI. **3 0 L. J. 229 : 34 I. C. 702.**

———O. 43, R. 1 (c) and O. 9, R. 9—*Dismissal of petition to restore for default—Appeal.*

There is no appeal from an order passed under O. 9, R. 9, C. P. C., dismissing for default a petition to restore a suit dismissed for default. (*Chapman and Atkinson, JJ.*) JAGDISH NARAIN PRASAD SINGH *v.* HARBANS NARAIN SINGH.

2 P. L. W. 221 : 43 I C. 54 : 2 P. L. J. 720.

———O. 43, R. 1 (d) and O. 9, R. 13—*Order granting application—Appealability.*

An order granting an application under O. 9, R. 13 of the C, P. C. is not appealable, (*Banerjee and Piggott, JJ.*) BENAIK RAO *v.* PUTAIN SINGH, **52 I. C. 901 : 17 A. L. J. 1052.**

———O. 43, R. 1 (d)—*Case open to appeal*

The words are perfectly general and they mean whether the case was open to appeal and not whether an appeal could have been successfully prosecuted against the decree. (*Piggott and Walsh, JJ.*) NEHAL SINGH *v.* KHUSHAL SINGH, **14 A. L. J. 332 : 33 I. C. 80 : 38 A. 297.**

C. P. CODE (V OF 1908). O 43, R. 1 (j).

———O. 43, R. 1 (d) and O. 9, Rr. 3 and 13—*Dismissal for default of application to set aside* ex parte *decree.*

No appeal lies from an order purporting to be made under O. 9, R. 13, C. P. C., dismissing an application for restoration of an application to set aside an *ex parte* decree. (*Woodroffe and Huda, JJ.*) RAHMATUNNESSA KHANAM *v.* ABDUL SOBHAN **49 I. C. 745.**

———O. 43, R. 1 (d) and O. 9, Rr. 13 and 14—*Decree* ex parte—*Application for setting aside—Dismissal for default.*

An order dismissing for default an application to set aside an *ex parte* decree is appealable. (*N. R. Chatterjee and Newbould, JJ.*) SACHEENI *v.* KANTA HAZI. **36 I. C. 798.**

———O. 43, R. 1 (d)—*Dismissal for default of application to set aside,* ex parte *decree.*

An appeal is allowed from order of summary dismissal for default of an application to set aside an *ex parte* decree. (*Mookerjee and Newbould, JJ.*) KUMUD KUMAR BOSE *v.* HARI MOHAN SAMDAR. **30 I. C, 45 : 21 C. L. J. 628.**

———O. 43, R. 1 (d) and O. 9, R. 13—*Rejection of application.*

The words "rejecting an application" in O 43, R. 1 (*d*) signify an immediate rejection and not a conditional or prospective rejection, *i. e.*, an order imposing a condition before setting aside. 26 All. 173 : 36 All 77 Foll. (*Oldfield and Bakewell, JJ.*) VENKATASWAMI *v.* SHANMUGAM PILLAI. **6 L. W. 757 : 43 I. C. 1 : (1917) M. W. N. 815.**

———O. 43. R. 1 (e) and O. 9, R. 4—*Refusal to set aside dismissal of suit—No appeal.*

No appeal lies against an order refusing to set aside a dismissal of a suit under O. 9, R. 4 of the C. P. C. (*Mookerjee and Beachcroft, JJ.*) PITAMBAR DHAL *v.* BAIDYANATH SIT.

43 I. C. 374 : 27 C. L. J. 117.

———O. 43. R. 1 (e)—*Execution sale—Application to restore an application for a reversal of a sale—Dismissal—Appeal.*

Under O. 43, R. 1 (*e*) C. P. C., no appeal lies against an order rejecting an application under O. 9, R. 9 for revival of an application for reversal of a sale, which had been dismissed for default of appearance of the judgment-debtor (*Mookerjee and Beachcroft, JJ.*) CHANU CHANDRA GHOSH *v.* CHANDI CHARAN ROY CHOWDHURY.

27 I. C. 492 : 19 C. W. N. 25.

———O. 43, R. 1 (j)—*Order refusing leave to bid under O. 21, R. 72, C. P. C.—Not appealable.*

An order refusing leave to a decree-holder to bid under O. 21, R. 72 of the C. P. C. is not appealable. (*Lord Macnaghten.*) KOTHA HNYIN *v.* MA HNYIN. **38 C. 717: 15 C. W. N. 862 : (1911) 2 M W. N. 449: 13 Bom. L. R. 694 : 14 C. L. J. 241 : 8 A L. J. 1117 : 6 L B. R. 26 : 11 I. C. 545 : 4 Bur. L. T. 257. (P. C.)**

———O. 43, R. 1 (j)—*Appealable order—Costs—Appeal as to—Competency of*

If an order is itself appealable, an appeal will lie from that part of the order which relates to costs. 8 C. 91 : 12 Cal. 271 : 16 B. 241 Ref.

C. P. CODE (V OF 1908), O. 43, R. 1 (j).

Where on the application of the judgment-debtors, a sale was set aside but the order setting aside the sale saddled them with the costs of the other side, and they filed an appeal against that part of the order which directed them to pay the costs of the other side, *held*, that an appeal lay. (*Piggott and Walsh, JJ.*) SHIB KUMAR *v.* SHEO GHULAM. **44 A. 209 : 20 A. L. J. 11 : L. R. 3 A. 91 : L. R. 3 All. 577 : 64 I. C. 932 : 1922 A. 90.**

——0. 43, R. 1 (j) and O. 21, Rr. 90 and 92—*Dismissal for default.*

An appeal lies against an order on an application under O. 21, R. 90 to set aside a sale, which is dismissed for default, this dismissal amounting to an order under S. 92. But no appeal lies against an order under S. 90 dismissing an application to set aside the dismissal. (*Richardson and Smither, JJ.*) KALI KANT *v.* SHYAMLAL DAS BASU. **38 I. C. 598: 25 C. L. J. 163.**

——0. 43, R. 1 (j)—*Dismissal for default of an application under O. 21, R. 90—Appeal.*

An order dismissing for default, an application under O. 21, R. 90 is appealable. (*Chatterjee and Newbould, JJ.*) GIRINDRA KISHORE *v.* NAND LAL SINGH ROY. **38 I. C. 63.**

——0. 43, R. 1 (j)—*Auction-purchaser's right to appeal.*

An auction-purchaser can appeal against an order setting aside the sale on the ground of irregularity even if the decree-holder has compromised his claim with the judgment-debtor. He is a party to the proceedings and has a right to appeal. (*Mookerjee and Caspersz, JJ.*) BIBI SHEROFAN *v.* MAHOMED HABIBUDDIN. **13 C. L. J. 535: 10 I. C. 148: 15 C. W. N. 685**

—— 0. 43, R. 1 (j) and S. 104, Cl. (2)—*Second appeal where no First Appeal lay.*

There can be no second appeal to the High Court from the decision in appeal which did not lie. (*Scott-Smith, J.*) GUL BANO *v.* MUHAMMAD ZAKAR KHAN. **3 Lah. L. J. 463.**

——0. 43, R. 1 (j)—*Execution sale—Order setting aside—Second Appeal.*

There is no second appeal against an order setting aside a sale on the ground of fraud under O. 21, R. 92 of the C. P. C. (*Broadway, J.*) JIWAN SINGH *v.* SAWAN MAL. **168 P. R. 1919 : 54 I. C. 941 : 2 Lah. L. J. 41.**

——0. 43, R. 1 (j)—*Order refusing deposit under O. 21, R. 89—Appeal.*

An appeal lies under O. 21, R. 92 and O. 43, R. 1 (j) against an order passed by an executing Court refusing to receive the amount of decree and costs from a mortgagee under O. 21, R. 89, C. P. C. (*Kensington, J.*) THAKUR SINGH *v.* GURDIT SINGH. **12 I. C. 733 : 178 P. W. R. 1911.**

—— 0. 43, R. 1 (j) and O. 50, R. 1 (a)—*Order under O. 21, R. 92—Execution of small cause decree transferred to the original side—Appealability.*

An appeal lies under O. 43, R. 1 (j) from an order under O. 21, R. 92 (2) in execution of a small cause decree transferred to the original side for execution. (*Krishnan, J.*) KANDASWAMI ASARI *v.* SWARNAVELU STAPATHI. **10 L. W. 556: (1920) M. W. N. 151: 53 I. C. 958: 27 M. L. T. 130.**

C. P. CODE (V OF 1908), O. 43, R. 1 (m).

——0. 43, R. 1 (j)—*Order under O. 21, R. 89—Appeal if lies from.*

An appeal lies from an order refusing to set aside a sale under O. 21, R. 89 whether the purchaser is the decree-holder or stranger. 8 I. C. 855 Foll. (*Abdur Rahim and Sundara Aiyar, JJ.*) VEDALA LAKSHMINARASAMMAH *v.* PACHA LAKSHMAMMAL. **14 I. C. 326: (1912) M. W. N. 756.**

——0. 43, R. 1 (k)—*Abatement—Application to bring on record legal representative—Order on, if appealable.*

When an application to bring the representatives of a deceased plaintiff is made within time, the suit abates; and an application for substitution made afterwards ought necessarily to be considered on an application under O. 22, R. 9 (2), C.P.C., to set aside the abatement. (*Moti Sagar, J.*) BADLU *v.* NARAINI. **74 I. C. 17: 1924 Lah. 424.**

——0. 43, R. 1 (k)—*Punjab Courts Act (XVIII of 1884), S. 70 (1) (a).*

No appeal lies under O. 43, R. 1 (*k*) if there has been no application to set aside an abatement An order of abatement cannot be interfered with in revision, if a person fails to set it aside. (*Reid, C. J.*) THAKAR DAS *v.* PERMANAND. **95 P. R. 1911: 13 I. C. 963: 262 P. W. R. 1911.**

——0. 43, R. 1 (k) and O. 22, R. 3—*Order under O. 22, R. 3 is not appealable.*

An order under O. 22, R. 3 is not open to appeal, O. 43, R. 1 (*k*), Civil Procedure Code, allows an appeal from an order under R. 9, O. 22, but no appeal is allowed against an order under R. 3. (*Daniels, A. J. C.*) TRILOCHAN PRASAD SINGH *v.* BHAGWATI. **73 I. C. 230: 9 O. & A. L. R. 70 : 1924 O. 114.**

——0. 43, R. 1 (m), O. 12, R. 6 and O. 23, R. 3—*Judgment and decree on admission of defendant—Dismissal of petition—Appeal.*

Orders rejecting petitions filed by plff. and defts. by which the plff. prays for judgment against the defts, and the defts. state that they consent to a decree being made against them, are not appealable under the C. P. C. unless such petitions are presented and dealt with in the Court on the footing that they, taken together, amount to a lawful agreement or compromise within R. 3 of O. 23, C. P. C. (*Richardson and Beachcroft, JJ.*) PRASANNA DEB RAIKAT *v.* DARPA NARAYAN SINGH. **44 I. C. 145.**

——0. 43, R. 1 (m) and O. 23, R. 3—*Compromise—Order refusing to record—Appeal.*

The remedy of a party dissatisfied with the order of a Court refusing to record a petition of compromise is to appeal from the order so refusing and not from the judgment given by the Court on the merits (*Woodroffe and Huda, JJ.*) MAHAMAD IDRIS MEAH *v.* MAHAMAD ESAHAK. **42 I. C. 192.**

——0. 43, R. 1 (m)—*Decree—Appeal—C.P.C. O. 23, R. 3*

A decree under O. 23, R. 3 can be passed only after there has been an order that the compromise be recorded; this is not a mere matter of form and a consent decree passed without such order is liable to be set aside on appeal notwithstanding

C. P. CODE (V OF 1908), O. 43, R. 1 (m).

the bar under S. 96 (3). (*Jenkins, C.J and Chatterjee, J.*) PABAN SARDAR *v.* BHUPENDRA NATH NAG. **33 I. C. 769: 43 C. 85.**

——**O. 43 R. 1 (m)**—*Order holding no compromise is not appealable.*

The words used in O. 43, R. 1 (*m*), C. P. C., "an order under R. 3 of O. 23 recording or refusing to record an agreement, compromise or satisfaction" pre-suppose the existence of an agreement, compromise or satisfaction. An order holding that no compromise has been proved is not appealable. (*Martineau, J.*) SHANTI SARUP *v.* THE FIRM OF JAHANGIR MAL BANSI MAL.
73 I. C. 177 : 1924 Lah. 248.

——**O. 43, R 1 (n)**—*Order for injunction subject to a condition is appealable.*

An order for the issue of an injunction subject to a condition is appealable, but there is only one appeal against it. (*Banerji, J.*) GANESH PRASAD SAHU *v.* DUKH HARAN SAHU. **66 I. C. 509 : 1922 All. 441.**

——**O. 43, R. 1 (q)**—*Dismissal of application—Attachment before judgment.*

Where an application for attachment before judgment is dismissed by the Court of first instance after hearing the defts., no appeal lies against that order. (*Mookerjee and Chatterjee, JJ.*) MAHENDRA NARAIN *v.* GURU DAS BAIRAGI.
33 I. C 689: 23 C. L. J. 392.

——**O. 43, R. 1 (r) and O. 39, R. 1**—*Order refusing or granting injunction—Appeal.*

An appeal lies from an order granting as well as from an order refusing to grant an injunction under O. 39, R. 1 as either case is covered by O. 43, R. 1 (*r*). (*Tudball and Rafique, JJ.*) LACHMI NARAIN *v.* RAMACHARAN DAS.
11 A. L. J. 613 : 20 I. C. 653 : 35 A. 425.

——**O. 43, R. 1 (r)**—*Order refusing to attach property—Appealable.*

An order of Court refusing to attach property for disobedience of an interim injunction falls within O. 39, R. 2 (3), C. P. Code, and is open to appeal. 27 I.C. 131 (foll.) (*Scott Smith, J.*) DIWAN CHAND *v.* JHARIA COAL CO. **66 I. C. 9 : 1922 Lah. 347.**

——**O. 43, R. 1 (r) and O. 39, R. 2 (3)**—*Appeal—Disobedience to injunction—Power of Appellate Court.*

An order refusing to attach property for disobedience of an injunction comes under O. 39, R. 2 (3) and is appealable under O. 43, R. 1 (*r*). The Appellate Court has jurisdiction to pass an order of imprisonment in appeal.

Per *Oldfield, J.*—Disobedience of an injunction order is an act independent of the suit and calls therefore for a separate punishment.

Per *Tyabji, J.*—(Dissenting)—O. 43, R. 1 (*r*) is not sufficient to give the Appellate Court the power which is restricted to the "Court granting the injunction". In other words, no appeal is intended to be given as regards the exercise of a power which is annexed to a specified Court. (*Oldfield and Tyabji, JJ.*) OTTAPURAKKAL THAZATH SUPHI *v.* ALABI MASHUR KOYANNA KOYA KUNHI KOYA. **27 I. C. 131**

——**O. 43, R. 1 (s) and O. 40, R. 1**—*Order for appointment of a Receiver—Appealability.*

C. P. CODE (V OF 1908), O. 43, R. 1 (s).

An order for the appointment of a Receiver without actually appointing any one to that office is not appealable. O. 43, R. 1, C. P. C., contemplates an order appointing a Receiver. 40 M. 18 (F. B.) Diss. ; 13 A. L. J. 79 ; 13 C. L. J. 157 ; 17 Bom L. R. 510 Foll. (*Tudball and Ryves, JJ.*) SYED MOHAMMED ASKARI *v.* NISAR HUSAN.
18 A. L. J 212 : 2 U. P. L. R. (H. C) 95: 54 I. C. 520 : 44 A. 227.

——**O. 43, R 1 (s)**—*Order appointing Receiver provisionally—Right of appeal.*

Where on an application for appointing a Receiver the Court allowed the application provisionally and called on parties to put in their application showing their views regarding the person and powers of the Receiver and the income, if any, to be paid by him, *held*, that the order did not amount to an appointment of a Receiver but was only an expression of opinion that a Receiver should be appointed and therefore no appeal lay. (*Chamier and Piggott, JJ.*) RAMJI *v.* KOMAN DAS. **27 I. C. 646 : 13 A. L. J. 79.**

——**O. 43, R. 1 (s)**—*Receiver's accounts—Appeal.*

Orders of Court in passing Receiver's accounts are not appealable. (*Mookerjee and Caspersz, JJ.*) MOHINI MOHAN *v.* BARODA KANT.
12 I. C. 780 : 14 C. L J. 445.

——**O. 43, R. 1 (s)**—*Order appointing Receiver.*

An interlocutory order for the appointment of a Receiver in the terms "the property in suit will be better managed if a Receiver is appointed" is not appealable. It is only the final order that is appealable. (*Mookerjee and Teunon, JJ.*) UPENDRA NATH *v.* BHUPENDRA NATH.
9 I. C. 582: 13 Cr. L. J. 157.

——**O. 43, R. 1 (s)**—*Order providing for appointment of Receiver, if appealable.*

An order merely directing that a proper person should be appointed as a Receiver is not appealable under O. 43, R. 1 (s.) 9 I.C. 582, foll. (*Heaton and Shah, JJ.*) NARBADA SHANKAR MUGATRAM VIYAS *v.* KEVALDAS RAGHUNATH DAS.
29 I. C. 504 : 17 Bom. L. R. 510.

——**O. 43, R. 1 (s)**—*Dispossession by Receiver of a third party—Appeal.*

When property of a third party is interfered with by an officer of the Court like the Receiver the party has ordinarily two remedies. He may apply to the Court for a summary order restraining the Receiver from interfering or he may ask the leave of the Court to permit him to sue the Receiver and restrain him from interfering and for any other appropriate relief. Where the party has adopted the summary remedy, the order of the Court is an order under O. 40, R. 1 (*b*) and is appealable. 39 C. 713, 3 Pat. L. J. 573 Rel. (*Oldfield and Venkatasubba Rao, JJ.*) RAMASWAMY PILLAI *v.* JANAKI AMMAL.
32 M. L T. (H. C.) 96 : 16 L. W. 833 : 69 I. C. 393 : (1922) M. W. N. 725 : 1923 Mad. 129.

——**O. 43, R. 1 (s)**—*Order under O. 40, R. 4 directing attachment of Receiver's property for failure to pay amount fixed as due from him—Correctness of amount—Right to question.*

C. P. CODE (V OF 1908), O. 43, R. 1 (s).

In an appeal from an order under O. 40, R. 4, C.P.C., directing attachment of the property of a receiver on the ground that he failed to pay the amount directed to be paid by him, it is open to the Receiver to question the amount fixed as due from him by the lower Court. *Held*, that the Court below erred in law in not fixing the exact amount of the receiver's indebtedness and in directing him to pay an approximate amount.

Observations on the proper procedure to be followed in fixing the amount to be paid by a Receiver and in directing attachment of his property in default of payment. (*Krishnan and Venkatasubba Rao, JJ.*) R. M. P. PALANIAPPA CHETTI *v.* M. S. A. PT. PALANIAPPA CHETTY.

16 L. W. 754 : (1922) M. W. N. 741 : 69 I. C. 203 : 43 M. L. J. 707 : 1923 Mad. 85 (2).

——**O. 43, R. 1 (s) and O. 40, R. 1 (d)**—*Appeal—Order directing Receiver to pay.*

An order of Court directing a Receiver appointed in the suit to pay money to a person pending disposal of the suit is appealable by the combined operation of O. 43, R. 1 and O. 40, R. 1. (*Abdur Rahim and Sundara Aiyar, JJ.*) KAMALATHAMMA *v.* SRINIVASA CHARIAR.

14 I. C. 277 : 11 M. L. T. 383.

——**O. 43, R. 1 (s)**—*Order declaring that Receiver should be appointed—Appeal.*

An order under O. 40, R. 1, C. P. C. declaring that a Receiver should be appointed in the case or appointing anybody by name as Receiver is an order which is appealable under O. 43, R. 1 14 C.L.J. 489: 40 M. 18 (F.B.)[foll. 13 C.L.J. 157 : 17 Bom. L. R. 510 : 18 A. L. J. 212 Not Foll. (*Jwala Prasad and Bucknill, JJ.*) GOBIND RAM *v.* GANESH RAM. **4 U. P. L. R. (Pat.) 68 : 69 I. C. 929 : 1 P. L. R. 161 : 1 P. 625 : 4 P. L. T. 210 : 1922 Pat. 250 : 1922 P. 577.**

——**O. 43, R. 1 (s)**—*Receiver in execution of a mortgage decree—Third party—Appeal—Revision.*

Where a Receiver is appointed in execution of a mortgage decree overruling the objections of a third party, the latter has no right of appeal but he can prefer a revision to the High Court. (*Chapman and Atkinson, JJ.*) INDERDEO NARAIN SINGH *v.* GOURI SHANKER. **4 P. L. W. 414 : 45 I. C. 177 : 1918 Pat. 138.**

——**O. 43, R. 1 (s)**—*Order construing order—Whether appealable.*

An order construing an order of appointment does not fall under either rule, R. 1 or R. 4 of O. 40, C. P. C. and is not appealable. (*Sultan Ahmed, J.*) SAMHAUTTA SINGH *v* BHAGWANTI SINGH.

5 P. L. J. 97 : 55 I. C. 15 : 1920 Pat. 121.

——**O. 43, R. 1 (t)**—*Appeal—Order refusing to restore application.*

An appeal does not lie against an order refusing to restore an application to set aside an appellate decree which has been dismissed for default. But where there has been a serious miscarriage of justice revision lies. (*Walsh and Stuart, JJ.*) KAMESHWAR DAYAL *v.* MISSRI LAL. **40 I. C. 336.**

C. P. CODE (V OF 1908), O. 43, R. 1 (u).

——**O. 43, R. 1 (t)**—*Refusal to rehear appeal.*

An appeal lies to the High Court from an order refusing to rehear an appeal dismissed for default even though such appeal has been preferred to the special judge under S. 109 A. (2) of the Bengal Tenancy Act in a suit under S. 106 of the Act. (*Mookerjee and Newbould, JJ.*) MANMOTHA NATH DEY *v.* GADHADHAE MANNA.

41 I. C. 751 : 28 C. L. J. 155 : 45 Cal. 638.

——**O. 43, R. 1 (t)**—*"Suit"—Whether includes an appeal—Application to release an appeal—Nature of.*

"Suit" includes the appellate stage and also includes the execution proceedings based on the final decree made in the suit and an application to rehear an appeal heard *ex parte* is an application in the suit. (*Mookerjee and Beachcroft, JJ.*) SAMED SHAIKH *v.* NABA NEPAL. **19 C. L. J. 310 : 23 I. C. 12 : 19 C. W. N. 859.**

——**O. 43, R. 1 (t)**—*Appeal—Dismissal for default—Review.*

An order of the Lower Appellate Court rejecting an application for review of an appeal dismissed for default and a memo of cross-objections allowed *ex parte*, is not appealable. (*Shadi Lal, J.*) MAHMUD HUSSAIN *v.* MUHAMMAD USMAN. **53 I. C. 333.**

——**O. 43, R. 1 (t) and O. 41, R. 10 (2)**—*Order rejecting appeal for failure to furnish security for costs.*

An order rejecting an appeal for failure to furnish security for costs is not appealable. 18 A. 101 and 13 O. C. 5 Ref. (*Evans, A. J. C.*) FATEH SINGH *v.* RAMA SINGH. **9 I C. 748 : 14 O. C. 40.**

——**O. 43, R. 1 (u)**—*Order of remand.*

When an appeal is remanded without any provision of law being stated the presumption is that the order is made under O. 41, R. 23, C. P. C. (*Walsh and Ryves, JJ.*) KULSOOMUNNISSA *v.* RAMPRASAD. **20 A. L. J. 321 : L. R. 3 A. 394 : 44 A. 492 : 67 I. C. 718 : 4 U.P. L. R. (A). 168 : 1922 A. 226.**

——**O. 43, R. 1 (u)**—*General order of remand is not appealable.*

A general order of remand by the Lower Appellate Court on the ground of misbandling of the trial in the First Court is not appealable. (*Walsh and Wallach, JJ.*) CHHAJJU MALMUNNA LAL *v.* PYARE LAL JUMNA PRASAD. **63 I. C. 858.**

——**O. 43, R. 1 (u)**—*Order of remand—No second appeal.*

Where there is no second appeal from the decree of the Appellate Court, there is also no Second Appeal from the order of remand. (*Piggott and Walsh, JJ.*) SANT PRASAD *v.* BHAWANI PRASAD. **2 U. P. L. R. (All.) 416 : 60 I. C. 831 : 19 A. L. J. 72 : 43 All. 403.**

——**O. 43, R. 1 (u)**—*Small cause nature—Remand—No appeal.*

There is no second appeal in a suit of a small cause nature of the value below Rs. 500 and an order of remand in such a suit is not open to

C. P. CODE (V OF 1908), O. 43, R. 1 (u).

appeal. (*Tudball and Ryves, JJ.*) AMBA PRASAD *v.* MUSHTAQ HUSAIN. **2 U. P. L. R. (H. C.) 69 : 18 A. L. J. 167 : 54 I. C. 432 : 42 A. 200.**

———O. 43, R. 1 (u)—*Remand—Appealability —Small cause nature.*

A remand order in a suit of a small cause nature is not appealable for the decree itself would not be open to further appeal. (*Tudball and Rafique, JJ.*) BINDRA BAN *v.* SAHODRA. **21 I. C. 638 : 11 A. L. J. 599.**

———O. 43, R. 1 (u)—*Remand—Inherent power —Not falling under O. 41, R. 23—Appeal.*

No appeal lies against an order passed by an Appellate Court remanding a case otherwise than under O. 41, R. 23 of the C.P.C. (*Walmsley and Huda, JJ.*) MOHENDRA NATH CHAKRAVARTI *v.* RAMTARAN BANDOPADHYA. **31 C. L. J. 357 : 55 I. C. 96 : 23 C. W. N. 1049.**

———O. 43, R. 1 (u)—*Nature of appeal under.*

An appeal under R. 1 (u) is one from the order granting an application for review and not one from the final decree in the suit. The appeal is restricted to the grounds mentioned in O. 47, R. 7. (*Chevis, J.*) KANSHI RAM *v.* KARAM NARAIN. **3 Lah. L. J. 100 : 60 I. C. 259 : 3 U. P. L. R. (Lah.) 65.**

———O. 43, R. 1 (u)—*Remand—Appeal—Execution sale.*

An order of remand made on an appeal from an order setting aside or refusing to set aside an execution sale, is final under S. 104 (*c*) and no appeal lies therefrom. (*Chevis, J.*) ASANAND *v.* JHANGI RAM. **2 P. W. R. 1919 :: 50 I. C. 610 : 29 P. L. R. 1919.**

———O. 43, R. 1 (u)—*Appeal—Order of remand—Question of fact binding.*

Findings of fact cannot be disturbed in an appeal against an order remanding a case under O. 41, R. 23, C. P. C. (*Chevis, J.*) WARYAN SINGH *v.* HARNAM SINGH. **48 I. C. 379 : 109 P. R. 1918 : 23 P. L. R. 1919.**

———O. 43, R. 1 (u)—*Remand—Appeal—Point of law.*

An appeal to the Chief Court against the order of remand is competent under O. 43, R. 1 (u) if it involves point of law. 23 I. C. 817 : 85 P. R. 1914 Dist. (*Johnstone and Shadi Lal, JJ.*) MUSSAMMAT MALAP KUAR *v.* HAKIM SINGH. **8 P. R. 1915 : 28 I. C. 441 : 195 P. L. R. 1915.**

———O. 43, R. 1 (u)—*Case open to appeal—Order of remand—Appeal when lies.*

An appeal lies from an order of remand in a case where if the appellate Court which passed that order, had passed instead a decree reversing that of the Lower Court, an appeal would lie from such decree. (*Shah Din and Chevis, JJ.*) SAWAN SINGH *v.* A. MATHU. **162 P. L. R. 1914 : 120 P. W. R. 1914 : 23 I. C. 817 : 85 P. R. 1914.**

———O. 43, R. 1 (u)—*Remand—Appeal—Test of.*

Where a question affecting the final result of the case has been decided against a party and the suit is remanded under O. 41, R. 23, the order of

C. P. CODE (V OF 1908) O. 43, R. 1 (u).

remand is appealable. (*Scott-Smith, J.*) FATI *v.* GADDI. **158 P. W. R. 1913 : 20 I. C. 788 : 279 P. L. R. 1913.**

———O. 43, R. 1 (u)—*Remand of case for disposal after decision of the main point—Not appealable*

Where the appellate Court decides the main point in a case and remands the case for disposal of remaining issues, the decision is not one on a preliminary point and thus the order is not appealable. 44 Cal. 929 foll. (*Abdur Rahim and Oldfield, JJ.*) PONANGI VENKATA SUBBARAIDU *v.* ZEMINDAR OF NUZVID. **60 I. C. 609 : 12 L. W. 667.**

———O. 43, R. 1 (u)—*Remand not under O. 41 R. 23—No appeal lies.*

Under O. 43, R. 1 (*u*) of the Code no appeal will lie against an order of remand unless that order of remand be passed under O 41, R. 23. (*Ashworth, J. C.*) SHEIKH FARZAND ALI *v.* EKADASHI. **26 O. C. 10 : 73 I. C. 591 : 10 O. L. J. 36 : 1923 O. 177.**

———O. 43, R. 1 (u)—*Order of remand—Appeal—Findings of fact.*

On an appeal from an order of remand, the High Court is bound by the findings of fact of the lower appellate court. 20 All. 42 ref. (*Daniels, A. J. C.*) QAMAR JEHAN BEGAM *v.* BANSI DHAR. **65 I. C. 376 : 8 O. L. J. 624.**

———O. 43, R. 1 (u) and O. 41, Rr. 23 and 25—*Remand—Order under wrong rule by clerical mistake.*

An order of remand passed initially under O. 41, R. 23 but by a clerical mistake purporting to be under O. 41, R. 25 is appealable. (*Sundar Lal, A. J. C.*) ANGNE LAL *v.* JAGDISH SINGH. **9 I. C. 431.**

———O. 43, R. 1 (u)—*Remand—Appeal.*

No appeal lies against an order of remand by the Appellate Court to the trial Court for its fresh decision on the reversal of its previous decree on the merits though an appeal is maintainable on the decree of the Appellate Court reversing the decree of the trial Court. (*Jwala Prasad, J.*) RAMCHANDRA RAO *v.* NARAYAN LAL. **58 I. C. 909.**

———O. 43, R. 1 (u)—*Remand — Inherent power—Case not within O. 41, R. 23, C. P. C.—Appeal.*

O, 41, R. 23, C. P. C., does not contemplate a case decided upon the whole evidence and upon all the issues which were raised. In such a case an Appellate Court thinks that the burden of proof has been cast on the wrong party and remands the case for re-trial in the light of the evidence already taken and authorises the taking of fresh evidence, the rule has no application and consequently the order of remand is not appealable. (*Miller, C. J. and Coutts, J.*) BRIJ MOHAN PATHAK *v.* DEOBHOJAN PATHAK. **55 I. C. 484 : 1 Pat. L. T. 509.**

———O. 43, R. 1 (u)—*Remand — Inherent power—Appeal from order of remand—Court-fee.*

C. P. CODE (V OF 1908), O. 43, R. 1 (u)

An appeal against the order of remand by the Lower Appellate Court not made under O. 41, R. 23, C. P. C., is a second appeal and *ad valorem* Court-fee should be paid thereon. (*Roe, J.*) PANDIT SINGH *v.* MODE NARAIN SINGH.
50 I. C. 367.

———**O. 43, R. 1 (u) and O. 41, Rr. 23 and 25**—*Remand—Inherent power—No appeal.*

An Appellate Court has, apart from Rr. 23 and 25 of O. 41 of the C. P. C., inherent power under S. 151 of the C. P. C. to remand a case for re-trial. No appeal lies against such an order. The power of remand should be exercised with the very great caution. (*Roe and Jwala Prasad, JJ.*) RAGHU NANDAN SINGH *v.* JADUNANDAN SINGH.
3 P. L. J. 253 : 43 I. C. 959 : 4 P. L. W. 450.
Also **39 M. L. J. 536 : 12 L. W. 667.**

———**O. 43, R. 1 (w)**—*Order granting review—Appeal—Conditions.*

The right of appeal under R. 1 (*w*) is subject to conditions laid down by O. 47, R. 7 and therefore an appeal not coming under this rule cannot be maintained. (*Piggott and Kanhaiya Lal, JJ.*) SUNDER *v.* HABIB CHICK. **42 All. 626 : 18 A. L. J. 838 : 60 I. C. 81 : 2 U. P. L. R. (All) 283.**

———**O. 43, R. 1 (w) and O. 47, R. 7**—*Appeal from order granting review.*

O. 43, R. 1 (*w*) is merely inserted in order that the rule in question may contain a complete list of those orders from which an appeal lies. It must be read subject to O. 41, R. 7 by which the right of appeal from an order granting an application for review is limited and defined. Thus an appeal is allowed only on grounds in O. 47, R. 7. (*Piggott, J.*) LACHMANDAS *v.* MUTSADDI LAL.
41 I. C. 886 : 15 A. L. J. 505.

———**O. 43, R. 1 (w) and O. 47, R. 7**—*Order granting review—Appeal.*

An appeal against an order granting a review on the ground the order sought to be reviewed was really an earlier order, does not lie. O. 43, R. 1 (*w*) must be read with O. 47, R. 7, by which the grounds on which an order granting review can be set aside on appeal are limited. (*Newbould and Suhrawardy, JJ.*) SURYA NARAIN *v.* KUNJ BEHARI. **66 I. C. 909 : 25 C. W. N. 884.**

———**O. 43, R. 1 (w) and O. 47, Rr. 1, 4 and 7**—*Appeal from order granting review.*

O. 43, R. 1 (*w*), C. P. C., allows an appeal from an order granting an application for review only on the grounds mentioned in O. 47, R. 7 of the Code and on no other. (*Chitty and Walmsley, JJ.*) WAHED ALI *v.* CHAND MIA.
52 I. C. 29 : 30 C. L. J. 250.

———**O. 43, R. 1 (w) and O. 47, R. 7**—*Order granting review—Appeal.*

An order granting a review of judgment, though appealable under the provisions of O. 43, R 1 (*w*) of the C. P. C., is subject to the limitations mentioned in O. 47, R. 7 of the Code, namely, that there can be an appeal only upon the grounds mentioned in that rule. (*Fletcher and Huda, JJ.*) ABDUL HAMID SADAGAR *v.* AKHINA KHATUN.
47 I. C. 850.

C. P. CODE (V OF 1908), O. 43, R. 1 (w)

———**O. 43, R. 1 (w) and O. 47, R. 7**—*Appeal—Grounds for.*

A right of appeal under O. 43, R. 1 (*w*) against an order granting a review is restricted in its scope by O. 47, R. 7. (*Sanderson, C. J. and Mookerjee, J.*) NANDU LAL MALIK *v.* PANCHANAN MOOKERJEE. **45 Cal. 60 : 21 C. W. N. 1076 : 42 I. C. 484 : 26 C. L. J. 187.**

———**O. 43, R 1 (w) and O. 47, R. 7**—*Order granting review—Appeal.*

O. 43, R. 1 (*w*), C. P. C., must be read subject to O. 47, R. 7 and an order granting review is appealable only on grounds mentioned in O. 47, R. 7. (*Carnduff and Richardson, JJ.*) HARICHARAN SAHA *v.* BARAN KHAN. **25 I. C. 903 : 41 Cal. 746.**

———**O. 43, R 1 (w)**—*Appeal- Order granting review.*

No appeal lies from an order granting a review except on any of the grounds mentioned in O. 47, R. 7, C. P. C. (*Richardson and Mullick, JJ.*) TRIPURA CHARAN KUL *v.* SHOROSHI BALA.
22 I. C. 773.

———**O. 43, R 1 (w) and O. 47, R. 7**—*Appeal—Grounds for.*

Cl. (*w*) of R. 1 should be read with O. 47, R. 7; the one allows an appeal and the other shows the grounds on which an order granting a review can, in appeal, be impeached. (*Ayling and Srinivasa Aiyangar, JJ.*) MULAMBATH KUNHAMMAD *v.* ACHARATH PARAKAT KATHIRI KUTTI.
31 M. L. J. 827 : 38 I. C. 373 : 5 L. W. 472.

———**O. 43, R. 1 (w), O. 47, R. 7 and O. 9, R. 9**—*Appeal—Review.*

Where there were in order (1) an order of dismissal of an application for execution of a decree for default, (2) restoration of the application under O. 9, R 9, (3) application of judgment-debtors for review of the restoration order followed by the Court's granting the review, (4) application by decree-holder for review of the original order dismissing execution petition for default, it was *Held* that the Application No. 4 was not in effect for reviewing the order in petition No. (3) and that order (1) above was liable to independent review. (*Oldfield and Sadasiva Aiyar, JJ.*) KALI SHETTATHI *v.* SHAMA RAU. **5 L. W. 124 : 37 I. C. 229 : 21 M. L. T. 297.**

———**O. 43, R 1 (w) and O. 47, R. 7**—*Appeal—Madras Estates Land Act (I of 1908), S. 195.*

No appeal lies to the Dt. Court against the order of a Revenue Court granting a review in a summary suit. 41 C. 74 ; 24 M. L J. 93 Foll. (*Oldfield and Tyabji, JJ.*) AIYARAPPA MUDALIAR *v.* GULAM GHOSE. **26 I. C. 831 : 2 L. W. 62.**

———**O. 43, R. 1 (w)**—*Review—Appeal—When competent.*

An appeal lies only when an order is passed granting a review in cases provided in O. 47, R .7 (1), C. P. C. (*Benson and Sadasiva Aiyar, JJ.*) ORAVUKUNDIYIL PARKUM ELAVANA SHOLAN *v.* PALANKUNDY KUNHI KUTTY. **24 M. L. J. 93 : 18 I. C. 549 : (1913) M. W. N. 52.**

———**O. 43, R. 1 (w)**—*Appeal against decree passed on review—Appealability—Grounds of.*

C. P. CODE (V OF 1908), O. 43, R. 1 (w)

An appeal against a decree passed on an application for review of judgment is appealable on the ground that the Court which admitted the application for review had no jurisdiction to do so. (*Chamier, J. C.*) UJAGAR *v.* RAM SAHAI.
11 I. C. 343 : 14 O. C. 108.

——O. 43, R. 1 (w)—*Review—Appeal.*

An order, granting a review of a judgment, itself not appealable, is appealable, subject to O. 47, R. 7. There can be no appeal against an order granting a review merely for sufficient grounds. (*Mullick, J.*) SUNDAR LAL *v.* UPENDRANATH SEAL. **35 I. C. 15 : 1 P. L J. 193.**

——O. 43, R. 1 (w) and O. 47, R. 7—*Order granting review—Appeal—Grounds for.*

The right of appeal against an order granting an application for review is restricted by the provisions of O 47, R. 7. There is no general right of appeal against such an order. (*Saunders, J. C.*) RAMDAT KURME *v.* PARASUTAN.
49 I. C. 57 : 3 U. B. R. (1918) 104.

——O. 44, R. 1—*Leave to appeal in* forma pauperis—*Refusal of—Applicant if entitled to prosecute appeal on payment of Court-fee.*

The dismissal of an application for leave to appeal in *forma pauperis* presented along with the memo. of appeal does not amount to the dismissal of the appeal. The Court refuses to exercise its jurisdiction if it declines to allow Court-fees to be paid on the memo. of appeal. (*Tudball and Rafique, JJ.*) MUHAMMAD FARZAND ALI *v.* RAHAT ALI. **40 All. 381 : 45 I. C. 29 : 16 A. L. J. 309.**

——O. 44, R 1—*Appeal in* forma pauperis—*Limitation Act, Art.* 170.

An appeal was filed in the High Court long after 30 days had expired from the decision of the Courts below and the appellant expressed his inability to pay the Court-fee and asked the Court to take the appeal in *forma pauperis. Held*, that the appeal having been filed beyond 30 days of the decision of the Court below, could not be treated as an application to appeal in *forma pauperis*, and was barred by limitation. (*Tudball and Rafique, JJ.*) GATI *v.* RACHLA KUNWAR.
29 I. C. 1003 : 13 A. L. J. 635.

——O. 44, R. 1—*Privy Council—Appeal—In* forma pauperis—*If High Court can grant leave.*

The High Court cannot grant leave to prosecute an appeal to the Privy Council in *forma pauperis*. The petitioner must apply in England. (*Jenkins, C. J. and Harrington, J.*) JAGADANDA ASRAM *v.* RAJENDRA ROY. **18 I. C. 129 : 17 C. L. J. 381.**

——O. 44, R. 1—*Leave to appeal in* forma pauperis—*Dismissal of application does not involve dismissal of appeal.*

There is a distinction between applications to sue as a pauper, and applications to appeal as such. The distinction was deliberately drawn by the legislature. 40 M. 687 Ref. In the case of an application to sue, the plaint is an integral portion of the application, in the case of an appeal, the memorandum of appeal is a separate document. Consequently the dismissal of the application for leave to appeal as a pauper does not involve the dismissal of the appeal. An order of the Court

C. P. CODE (V OF 1908), O. 44, R. 1.

directing payment of the Court-fees which could be made under S. 149, C. P. Code, is valid and proper. On payment of the Court-fees the appeal is effective as from the date of the original presentation. 2 Lah. 1 ; 55 P. R. 1913: 95 P. R. 1917. Dist. (*Le Rossignol and Campbell, JJ.*) MAHANT DIYAL DAS *v.* SUNDAR DAS. **3 Lah 35 : 65 I. C. 741 : 26 P. W. R. 1922 : 1922 Lah 225.**

——O. 44, R. 1—*Appeal to be continued in* forma pauperis.

Assuming the Court has jurisdiction to allow an appellant to continue an appeal in *forma pauperis* (it can be exercised only if on a perusal of the judgment) and decree appealed from and the appeal memo., the Court is of opinion that decree is contrary to law. (*Sadasiva Iyer and Burn, JJ.*) SOLIAPPA CHETTY *v.* LAKSHMANAN CHETTY. **38 M. L J. 146 : (1920) M W. N. 277 : 54 I. C. 761 : 10 L. W. 659.**

——O. 44, R 1—*Privy Council—Leave to appeal in* forma pauperis.

The High Court has no power to grant leave to a party to appeal to the Privy Council in *forma pauperis*, 3 Pat. L. J. 179 Foll. (*Oldfield and Phillips, JJ.*) AHUBA *v.* SHRINIVASA KAMPATHI.
42 Mad. 32 : 35 M. L. J. 258 : 24 M. L. T. 207 : 47 I. C. 646 : 8 L. W. 460

——O. 44, R. 1 and S. 149—*Dismissal of application for leave to appeal as pauper—Effect on memorandum of appeal.*

An Appellate Court can, under S. 149, grant time to the applicant to pay Court-fees on dismissing the application for leave to appeal as a pauper. The rejection of such an application does not include the rejection of the memo. of appeal. (*Oldfield and Sadasiva Iyer, JJ.*) NELLAVADIVU AMMAL *v.* SUBRAMANIA PILLAI. **31 M. L. J. 269 : 38 I. C. 617 : 40 Mad. 687.**

——O. 44, R. 1—*Appeal in* forma pauperis—*Right of applicant to be heard.*

An applicant applying for permission to appeal as a pauper is not entitled as of right to be heard either in person or by pleader before the Court exercises its power to allow or reject the application. (*Sadasiva Iyer, J.*) *In re* PARAMASIVAN PILLAI. **28 I. C. 957.**

——O. 44, R. 1—*Leave to appeal—Oudh Court's Act, S.* 8 (*c*).

When the subject-matter is of the value of Rs.10,000 or upwards, it is advisable to apply for leave to appeal as a pauper to a Bench of two Judges under S. 8 (*c*). (*Lindsay, J. C. and Stuart, A. J. C.*) TEJ KISHEN *v.* ABDUL HAMID KHAN.
38 I. C. 541 : 3 O. L. J. 694.

——O. 44, R. 1—*Leave to appeal.*

Unless a Lower Appellate Court acts with illegality or irregularity, its order rejecting an application for leave to appeal as a pauper cannot be revised by the High Court. (*Lindsay, J.C.*) AHSAN ALI *v.* MUHAMMAD JAFARAH KHAN.
30 I. C. 86 : 2 O. L. J. 254.

——O. 44, R. 1—*Privy Council—Leave to appeal in* forma pauperis.

C. P. CODE (V OF 1908), O. 44, R. 2.

The High Court has no jurisdiction to grant a party leave to appeal in *forma pauperis* to His Majesty in Council. O. 44, R. 1 of the C. P. Code does not apply to appeals to His Majesty in Council. (*Dawson Miller, C. J and Chapman, J.*) RAM KISHEN LAL *v.* MANNA KUMRI.
44 I. C. 731 : 3 P. L. J. 179.

——— —O. 44, R 2—*Presentation of an appeal—Payment of Court-fee.*

The appeal is said to be filed on the day on which the application for leave to appeal as pauper is made though the Court-fee is paid before the end of inquiry. 2 A. 241, P. C., Foll. (*Fox, C. J. and Parlett, J.*) SWANTEE *v.* MA NGWE.
32 I. C 630 : 9 Bur L. T. 69.

———O. 45—*Application for leave to appeal—Review petition successful—Reversal in appeal—Effect on original application.*

An application for leave to appeal to the Privy Council and a review petition were put in against the judgment of the High Court. The latter proving successful no order was necessary on the former. In an appeal against the order granting the review the same was reversed by the Privy Council. *Held*, the original application for leave to appeal was still alive and leave could be granted thereon. (*Harrison and Zafar Ali, JJ.*) NEKI *v.* CHHAJJU RAM. **4 Lah. 445 : 77 I. C. 869: 1924 Lah. 225.**

———O. 45, R. 3—*Certificate—Contents.*

A certificate issued under O. 45 must clearly show whether it fulfils the conditions of S. 110 or is otherwise a case fit for appeal to Privy Council under S. 109 (*c*). (*Lord Buckmaster.*) RADHA KRISHNA AYYAR *v.* SWAMINATHA AYYAR.
44 Mad. 293 : 19 A. L. J. 161 : 48 I. A. 31 : 23 Bom. L. R. 718 : 25 C. W. N. 630 : 40 M. L. J, 229 : 33 C. L. J. 277 : 13 L. W. 321 : (1921) M. W. N. 119 : 60 I. C. 85 : 29 M. L. T. 418 (P. C.).
[On appeal from 40 I. C. 587.

———O. 45, R. 3—*Question of law involved—Leave to appeal to Privy Council, when can be granted.*

Where many important and wide reaching questions of law are involved in a decision sought to be appealed against, the case is " otherwise a fit one for appeal to His Majesty in Council" within R. 3. (*Ayling and Sadasiva Iyer, JJ.*) JAGAVEERA RAMA VENKATESWARA *v.* SAPPANSARI.
22 I. C. 390 : (1914) M. W. N. 162.

——— —O. 45, R. 4—*Essentials for.*

Under O. 45, R 4 of the C. P. C. consolidation for purposes of valuation for leave to appeal to the Privy Council is admissible only when the suits in question involve substantially the same questions for determination and have been decided by the same judgment. (*Oldfield and Krishnan, JJ.*) RAJA RAJESWARA *v.* ARUNACHELAM,
44 M. L. J. 424 : 73 I. C 217 : 1923 M, 602.

——— —O. 45, R 4—*Consolidation—When permissible,*

O. 45, R. 4, C. P. C., allows consolidation but only to make good a defect of pecuniary valuation and not a defect of any other kind. The rule

C. P. CODE (V OF 1908), O. 45, R. 5.

speaks only of the consolidation of different suits decided by the same judgment but the principle applies where the interests of the two parties are so entirely separate that they are practicially defendants in two different suits decided by one judgment. (*Batten, J. C. and Hallifax, A. J. C.*) SETH NARAYANA DASS *v.* MT. KAMLABAI.
69 I. C. 525 : 1923 Nag. 198.

———O. 45, R 4—*Consolidation when allowed.*

Under O. 45, R 4, the case is only consolidated for the purpose of pecuniary value. It does not matter what the reason is why the appeals are consolidated. Once they are consolidated for whatever reason they form in fact one appeal and the parties in that appeal must be treated just as the parties in one suit. (*Dawson Miller, C. J. and Mullick, J.*) THE MIDNAPUR ZEMINDARI CO *v.* MADAN MARWARI. **70 I. C. 782 : 1923 Pat. 17: 1923 P. 215.**

———O. 45, R. 4—*'Judgment'—Meaning of—Requirements of R 4.*

'Judgments' in R. 4 refers the judgment appealed against, *i. e* the judgment of the High Court. According to the rule the judgment which their Lordships of the Privy Council have to consider should be the same judgment in the consolidated appeals and the rule does not mean that they should have in the same case or in the same appeal to consider the effect of several judgments of the High Court. (*Miller, C. J. and Mullick, J.*) DEOKI NANDAN PRASAD *v.* NARASINGH RAUT,
6 P. L. J. 97 : 2 P. L. T. 157 : 60 I. C. 517 : 1921 Pat. 145.

———O. 45, R, 4—*Consolidation of appeals—Security for costs.*

O. 45, R. 4, C.P.C., does not limit the inherent power of the High Court to consolidate appeals to the Privy Council for the purpose of security for costs and for saving expenses. (*Miller, C. J. and Imam, J.*) HAR PRASAD RAI *v.* BRJI KISHEN DAS. **3 P. L. J. 446 : 45 I. C. 551 : 1918 Pat. 259.**

———O. 45, R. 5—*Privy Council—Appeal to.*

Plff. valued the subject-matter below rupees 10,000 ; deft. accepted it in his written statement and also in appeal. *Held*, he cannot be allowed to dispute the valuation on appeal to Privy Council although market value is the real test as to whether an appeal lies to the Privy Council, (*Lindsay, J, C. and Kanhaiya Lal, A, J. C.*) JAGANNATH BUKHSH *v* MENDANA,
30 I. C. 204 : 2 O. L. J. 208.

——— —O. 45, R. 5—*Value of subject-matter of suit.*

A deft. who had consistently acquiesced in a finding as to valuation and Court-fee cannot reopen it to enable him to prefer an appeal to His Majesty in Council. (*Batchelor, C. J. and Heaton, J.*) ANANT NARAYAN DESHPANDE *v.* RAMCHANDRA GANGADHAR DESHPANDE
42 Bom. 609: 46 I. C. 4 : 20 Bom. L. R. 418.

——— —O. 45, R. 5—*Reference—Delegation of inquiry.*

Where a reference is made under this order to a court of first instance, the court must carry it

out itself; it should not remit the investigation to some other officer. (*Jenkins, C. J. and Holmwood, J.*) HANSMAN JHA *v.* BAHUJI JHA.
34 I. C. 203: 43 C. 225.

——— O. 45, R. 7—*Time for furnishing security —Act XXVI of* 1920.

An appeal to His Majesty in Council from a decree passed before the coming into force of Act XXVI of 1920 is governed by O. 45, R. 7 as it existed before its amendment and the period for furnishing security is 6 months. Where cash is offered as security before the expiry of 6 months but is accepted after that period owing to the court's delay the deposit must be deemed duly made. (*Mears, C. J. and Banerji, J.*) DEBI RAI *v.* PRAHLAD DAS. 44 A. 242: 20 A. L. J. 51 : L. R. 3 A. 94 : 66 I. C. 340 : 1922 All. 87.

——— O. 45, R. 7—*Time for furnishing security and deposit cannot be extended by more than six weeks.*

Under O. 45, R. 7 as amended by S. 3 of Act XXVI of 1920 the High Court's discretion to extend the time for furnishing security and making a deposit for translation and printing and other charges has been curtailed and limited to the period mentioned in the amendment. The High Court has no power to extend the period beyond six weeks. (*Mears, C. J. and Banerji, J.*) RAM DHAN *v.* PRAG NARAIN. 44 A. 216 : 20 A. L. J. 13 : 65 I. C. 249 : L. R. 3 A. 634 : 1922 All. 43

——— O. 45, R. 7—*Decree amended on review —Leave to appeal to Privy Council—Limitation.*

On an application for leave to appeal from a decree of the High Court which reversed the decree of the Court of first instance, the decree of the High Court was first passed on the 29th November 1921 but on an application for review it was modified on the 9th May 1922. *Held* that the period of limitation for the application for leave to appeal to the Privy Council is to be recounted from the latter date, on which a new decree was passed in substitution for first one. (*Abdul Raoof and Martineau, JJ.*) NAWAZ ALI *v.* ALLU.
4 Lah. 185 : 75 I. C. 590 : 6 Lah. L. J. 44 : 1924 Lah. 82

——— O. 45, Rr. 7 and 8—*Extension of time for security—When allowed.*

The period of filing security for costs of the opposite party in a Privy Council appeal should not be extended without cogent reasons. A misapprehension as to the extent of the court vacation is not a cogent reason where ample legal advice would have been obtained. (*Reid and Kensington, JJ.*) SHAMSUL-NISA *v.* SECRETARY OF STATE. 71 P. W. R. 1913 : 18 I. C. 489 : 105 P. L. R. 1913.

——— O. 45, R. 7—*Time for furnishing security—Extension of—Limitation Act (XXVI of* 1920), S. 3 (1).

The High Court has no power to extend time or excuse delay in the matter of furnishing security for the costs of the respondent in an appeal to His Majesty in Council, beyond the period given by S. 3 (1) of Act XXVI of 1920. (*Oldfield*

and Ramesam, JJ.) KAGHI REDDI *v.* NARAYANA REDDI. 18 L. W. 29 : (1923) M. W. N. 510 : 74 I. C. 703 (1) : 1924 Mad. 44.

——— O. 45, R. 7—*Power to extend time—High Court cannot extend period.*

Power is given to extend the first period of 30 days from the date of the decree up to a period of 60 days on cause shown but the Court has no power to extend the period of 6 weeks from the date of the grant of the certificate for the filing of the security and necessary costs. (*Lyle and Ashworth, A. J. C.*) ASHIQ ALI *v.* ARJUMAN-UN-NISSA.
70 I. C. 937 : 25 O. C. 254: 1923 O. 50 (1).

——— O. 45, R. 7—*Extension of time for security.*

The High Court can extend time for furnishing security, but it should not do so without cogent reason. (*Stuart, J. C. and Kanhaiya Lal, A. J. C.*) MAQBUL-UL-NISA *v.* M. FAZAL ALI. 6 O. L. J. 149: 50 I. C. 907 : 1 U. P. L. R. (J.C.) 58.

——— O. 45, Rr. 7 and 8—*Security—Consolidation of appeals.*

When two appeals are consolidated for valuation, and a joint certificate is granted, both the appeals will be stayed if security for costs is not deposited in any of them. Security has to be furnished in respect of each appeal though consolidated. (*Miller, C. J. and Coutts, J.*) BIBI NABI JOHRA *v.* BAIJ NATH GOENKA.
4 P. L. J. 198: 50 I. C. 511: 1919 Pat. 139.

——— O. 45, R. 7—*Security for costs--Extension of time.*

A High Court has power to extend the time allowed for giving security under O. 45, R. 7 of the C. P. C. provided there is cogent reason for such extension. 10 Cal. 57 Foll. (*Atkinson and Dass, JJ.*) THAKUR SINGH *v.* SHEO BHANJAN SINGH.
49 I. C. 892 : 4 P. L. J. 521.

——— O. 45, R. 7—*Security must be in cash or Govt. security—Order for, when to be made.*

As an ordinary rule security shall be furnished in case or in Government securities while the proviso to O. 45, R. 7. allows some other form of security. It provides against any delay by reason of such permission being given by requiring that the order for such other form of security might be passed at the time the certificate is granted. While, therefore, it is open to the applicant to move the Court to permit security in any other form to be granted it is essential the court should be so moved before or at the time of the hearing of the application for leave to appeal when a certificate would be granted. If no such order is obtained at the date of the grant of the certificate security must be furnished in cash or in Government securities within the period allowed by O. 45 R. 7, C. P. Code. (*Robinson, C. J. and Maung Kin, J.*) KIRKWOOD *v.* MAUNG SIN.
66 I. C. 548: 11 L. B. R. 213.

——— O. 45, R. 7—*Time for furnishing security can be extended.*

It is competent to the High Court to extend the time for furnishing security for the costs of an appeal to His Majesty in Council if the appellant

C. P. CODE (V OF 1908), O. 45, R. 8.

shows cogent reasons for such extension and also satisfies the Court that he has exercised due diligence during the period allowed. The mere fact that he has not been successful in his attempt to raise a loan is not a sufficient reason. 11 All. 7, 14 Mad. 391, 44 P. R 1910, 11 C. W. N. 1104 Ref. (*Maung Kin and Duckworth, JJ.*) PONNAMMAL *v.* THE BANK OF RANGOON.

65 I. C. 450: 11 L. B. R. 108.

———**O. 45, R. 8**—*Deposit out of time—Effect—Act XXVI of* 1920.

A deposit made out of time is not one made to the satisfaction of Court within O. 45, R. 8. The periods both for security and deposit are identical. 20 A. L. J. 13 foll. (*Mears, C. J. and Piggott, J.*) JAGMOHAN SARAN *v.* SAHU DEOKI NANDAN. **L. R. 5 A. 40: 1923 All. 572.**

———**O. 45, R. 8 (b)**—*Judicial Committee's Rules, R.* 43—*Appeal heard* ex parte—*Rehearing—Procedure.*

The omission to give notice to the respondents of the admission of an appeal to the Privy Council is no sufficient ground for rehearing provided the respondents in fact knew of the admission. (*Lord Shaw, Lord Phillimore, Sir John Edge, Ameer Ali and Sir L. Jenkins.*) HARDIT SINGH *v.* GURMUKH SINGH. **22 Bom. L. R. 550. 59 I.C. 7 : 4 P. W. R. 1921 (P. C.).**

———**O. 45, Rr. 9 and 10**—*Enhancement of security for costs—Application for.*

An application for the enhancement of the amount of security for costs furnished by an appellant to the Privy Council can, after the admission of the appeal, be made under under O. 45, R. 10 only and not under R. 9. The latter rule is applicable to applications before the admission of the appeal and not after. (*Batten, A. J. C.*) MURLIDHAR *v.* B. L. RAI. **49 I. C. 893**

———**O. 45, R. 13**—*Appeal to Privy Council admitted by special leave—Power of High Court to stay execution.*

The High Court has power to stay execution of a decree notwithstanding that an appeal from such decree has been admitted by special leave of His Majesty in Council (*Lord Macnaghten, J.*) NITYAMANI DASI *v.* MADHU SUDAN SEN.

38 Cal. 385 : 13 C. L. J. 529 : 8 A. L. J. 449 : 13 Bom. L. R. 419 : 10 M L. T. 25 : (1911) 2 M. W. N. 124 : 4 Bur. L T 123 : 11 I. C. 384 : 38 I. A. 74 (P. C).

———**O. 45, R. 13**—*Preliminary decree—Appeal to Privy Council—Stay of proceedings.*

Defts. appealed to the Privy Council from a preliminary decree and applied to the High Court to stay the proceedings in the lower Court for a final decree pending the decision of the Privy Council. *Held*, that the further proceedings were not proceedings in execution, and the present application for stay was not justified by O. 45, R. 13, 9 C L, J. 561 Ref. (*Mears, C. J. and Banerj, J.*) RAM NARAIN *v.* HARNAM DAS. **18 A. L. J. 142 : 54 I. C. 561 : 1 U. P. L. R. (H. C.) 166 : 42 A. 170.**

C. P. CODE (V OF 1908), O. 45, R. 13.

———**O. 45, R. 13**—*Stay of execution pending appeal to Privy Council—Security directed to be furnished within a time.*

While directing stay of execution of a decree which is being appealed against to His Majesty in Council the Court must specially define the time within which the security must be tendered and give such further directions as may be necessary to ensure the intention of the Court being carried out to its satisfaction. (*Sanderson, C. J. Mookerjee and Fletcher, JJ.*) KEDAR NATH SANYAL *v.* MATI LAL DAS. **57 I. C. 382: 24 C. W. N. 265.**

———**O. 45, R. 13**—*Intended appeal—Stay of proceedings—Inherent power.*

The High Court has inherent power to stay execution in view of an intended appeal to Privy Council. (*Mookerjee and Holmwood, JJ.*) NAND KISHORE SINGH *v.* RAM GOLAM. **40 Cal. 955 : 18 I. C. 207 : 16 C. L. J. 508.**

———**O. 45, R. 13**—*Stay of execution—Pending decision of Privy Council.*

Execution of decree will not, without sufficient cause being shown, be stayed pending the decision of an appeal to the Privy Council. (*Johnstone and Rattigan, JJ.*) MELA RAM *v.* RUKMAN. **29 P. L. R. 1915 : 27 I. C. 572 : 244 P. W. R. 1915.**

———**O. 45, R. 13**—*Stay of execution—Grounds for.*

If, in the event of the appeal to the Privy Council being successful, the restoration of property as it was before execution of the decree is impossible or would be with great difficulty, the executiou should be stayed and not merely because the applicant will suffer much loss. (*Reid, C. J. and Johnstone, J.*) KHADAM HUSAIN KHAN *v.* MURAD BIBI. **87 P. W. R. 1912 : 15 I. C. 187 : 234 P. L. R. 1912.**

———**O. 45, R. 13**—*Court—Meaning of—Whether Subordinate Judge has jurisdiction to stay execution—Exercise of powers of revision where no Second Appeal lies.*

A Subordinate Judge has no jurisdiction to stay execution of a decree of the High Court. The only Court which can stay execution is the High Court. The word "Court" in the first para of R.13 of O. 45 means a High Court. Such an order of a Sub-Judge staying execution is revisable. (*Chamier, C. J.*) RAM BAHADUR *v.* RADHAKRISHNAN. **3 P. L. W. 222 : 3 P. L. J. 40 : 42 I. C. 835 : 1917 Pat. 285.**

———**O. 45, R. 13**—*Stay of execution.*

An application for stay of execution under O, 45, R. 13 cannot be entertained by the Court till the certificate for appeal to the Privy Council is granted. The presentation of a petition under O. 45, Rr. 2 and 3 is not an appeal. The powers of the Court under O. 45, R. 13, C.P.C. could be exercised even though there is no decree for execution, for granting a relief to the plff, whose suit was dismissed and who has obtained the certificate. 2 W. R, Mis, 23 not applied. (*Pratt, J. C. and Crouch, A.J.C.*) BIBI SONA *v.* MIR ABDUL HUSAIN KHAN. **16 I. C. 845: 6 S. L. R, 86.**

C. P. CODE (V OF 1908), O. 45, R. 13 (d)

——O. 45, R. 13 (d)—*Appeal to Privy Council—Decree of High Court executed—Proceedidgs in Revenue Court to eject defendant—Stay.*

Where a decree-holder obtains possession in execution of the High Court's decree, which is under appeal to the Privy Council and thereafter sues in the Revenue Court to eject defendant, the proceedings in the Revenue Court are not proceedings in execution of the decree and the matter is not within O, 45, R. 13 (*d*) of the Code. (*Mears, C. J. and Banerji, J.*) CHET RAM *v.* RAM SINGH. **64 I. C. 152.**

——O. 45, R, 13 (d)—*Receiver—Privy Council appeal.*

It is competent to the High Court to appoint a Receiver to an estate which is the subject-matter ot an appeal for which special leave has been granted by the Privy Council. 38 Cal. 335 Foll. 10 C.L.J. 326 and 27 C. 1 Ref. (*Mullick and Jwala Prasad, JJ.*) RAJA WAZIR NARAIN SINGH *v.* RANI JAGADAMBA KUERI. **52. I. C 407: 4 P. L. J. 482.**

——O. 45, R, 15—*Execution, meaning of.*

A person seeking execution either by way of restitution or otherwise must apply first, to the Court indicated by R. 15, as the word "execution" means any kind of execution. For action on the judgment of their Lordships of Privy Council, proof of an order-in Council is necessary, (*Chamier and Piggott, JJ.*) DAMODAR DAS *v.* BIRJLAL. **37 A. 567 : 30. I. C. 77: 13 A. L. J. 769.**

——O. 45, R. 15—*Order of Privy Council—Transmission—Execution—Limitation—Right of person not a party to Privy Council—Appeal to apply for restitution.*

Though O. 45, R. 15, C. P. Code, makes it part of the procedure for the enforcement of orders of His Majesty in Council that the person desiring to obtain execution of such an order shall obtain its transmission, it is inconvenient, if not impossible, to require that each person interested in the execution of a particular order shall obtain a separate transmission when that order has already been transmitted at the instance of another successful party. The fact that a person applying for restitution was not a party to an appeal to the Privy Council does not disentitle him to such relief. 17 M. 82; 25 M, 426 referred to. (*Oldfield and Devadoss, JJ.*) BALUSAMI IYER *v.* VENKATASWAMI NAICKEN. **32 M. L. T. 249 (H. C.); 75 I. C. 219 : 1924 Mad. 95.**

——O. 45, R. 15—*Certified copy of decree—Meaning of—Plain copy with affidavit—Whether sufficient.*

R. 15 should not be construed as restricting the only possible evidence of an order in Council to the certified copy. It is intended to ensure that proper information on the subject of an order-in-council should be supplied to the courts in India. 9 C. 482 Foll. 37 A. 567 Dist. (*Abdur Rahim and Napier, JJ.*) JANAKI AMMAL *v.* NARAYANASWAMI AIYAR. **(1917) M. W. N. 587 : 33 M. L. J. 300 : 41 I. C. 629.**

——O, 45, R. 15—*Order of His Majesty in Council— Transmission of — Power to impose conditions.*

C. P. CODE (V OF 1908), O. 46, R. 1.

Where a High Court acting under O. 45, R. 15 of the C. P. Code transmits an order of His Majesty in Council to the first court for execution it is competent to the High Court to give directions to pay out the money on taking sufficient security from the decree-holder. (*Daniels and Wazir Husan, A. J. Cs.*) RANI BIJAI RAJ KOER *v.* THAKUR JAI INDRA BAHADUR SINGH. **9 O. L. J. 5 : 66 I. C. 982 : 1922 Oudh 34.**

——O. 45, R. 15 -*Execution—Decree in ignorance of death of one of the parties.*

Under O. 21, R. 15, C. P. C., some of the decree-holders who have obtained permission under O. 45, R. 15, can execute the Privy Council decree on behalf of all the decree-holders though some were dead at the time of the Privy Council decree. (*Coutts and Adami, JJ.*) RAI BAHADUR BAIJNATH GOENKA *v.* SIR RAVANESHWAR PRASAD SINGH. **58 I. C. 212 : 1 P. L, T. 426.**

——O, 45, R. 15 (1)—*Order in Council on appeal from Calcutla High Court—Jurisdiction of Patna High Court to execute—Letters Patent (Patna), Cl.* 39.

The High Court at Patna has no jurisdiction to execute an order in council passed in an appeal from the Calcutta High Court on appeal from a subordinate court in Behar. An application for the execution of such an order should be to the High Court at Calcutta. (*Chamier, C. J.*) LALJI SAHU *v.* RAI BAHADUR BAIJNATH GOENKA. **2 P. L. J. 684 : 1918 Pat. 49 : 43 I. C. 457 : 4 P. L. W. 133.**

——O. 46, R 1—*High Court of N. W. Provinces—Second appeal—Question of fact.*

No reference lies to the High Court of the N.W. Provinces where the question involved is one of fact and not of law. There is no provision in law for a reference to the High Court of Allahabad of an Ajmere case decided by a Second Court of appeal. (*Colvin, J. C.*) BADRUDDIN *v.* BISMILAH. **11 I. C, 671.**

——O. 46, R. 1—*Scope of.*

S. 113 read with order O. 46, R. 1 permits reference to the High Court of only such cases as do not admit of further appeal (*Johnstone, C. J. and Chevis, J.*) NIAJ ALI *v.* MUHAMMAD RAMZAN. **130 P R. 1916 : 37 I. C. 227.**

——O. 46, R. 1—*Question of law—When can be referred—Practice.*

Subordinate Courts in the Punjab are bound to follow the decisions of the Chief Court and cannot make a reference on a question of law, already decided by the Chief Court, unless such decision is questioned by a judgment of the Privy Council, (*Agnew and Shadi Lal, JJ.*) FILLINGHAMY, G. T. *v.* CAPTAIN C. L. DUNNI. **266 P. L, R, 1913 : 20 I, C. 194 : 8 P. R. 1914.**

——O. 46, R. 1—*Reference by an Appellate Court—No jurisdiction to hear appeal—Effect.*

Where no appeal lies to an Appellate Court, the Court has no jurisdiction to make a reference to the High Court under O 46, R. 1, C.P. C. Where the referring Court has no reasonable doubt on the question of law referred, no reference can

C. P. CODE (V OF 1908), O. 46, R. 1.

be made. (*Shah Din and Chevis, JJ.*) GANGA SINGH *v.* KAUSHI RAM. **123 P. L. R. 1913 : 117 P. W. R. 1913 : 18 I. C. 314 : 61 P. R. 1913.**

———O. 46, R. 1—*Court—Collector—Executing decree transferred under S. 68, C. P. C.*

The word "Court" in O.46, R. 1 means a Court of Civil Judicature. The functions of a Collector in execution of a decree transferred to him under S. 68 of the Code though treated as judicial under S. 71 do not make him such a Court as to empower him to make a reference. (*Stuart and Kanhaiya Lal, JJ.*) ALI BAHADUR KHAN *v.* BISHESHAR SINGH. **2 U. P. L. R. (J. C.) 21 : 54 I. C. 564 : 22 O. C. 319.**

———O. 46, R. 1—*Reference—When justified—Reasonable doubt.*

Reference under O. 46, R. 1, C.P. C. cannot be made to the High Court on the mere ground that there are conflicting rulings on any particular matter of law, if the subordinate Court has no reasonable doubt regarding the matter before it. (*Lindsay, J. C. and Rafique, A. J. C.*) AJHODHIA PRASAD *v.* RAGHUBIR, **18 I. C 977 : 15 O. C. 380.**

———O. 46, R 5—*Powers of High Court.*

When a High Court hears a reference, it acts like Court of appeal quite as much as it undoubtedly does when it hears an application for revision. (*Mookerjee, A. C. J., Fletcher and Walmsley, JJ.*) MAHARAJAH BIRENDRA KISHORE MANIKYA BAHADUR *v.* SECY. OF STATE. **25 C. W. N. 81 : 32 C. L. J. 433.**

———O. 46, Rr. 6 and 7—*Reference to High Court—Small Cause.*

A Munsif returned a plaint holding that the suit was triable in a Small Cause Court which however returned the plaint back holding that it was cognizable by it. *Held*, the procedure adopted by the Subordinate Judge was wrong. If he entertained a doubt as to the forum in which the suit should be instituted, he should have referred the matter to the High Court under O. 46. If he had no doubt he should have sent the record to the District Judge for action under R. 7 of the order. (*Mookerjee and Cuming, JJ.*) KSHETRA NATH BHUIYA *v.* KALI DASI. **21 C. W. N. 784 : 41 I. C. 929 : 27 C. L. J. 96.**

———O. 47, R. 1.

Grounds for Review.
Mistake or Error.
New Evidence.
" Other Sufficient Reason "
Miscellaneous.

Grounds for Review.

———O. 47, R. 1—*Grounds for review—Power of appellate court.*

Under O. 47, R. 1, which reproduces S. 623 of the C. P. Code, 1882, a party has as a right to apply for a review of judgment to the court that has decided the case before an appeal has been preferred. The grounds on which such an application may be made are specifically set forth in R. 1. (*Mr. Ameer Ali.*) RAJA INDRAJIT

C. P. CODE (V OF 1908), O. 47, R. 1—Grounds for review.

PRATAP BAHADUR SAHI *v.* AMAR SINGH. **4 P. L. T. 447 : 1 P. L. R. 345 : 21 A. L. J. 554 : 2 Pat. 676 : 50 I. A. 183 : 33 M. L. T. 233 : L. R. 4 P. C. 123 : 5 L. R. P. C. 8 : 28 C. W. N. 277 : 45 M. L. J. 578 : 18 L. W. 728 : 25 Bom. L. R. 1259 : 74 I. C. 747 : 39 C. L. J. 318 : 1923 P. C. 128.**

———O. 47, R. 1—*Grounds for review—Dismissal of appeal for default.*

Where an appeal against a decree has been dismissed for default and that order of dismissal has become final, the appellant cannot thereafter apply for review of the judgment. (*Piggott and Walsh, JJ.*) MANPHUL SINGH *v.* HAKIM HAMID ALI KHAN. **21 A. L. J. 416 : L. R. 4 A. 276 : 74 I. C. 528 : 1923 A. 576.**

———O. 47, R. 1—*Grounds for review—Commissioner for taking accounts.*

A Commissioner in order to take accounts may in his discretion and on proper grounds re-open the enquiry into any one or more of the items before his report is made. Until then he decides nothing that is final and conclusive. Having given every opportunity to a party to prove his objection to a particular item, and then the Commissioner has after hearing the parties recorded his finding it is highly undesirable that he should re-open the enquiry merely because he is invited to do so by the party. The enquiry must be final and if he does re-open the enquiry, it must be on grounds similar to those mentioned in O. 47, R. 1; not because the provisions of O. 47, R. 1 apply to proceedings before him but because that rule affords the best guide in a matter of this kind. If the enquiry is re-opened on grounds which are not proper, the party aggrieved can object only by way of exception to this report. (*Mulla, J.*) FERNANDEZ *v.* RODRIGUES **47 Bom 593: 25 Bom. L. R. 280 : 1924 Bom. 231.**

———O. 47, R. 1—*Grounds for review—Order passsd by Registrar—Application must be made to him.*

Where an order under S. 41, Presidency Towns Insolvency Act, was made by the Registrar in Insolvency, an application for review of his order must be made to the Registrar and not to the Court. (*Greaves, J.*) MEGHRAJ PUROHIT (INSOLVENT), *In re.* **27 C.W.N. 916 : 1924 Cal. 83.**

———O. 47, Rr. 1 and 7—*Grounds for review—Inherent power—Exercise of—Appeal from.*

Where a suit was dismissed for default though one of the plaintiffs was personally present at the time of the hearing and on an application for review the trial Court purported to set aside the order of dismissal for default, acting under the inherent powers of the Court. *Held*, that though there was no sufficient cause for entertaining a review, there was no appeal from the order of the Court below. (*Ghose, J.*) BASANTA KUMARI GUPTA *v.* ABHOY SHANKER SEN. **37 C. L. J. 99: 73 I. C. 306 : 1923 Cal. 450.**

———O. 47, R. 1, O. 43, R. 1 (u)—*Grounds for review.*

An appeal against an order granting a review on the ground the order sought to be reviewed was really an earlier order, does not lie. O. 43,

C. P. CODE (V OF 1908), O. 47, R. 1—Grounds for review.

R. 1 (*a*) must be read with O. 47, R. 7 by which the grounds on which an order granting a review can be set aside on appeal are limited. (*Newbould and Suhrawardy, JJ.*) SURYA NARAIN *v.* KUNJ BEHARI **66 I. C. 909: 25 C. W. N. 884.**

———**O. 47, R. 1**—*Grounds for review—Fraud.*

The ground of fraud, when practised upon a party in connection with a petition of compromise upon which a decree was made, is a good ground for review. A remedy by suit is an alternative and a more appropriate remedy. 13 C. W.N. 1197, 10 C W.N. 286 Ref. (*Walmsley and Buckland, JJ*), CHANDRA MOHAN GHORAI *v.* PROSUNNA KUMAR MAITY. **64 I. C. 259.**

———**O. 47, R. 1**—*Grounds for review—Party to the appeal—Cross-objections—Incompetency.*

If the party to the appeal presents his case to the Court of Appeal by way of cross-objections or otherwise, it is manifest that an application for review by him is incompetent. (*Shadi Lal and Le-Rossignol, JJ.*) THE PUNJAB SIND BANK, LTD. LYALLPUR *v.* RAM KISHEN **35 I. C. 529: 156 P. L. R. 1916.**

——**O. 47, R. 1**—*Grounds of review—Application for review limited to grounds raised.*

An applicant in a review application must confine himself to the grounds on which the application is admitted. (*Johnstone and Chevis, JJ.*) BURI *v.* MULA SINGH. **73 P. R. 1911: 11 I. C. 427: 113 P. W. R. 1911: 208 P.L.R. 1911.**

——**O. 47, R. 1**—*Grounds for review—Reversal of High Court's decision by Privy Council—Effect of.*

The ground for review under O. 47, R. 1, C. P. Code, must be something which existed at the date of the decree and the rule does not authorise the review of a decision which was right when it was made on the ground of the happening of some subsequent event. Where the lower court had decided a case following the decision of the High Court in a connected case which was subsequently reversed on appeal by the Privy Council the reversal of the High Court's judgment is not a ground for review of the lower court's judgment. 24 M. 1 (P.C.); 4 M. L. T. 86 foll. ; 13 B. 330 : 33 A. 566 ; 31 B. 128 : 13 M.L.T. 225: 3 Pat.L.J. 372 Ref. (*Kumaraswami Sastri, J.*) GANNABATHULA VENKAMMA *v.* GANNABATHULA RANGA RAO. **43 M. L. J. 33: (1922) M. W. N. 304: 15 L. W. 593: 31 M, L. T. 473: 70 I.C. 741 : 1922 Mad. 227**

———**O. 47, R. 1 and O 9, R. 9**—*Grounds for review—Order of dismissal for default—Review.*

Plff. can apply for review when his suit has been dismissed for default under O. 9, R. 8 and he has not applied under O. 9, R. 9 to set the order aside. 26 C. 598 : 16 C.W.N. 43 Foll. ;1 Pat. L.J. 547 not Foll. (*Kumaraswami Sastri, J.*) VIRU PAKSHI GOUD *v.* BANDAPPA. **9 L. W. 311: (1919) M. W. N. 246: 50 I. C. 327 : 37 M. L. J. 59.**

——**O. 47, R. 1**—*Grounds for review—Inherent power.*

An inferior Court has no power of review, unless such power is granted by statute. 20 W. R. 180; 37 W. R, 310, 3 I. C. 463, Ref. (*Sadasiva Aiyar and Moore, JJ.*) PARAMASIVAN PILLAI *v.* PERIYANAIGATH AMMAL. **34 I. C. 503.**

C. P. CODE (V OF 1908), O. 47, R. 1—Grounds for review.

——**O. 47, R. 1**—*Grounds for review—Different view of law taken since original judgment.*

The ground for a review must be something which exists at the time of the decree, There is no authority that review can be granted because of the happening of some subsequent event. It may be that the decree of a court would have been different had the new law been in force. But if it was not in force at the passing of the decree and the decree was perfectly correct there is no ground for review. (*Prideaux, A.J.C.*) SARFARAJ KHAN *v.* RAMCHANDRA. **73 I. C. 4: 1924 Nag. 70.**

——**O. 47, R. 1**—*Grounds for review.*

It is not a sufficient reason for granting a review that if another opportunity is given to the applicant he would satisfy the court that its previous order was wrong. (*Prideaux, A.J.C.*) MANWAR SHAH *v.* NIZAMALIKHAN. **57 I. C. 145.**

———**O. 47, R. 1**—*Grounds for review—Wrong decision is not a ground for.*

A wrong decision on a question of law, is not a sufficient ground for review. (*Daniels, A. J. C.*) RUGUAIYA KHANAM *v.* FAZL HAQ. **24 O. C. 154: 63 I. C. 344.**

——**O. 47, R. 1**—*Grounds for review—Judgment on a wrong view of the law—Full Bench decision not noticed.*

It is not a sufficient ground to order a review that the decision of the court was based on a view of the law which had been overruled by a Full bench decision, but which had not been taken to the notice of the court by the pleader appealing in the case. (*Miller, C. J. and Mullick, J.*) SM. GARABINI KUMARI *v.* SURAJ NARAIN SINGH. **3 Pat. 134: 5 Pat. L. T. 52: 1923 Pat. 361: 75 I. C. 177: 1924 P. 250.**

———**O. 47, R. 1**—*Grounds for review—Omission to raise a point of law—Error apparent on the face of the record.*

The mere omission to raise a point of law which had it been raised, might and probably would have brought about a different result is not necessarily a "mistake or error apparent on the face of the record" for which a review can be claimed. 13 Cal. 62; 20 C. W. N. 1099. (*Dawson Miller, C. J. and Coutts, J.*) CAMLA PRASAD CHAUDHURI *v.* KUNJ BEHARI MANDER. **1922 Pat. 1: 1922 P. 119.**

——**O. 47, R. 1**—*Grounds for review—Order as to costs.*

A Court can review an order as to costs, if the order is not a proper one. (*Jwala Prasad and Adami, JJ.*) BRAJA SUNDAR *v.* JAGANNATH. **6 Pat, L. J, 284: 63 I.C. 768: 3 P.L.T. 67: 1922 P. 1.**

———**O. 47, R. 1**—*Grounds for review—Bengal Tenancy Act, S. 153.*

S. 153 of the B. T. Act bars an application under O. 49, R. 13 or O. 47, R. 1, unless the application states injuries sustained by the applicant on

C. P. CODE (V OF 1908), O. 47, R. 1—Grounds for review.

account of the decree or judgment, and he deposits in court the amount of rent admitted by him to be due. If no rent is admitted to be due, no deposit is needed. (*Jwala Prasad, J.*) CHANDRA DHUR DEV *v.* BHOLA RAI. **2 P. L. T. 372: 62 I.C. 80: 1921 Pat. 301.**

——O. 47, R. 1—*Grounds for review—Production of authority contrary to decision, whether sufficient ground for review.*

The production of an authority which was not brought to the notice of the Judge at the first hearing and which lays down a view of the law contrary to that taken by the Judge is not a sufficient ground for granting a review. (*Coutts and Adami, JJ.*) SHEIKH ABDUL AZIZ *v.* MUSST. MUNRO. **57 I. C. 147 : 1 P. L. T 561 : 1921 Pat. 152.**

——O. 47, R. 1 and O. 21, R. 96—*Grounds for review—Delivery of possession in execution—Review of order.*

A Court has jurisdiction to review its own order erroneously made directing delivery possession and the High Court has no power to interfere in revision. 19 C. W. N. 835 Expl. 2 Cal. 131 Ref. (*Roe and Imam, JJ.*) DHANINDER DAS *v.* BAKSHI HARIHAR PRASHAD SINGH. **3 P. L. J. 571: 48. I. C. 129.**

——O. 47, R. 1—*Grounds for review — New case.*

An applicant for review of a judgment of High Court will not be allowed to re-open the finding of the High Court by referring to a document not pressed by him upon the Court or mentioned in the memorandum of appeal or referred to in the course of argument. (*Chamier, C. J, and Iwala Prasad, J.*) ADIT NARAYAN SINGH *v.* MAHABIR PRASAD TIWARI. **38 I. C. 196.**

——O. 47, R. 1—*Grounds for review—Diversity of opinion.*

The mere fact that another Judge is inclined to take a different view of the case from that taken by a Judge who originally decided the case, is no ground for review. 2 U. B. R. 608 ; 2 U. B. R. 534 ; 2 U. B. R. 7; 10 I. C. 993 Ref. (*Brown, J. C.*) MA KYAW *v.* MA KYIN. **4 L. B. R. (1921) 27 : 64 I. C. 895 : 1922 U. B. 16.**

Mistake or error.

——O. 47, R. 1—*Mistake or error—What is.*

A decree can be reviewed on such grounds only as, if tenable, would justify an alteration or cancellation of the decree. (*Rafique and Piggott, JJ.*) MAHABIR PRASAD *v.* COLLECTOR OF ALLAHABAD. **36 All. 277 : 23 I. C. 514 : 12 A. L. J. 382.**

——O. 47, R. 1—*Mistake or error—Inconsistent judgments in the same case—Review.*

Where the High Court gave two inconsistent judgments in the same case one before and another after remand, and the error was apparent on the face of it, a review lies, (*Richards, C. J. and Banerjee, J.*) OUDH BEHARI PANDE *v.* MAHADEO SAHI. **13 I. C. 646.**

——O. 47, R. 1 and Sch. II, Para. 12—*Mistake or error—Award—Decree on.*

C. P. CODE (V OF 1908), O. 47, R. 1—Mistake or error.

An application for review of a decree based on an award, on the ground of an evident mistake in the award, is maintainable and a Court has jurisdiction, under O. 47, R. 1, of the C.P.C. to go into the merits of the application, (*Chaudhuri, J.*) JOGESH CHANDRA DEB *v.* JAGAT CHANDRA DEB. **52 I. C. 696.**

——O. 47, R. 1—*Mistake or error—Other sufficient reason.*

A mere mistake of law is not in itself a sufficient mistake or error apparent on the face of the record so as to form a ground for review of judgment. Where the mistake arises from the negligent conduct of the applicant for review, the mistake cannot even be pleaded as "any other sufficient reason" within O. 47, R. 1. (*Fletcher and Smither, JJ.*) HAZIRA SARDHAR *v.* KUNJA BEHARY NAG CHUODHURY. **44 I. C. 161.**

——O. 47, R. 1—*Mistake or error—Decree by court without jurisdiction.*

Review of a decree by a Court without jurisdiction ought to be granted. (*Mookerjee and Beachcroft, JJ.*) RAM PRASAD PRAMANIK *v.* SRI CHARAN MANDAL. **21 C. W. N. 1109 : 41 I. C. 276 ; 27 C. L. J. 594.**

——O. 47, R. 1—*Mistake or error—Leave to appeal to Privy Council.*

An order under O. 45 rejecting an application to grant leave to appeal may be reviewed by the Court which made the order. Where on a redemption suit the sum would not reach Rs.10,000 with the addition of interest up to the six months allowed for redemption but would reach that sum if interest was calculated subsequently it was held there was no error apparent on the face of the record sufficient to justify a review. 8 M. I. A 166 F. (*Jenkins, C. J. and Chatterjee, J.*) NAND KISHORE SINGH *v.* RAM GULAM SAHU. **39 Cal. 1037 : 17 I. C 221: 16 C. W. N. 1089.**

——O. 47, R. 1—*Mistake or error.*

Erroneous view as to cognizability of a suit by a Court is a sufficient cause for review. (*Johnstone, J.*) FAIZ MUHAMMAD *v.* MUHAMMAD ZAKRIYA. **140 P.W.R. 1911 : 11. I. C. 15 : 195 P. L. R. 1911.**

——O. 47, R. 1—*Mistake or error—Amendment of decree—If proper—Excusing delay in applying for review.*

Where a court passes a personal decree where it ought not to have done so, and the same is found out by the party aggrieved only when it is sought to be executed his remedy is not by way of amendment but by way of review. If he first applies for amendment and fails and then puts in a petition for review the second may be looked upon as a continuation of the first one for purposes of limitation. (*Hughes, J.*) LAKSHMANA AIYANGAR *v.* NARAYANA IYENGAR. **18 L. W. 876 : 33 M. L. T. (H. C) 221: 76 I. C, 786 : 1924 M. 225.**

——O. 47, R, 1—*Mistake or error—Compromise decree—Setting aside—Grounds for—Separate suit—New and important matter—Discovery of.*

A person who wishes to displace a decree passed in terms of a compromise to which she was a party on the ground that she affixed her signature

C. P. CODE (V OF 1908), O. 47, R. 1—Mistake or error.

to the compromise at the instance of an agent in ignorance of its contents, can either apply for a review of the decree or institute a separate suit for the purpose. The mere fact that an application to set aside the decree is headed as made under S. 151, C. P. C. (which is clearly inapplicable to the case) does not preclude the court from dealing with the application as one for review, if the provisions of the code relating to review are applicable to the case. The fact that a party to a compromise in terms of which a decree has been passed has affixed his signature to a compromise at the instance of an agent in ignorance of its contents is new and important matter within the meaning of O. 47, R. 1, C. P. Code.

Quaere :—Whether the circumstances that a party to a compromise affixed her signature to the same on misrepresentation or ignorance of its meaning and without enquiring as to its meaning in consequence of her confidence in her agent are sufficient to render the compromise void or voidable. (*Oldfield and Venkatasubba Rao, JJ.*) ALAMELU AMMAL *v.* RAMA IYER.

43 M. L. J. 290 : 31 M. L. T. 132 (H.C): (1922) M. W. N. 495: 16 L. W. 440 : 70 I. C. 425 : 1922 Mad. 446.

———O. 47, R. 1—*Mistake or error—Jurisdiction of Court.*

The Court has jurisdiction to review its judgment on the ground that the previous finding was wrong. 2 C. 131 Ref. (*Wallis, J.*) LAKSHMANA NADAN *v.* PAKHIA NADATHI.

9 I. C. 273: 9 M. L. T. 361.

———O. 47, R. 1—*Mistake or error—Jurisdiction, objection to, after decision invited on merits.*

Whether Civil Courts have jurisdiction to declare the class of tenancy or not, if the defts. invited the adjudication of the Court by putting forward documents of title, they could not turn round and dispute a finding unfavourable to themselves, in review, by alleging that the Court had no jurisdiction to make it. (*Lindsay, J. C and Stuart, A.J.C.*) KAM AUTUAR *v.* MUHAMAD ABDUL HASAN KHAN.

36 I. C. 83 : 3 O. L J. 267.

———O. 47, R. 1—*Mistake or error.*

Where there is no mistake in computing the period of notice but only an error in law, in holding that 15 days from the 17th to the 31st inclusive of the month were sufficient, there is no sufficient ground for review. (*Adami, J.*) AKSHY KUMAR BHATTACHARJEE *v.* AGARWALA.

1922 P. 308.

———O. 47, R. 1—*Mistake or error—Cases not cited on prior occasion.*

Producing an authority not brought to the notice of the Judge at the first hearing, but which lays down a view of the law contrary to that taken by the judge is not a sufficient ground for review. (*Coutts and Adami, JJ.*) SHEIKH ABDUL AZIZ *v.* MUNRO.

1 P. L. T. 561: 57. I. C. 147 : 1921 Pat. 152.

———O. 47, R. 1—*Mistake or error—Omission to raise question of law at the hearing.*

The mere fact that a point of law which might have been raised was not raised during the trial

C. P. CODE (V OF 1908), O. 47, R. 1—New evidence.

is not necessarily in itself sufficient to support an application for review. *Quaere* :—Whether an omission to raise a point of law which, had it been raised, might and probably would have brought about a different result, is necessarily a mistake or error apparent on the face of the record for which a review can be claimed. 20 C.W.N. 1099; 13 Cal. 62 Ref. (*Miller, C. J. and Coutts, J.*) KAMLA PRASAD CHOWDHURY *v.* KUNJI BEHARI.

1 Pat. L. T. 625 : 5 Pat. L. J. 344: 57 I. C. 11: 2 U. P. L. R. (Pat.) 159.

———O. 47, R. 1—*Mistake or error—Dismissal for default—Review—Limitation.*

When special provisions have been provided for recourse cannot be had to general provisions. When a remedy is open under O. 9, R. 9, the party in default will not be permitted to evade the rule of limitation by applying for review. (*Sharfuddin and Roe, JJ.*) DEODIP SINGH *v.* GOPAL SINGH.

3 P. L.W. 66 : 38 I. C. 53: 1 P. L.J. 547.

New evidence.

———O. 47, R. 1—*New evidence—Second appeal.*

The High Court cannot, in a second appeal, entertain an application for review of judgment based on the ground that since the disposal of the appeal documentary evidence has been discovered, which, if sufficiently proved, would have led the court below to come to a different finding, although had such evidence been discovered before the disposal of the appeal the court might have allowed the appellant to withdraw the appeal with a view to apply to the lower appellate court for a review of judgment on the discovery of fresh evidence. 32 A. 71 foll. (*Lindsay and Rafiq, JJ.*) MARIAM-UN-NISSA BIBI *v.* BABU RAM.

45 A. 458 : 21 A. L. J. 377: L. R. 4 A. 416 : 73 I. C. 1016 : 1923 A. 541.

———O. 47, R. 1—*New evidence—Burden of proving due diligence.*

The applicant praying for review of judgment on the ground of discovery of new evidence must prove his inability to produce it during trial in spite of due diligence. (*Tudball and Walsh, JJ.*) PALIA *v.* MATHURA PRASAD.

38 A. 280 : 32 I. C. 622 : 14 A. L. J. 204.

———O. 47, R. 1—*New evidence—Essentials.*

Review on the sole allegation that new evidence had been discovered which was not within the applicant's knowledge cannot be granted without strict proof of such allegation. (*Knox, C. J. and Karamat Husain, J.*) LACHAN RAM *v.* DEBI PRASHAD.

9 I. C. 266.

———O. 47, R. 1 and O. 41, R. 11—*New evidence—Dismissal of second appeal—Review.*

The High Court will not accept a review of a judgment in a second appeal dismissed under O. 41, R. 11, C. P. Code, on the ground that new evidence to prove a fact has been discovered. 41 C. 809 foll. (*Sanderson, C.J. and Richardson, J.*) SRILABALA DEI *v.* GADAHAR HAZRA.

36 C. L. J. 76 : 27 C. W. N. 918 : 70 I. C. 408 : 1922 Cal. 165.

C. P. CODE (V OF 1908), O. 47, R. 1—New evidence.

———O. 47, R. 1—*New evidence—Subsequent decision is no ground.*

A judgment delivered after the passing of the decree sought to be reviewed is no material on which an application for review can be based; for the new and important matter alleged to have been discovered must have existed at the date of the decree. 24 M. 1; 50 C, 119 foll. 51 I. C. 625 dist. (*Newbould, J.*) KALI PRASANNA GUHA CHOUDHURI *v.* BHAGABATI DEBYA. **64 I.C. 324.**

———O. 47, Rr. 1, 4 and 7—*New evidence—Allegations to be strictly proved.*

Before a Court can grant an application for review on the ground of new and important matter of evidence, it must be satisfied with the allegation of the applicant that the evidence in question constituted new and important evidence within O. 47, R. 1, of the Code. If a Court without adjudication of the allegation that the evidence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, allows an application for review, the order is contrary to O. 47, R. 4, and an appeal lies against it. (*Sanderson, C.J., Mookerjee and Fletcher, JJ.*) CHIRANJI LAL *v.* TULSI RAM JANKI DAS. **47 Cal. 568: 56 I. C. 734: 31 C. L. J. 134.**

———O, 47, R. 1—*New evidence.*

The ground on which a decree may be reviewed, must be in existence at the date of the decree, A judgment not in existence at the time of appeal. should not be admitted in review of the appellate decree as it is not "evidence" new. (*Richardson and Walmsley, JJ.*) CUMAR SARAT *v.* SRIPATHI CHATTERJEE. **50 I, C. 119: 23 C. W. N. 242.**

———O. 47, R. 1—*New evidence.*

The greatest care ought to be exercised in granting a review when it is asked for on the ground of discovery of fresh evidence after judgment. (*Sanderson, C. J. and Mookerjee, J.*) NANDO LAL MALLICK *v.* PANCHANAN MOOKERJEE.
45 Cal. 60: 21 C. W. N. 1076: 42 I. C. 484: 26 C. L. J, 187.

———O. 47, R. 1—*New evidence—Discovery of—Procedure.*

An application to receive fresh evidence discovered out of Court by the parties to an appeal comes under O. 47, R. 1, and not under O. 47, R. 27, C. P. C. (*Fletcher and Richardson, JJ.*) GARDEN REACH SPINNING AND MANUFACTURING CO. *v.* SECRETARY OF STATE FOR INDIA.
19 C. W. N. 401: 28 I. C. 865: 42 C. 675.

———O. 47, R. 1—*New evidence—Discovery of.*

No review lies of an order dismissing an appeal under O. 41, R. 11, C. P. C., merely on the ground of discovery of new and important evidence. 16 W. R. 112 Foll. (*Coxe, J.*) RAJANI KANTA DAS *v.* KALI PRASANNA MUKHERJEE.
26 I. C, 281: 41 C. 809.

———O, 47, R, 1—*New evidence—Discovery.*

Discovery of new and important matter is no ground for an application for review but a judgment which is erroneous on the merits is, since the applicant is not entitled to re-argue the whole case. (*Shadi Lal, J.*) KHALIL *v.* YAQIN-UD-DIN.
135 P.L.R. 1916: 35 I C. 342: 147 P. W. R, 1916.

C. P. CODE (V OF 1908), O. 47, R. 1—Other sufficient reason.

———O. 47, R. 1—*New evidence—Discovery of document admitting liability.*

Discovery of a document after judgment containing an admission of liability by defendant is a good ground for review. (*Johnstone, J.*) FAIZ MAHOMED *v.* MUHAMMAD ZAKRIYA.
140 P.W.R. 1911: 11 I. C. 15: 195 P.L,R. 1911.

———O. 47, R. 1—*New evidence—Negligence—Rights of pardhanashin lady.*

Though the case of a pardhanashin lady is neglected by her agents, she cannot apply for re-hearing of the case in review. (*Roe and Jwala Prasad, JJ.*) BIBI JIGARAN *v.* BIBI ZOHRA.
42 I. C. 970.

———O. 47, R. 1—*New evidence—Negligence of applicant.*

The Court can in the interests of justice grant a review to the party affected by the non-production of a document before judgment notwithstanding his gross negligence. 2 C. 131 P, C. Foll. (*Atkinson and Jwala Prasad, JJ.*) BHAGELA KUER *v*, ABDUL RAHMAN. **40 I. C. 79.**

———O, 47, R. 1—*New evidence—Document in possession of party at the date of hearing.*

Where an application is made under O. 47, R. 1, for review, on the ground that the new evidence which was not in existence and was not procurable after due diligence, when the final decree was passed, is now available. The guiding principle in such matters should be that the new evidence must be such as would entitle the court to modify or cancel the decree. Where a document being in possession of the party is not produced no sufficient ground for review is made. (*Atkinson, J.*) SHAH ABDUL AZIZ *v.* SHA SHARFUDDIN. **38 I. C. 142.**

Other sufficient reason.

———O. 47, R. 1—"*Other sufficient reason,*" *meaning of.*

Rule 1 of the Order 47 must be read as in itself definite of the limits within which review is, under the new Code, permitted and reference to practice under former and different statutes is misleading. So constructing the words, "any other sufficient reason," are to be interpreted as meaning a reason sufficient on grounds at least analogous to those specified immediately previously. Such an interpretation of other grounds of appeal which have not been decided by a former Bench or Judge being immaterial. (*Viscount Haldane*). CHHAJU RAM *v.* NEKI.
43 M. L. J. 332: 3 Lah. 127: 30 M. L. T. 295 (P.C.): 26 C. W. N. 697: 16 L. W. 37: (1922) Pat, 435: L. R. 3 P. C. 109: 41 P. L. R. 1922: 36 C. L. J, 459: 4 U. P. L. R. (P. C) 99: 49 I. A. 144: 24 Bom. L. R. 1238: 3 P. L. T. 435: 17 P. W. R. 1922: 72 I. C. 566: 1922 P. C. 112.

———O. 47, Rr. 1 and 7—'*Other sufficient cause.*"

The "discovery of new and important evidence" in O. 47, R 1, C. P. C., would refer only to a dis-

C. P. CODE (V OF 1908), O. 47, R. 1—Other sufficient reason.

covery made since the order sought to be reviewed was passed. If an application for review is vague and general on this point and yet the court grants a review, it may be taken to have formed the existence of "other sufficient cause" within O. 47, R. 1, but in the latter case there would be no appeal. (*Piggott and Walsh, JJ.*) MUSSAMMAT TIRBENI KUNWAR *v.* MOHAN LAL.
L. R. 3 A. 251 : 66 I. C. 558 : 1922 All. 366.

———O. 47, R. 1—*Other sufficient reason—Case not well argued.*

An application for review on the ground that if the Court allowed the applicants another opportunity of producing evidence they might persuade the judge that the view taken by him on the previous occasion was erroneous is not permissible. (*Chamier and Piggott, JJ.*) BINDA PRASAD *v.* RAGHUBIR SARAM. 37 All. 440:13 A. L. J. 673: 29 I. C. 994.

Also (*Prideaux, A.J.C.*) MANWARSHAH *v.* NIZAMALIKHAN. 57 I. C. 145.

Also (*Mc Coll, A. J. C.*) NGA LA *v.* NGA THAN. 14 I. C. 837: 5 Bur. L. T. 57.

—— ——O. 47, R. 1—*Other sufficient reason.*

A mortgage suit was dismissed on the ground of limitation. The lower appellate Court agreed with the first Court. In second appeal the High Court disagreed on the question of limitation and decreed plaintiff's suit. The failure to bring to its notice that other points also are to be determined does not furnish sufficient cause for review of the judgment. (*Knox and Rafique, JJ.*) RANDEI *v.* NANDAN SINGH. 19 I. C. 689.

———O. 47, R. 1—*Other Sufficient reason—Subsequent events.*

Where a judgment is based on the decision of the Revenue Court, the reversing of the Revenue Court's decision in appeal is a good ground for granting a review of the judgment. (*Knox and Banerji, JJ.*) RAM LAL *v.* KALA PRASAD.
33 All. 566 : 10 I. C. 244 : 8 A. L. J. 584.

———O. 47, R. 1—*Other sufficient reason—Omission to notice provision of law.*

The omission of the Court and the pleaders to notice certain provisions of the Code which apply to a case is a sufficient reason within O. 47, R. 1, for granting a review. (*Chitty and Walmsley, JJ.*) WAHED ALI *v.* CHANDA MIA. 52 I. C. 29 : 30 C. L. J. 250.

———O 47, R. 1 (2)—*Other sufficient cause—Right to apply for review—Appeal by some of the defendants summarily dismissed.*

The expression "where the ground of such appeal is common to the applicant and the appellant" refers to a case where the grounds of appeal and review are the same and does not refer to a comparison between the actual appeal by a party and a possible appeal by the applicant for review. If an appeal by some of the defendants has been summarily dismissed under O. 47, R. 1, an application for review of the judgment appealed against "on the ground of discovery of new and important matters or evidence" should be dismissed if review is sought by the defendants who preferred the appeal but if the other defendants apply, the application is not entertainable as the grounds of appeal are different from the grounds of review and as these defendants could not possibly present their case to the appellate Court as respondents, the appeal being summarily dismissed. (*Mookerjee and Cuming, JJ.*) CHANDRA KANTA *v.* LAKSHMAN. 36 I C 460 : 24 C. L. J. 517 : 21 C. W. N. 430.

———O. 47, R. 1 and O. 41, R. 10 (2)—*Other sufficent cause—Dismissal of appeal under O. 41, R. 10 (2), C. P. C.—Application for restoration of an appeal.*

Semble:—An application for restoration of an appeal rejected under O. 41, R. 10 (2), may be treated as an application for review of the order rejecting the appeal. (*Richardson and Imam, JJ.*) MAJAJENNESSA BIBI *v.* SHEIK DIDARY. 32 I. C. 86.

———O. 47, Rr. 1 and 4—*Other sufficient reason—Precedents overlooked—Service on all parties.*

Notice of an application under O. 47, C. P. C. must be served not only on the contesting but on all the defendants under R. 4 of that order. The discovery of the ruling of the High Court contrary to another ruling of equal authority of the same High Court on which the Court has passed an order is not a sufficient cause for granting a review, and in such a case the Court has no inherent power to grant it. (*Brett and Richardson, JJ.*) CHANDI CHARAN *v.* MANORANJANA. 18 I. C. 275 : 17 C. L. J. 416.

———O. 47, R. 1—*Other sufficient reason—Review in part.*

An application for review of judgment can be granted in part; but when a decree is sought to be set aside on the ground that it was made in favour of a person who at that time had no subsisting title, the entire decree should be set aside. An order passed under an erroneously assumed state of circumstances, is a sufficient ground for review. In dealing with a review application, the Court is not restricted to the grounds mentioned in the application, but it may enlarge those grounds even on an oral application. 9 W. R. 23 (P. C.) Rel. (*Mookerjee and Caspersz, JJ.*) BHUBANESWARI KOER *v.* AJODHYA SINGH. 11 I. C. 102: 15 C. L. J. 339.

———O. 47, R. 1—*Other sufficient reason—Consent decree.*

A Court can review its order, which was passed on the alleged consent of both parties, on an application by one of the parties that he never consented to it. (*Mookerjee and Casbersz, JJ.*) HAKIM GIR *v.* BASDEO SAHI. 15 C. L. J. 408 : 10 I. C. 894 : 17 C. W. N. 631.

———O. 47, R. 1—*Other sufficient reason—Subsequent events—Revision.*

A review of the decree, which was right when it was made, on the ground of the happening of some subsequent event is not justified. The proper course in such cases is to request the appellate Court to accept additional evidence regarding the subsequent event and the Court will be justified in taking such evidence into considera-

C. P. CODE (V OF 1908), O. 47, R. 1—Other sufficient reason.

tion. (*Scott-Smith and Wilberforce, JJ.*) NEKI *v.* CHAJJU RAM. **48 I. C, 137 : 111 P. W. R. 1918.**

——**O. 47, R. 1**—*Other sufficient reason—Other remedy open.*

A review cannot be granted on ground other than those enumerated in O. 47, R. 1. Where a party has another remedy open to him to obtain the relief sought for, review cannot be granted. Where an appellant has not contested a liability imposed on him by first Court in his appeal grounds or in the course of arguments he cannot ask for review of judgment to escape that liability. That an appeal was badly argued is no ground for review. (*Johnstone and Chevis, JJ.*) HUSAINA *v.* SAHIB NUR. **208 P. W. R. 1913 : 22 I. C. 785 : 103 and 197 P. L. R 1914.**

——**O. 47, R. 1 (1)**—*Other sufficient cause—Dismissal for default.*

R. 1 (1) of O. 41, C P.C., enables a court to entertain an application for review of an order of dismissal for default even in cases where no application for restoration of the suit is made within time. 15 P.R. 1897 Dist. (*Shah Din and Scott-Smith, JJ.*) FETEH CHAND *v.* MUSSAMMAT MEGHI BAI. **181 P. L. R. 1913 : 109 P. R. 1913 : 19 I. C. 481 : 108 P. W. R. 1913.**

——**O. 47, R. 1**—*Other sufficient reason—Scope of.*

A party can only ask for a review on the ground of 'other sufficient cause' if he can show the judgment to be incorrect. (*Johnstone, J.*) SANTU *v.* ARJAN DAS. **13 I. C. 318 : 131 P. W. R, 1912.**

——**O. 47, R. 1**—*Other sufficient reason—Consistency—Decree not signed.*

Where to be consistent in the decree finally passed, the court has to pass orders under O. 41, R. 33, the same relief can be given in a petition put in by way of review. Much more so will it be the case when the decree itself has not been signed. (*Spencer and Devadoss, JJ.*) GOPALA IYENGAR *v.* NUMMACHI REDDIAR. **74 I. C. 416: 17 L. W. 254 : 1923 Mad. 392.**

——**O. 47, R. 1**—*Other sufficient cause—Decision overlooked.*

Where a decision is erroneous owing to the fact that a decision of the High Court binding upon the Court was not referred to it, the Court can grant a review and an order passed on review cannot be interfered with by the High Court under S. 115 of the C. P. C. Where a Judge who heard the case issues notice on an application for review, his successor is not prohibited from disposing of it. (*Kumaraswamy Sastri, J.*) SUBBAIYER *v.* CHINNAPPA ROWTHAN. **26 I. C. 366 : (1915) M. W. N 22.**

——**O. 47, R. 1**—*Other sufficient reason—Meaning of.*

The phrase 'or for any other sufficient reason' means that the reason must be one sufficient to the Court before whom the application for review is made. (*Drake Brockman, J.C.*) GANGABAI *v.* GHASARAM. **62 I.C. 253 : 4 N.L.J. 16.**

C.P. CODE (V OF 1908), O. 47, R. 1—Miscellaneous.

——**O. 47, R. 1**—*Other sufficient reason—Mistaken advice.*

The mere fact of failing to produce evidence on account of wrong advice of counsel is no ground for re-hearing the case. (*Stuart and Kanhaiya Lal, A.J.Cs.*) PRAG DUTTA *v.* KANHAIYA LAL. **48 I. C 918 : 5 O. L. J. 695.**

——**O. 47, R. 1**—"*Other sufficient reason*"—*Omission to refer to documentary evidence.*

For review there should be more than simply non-reference by the Judge to evidence in favour of either party. (*Miller, C.J. and Kulwant Sahay, J.*) RAGHU SINGH *v.* MAHANT KRISHNA DAYAL GIR. **2 P. 765 : 1924 P. 258 (2).**

——**O. 47, R 1**—*Other sufficient reason—Point of law which could have been raised.*

A point of law which could have been raised but was not raised does not justify grant of review. (*Miller, C. J. and Coutts, J.*) KAMALA PRASAD CHOWDHURY *v.* KUNJ BEHARI MANDER. **5 P. L. J. 344 : 57 I. C. 11 : 1 Pat. L.T. 625 : 2 U.P.L.R. (Pat.) 159.**

——**O. 47, R. 1**—*Other sufficient cause—Dismissal of appeal for deficient Court-fee—Not a dismissal for default.*

An order rejecting a memorandum of appeal as being insufficiently stamped is open to review under O. 47 and no application for restoration of the appeal can in such a case be made uuder O. 41, R. 19. An application for review bearing Court-fees prescribed for such application is the proper remedy. (*Mullick and Thornhill, JJ.*) SIRDAR SINGH *v.* CHRISTIAN. **55 I. C. 502.**

——**O. 47, R. 1 and S. 115**—*Other sufficient reason.*

A review of an order summarily rejecting an application for revision of a judgment on the original side was granted on the ground that the judgment as it stood was open to misconstruction and that the points raised involved questions of importance and of frequent occurrence and that it was desirable to have the views of the Appellate Court declared. (*Crouch and Hayward, A. J, Cs.*) POKARDAS *v.* FORBES CAMPBELL & Co. **19 I. C. 363 : 6 S. L. R. 127.**

Miscellaneous.

——**O. 47, R 1 and O. 41, R. 27**—*Effect of filing appeal—Duty and power of appellate Court.*

Under O. 47, R. 1, which reproduces S. 623 of the C. P. C., 1882, a party has a right to apply for a review of judgment to the court that has decided the case before an appeal has been preferred. The grounds on which such an application may be made are specifically set forth in R. 1. Where an appeal has been preferred, a review is out of the question and the party's proper course is to apply to the appellate Court, which is in possession of the cases to admit the additional evidence either under the general principles of law or under the specific provisions of R. 27, which lays down that the appellate Court may for any other substantial cause (viz., other than those particularly specified) allow such

C.P. CODE (V OF 1908), O. 47, R. 1—Miscellaneous.

evidence or documents to be produced or witnesses to be examined. Rules of procedure are not made for the purpose of hindering justice. 11 Moo. I. A. 28 : 34 I. A. 115 Dist. (*Mr. Ameer Ali*). RAJA INDRAJIT PRATAP BAHADUR SAHI *v.* AMAR SINGH. **2 Pat. 676 : 45 M. L. J. 578 : 33 M. L. T. (P. C.) 233 . 18 L. W. 728 : 25 Bom. L. R. 1259 : 28 C. W. N. 277 : 1 Pat. L. R. 345 : 50 I. A. 183 : 21 A. L. J. 554 : 4 Pat. L. T. 447 : L. R. 4 P. C. 123 : L. R. 5 P. C. 8 : 74 I. C. 747 : 39 C. L. J. 318 : 1923 P. C. 128 (P. C.).**

——O. 47, R. 1—*Appeal filed after application for review.*

O. 47, R. 1, does not apply where after filing an application for review the opposite party prefers an appeal. (*Walsh and Ryves, JJ.*) GAURI SHANKAR *v.* JAGANNATH. **63 I. C. 841.**

——O. 47, R. 1—*Withdrawal of appeal—Effect of.*

When an appeal is withdrawn, it must be treated as if it had never been "presented" within the meaning of O. 47, R. 1, of the Code. (*Piggott and Walsh, JJ.*) RAM PRASAD *v.* ASA RAM. **43 All. 288 : 61 I. C. 334 : 19 A. L. J. 24.**

——O. 47, R. 1—*Appeal—Filing of, after review.*

A Court can entertain an application for review and dispose of it on the merits even though subsequently an appeal is filed against the decree originally passed. The first Court dismisses the application for review on the ground that an appeal had been filed ; but the High Court refused to interfere in revision against the order of the first Court as the Judge had dismissed the appeal. (*Rafique and Piggott, JJ.*) RAM PARSAN UPADYA *v.* NAGESHAR PANDE. **2 U. P. L. R. (H. C.) 43 : 18 A. L. J. 135 : 54 I. C. 764 : 42 A. 317.**

——O. 47, R. 1—*Appeal—Filing of appeal during pendency of review.*

If, during the pendency of an application for review, the applicant files an appeal against the order of which he is seeking a review, the pendency of the appeal is no bar to the disposal of the application for the review. (*Rafique and Wallach, JJ.*) PARTAP SINGH *v.* JASWANT SINGH. **17 A. L. J. 1021 : 52 I. C. 642 : 42 A. 79.**

——O. 47, R. 1—*Appeal—Review after appeal.*

The application for review is not maintainable after preferring an appeal against the same decree. (*Rafique, J.*) MUHAMMAD YUSUF *v.* RAJA RAM. **35 I. C. 867.**

——O. 47, R. 1 (2)—*Withdrawal of appeal—Review lies to original Court.*

On the withdrawal of the appeal the original Court has jurisdiction to entertain an application for review of its judgment. (*Richards, C. J. and Tudhall, J.*) NEHORA *v.* INDARJIT RAI. **14 I. C. 327.**

——O. 47, R. 1 and O. 41, R. 11—*Review after dismissal of appeal.*

C.P. CODE (V OF 1908), O. 47, R. 1—Miscellaneous.

Where an appeal against a judgment to the High Court is dismissed under O. 41, R. 11, the District Court cannot deal with an application for review of the same judgment. (*Macleod, C.J. and Shah, J.*) SHIVAPPA PASSA SAVADE *v.* RAMACHANDRA NARSIMH. **23 Bom. L. R. 597 : 63 I. C. 910 : 46 Bom. 1 : 1922 Bom. 130.**

——O. 47, R. 1—*Appeal—Review filed before appeal.*

Per Shah, J.—If an application for review is made and also an appeal is preferred, the Court, to which the review application is made, can still entertain the application for review. 32 M. 416 (F. B.) Foll. (*Heaton and Shah, JJ.*) NARAYAN PURSHOTTAM *v.* LAXMIBAI DATTO. **38 Bom. 416 : 23 I. C. 513 : 16 Bom. L. R. 189.**

——O. 47, R. 1—*Appeal—Filing of, after review.*

An appeal may be preferred even after an application for review ; the Court in such a case can proceed with application for review ; but the hearing of the appeal must be stayed. (*Chatterjee and Panton, JJ.*) SHASHI BHUSHAN BERA *v.* RAGHUNATH MANDALA. **57 I. C. 785.**

——O. 47, R. 1—*Appeal— Filing of, after review.*

The court must proceed with a review application though an appeal is preferred subsequently by the applicant. But once the appeal is heard and a final decree passed, in appeal, the review cannot be proceeded with. If on the contrary the application for review is successful the appeal abates. (*Chatterjee and Newbould, JJ.*) PYARI MOHAN KUNDU *v.* KALU KHAN. **41 I. C. 497 : 44 C. 1011.**

——O. 47, R. 1—*Appeal—Review—Order of Lower Court after appeal.*

A lower court cannot review its order after it has been confirmed on appeal. (*Chevis and Shadi Lal, JJ.*) KISHEN DAS *v.* OFFICIAL LIQUIDATOR. **40 P. R. 1918 : 45 I. C. 84 : 60 P. W. R. 1918.**

——O. 47, R. 1—*Review—Inferior Court.*

It is illegal for an inferior Court to review the judgment of a superior Court. (*Mitra, A. J. C.*) BRIJ LAL *v.* SITARAM. **50 I. C. 910.**

——O. 47, R. 1—*Appeal—Filing of, after review.*

An application for review can be continued after the filing of appeal from the decree. If the review succeeds then the appeal becomes incompetent and cannot be heard. (*Drake Brockman, J. C.*) BHAVANI PRASAD *v.* LAXMI BAI. **50 I. C. 329 : 15 N. L. R. 65.**

——O. 47, R. 1—*Review—Application for—If reopens questions already decided.*

The question whether an application for review gives a fresh starting point of limitation for a declaratory suit depends upon whether the application re-opened the question already decided. A review of judgment is not an ordinary process and does not of necessity reopen questions already decided between the parties. The matter in issue isonly re-opened when the application for review is accepted unlike a petition in appeal.

C.P. CODE (V OF 1908), O. 47, R. 1—Miscellaneous.

(*Dalal, A. J. C.*) BHAGWAN BAKSH SINGH *v.* MANRAK KUNWAR. **24 O. C. 280 : 8 O. L. J. 3 : 66 I. C. 205 : 1922 Oudh 148.**

——— **O. 47, Rr. 1 (2) and 7**—*Application for review—Appeal filed against decree—Admissibility.*

A Court has no jurisdiction to entertain an application for review of its own judgment, where an appeal has been filed against the same and the applicant has an opportunity of presenting his case in that appeal. (*Chamier, J. C.*) UGGAR *v.* RAM SAHAI. **11 I. C. 343 : 14 O. C. 108**

——— **O. 47, R. 1**—*Review—Pendency of appal—Effect of.*

Where an application for review is preferred before the filing of an appeal, it is the duty of the Court to decide the application on the merits notwithstanding the fact that an appeal has subsequently been filed. 44 Cal. 1011 : 32 M. 415 foll. (*Dass and Ross, JJ.*) SHAM LAL SAHU *v.* MT. NAG KOER. **65 I. C. 125.**

——— **O. 47, R. 2**—*Review cannot be granted where applicant has mismanaged his case and wishes to secure a rehearing thereof.*

The Legislature could not have intended that the provisions of the C. P. C. dealing with applications for review should be availed of by a party who has mismanaged his case, in order to obtain a rehearing of the case on the same materials. An application for review made before the judge who passed the decree could be disposed of by the successor. (*Piggott, J.*) GITA RAM *v.* EAST INDIAN RAILWAY. **23 I. C. 394.**

——— **O. 47, R. 2**—"*Judge who passed the decree*"—*Review by judge who signed decree—Validity.*

A Judge who merely signed the decree but did not write or deliver the judgment in the case cannot entertain a review of a decree on any ground other than new and important matter of evidence or clerical orarithmetical mistake, though the Judge deciding the case had granted an application for review which was set aside on the ground of want of notice to the other side. (*N. R. Chatterjee and Newbould, JJ.*) TAMIJUDDI SHEIK *v.* SATTYA SHANKAR. **32 I. C. 101: 20 C. W. N. 391.**

——— **O. 47, Rr. 2 and 7**—*Application for review—Receipt by officer in charge of duties of judge—Issue of notice—Review by successor in office—Appeal from order granting review.*

Held, the order of the successor of the Dt. Judge granting a review was bad, being in contravention of O. 47, R. 2, C. P. C. The policy of the legislature was that the application for review should be received and considered by the judge who made the original order and it was never intended that the application should be considered by his successor or by some person in charge of the duties of his office. An appeal under O. 47, R. 7, from an order granting an application for review is not controlled by S. 104, Sub.-Sec. (2) which provides that no appeal shall lie from any order passed in appeal under that section ; and even if the final decree or order is one against which no appeal lies,

C. P. CODE (V OF 1908), O. 47, R. 4.

an appeal from the order granting an application for review can be preferred at once. (*Mookerjee and Beachcroft, JJ.*) SHAMSHER ALLI *v.* JAGARNATH THIRAN. **16 I. C. 203: 17 C. W. N. 403.**

Also 5 C. 86 Dist. 11 M. I. A. 487 Ref. to. (*Jenkins, C.J. and Mookerjee, J.*) SADARUD-UD-DIN *v.* EKRAM UDDIN. **18 C. W. N. 22: 20 I. C. 670. 19 C. L. J. 225.**

——— **O. 47, Rr. 4 and 7**—*Order granting an application for review—Appeal conditions.*

The right of appeal under R. 1 (*w*), is subject to conditions laid down by O. 47, R. 7, and therefore an appeal, not coming under this rule, cannot be maintained. (*Piggott and Kanhaiya Lal, JJ.*) SUNDER *v.* HABIB CHICK. **42 All. 626: 18 A. L. J. 838 : 60 I. C. 81 : 2 U. P. L. R. (All.) 283.**

——— **O. 47, Rr. 4 and 7**—*Review—Stages of proceeding.*

There are three distinct stages through which an application for review has to pass. If the application is granted in the second stage, the decree already passed is set aside and the case is re-heard and a fresh judgment and decree are pessed and from the latter an appeal lies. If the application is rejected, the original decree subsists and an appeal lies from it. (*Richard, C. J. and Tudball, J.*) NANHE *v.* MANGAT RAI. **20 I. C. 647.**

——— **O. 47, Rr. 4 and 7**—*Review—Grant of application—Powers of appellate court.*

Where the Court of first instance grants an application for review on the ground of discovery of new not important evidence not within the knowledge or power of the applicant at the time of the trial the appellate court will not generally consider the evidence afresh and disturb the conclusion of the lower court. (*Teunon and Newbould, JJ.*) AMBIKA CHARAN HAZRA *v.* BHANI RAM RATHI. **64 I. C. 219.**

——— **O. 47, R. 4**—*Absence of notice—Effect.*

Where the defendant was given every opportunity to raise any objection that he could raise and he is in no way, therefore, prejudiced by reason of the fact that no notice was issued to him. *Held*, the order granting review should not be set aside by the appellate Court. 237 P. L. R. 1913 Appr. (*Abdul Raoof, J.*) THE FIRM OF GOPAL MAL GANDA MAL *v.* HIRA CHAND. **75 I. C. 656 : 1923 Lah. 303.**

——— **O. 47, Rr. 4 and 8**—*Dismissal of application after review is granted is not proper.*

The granting of an application for review merely amounts to a decision to rehear the case in which the decree or order (in respect of which a review is claimed) was passed. The judge hearing the review is not entitled to anything in the first stage beyond passing an order granting the review and giving his reasons for so doing. If the review is granted the judge who bas allowed the review becomes vested with jurisdiction to pass any order which the original judge could have passed. It may be sufficient for him merely to alter the order of original judge or it may be necessary for him to take some intermediate step such as an order in remand or referring an issue.

C. P. CODE (V OF 1908), O. 47, R. 4.

When once an application for review is granted an order dismissing the application for review is wrong and cannot be ignored. (*Ashworth and Simpson, A. J. Cs.*) BHAGWATI PRASAD *v.* ACHHAIBAR SINGH. 9 O. L. J. 531 : 74 I. C. 214 : 26 O. C. 24 : 1923 O. 93.

——— O. 47, Rr. 4 and 7—*Order granting review is appealable.*

An order granting a review on the ground that the view of the law taken was contrary to a Full Bench decision which had not been taken to its notice, is appealable. (*Miller, C. J. and Mullick, J.*) SM. GARABINI KUMARI *v.* SURJA NARAIN SINGH. 1923 Pat. 361 : 3 Pat. 134 : 75 I. C. 177 : 5 Pat. L. T. 52 : 1924 P. 250.

———O. 47, R. 4 (1)—*Sufficient grounds.*

The discretion of the Court in saying what constitutes good sufficient reason is unlimited. (*Woodroffe, J.*) MAKSUD MAHI *v.* SECRETARY OF STATE. 9 I. C. 532.

———O 47, R. 4 (1)—*Discretion of Court.*

If the Court thinks that an application for review should be granted, the rule does not stand in its way. (*Johnstone, C.J, and Shadi Lal, J.*) HIRA SINGH *v.* ALLAH BAKSH. 38 I C. 769: 115 P. R. 1916.

——— O. 47, R. 4 (2) and O. 41, R. 11—*Summary dismissal—Review—Notice to the respondent, if necessary.*

An application for review of an order summarily dismissing an appeal under O. 41, R. 11, C. P. Code, can be granted without the issue of any notice to the respondent. 42 Cal. 433 Ref. The expression "opposite party" in the proviso to O. 47, R. 4, of the C.P.Code, means the party interested to support the order sought to be vacated or modified the application for review. Where the order granting the review has been made irregularly or with material irregularity in the exercise of jurisdiction possessed by the Judges, it cannot be ignored or vacated by other Judges hearing the appeal. (*Mookerjee and Roe, JJ.*) JANAKI NATH *v.* PRABHASINI DASI. 43 Cal. 178 : 19 C. W. N. 1077 : 30 I. C. 898 : 22 C. L. J: 99.

——— O. 47, R. 4 (2) and O. 41, R. 11—*High Court—Review—Division Bench.*

When an appeal dismissed under O. 41, R. 11, C. P. C., has been revived by an order passed by a Divisional Bench of the High Court, this order of revival cannot be questioned by the Bench hearing the appeal. (*Coxe and Mulick, JJ.*) HALDHAR JHA *v.* SHAH MUHAMMAD ASHRAF. 25 I. C. 880: 22 C. L. J. 95.

———O. 47, R. 4 (2)—*Review—Grounds of—Reasons—Appellate Court not to criticise—C. P. Code, O. 43. R. 1 (w).*

The legislature in enacting O. 47, R. 4 (2), of the new Code and omitting the provision in the Old Code concerning the record of reasons for granting review intended that the grounds which satisfied a Court that its own judgment may be reconsidered should not be criticised by Court of appeal. The right of appeal under O. 43, R. 1 (w), against an order granting a review is controlled by O. 47, R. 7 (1). (*Seshagiri Iyer and Phillips, JJ.*) MADURU BRAHMAYYA *v.* VEDULLA YELLAMMA. 31 M. L. J. 509: (1916) 2 M. W. N. 278 : 36 I. C. 437 : 4 L. W. 403.

———O. 47, Rr. 4 (2) and 8—*Review petition rejected without being admitted—Parties heard.*

If a review petition is rejected after hearing the parties though not regularly admitted, the order of rejection is not one passed on the rehearing of the original case. (*Sadasiva Iyer, JJ.*) KAILAS IYER *v.* ARUNACHALA CHETTIAR. 22 I. C. 953 : 15 M. L. T 224.

———O 47, R. 4 (2) Pro. (*a*)—*Opposite party—Restoration of appeal under O. 41, R. 19.*

The expression 'opposite party' in Pro (*a*) is not restricted to cases in which such party has actually appeared before the Court, but it means the party interested to support the order or decree sought to be set aside on review. Where an appeal has been dismissed for not making good the stamp in the prescribed time, the appeal cannot be restored under O. 41, R. 19 nor under O. 47, R. 4 (2), Pro. (*a*) without notice to the opposite party. But if the case is dealt with, without notice to the opposite party, he is entitled to a hearing even in second appeal, as soon as the matter has been brought to his knowledge. (*Miller, C. J. and Coutts, J.*) SURAJPAL PANDEY *v.* UTIM PANDE. 63 I. C. 99 : 1921 Pat. 337.

——— O. 47, R. 4 (2) (a)—*Notice to opposite party.*

Before granting an application for review notice to opposite party is necessary or else the granting is a nullity. (*Holmwood and Chapman, JJ.*) ABDUL HAKIM *v.* HEM CHANDRA DAS. 30 I. C. 165 : 42 Cal. 433.

Also (*Scott-Smith, J.*) TAJ MUHAMMAD *v.* KANSHI MAL. 135 P. W. R. 1913 : 19 I. C. 864 : 237 P. L. R. 1913.

——— O. 47, R. 4 (2) (b)—*Discovery of document—Not produced at trial formerly.*

When a party seeks a review of judgment saying that a document not produced at the trial was subsequently discovered, he must under Order 47 strictly show that the document was not available at the time of the trial, or that no diligence on his part was wanting to produce the document. (*Lindsay, J.*) KARIYA MAHTO KURMI *v.* RAM SARUP. 37 I. C. 399.

———O. 47, R. 4 (2 (b)—*Fresh evidence—Strict proof—Meaning of sufficiency of evidence if High Court can weigh.*

"Strict proof" in O. 47, R. 4 (2) (b), refers to the formal correctness of the evidence offered and not to its sufficiency, effect or result. *Per Kemp, J. contra.* The High Court is entitled to satisfy itself if there was suffiicient evidence before the lower Court and if it has been properly appreciated in granting the application for review, (*Batchelor, C. J. and Kemp, J.*) BAI NEMATHU *v.* BAI NEMATULLABU. 20 Bom. L. R. 434 : 46 I. C. 14 : 42 Bom. 295.

C. P. CODE (V OF 1908), O. 47, R. 4 (2) (b).

———O. 47, R. 4 (2) (b)—*Fresh evidence—Strict proof.*

Strict proof means legal conviction of the Court not necessarily by evidence. An application for review can be made even after 90 days if it is shown that new evidence has come to the knowledge of the plff. which was not possible at the time of judgment (*Mookerjee and Cuming, JJ.*) CHANDRA KANT *v.* LAKSHAN CHANDRA.
35 I. C. 651 : 27 C. L. J. 540.

———O. 47, R. 4 (2) (b)—*Fresh evidence—Strict proof.*

"Strict proof" means anything which may serve directly or indirectly to convince a Court and has been brought before the Court in legal form and in compliance with the law of evidence. It is the formality of proof which is prescribed and not the sufficiency in result. The Court of first instance is the proper court, to determine whether or not there should be a review but before a review is granted, those safe-guards must be observed Whether the proof is according to the law or not is within the jurisdiction of the Appellate Court to determine but the question of sufficiency of evidence is for the Court admitting the review. 22 C. 734; 20 W.R. 84 ; 25 W. R. 324 Ref. (*Jenkins. C. J. and Woodroffe, J.*) ABED KHONDKAR *v.* MOHENDRA LAL DE.
42 Cal. 830 :
29 I. C 282 : 19 C. W. N. 804.

Also (*Sanderson, C.J. and Mookerjee, J.*) NANDU LAL MALIK *v.* PANCHANAN MOOKERJEE.
45 Cal. 60 : 21 C. W. N. 1076 :
42 I. C. 484 : 26 C. L. J. 187.

———O. 47, R. 4 (2) (b)—*Fresh evidence—Strict proof.*

Application for review on the ground of discovery of new evidence must be strictly proved. 31 B. 381 Foll. (*N. Chatterjee, J.*) AHED KHUND KAR *v.* MOHENDRA LAL DEY. 9 I. C. 320.

———O. 47, R. 4 (2) (b)—*Fresh evidence—Strict proof.*

An application for review of judgment owing to discovery of new matter or evidence which was not within the knowledge of the applicant or could not be adduced at the trial should not be entertained without strict proof of such grounds. O. 47 should be strictly construed. (*Saunders, J. C.*) NGA TEE PYO *v.* MA NG WE KA.
38 I. C. 403 : 2 U. B. R. (1916) 126.

———O. 47, R. 5—*Single Judge of a bench of two Judges—Jurisdiction—Order passed on review—Appeal.*

One Judge of a Bench of two High Court Judges who disposed of an appeal having left the Court on a month's leave, an application for review of the judgment was heard and dismissed by the remaining Judge. *Held*, that the Judge had no jurisdiction to dispose of the application by reason of R. 5, and an appeal lay against that order under cl. 15 of Letters Patent. 21 C. W. N. 652 Rel. (*Sanderson, C.J., Teunon and Walmsley, JJ.*) JAGAT CHANDRA ACHARYA *v.* SHYAMA CHARAN BUTTACHARYA. 44 I. C. 999 : 22 C.W. N. 550.

C. P. CODE (V OF 1908), O. 47, R. 7.

———O. 47, R. 5—*High Court—Procedure.*

Where an appeal is heard by two Judges, one of whom has since left, the continuing judge alone is competent to hear the review but in case the rule is made absolute the appeal should be heard by two Judges. (*Woodroffe, J.*) MAKSUD MAHI *v.* SECRETARY OF STATE. 9 I. C. 532.

———O. 47, R. 5—*Successor of Judge deciding case—When can grant review.*

When the Judge deciding a case issues notice on an application for review his successor can dispose of the application. O. 47, R 5 applies to Courts composed of more than one Judge. (*Kumaraswami Sastri, J.*) SUBBAIYER *v.* CHINNAPPA. 26 I. C. 366 : (1915) M. W. N. 22.

———O. 47, R. 7—*Order granting review—Appeal.*

An order granting a review of judgment cannot be questioned under any of the provisions of O. 47, R. 7 C. P. Code. (*Piggott and Walsh, JJ.*) MUNNU LAL *v.* KUNJ BEHARI LAL.
20 A. L. J 517 : L. R. 3 A. 295 :
44 All. 605 : 4 U. P. L. R. (A) 66 :
67 I. C. 317 : 1922 All. 206.

———O. 47, R. 7—*Insufficiency of reason for review is no ground for appeal.*

Under R. 7, the sufficiency or otherwise of the reason for granting a review is not a ground for appeal. (*Stuart, J.*) BENARSI *v.* ALTAB HUSAIN.
63 I. C. 171.

———O. 47, R. 7 and O. 43, R. 1 (*a*)—*Appeal—Grounds for* ex parte *judgment on appeal.*

No appeal lies from an order granting a review of an *exparte* judgment passed on appeal except on any of the grounds mentioned in O. 47, R. 7 and O. 43 R. 1 (W) should be read with O. 47, R. 7. (*Mookerjee and Carnduff, JJ.*) JAGAR NATH PRASAD SINGH *v.* RAMAVATAR SINGH.
14 I. C. 39.

———O. 47, R. 7—*Execution application—Dismissal for default—Order granting review—Notice is not necessary.*

Before the judgment debtor has been served with a notice if an application for execution is dismissed in default, the court has power to restore the application without giving notice to the judgment debtor. Even if the application for restoration is treated as one for review, notice to the Judgment-debtor is not necessary. (*Scott Smith, J.*) ABDUL KARIM *v.* CHAUDHRI RAMSING. 69 I. C. 506.

———O. 47, R. 7 and S. 152—*Application challenging system of calculation only granted—Nature of order.*

Where a Court purported to act under S. 152 on an application which challenged the whole system of calculation adopted by a Court but there was no allegation that there was an arithmetical or clerical mistake really, the order is an order under O.47, R. 7 of the Code and an appeal lies from it. (*Wilberforce, J.*) RAMJI LAL *v.* GIYANI. 3 Lah. L. J. 341 : 66 I. C. 992 :
4 U. P. L. R. (Lah.) 54.

C. P. CODE (V OF 1908), O. 47, R. 7 (1).

——0. 47, R. 7 (1)--*Review--Grant of--Appeal.*

An appellate Court ought not to reverse the order of the lower court granting review of its own judgment without coming to a finding that the conditions laid down by O. 47, R. 7 have not been fulfilled. (*Piggott, J.*) KHURSHED ALAM KHAN *v.* RAHMATULLAH KHAN. **15 A. L J. 899 : 43 I. C. 490 : 40 All. 68.**

——0. 47, R. 7 (1)—*Appeal—Order granting review.*

No appeal is allowed from an order granting an application for review of an order dismissing a suit for default on the ground that review could not be granted when an application for restoration was dismissed. (*Griffin, J.*) HARNARAIN *v.* UMRAI. **17 I. C. 661 : 10 A. L. J. 396.**

——0. 47, R. 7 (1)—*Appeal—Original decree modified—Appeal from original decree.*

Where a decree is modified on an application for review, the original decree is superseded and so no appeal lies from that decree, the remedy of the aggrieved party being to appeal from the decree passed on review. 28 A. 240 ; A. W. N. (1890) 144 foll ; 30 A. 79 dist. (*Knox and Griffin JJ.*) BIRJBASI LAL *v.* SALIG RAM. **9 A. L. J. 188 : 14 I. C. 472: 34 All. 282.**

——0. 47, R. 7 (1)—*Appeal—Objection to admission of evidence.*

The objection that the Court admitted in review, inadmissible evidence may be taken on appeal from the final decree, *i. e*, original decree amended on review. (*Richardson and Walmsley, JJ.*) KUMAR SARAT *v* SRIPATI. **50 I. C. 119 : 23 C. W. N. 242.**

——0. 47, R. 7 (1)—*Appeal—Grant of review —Appeal.*

Against an order granting an application for review of judgment and restoring the appeal to the file, an appeal lies. (*Carnduff and Richardson, JJ.*) SURENDRA NATH *v.* SITA NATH DAS. **21 I. C. 943.**

——0 47, R, 7 (1)—*Appeal—Review—Appeal from final decree—Order granting review challenged.*

In an appeal against the final decree the propriety of an order granting a review can be challenged only on the grounds specified in S. 629 of the Code of 1882. (*Jenkins, C. J. and Mookerjee, J.*) SADARUDDIN *v.* EKRAMUDDIN. **18 C. W. N. 22: 20 I. C. 670 : 19 C. L. J. 225.**

——0. 47, R. 7 (1)—*Appeal—Duty of appellate court.*

In an appeal from an order granting a review, the appellate court must decide whether the allegation that the new evidence was not within the knowledge of the applicant when the decree was passed has been strictly proved. 12 B. 131 ; 22 C. 3 ; 22 C. 984; 25 C. 878 Ref. (*N. Chatterjee, J.*) AHED KHUND KAR *v.* MOHENDRA LAL DEY. **9 I. C. 320**

——0. 47, Rr. 7 (1) and 4—*Appeal—Order granting review.*

Where the Lower Appellate Court had first decided that the dismissal of suit for default did not render pending arbitration proceedings null and void and subsequently on review took the contrary view and thought that, "the application for review should be granted". *Held*, having regard to the wide discretion given by O 47, R. 4 (2), that Court did not act in contravention of R. 4, and consequently no appeal was competent under R. 7 (1) (*b*). 11 P. R 1913; 2 C. 131 (P. C.) Ref. 24 W. R. 324, Dist. (*Johnstone, C. J. and Shadi Lal, J.*) HARI SINGH *v.* ALLAH BAKSH. **38 I.C. 769: 115 P. R. 1916.**

——0. 47, R. 7 (1)—*Appeal—Grant of review, "other sufficient reason", Revision.*

An appeal does not lie under O. 47, R. 7 against an order granting review for "other sufficient reason" within R. 1. 11 P.R. 1913, foll. No revision lies especially when there is a right of appeal from the final decree. (*Shadi Lal, J.*) BASHESHAR NATH *v* RAMKISHEN DAS. **32 I. C. 860: 48 P. W. R 1916.**

——0. 47, R. 7 (1) — *Appeal— Grounds for objection.*

Under rule 7 (1), an objection that the lower court granted a review can be taken in appeal from the final decree only upon one of the three grounds specified in the sub-rule (1). (*Shah Din and Scott-Smith, JJ.*) FATEH CHAND *v.* MENGHI BAI. **108 P. W. R. 1913: 181 P. L. R. 1913: 19 I. C. 481: 109 P. R. 1913.**

——0. 47, R. 7 (1)—*Interlocutory order—Appeal—Review of judgment.*

An interlocutory order admitting or excluding a document is not ordinarily appealable but an order holding a document inadmissible in evidence on reviewing a previous order to the contrary is appealable. (*Beadon, J.*) BHAGAT SINGH *v.* SADA NAND. **49 P. W. R. 1913: 18 I. C. 309: 94 P. L. R. 1913.**

——0. 47, R. 7 (1)—*Appeal—Grant of review —Reason for.*

An order of a Judge granting review considering the grounds to be 'the other sufficient reason' is not appealable whether the appellate Court would hold them sufficient or not. But an appeal would lie ordinarily from the final judgment and the decree passed on review. (*Robertson and Chevis, JJ.*) YUSUF *v.* NAZEE. **17 P. L. R. 1913: 278 P. W. R. 1913: 16 I. C. 995 : 11 P. R. 1913.**

——0. 47, R. 7 (1)—*Appeal—Order granting review—Grounds.*

An appeal against an order granting review lies only on the grounds specified in O. 47, R. 7 and on no other grounds. There can be no appeal against the order granting review on the objection that the case was decided before plff.'s evidence was over. O. 43, R 1 does not carry the right of appeal any further than O. 47, R 7. Both must be read together. There is no difference in this respect between the old and new code. (*Chevis, J.*) FARAL AHAMAD *v.* KHAN BAHADUR. **10 P. L. R. 1912: 12 I. C. 624: 221 P. W. R. 1911.**

——0. 47, R. 7 (1)—*Appeal—Order rejecting a review.*

Order rejecting an application for review is final under S. 629, C. P. C., and is not subject to

C. P. CODE (V OF 1908), O. 47, R. 7 (1).

appeal or revision. The provisions of the new Code cannot help a petitioner whose application for revision was presented before the new Code came into force. (*Johnstone, J.*) SEA DAT PRASAD *v.* KARM CHAND. 10 I. C. 725: 35 P. W. R. 1911.

——O. 47, R. 7 (1)—*Appeal—Order granting review—Grounds for appeal.*

In an appeal from an order granting a review, the only grounds that can be taken are those mentioned in O. 47, R, 7, C. P. C. (*Spencer and Krishnan, JJ.*) CHOKKALINGAM *v.* LAKSHUMANAN. 38 M. L. J. 224: (1920) M. W. N. 228: 55 I. C, 444: 11 L. W. 217.

——O. 47, Rr. 7 (1) and 1—*Appeal—Order granting review—Sufficient cause—Interference by appellate Court—Prov. Sm. C. C. Act, S. 25—Revision.*

Where a review is granted for sufficient cause the control to be exercised by an appellate Court need not be strict and when the Court has applied its mind to the circumstances, such control may be exercised with reference to every presumption in favour of its having done so correctly. The simple fact that fresh evidence will alter or is expected to alter a decision already arrived at, is ordinarily not a sufficient cause for granting a review. Although O. 47, R. 7 of the C.P. Code is not applicable to Sm. C. Courts, its provisions will guide the discretion which the High Court possesses under S. 25 of the Prov. Sm. C. C. Act. 36 I C. 437 expl. and dist, (*Oldfield, J.*) VALLIAMMAI NADATHI *v.* ASEERVADA NADAR. 53 I C. 44.

——O. 47, R. 7 (1) and O. 43, R 1 (w)—*Appeal—Order granting review.*

An order granting a review is not appealable under O. 43. R. 1 (w) except on the grounds specified in O. 47. R. 7. (*Ayling and Srinivasa Iyengar, JJ.*) MULAMBATH KUNHAMMAD *v.* PARAKAT KATHIRI KUTTI. 31 M. L. J. 827: 38 I. C. 373: 5 L. W. 472.

——O. 47, R. 7 (1)—*Difference between old and new Code.*

The change in the language of O. 47, R 7 (1), is due to a mistake on the part of the Legislature and there is no deliberate departure from S. 629 of the C. P. Code, 1882. (*Seshagiri Iyer and Phillips, JJ.*) M. BRAHMAYYA *v.* VEDULA YELLAMMA. 31 M. L. J. 509: (1916) 2 M W. N. 278: 36 I. C. 437: 4 L. W. 408.

——O. 47, R. 7 (1) and O. 43, R. 1 (w)—*Appeal—Order granting review—Grounds for.*

No appeal lies upon an order granting a review except on the grounds mentioned in O. 47, R. 7. 41 C. 746 foll. (*Spencer and Seshagiri Iyer, JJ.*) SRINIVASA IYER *v* NATARAJA IYER. 28 I. C. 707: 2 L. W. 366.

——O. 47. R. 7 (1) (a) and (b)—*Appeal—Order granting review—Power of High Court in revision.*

An order granting review under O. 47, R. 7, is appealable only when it either contravenes the provisions of Rules 2 or 4 or the application for review is barred by time or is based upon insufficient grounds. But such an order can be interfered with by the High Court in revision, only if it is irregular and has led to miscarriage of justice. (*Johnstone, J.*) ATRA *v.* CHAGU. 12 I. C. 246: 49 P. W. R 1911.

C. P. CODE (V OF 1908). O. 47, R. 8.

——O. 47, R. 7 (1) (b) and O. 43, R. 1 (u)—*Appeal—Review—Grant of—Appeal when lies.*

O. 43, R. 1 (u), does not give a general right of appeal but is controlled by order 47, rule 7. The order granting a review application is not appealable merely on the ground that it is not made on satisfactory grounds. The court need not record full grounds for granting review application. (*Seshagiri Aiyar and Phillips, JJ.*) MEDURU BRAHMAYYA *v.* VEDULA YELLAMMA. 31 M. L. J. 509 : (1916) 2 M. W. N. 278 : 36 I. C, 437 : 4 L. W. 408.

——O. 47, Rr. 8 and 11—*Review—Grant of—Appeal—Effect on original decree.*

A review commences ordinarily with an *ex-parte* application. The court then may either reject the application at once or may grant a rule calling on the other side to show cause why the review should not be granted. In the second stage, the rule may either be admitted or rejected and it is obvious that the hearing of this rule may involve to some extent an investigation into the merits. If the rule is discharged then the case ends. If, on the other hand, the rule is made absolute, then the third stage is reached ; the case is reheard on the merits and may result in a repetition of the former decree or in some variation of it. Though, in one respect, the result is the same whether the rule be discharged or on the rehearing the orginal decree be repeated, in law there is a material difference, for in the latter case, the whole matter having been reopened, there is a fresh decree ; in the former case, the parties are relegated to and still rest on the old decree. Consequently the order appropriate to a discharge of the rule is the rejection of the application ; an order so made terminates the second stage of the proceedings, and there is no third stage for the rehearing of the case. When the application for a review is granted, the decree previously made is vacated, with the consequence that an appeal preferred against that decree can no longer be prosecuted. But the parties can appeal from the final decree passed on review. Cases reviewed. (*Mookerjee and Rankin, JJ.*) GOURKRISHNA SARKA *v.* NILMADHAB SHA, 73 I. C, 34 : 36 C. L. J. 484 : 1923 C. 113.

——O. 47, R. 8—*Scope of—Whole case if open on review.*

Two judges of the Division Bench of the High Court heard an appeal and retired. An application for review was made, admitted and the decree amended. Subsequently the judge was moved to re-hear the case and be made a similar order, which was set aside an appeal on the ground that the Judge as a single Judge could not hear the case, he not being a Division Bench. The Division Bench on hearing the appeal only considered the point involved in the Review and made a similar order against which an application for review was made on the ground tnat the Division Bench ought to have heard the whole case. *Held* (*Per Sanderson, C. J.*) All the proceedings after the

C. P. CODE (V OF 1908), O. 47, R. 8.

amendment of decree in the review application were superfluous. (*Per Mookerjee, J.*) The judgment of Division Bench need not be interfered as it repeats the decision of the judge who granted the review, but the Division Bench ought to have heard the whole appeal. A review may be granted either as to the whole or part, and according to R. 8 on admitting of a review the whole case is not re-opened. 10 B.H.C.R. 360 and 32 Bom. 111 at 120 fell. (*Sanderson, C. J. and Mookerjee, J.*) GOUR SUNDAR BHOWMICK *v.* RAKHAL RAI BHOUMICK. **20 C W N. 1165 : 34 I. C. 592 : 27 C. L. J. 326.**

———O 47, R. 8—*Procedure--Discovery of new evidence—Review.*

The discovery of new evidence which, with due diligence, could not be produced at the original trial is a good ground for review ; and the Court, on being satisfied with the same, should first record an order admitting the review and then give directions under O. 47, R. 8, C.P. Code, for the rehearing of the suit. (*Mookerjee and Teunon, JJ.*) PURANDER KUMAR *v.* RAM NARAIN SINGH. **11 I. C. 720 : 14 C. L J. 103.**

———O. 47, R 8—*Procedure.*

A Court can under O 47, R. 8, grant a review and at once proceed to re-hear the case. (*Kumaraswami Sastri, J.*) SUBBAIYER *v* CHINNAPPA ROWTHAN. **26 I. C. 366 : (1915) M. W. N 22.**

———O. 47, R. 9—*Review—Subsequent review.*

Where a plea of *res judicata*, has been wrongly accepted between the parties, by a single Judge of the Chief Court, the question cannot be re-opened afterwards by a Division Bench of that Court in an application to revise the orders of the Courts below, forming basis of the judgment of the single Judge as a revision of these orders would not benefit the party against whom the single Judge's ruling subsists. 211 P. W. R. 1908 Ref. A second review of the order is barred by O. 47, R. 9, as it is practically for the review of the order passed on review. (*Johnstone and Shah Din, JJ.*) DURGA DAS *v.* AMIR CHAND. **10 I. C. 679 : 25 P. W. R. 1911.**

———O. 50. R. 1 (a) (iii)—*Small Cause Court—Case involving many questions—Issues not struck—Duty of Court.*

Though a Small Cause Court is not required to frame issues, yet where a case involves many questions, the Court should indicate what the points are to give the parties an opportunity to produce their evidence thereon. (*Martineau, J.*) PIR MOHAMMAD SADRUD-DIN *v.* KHAIRUDDIN. **59 I. C. 703.**

——— Sch. II—*Arbitration—Agreement to refer to—Withdrawal from.*

A party to an agreement to submit a matter to arbitration cannot, after the arbitrator proceeds to evidence, withdraw from the arbitration. The Court cannot compel a private arbitrator to arbitrate against his will. (*Sulaiman and Kanhaiya Lal, JJ.*) BASUDEO MAL *v.* KANHAIYA LAL. **59 I. C. 667 : 43 All. 101 : 18 A. L. J. 952.**

C. P. CODE (V OF 1908), Sch. II, Para 1—Form of reference.

———SCHEDULE II, PARA 1.

Form of reference.
Insolvency proceedings.
Minor.
Parties.
Private reference.
Reference to Chamber of Commerce.
Reference to Court.
Subject to reference.
Validity of reference.

Form of reference

———Sch II, Para 1 (1) and (2)—*Form of reference—Agreement to abide by the statement of one.*

From the way in which an agreement was entered in the robkar of the Court and the application of the defendant, it appeared that the parties had agreed to abide by the statement of one H. and not that they had agreed to refer the matter in dispute for decision by H. Where no application in writing showing the agreement to refer the matter in dispute was ever filed in Court nor did the defendant ever apply to the Court to refer the matter to H. *Held*, the provisions of S. 1 Subclauses (1) and (2) of Schedule II, C. P. C., were therefore not complied with, and accordingly the Court was not deprived of its jurisdiction to hear the appeal. (*Sulaiman, J.*) MT. MASITA BIBI *v.* KHUDA BAKSH. **1923 A. 65.**

——— Sch. II, Para. 1—*Form of reference—Strict compliance with statute necessary.*

The provisions of Sch II, para I must be strictly complied with in order that there may be a valid reference to arbitration in a suit. (*Chitty, J.*) DWARAKANATH ROY *v.* FANINDRANATH ROY. **49 I. C. 262.**

——— Sch. II, Para. 1— *Form of reference—Signature.*

The mere fact that one of the parties did not sign the petition of reference is not conclusive that he was not a party to the case sent to arbitrators and the award will not be invalid by reason of such omission. (*Fletcher and Richardson, JJ.*) TEKATMAL OSWAL *v.* ANANDA MOY BASU. **38 I. C. 226.**

——— Sch. II, Para. 1— *Form of reference—Oral submission if valid.*

A verbal submission to arbitration is valid, even though there is a likelihood of a question of title to immoveable property being affected. (*Mookerjee and Caspersz, JJ.*) RAMJI RAM *v.* SALIG RAM. **11 I. C. 481 : 14 C. L. J 188.**

——— Sch. II, Para 1—*Form of reference—Petition.*

It amounts to a request to make a reference to an arbitrator under Sch, II, Sc. 1, para 1 already approved by the parties, when an application is made for adjustment is made before the Court in which it is asked to send the records to a certain arbitrator to whom the parties had already referred the matter in dispute in the pending suit. 29 C. 167 (P. C.) : 9 I. C. 173 Foll. (*Sadasiva Iyer and Moore, JJ.*) NADAMARTHI KRISHNA MOORTHY *v.* GIRIJAPATI GANPATHI LINGAM. **34 I. C. 741 : 3 L. W. 375.**

C. P. CODE (V OF 1908), Sch. II, Para 1—Form of Reference.

——**Sch. II, Para 1**—*Form of reference—General terms—Question of costs.*

When a reference to arbitration in a suit is a general one of the whole case, the power of dealing with costs rests with the arbitrator. 91 P. R. 1888 Rel. (*Drake Brockman, J. C.*) DHARN *v.* DILDAR KHAN. **46 I. C. 182.**

——**Sch II, Para 1**—*Form of Reference—No application in writing—Waiver—Effect.*

The parties could ratify a reference to arbitration though the procedure laid down in para 1, The 2nd Schedule has not been strictly followed by appearing before the arbitrator and giving evidence. 30 A. 32 ; 27 C. 61 ; 23 B. 629, Con- (*Evans, A. J. C.*) GOKARAM NATH *v.* GUR PRASAD. **9 I. C. 412.**

——**Sch. II, Para. 1**—*Form of reference—Indefiniteness.*

If an agreement of reference to arbitration is so vague as to make it impossible to ascertain what the dispute was which the parties referred to arbitration the agreement to refer is bad for indefiniteness. (*Roe and Coutts, JJ.*) BABUA LAL PARDHAN *v.* BADRI LAL PARDHAN. **49 I. C. 522.**

——**Sch. II, Para 1**—*Form of reference—Objection—Waiver—Acquiescence.*

A person having an option to avoid an award is deemed to have consented to it if he voluntarily submits to the proceedings before arbitrators. (*Pratt, J. C. and Hayward, A. J. C.*) SHEO KARAN *v.* MAHADEO SINGH. **19 I. C, 374 : 6 S. L. R. 146.**

Insolvency Proceedings.

——**Sch. II, Para 1**—*Insolvency proceedings—Reference.*

A Court cannot refer to arbitrators, a proceeding in insolvency as Sch. II does not apply to proceedings under the Prov. Ins. Act. 88 P. R. 1887 referred to. (*Rattigan, J.*) LADHA SINGH *v.* BHAG SINGH. **50 P. R. 1916 : 135 P. W. R. 1916 : 34 I. C. 549 : 151 P. L. R, 1916.**

Minor.

——**Sch. II, Para 1**—*Minor—Reference—Application to Court—Not signed by parties—Award—Validity of.*

Sch. II, Para 1 does not require that the application in writing for an order of reference to arbitration should necessarily be signed by the parties to the suit agreeing to the reference. Where one of the parties to a suit being an infant, the agreement to refer was signed by the adult parties and by the *guardian ad litem* of the infant and all the parties, including the guardian, appeared before and the Judge, thereupon, made an order of reference. *Held*, that the order was proper and the award thereon was not vitiated. (*Viscount Haldane.*) UMED SINGH *v.* SOBHAG MAL DHADHA. **43 Cal 290 : 43 I. A. 1 : 20 C. W. N. 137 : 30 M. L. J. 67 : 14 A.L.J. 97 : 3 L.W. 145 : 19 M. L. T. 108 : 23 C. L. J. 130 : (1916) 1 M. W. N. 67 : 32 I. C. 161 : 18 Bom. L. R. 308 (P. C.)**

——**Sch. II, Para 1**—*Minor—Whether bound by arbitration consented to by natural guardian.*

C. P. CODE (V OF 1908), Sch. II, Para 1—Parties.

A natural guardian can on behalf of a minor enter into an arbitration so as to be binding on minor if it is proper, reasonable and for the benefit of minor. (*Shah and Hayward, JJ.*) SADASHIV RAMACHANDRA *v.* TRIMBAK KESHEO. **44 Bom. 202 : 56 I. C. 399: 22 Bom. L.R. 266**

——**Sch. II, Para 1**—*Minor—Reference.*

A minor is bound by an agreement of arbitration entered into by his predecessor in title, (*Woodroffe and Shamsul Huda, JJ.*) SHASI MUKHI DEBI *v.* PARBATI SUNKAR ROY. **50 I. C, 879 : 23 C. W. N. 293.**

——**Sch. II, Para 1**—*Minor—Submission to arbitration by guardian—How far binding on ward.*

A guardian may submit to arbitration on behalf of his ward so to bind both himself and the ward : but where he is, in his individual capacity, a party to the submission and his interest controversy submitted happens to be adverse to that of the ward, he has no power submit on behalf of the ward. The whole question to be considered is whether the reference is for the benefit of the ward and the award will be binding on him if it is found to be beneficial to him. (*Mookerjee and Caspersz, JJ.*) RAMAI RAM *v* SALIG RAM. **11 I. C. 481 : 14 C. L. J. 188.**

——**Sch II, Paras 1 and 16**—*Minor—Negligence of guardian—Award if binding on minors.*

Where a minor, party to a reference, is not properly represented in the arbitration proceedings and his guardian fails grossly and fraudulently in his duty to protect his interests, the award passed by the arbitrators is not binding on the minors. (*Oldfield and Bakewell, JJ.*) KANTALA VENKATA KRISHNAMACHARLU *v.* PERUNDEVAMA. **56 I. C. 593.**

——**Sch. II, Para 1**—*Minor—Reference—Guardian's assent—Repudiation by other party—Validity.*

A natural guardian can refer a question that concerns the ward to arbitration and when the question does not concern the minors solely but also the guardian there is consideration and mutuality sufficient to preclude the other party to the reference from repudiating it. (*Young, J.*) MG PO MYA *v.* MA DOUNG. **29 I. C, 800 : 8 Bur. L. T. 122.**

——**Sch. II, Para 1**—*Minor—parties—Duty of Court.*

Where some of the parties to a reference to arbitration are minors, it is the duty of the Court to ascertain if the reference is for the benefit of the minors. (*Kennedy, J. C. and Raymond, A. J. C.*) EMNABAI *v.* FAKIR MAHOMED. **15 S. L. R. 165 : 65 I. C. 50 : (1922) S. 1.**

Parties.

——**Sch. II, Para 1**—*Parties—Non-joinder of some parties to reference—Validity—Objections to award—Determination by Court ordering reference.*

When some of the defts. to a suit do not join in a reference to arbitration, the court should examine the fact of each case before coming to

C. P. CODE (V OF 1908), Sch. II, Para 1—Parties.

the conclusion that the arbitration is invalid since no relief may have been claimed against them. 32 A. 657 Foll. 8 A. L. J. 645 Dist. Objections to the award on the ground of invalidity from any cause whatever should be decided by the Court which has made the order of reference to arbitration and by no other Court. (*Piggott, J.*) AYODHYA PRASAD *v.* BADARUL HUSAIN.
39 All. 489 : 41 I. C. 357 : 15 A. L. J. 427.

——Sch. II, Para 1—*Parties—Unnecessary party—Suit for partition—Widow in possession in lieu of maintenance.*

A Hindu widow, in possession of property in lieu of maintenance is not a necessary party to a suit for partition, and her not joining in a reference to arbitration in such a suit does not vitiate the award The decree having been passed on the award no appeal lies. (*Richards and Banerji, JJ.*) SABTA PRASAD *v.* DHARAM KIRTISARAN. 35 All. 107 : 18 I. C. 609 : 11 A. L. J. 66

——Sch II, Paras 1 and 16—*Parties—Death of one—Reference to arbitration—Death of one of the parties—if revokes the authority of arbitrator.*

The death of one of the parties to an arbitration does not necessarily revoke the authority of the arbitrator. (*Karamat Husain and Chamier, JJ.*) DATTA *v.* KHEDU. 33 All. 645 : 11 I. C. 935 : 8 A. L. J. 678.

——Sch. II. Para 1—*Parties—Non-joinder of—Reference Award—Invalid.*

If all the parties interested at the time of the reference to the arbitrator have not joined in the reference, the reference is invalid and the award which follows such reference is also invalid. (*Karamat Husain and Chamier, JJ.*) HASWA *v.* MAHALA. 8 A L. J. 645 : 10 I. C. 559.

——Sch. II, Para 1—*Parties—All persons interested in suit to be parties*

Where all the persons interested in the subject-matter of the suit do not join in this application for reference to arbitration the Court has no jurisdiction to make the reference. 21 C. W. N. 387 relied on. (*Walmsley and Suhrawardy, JJ.*) HARA PRARANNA BANDOPADHYA *v.* ARAB ALI.
71 I. C. 326 : 1924 Cal. 353.

——Sch. II, Para 1—*Parties to reference—Objection to attachment under O. 21. R. 58, C. P. C.—Judgment debtor necessary party.*

Where a claimant objects to the attachment of property in execution of a decree and the matter is referred to arbitration the judgment-debtor is a necessary party to the reference. (*P. C. Banerji, J.*) BASUDEO SAHAI *v.* MUST. SARASWATI.
64 I. C. 469.

——Sch. II, para 1—*Parties—Omission of some of the parties to join—Validity of award.*

All the parties interested in a suit must join in the reference to arbitration and where only some of the parties agree to refer the award on such reference is void. (*N. R. Chatterjee and Newbould, JJ.*) DEBENDRA NATH BISWAS *v.* JOGENDRA NATH BISWAS. 64 I. C. 221.

C. P. CODE (V OF 1908), Sch. II, Para 1—Parties.

——Sch. II, Para 1—*Parties—Non-appearance—Reference—Consent of all parties—Award otherwise invalid.*

A Court has no jurisdiction to make an order of reference under Sch. II, para I without the consent of all the parties including the party who does not appear. If an order be made without the consent of such non-appearing party it is illegal, and an award made on such reference is also illegal. (*Sanderson, C. J., Fletcher and Mookerjee, JJ.*) LADURAM NATHMULL *v.* NAND LAL KARURI.
55 I. C. 747 : 47 Cal. 555 : 31 C. L J. 150.

——Sch. II, Para 1—*Parties—Application by some of the parties—Effect of.*

Quaere—Whether an order of reference to arbitration made by the Court on the application of the plff. and one of the defts. is legal. (*Fletcher and Huda, JJ.*) HARIDAS DEY *v.* KAILASH CHANDRA BOSE. 44 I. C. 480.

——Sch. II, Para 1—*Parties*—Ex parte *defts. award—Question of jurisdiction.*

The agreement to refer to arbitration and the application to the court must have the concurrence of all the parties concerned and if all, the defts. including those who have not appeared and contested the suit do not join in the reference the award is wholly invalid and not only against these who did not join it and is liable to be set aside on the application of any of the parties. 9 C. W. N. 873: 25 C.L.J. 339 Foll. 11 C.W.N. 1152, Diss. An objection to the validity of any reference as well as of the award on the ground that all the parties to the suit had not-joined in the reference though not taken in the Court of First Instance and not taken specifically in the grounds of appeal before the High Court must be given effect to, as it relates to the jurisdiction of the Court, to make a reference and the subsequent invalidity of the award. (*N. R. Chatterjee and Walmsley, JJ.*) GIRIJA NATH ROY CHOUDHURY *v.* KANAI LAL MITRA. 43 I. C. 169 : 27 C. L. J. 339.

——Sch. II, Paras 1 and 15—*Parties—Non-joinder—Validity.*

The Court has jurisdiction to make an order of reference only if all the parties interested in the suit agree to the reference. Otherwise the order of reference is invalid not only against those who have not agreed but also against those who have agreed. An award made upon such an invalid reference is not valid and no decree can be based upon it. Paragraph 15 of the schedule assumes a valid reference to arbitration and contemplates only cases where the propriety of an award on the basis of such a reference is in question. (*Sanderson, C. J. and Mookerjee, J.*) DOOLY CHAND *v.* MAMUYI MUSAJI, 41 I. C. 295 : 25 C. L. J. 339 : 21 C. W. N. 387.

——Sch. II, Para. 1 and O. 1, R. 13- *Parties—Non joinder—When can be raised—Waiver.*

Where in a reference to arbitration some of the defts. were not joined and no objection was at any stage taken on grounds of non-joinder the reference is not bad as under O. 1, R. 13, the right to object has been waived. (*Imam and Chapman, JJ.*) ANANDA PROSAD DUTT *v.* JOGESH CHANDRA SEN. 23 I. C. 862.

C. P. CODE (V OF 1908), Sch. II, Para 1—Parties.

——Sch. II, Para 1—*Parties—Death of one party before award is made—Effect—English law.*

The death of one of the parties to a reference to arbitration does not *ipso facto* revoke the reference ; the English common Law rule however is quite the reverse of the above. The question whether a legal representative of a deceased party to a reference to arbitration is bound by the contract of reference, depends upon whether the right is purely personal to the deceased or whether it survives to his legal representatives where such legal representative becomes a party thereto and proceeds with the investigation, the award is binding on him. (*Mookerjee and Caspersz, JJ.*) RAMJI RAM *v.* SALIG RAM.

14 C. L. J. 188 : 11 I. C. 481.

——Sch. II, Para 1—*Parties—Non-joinder of—Waiver of right to object to irregularity.*

The conduct of the parties amounting to waiver of the rights to object to an irregularity in the reference to arbitration. empowers a Court to construe very strictly the words "all the parties interested" in Sch. 1I, para I, and to exclude therefrom persons who did not take the trouble to appear in Court. (*Reid, C.J.*) GIAN CHAND *v.* BEHARI LAL. 18 I. C. 761 : 78 P. L. R. 1913.

——Sch. II, Para 1—*Parties*—Ex parte *deft.—Person interested.*

A deft. who is *ex parte* may be a party "interested" within Sch. II, Para 1, C. P. C, 32 A. 657 : 39 A. 489 : 18 M.L.J, 374 Diss. 27 C.L J. 339 : 25 C.L.J. 339 Foll. Where an *ex-parte* deft. who was interested in the whole suit as well as in the particular subject-matter of the reference, was not a party to the same, *held*, that the order of the reference was *ultra vires* and is without jurisdiction. (*Oldfield and Seshagiri Aiyar, JJ.*) POLITA PAVANA PANDA *v.* NARASINGA PANDA.

42 Mad. 632 : 36 M. L. J. 538 : 51 I. C. 155.

——Sch. II, Para 1—*Parties—Non-joinder of.*

An award is not invalid because certain defendants having no interest in the suit or only nominally on the record do not join in the reference to arbitration by the other parties. (*Wallis, J.*) SIVALINGA PILLAI *v.* MARUTHA PILLAI.

14 I. C 562.

——Sch. II, Para 1—*Parties—Non-joinder of.*

An agreement to refer where one of the parties interested has not joined is not governed by para 1, Sch, II (*Ayling and Spencer, JJ.*) VENKATACHALAM REDDI *v.* T. RANGAIYA REDDI

36 Mad. 353 : 21 M. L. J. 990 : 10 M. L. T. 248 : 12 I. C. 372 : (1911) 2 M. W. N. 249.

——Sch. II, Para 1—*Parties--Parties interested in subject matter to be joined.*

All the parties to a suit need not concur in an application for an order of reference in order to make the submission valid. It is only necessary that all the parties who are interested in the subject-matter of the reference should have joined in the submission. (*Miller, C. J. and Kulwant Sahai, J.*) RAGHUNATH SUKUL *v.* RAMRUP RAUT. 1923 Pat. 225 : 2 Pat. L. R. 76 : 76 I. C. 2 : 5 Pat. L. T. 239 : 2 Pat. 777 : 1924 P. 33.

C. P. CODE (V OF 1908), Sch. II, Para 1—Private reference.

——Sch. II, Para 1—*Parties—Interested parties—Who are.*

It is enough if all the parties interested in the litigation are parties to the application for reference to arbitration. It is a question of fac who are the parties interested in the litigation. (*Jwala Prasad, J.*) JAIPAL TEWARY *v.* TAPESWARI TEWARY. [45 I. C. 321.

——Sch. II, Para 1—*Parties—Reference to arbitration—Parties—Interested—Assent of.*

A Court has no jurisdiction to make an order of reference to arbitration unless all the parties interested assent to such reference. An order of reference made without such assent is invalid and an award based thereupon is liable to be set aside. (*Raymond, A. J. C.*) CHOITH RAM *v.* LAL CHAND. 61 I. C 451 : 14 S. L. B. 156.

——Sch. II, Paras. 1 and 2--*Parties—Limited owner—Reference by—If can confer on arbitrator a more extensive power.*

A person having a limited interest in the land cannot by a reference to arbitration confer on him an authority to alienate a more extensive interest than he himself has. (*Hayward, J. C. and Crouch, A. J. C.*) MIR MAHOMED KHAN *v.* POHUMAL MOTUMAL. 25 I. C. 949 : 8 S. L. R. 86.

Private reference.

——Sch. II, Para. 1—*Private reference—Pending suit.*

Parties can refer disputes to private arbitration though a suit between them is pending. They need not apply to Court for the purpose. (*Sadasiva Aiyar and Moore, JJ.*) ANNAMALAI CHETTY *v.* RAMASWAMY CHETTY.

(1916) 1 M. W. N. 203 : 33 I. C, 67 : 19 M. L. T. 228.

——Sch. II, Para. 1—*Private reference—Pending suit—Legality of.*

Parties to a pending suit are legally competent to refer the matters in dispute to a private arbitration without the help of the Court ; and especially so when the reference is even by person other than the parties to the suit. 29 C. 167 Expl. 30 C. 218 Dist. 27 A. 53 Rel. 37 C. 63 Ref. S. 525 of the Old Code applied to an award made on a private reference by parties pending a suit in Court. (*Miller and Sadasiva Aiyar, JJ.*) NANJAPPA *v.* NANJA RAO. 23 M. L. J. 290 : 16 I. C. 478 : (1912) M. W. N. 1091 : 12 M. L. T. 133.

——Sch. II, Para 1—*Private reference—Arbitration without reference to court—Consent of some of the parties only obtained to reference—Effect of.*

Though some of the parties have not joined in submitting the dispute to arbitration, the award does not become invalid or ineffectual as between the persons making the reference. The award is binding on them especially when it has been acted upon. The provisions of Sch. II, para 1, C. P, Code, are not applicable to a reference made outside court. Where the arbitrators decide a matter not strictly covered by the reference but the parties take part in the proceedings without

C P. CODE (V OF 1908), Sch II, Para 1—Private reference.

protest and acquiesce in the award and act upon it, they are bound by the award and cannot subsequently repudiate it. (*Dhobley, A. J. C.*) DHARNIDHAR *v* SAKHARAM. **71 I. C. 860.**

———Sch. II, Paras 1 and 20—*Private reference—Pendency of suit—Procedure.*

If a matter in dispute is during the pendency of a suit referred to arbitration without the intervention of the Court the reference does not fall within Sch. II but the award may be recorded as an agreement adjusting or compromising the suit and a decree may be passed in the terms of the award. 37 Bom. 930 and 26 Bom. 76 Foll. (*Prideaux, A. J. C.*) GHUNARI KURMI *v.* PURUSHOTTAM. **49 I. C. 746**

———Sch. II, Para. 1--*Private reference--Pending suit—If competent.*

Parties to a pending litigation cannot make a reference to private arbitration without reference to the Court. Neither an agreement to refer without the intervention of the Court, nor a disputed award made thereon is within O. 23, R. 3. 38 B. 687 Foll. 43 B. 386 not Foll., 30 C. 218 Rel. on., 29 C. 167 P.C. Ref. (*Stanyon, A.J.C.*) PUSHPI BAI *v.* ANSUYA BAI. **46 I. C. 902.**

Reference to Chamber of Commerce.

———Sch. II, Paras. 1 and 2—*Reference to Chamber of Commerce—Rules of Chamber if binding.*

If a party to a contract has agreed to submit to an arbitration of the Bengal Chamber of Commerce he is bound by the rules of that Chamber in the matter of hearing and adjudicating on such disputes. 33 C. 1169, appr. (*Jenkins, C.J., Woodroffe and Mookerjee, JJ.*) CHAITRAM *v.* BIDHI CHAND. **30 I. C. 681 : 42 Cal. 1140 : 19 C. W. N. 820 : 21 C. L. J. 584.**

Reference to Court.

———Sch. II, Para 1—*Reference to Court—Arbitration.*

When a suit is not maintainable under the law an agreement by a party to abide by the decision of Court cannot be binding. (*Chatterjee and Walmsley, JJ.*) HIRA KOER *v.* LACHUMAN GOPE. **21 I. C. 958 : 19 C. W. N. 1141.**

———Sch. II, Paras 1 and 16—*Reference to Court—Court as arbitrator—Appeals.*

Where both parties agreed to be bound by the decision of the Court acting *extra cursum curiæ* no appeal lies from the decree, the decision of the Court being in the nature of an award. 23 B. 752 Foll. (*Chitty and Coxe, JJ.*) SITA NATH *v.* BAIKUNTHA NATH. **9 I. C. 295 : 38 Cal. 421.**

———Sch. II, Para. 1—*Reference to Court—Judge acting as an arbitrator—Appeal—Decision on personal inspection and not on evidence.*

A consent given by the parties to abide by the decision of a Court as an arbitrator is not such a reference as falls within Sch. II to the C. P. Code. Consequently the provisions of Sch. II do not govern the proceedings of the Court acting as such arbitrator. The award of the Court is nevertheless not open to appeal for the reason that a party cannot go back on his consent to abide by the decision of an arbitrator after the award is given just as he cannot resile from an executed contract. 1896 A. C. 136 and 29 All 584. Rel. Where the Court departs from its function of deciding in the ordinary way and decides the question of fact extra *cursum curiæ* at the request of parties, the Court should follow the rules laid down in Sch. II of the C. P. Code and refuse to act as arbitrator unless all the parties interested agree. (*Sadasiva Aiyar and Spencer, JJ.*) CHENGALRAYA CHETTI *v.* RAGHAVA RAMANUJA DAS. **52 I. C. 569 : 37 M. L. J. 100.**

C. P. CODE (V OF 1908), Sch. II, Para 1—Subject to reference.

———Sch. II, Para 1—*Reference to Court—Presiding Judge—Validity—Award by majority—Final and binding nature.*

Per *Chief Justice.* A reference of a suit to the presiding Judge must be held to be altogether *extra cursum curiæ* and not the less so when two others are joined with him and the decree passed in accordance with their decision must be regarded as a consent decree, and as not subject to the provisions of the second schedule. 1896 A. C. 136. *Per Seshagiri Aiyar, J.*—Where parties have chosen to entrust their case to a judge and two others, they must be deemed to have agreed to accept the decision of that body as final and as not being open to the attack to which otherwise a judgment is liable. (*Wallis, C. J. and Seshagiri Aiyar, J.*) CHINNA VENKATASAMY NAICKEN *v.* VENKATASAMY NAIKEN. **42 Mad. 625 : 36 M. L. J. 291 : (1919) M. W. N. 221 : 25 M. L. T. 397 : 51 I. C. 827.**

———Sch. II, Para 1—*Reference to court—Procedure—Arbitrator—Finality of award.*

An award is final and cannot be questioned except upon such grounds as a corruption of an illegality apparent upon the face of the award. There is no reason for departing from the principles where the Court itself has been appointed and has the office of arbitrator. Where the Court itself is appointed to act an arbitrator, no separate award need be passed inviting the parties to put in objection before passing a decree. (*Sanders, J.C.*) MAUNG KALA *v.* MAUNG MEIK. **44 I.C. 622 : (1917) 3 U.B. R. 36.**

Subject to Reference.

———Sch. II, Para 1 — *Subject to reference—Withdrawal of part of claim after reference.*

A portion of the claim under reference to an arbitration cannot be withdrawn without the consent of the other party. (*Chatterjee and Walmsley, JJ.*) PURNA CHANDRA *v.* KUNJA BEHARI. **46 I. C. 477: 28 C. L. J. 275.**

———Sch. II, Para 1 — *Subject to reference Jurisdiction to make reference—Extent of—Invalid award—If valid as compromise.*

The jurisdiction of Courts to refer to arbitration is confined to matters in difference in the suit itself. An award under an invalid reference, being itself invalid gives no rights either as an award or as a compromise. (*Krishnan and Odgers, JJ.*) PEDDAPALAYAM BODACHARI *v.* MUNIYACHARI. **14 L. W. 666 : 65 I. C 92 : (1921) M. W. N. 756.**

C. P. CODE (V OF 1908), Sch. II, Para. 1—Subject to reference.

——— **Sch. II. Para, 1**—*Subject to reference—Construction to be liberal—Whole case referred—Power to award money or impose other conditions—Duty of Court in dealing with award.*

Where parties apply to the Court to refer their *muqaddama* to the arbitration of a particular person the words used in the application should not be interpreted in a narrow sense but should be taken to mean that the parties are desirous of having the whole dispute settled by the arbitrator and therefore he could award damages. (*Lindsay, A. J. C.*) LAL BEHARI LAL *v.* RAM DIAL.
15 I. C. 321.

Validity of reference.

———**Sch. II, Paras. 1 and 3 (2)**—*Validity of reference—Pending reference to High Court—Jurisdiction—Separate suit, if lies.*

During the pendency of a reference to the High Court under S. 17 of the Ajmere Courts Regulation, the Ajmere Court on an application by the parties, referred the case to arbitration and the award was made the rule of Court. A party dissatisfied with the award filed a suit to declare that the order of reference to arbitration was *ultra vires* and proceedings under it void, *held*, that notwithstanding the reference to the High Court, the Ajmere Court had jurisdiction to refer the case to arbitration inasmuch as, pending the answer by the High Court, to the reference, the suit was still pending judgment within the meaning of Para. 1 to Sch. II to the Code, *held*, also that no suit as here would lie under Para. 3 (2) of Sch. II to the Code. (*Walsh and Wallach, JJ.*) RAM LAL *v.* DEORAJ.
19 A.L. J. 876: 64 I. C. 601: 44 A. 91: 1922 A. 173.

———**Sch. II, Para. 1**—*Validity of reference—Pleader signing without authority—Reference invalid.*

The provisions of Para. 1 of Sch. II must be strictly complied with, in order that there might be a valid reference. Where a pleader signed a reference on behalf of a party but his *vakalatnama* did not contain a power to refer to arbitration, *held*, the reference was not valid so far as that party is concerned. (*Woodroffe and Chatterjee, JJ.*) FANINDRA *v.* DWARKA NATH,
25 C. W. N. 832.

——— **Sch. II, Para. 1**—*Validity of reference—Agreement to refer all disputes arising out of a contract—Successive awards.*

Where the parties agree to refer all disputes arising out of a contract to aribitration, the right to submit is not exhausted though one dispute is finally decided. Successive disputes as they arise may be referred may be referred and successive awards passed, (*Rankin, J.*) BAL MUKAND RUIA *v.* GOPISAN BHOTEA, **60 I. C. 195 : 24 C. W. N. 775.**

———— **Sch. II, Para. 1**—*Validity of reference—Death of one of the parties—Effect of—Agreement among parties to bind themselves and representatives.*

The arbitration is not revoked by the death of one of the parties if there is an agreement among the parties to bind themselves and their representatives-in-interest by the arbitration. 11 I.C. 481 Rel. on. Where one of the parties to an arbitration dies before the conclusion of the proceedings his representative should be brought on record but where the party dies after every business is finished except the grant of award, the parties and other representatives are bound even if the party dies. (*Mookerjee and Carnduff, JJ.*) MANINDRA NATH *v.* MOHU NUNDA ROY. **15 C.L.J. 360 : 13 I. C. 161.**

C. P. CODE (V OF 1908), Sch. II, Para 2.

——— **Sch. II, Para. 1**—*Validity of reference—Parties to reference—Exonerated defendants—Validity of award.*

To constitute a valid reference to arbitration it is enough if all the parties to suit interested in the subject-matter agree to the reference. From the mere fact that certain defendants did not appear and the suit proceeded *ex parte* so far as they were concerned, it could not be assumed they were not interested parties. 42 M. 632 : 47 Cal. 555 Ref. The High Court will not interfere in revision with an award on the ground that certain exonerated defendants were not parties to the reference when no such objection had been taken to the award in the Court below. (*Spencer, J.*) BHAGAVANULU *v.* SEETHARAMASWAMI.
44 M. L. J. 359: 17 L. W. 424: (1923) M.W.N. 296: 32 M. L. T. (H. C.) 298 : 73 I. C. 202 : 1923 Mad. 502.

———— **Sch. II, Para. 1**—*Validity of reference—Absence of one arbitrator at a meeting at which nothing particular was done.*

Absence of one of the arbitrators at one of the meetings, at which, it is shown, that nothing material was done, does not make the award invalid. (*Krishnan, J.*) VARANASI RAMANNA *v.* KILLAIN SETHI APPANA. **12 L. W. 505 : 60 I. C. 181.**

———**Sch. II, Para. 1**—*Validity of reference—Court when to restrain defendant from proceeding to arbitration.*

It is within Court's jurisdiction on equitable grounds to restrain the defendant from proceeding to arbitration when an action brought impeaches the instrument containing the agreement for reference. (*Raymond, A. J. C.*) FIRM OF KRIPALDAS KAHANDAS *v.* FIRM OF GAJANMAL BHAGWANDAS. **70 I. C. 864 : 15 S. L. R. 5.**

———**Sch. 11, Para. 2**- *Parties—All should join.*

In order that a reference may be made under R. 2 of the Schedule II all parties must join in the application to the Court. It is not enough if the petition is signed by all. 29 C. 167: 26 M. 47; 9 C. W. N. 873 Foll. (*Johnstone, J.*) MAHOMED MIRAN BAKSH *v.* SHAR MOHAMMAD. **59 P. L. R. 1911: 17 P. R. 1911 : 9 I. C. 195 : 39 and 200 P. W. R. 1911.**

———**Sch. II, Para. 2**—*Arbitrator—Commissioner—Difference between.*

The Commissioner submits his reports for the approval of the Court and has no greater power than what the parties and the Court choose to give him but an arbitrator has a final authority to decide all matters in difference forming the subject of reference subject to the power of the Court

C. P. CODE (V OF 1908), Sch. II, Para 3.

to set aside the award on certain grounds. (*Lindsay, J. C. and Kanhaiya Lal, A. J. C.*) ABDUL BASIT *v.* ABDUL SALAM. **25 I. C. 227.**

———Sch. II, Para. 3— *Time for submission of award—Extension by arbitrators themselves—Propriety of Misconduct of arbitrator.*

Matters in dispute between the parties in a pending suit were by their consent referred by Court to two arbitrators and the order of reference provided that the arbitrators should make their award within 6months from the date on which an office copy of the said order should be served on them or within such further time as they might allow themselves by endorsement on the said office copy. The arbitrators enlarged the time for making their award under the order from time to time and after a large number of sittings extending over a period of 2 years they adjourned the hearing *sine die*. On an application by the plaintiff to the Court for superseding the reference and for proceeding with the trial of the suit, *held*, that the order of the Court giving unlimited authority to the arbitrators to extend the time was bad and of no effect and that under the mandatory provisions of Sch. II, Cl. 3, C. P. Code, it was the Court that had to fix the time and enlarge it. Consequently it was open to the plaintiff to apply to the Court to supersede the reference and proceed with the trial of suit. 30 A. 169; 36 A 354 followed. 19 C. W. N. 165 dissented. The appropriate time for entertaining charges of misconduct against an arbitrator is when the award has been filed. (*Rankin, J.*) ROBINDRA DEB MANNA *v.* JOGENDRA DEB MANNA.

27 C. W. N. 420 : 1923 Cal. 410

———Sch. II, Para. 3—*Discretion of Court—Arbitration—Application for reference made by parties.*

The law gives the parties the right to have the matter submitted to arbitration at any time before the judgment is pronounced ; and an application for reference made by the parties cannot be rejected by the Court. (*Fletcher and Richardson, JJ.*) MOHENDRA LAL SINGH DEO *v.* FAKIR CHANDRA DUTTA. **24 I. C. 610.**

———Sch. II, Para. 3—*Time for making award.*

It is the duty of the Court to appoint a date within which to make the award. Where it does not do so, but fixes a date for the filing of the award an award made before but filed beyond that date can be received. (*Lindsay, J. C.*) MOHAN LAL *v.* BAZ KHAN. **46 I. C. 324 : 5 O. L. J. 205.**

———Sch. II, Para. 3— *Arbitration—Resulting from—Not permissible.*

A party cannot resile from a reference to arbitration at his sweet will and pleasure and it avails the appellant nothing here to show that having once agreed to the reference he afterwards repents of his action. (*Lindsay, J. C.*) CHET KUNWAR *v.* PUTTU SINGH. **17 O. C. 386: 27 I. C. 424 :2 O. L. J. 129.**

———Sch. II, Para. 3—*Time not fixed for making award—If fatal.*

Where the Court had fixed no time for making the award but had fixed one for filing it, *held*, that the award filed before the latter date is not invalid. (*Lindsay and Kanhaiya Lal, A. J. Cs.*) BHAGWAN DIN SINGH *v.* FAKIR SINGH.

C. P. CODE (V OF 1908). Sch. II, Para 4 (1) (b),

20 I. C. 773 : 16 O. C. 233.

———Sch. II, Para 3—*Time for making award—Award made within time but filed after the time fixed by a Court—Validity of.*

An award if made within the time fixed is valid even though it may have been filed after the time fixed by the Court for submitting it. (*Jwala Prasad, J.*) RADHA KANTA MISSER *v.* JALADHAR JHA.

37 I. C. 844.

———Sch. II, Paras. 4 and 16—*Majority award.*

A majority award is not bad even in the absence of a specific provision to that effect in the reference. (*Beachcroft and Walmsley, JJ.*) HARIDAS DUTTA *v.* BAIDYA NATH GHOSE.

40 I. C. 646 : 21 C. W. N. 895.

———Sch. II, Para. 4—*Umpire not appointed in case of difference of opinion—Effect of.*

The fact that there is no provision made for the appointment of an umpire in case of difference of opinion among arbitrators, does not make the submission bad on that account. 17 W. R. 30 Rel. on. 4 W. R. 4; 10 W. R. 398 Expl. (*Mookerjee and Carnduff, JJ.*) MANINDRA NATH *v.* MOHANUNDA ROY. **13 I. C. 161 : 15 C. L. J. 360.**

———Sch. II, Paras. 4 and 6—*Umpire—Award—No consultation with arbitrators.*

On the arbitrators disagreeing, the Court under the terms of submission appointed an Umpire who gave an award without consulting the arbitrators and differing both their awards. *Held*, that the award was valid and the Umpire was not bound to consult the arbitrators. (*Kensington, C. J. and Rattigan, J.*) JUMMA *v.* MUBARIK KHAN.

55 P. R. 1915 : 167 P. W. R. 1915 : 30 I. C. 87 : 50 P. L. R. 1916.

———Sch. II, Paras. 4 and 14—*Joint arbitrators—All should act.*

In the absence of a clause providing for an award made by less than all being valid, each of them must act personally as if he were the sole arbitrator. For as the office is joint if one refuse or omit to act, the others can make no valid award. (*Kanhaiya Lal, A.J.C.*) LALA *v.* ABDUS SAMAD. **17 I. C. 320 : 16 O. C. 94.**

———Sch. II, Para. 4—*Decision of majority—When binding on parties.*

Where a dispute is referred to several arbitrators and the deed of reference does not provide for the prevalence of the views of the majority in the case of the decision not being unanimous, a majority award cannot be maintained. (*Roe and Coutts, JJ*) BABUA LAL PARDHAN *v.* BADRI LAL PARDHAN. **49 I. C. 522.**

———Sch. II, Para. 4 (1) (b)—*Omission to record the fact of agreement to abide by majority whether invalidates arbitration.*

Where parties have entered into an agreement to be bound by the opinion of the majority of arbitrators, the omission of the court to record that fact in the order of reference does not vitiate the arbitration. 4 W. R. 4 : 14 W. R. 150 : 8 All

C. P. CODE (V OF 1908), Sch. II, Para 5.

64, and 7 and 174 dist. (*Mookerjee and Beachcroft, JJ.*) NARENDRA NATH DEY *v.* BOJESWARI DASI. 23 I. C. 842.

———Sch. II, Paras. 5 and 17—*Reference to arbitration—Refusal by one arbitrator—Remedy—Action.*

Where a reference to arbitration has been made without the intervention of the Court and during the proceedings one of the arbitrators refuses to act further, any of the parties, may apply to the Court under Para. 17, of Sch. II of the Code to file the reference or agreement and the Court can take action under Para. 5 and appoint a new arbitrator. (*Walsh and Wallach, JJ.*) BAGWANDAS *v.* GURDAYAL. 64 I. C. 459 : 19 A. L. J. 823.

———Sch. II, Para. 5—*Revocation of submission.*

A reference to arbitration stands on the same footing as all other lawful agreements and cannot be revoked by a party to the reference except on good cause. (*Sadasiva Iyer, J.*) VAPPU ROWTHAR, *In re.* 22 I. C. 548 : (1914) M. W. N. 52.

———Sch. II, Para. 5—*Supersession of arbitration—Order—Implied.*

Where a case is referred to arbitration and the arbitrators returned the papers without submitting their award and the parties also expressed their unwillingness to arbitration, the Court without expressly recording an order of supersession, fixed a date for deciding the case and passed final orders. *Held*, that the procedure followed was irregular. Where in fact the reference to arbitration has become impossible and by implication the Court has superseded it, the jurisdiction of the Court to try the issue between the parties is not affected. But where the proceeding is still pending before the arbitrators and where from the circumstances, it does not appear that the arbitration has in fact been superseded, the court has no jurisdiction to try the case. (*Jwala Prasad and Adami, JJ.*) MANGAR SAHU *v.* BHATOO SINGH. 5 Pat. L. J. 672 : 57 I. C. 473 : 1 Pat. L. T. 416.

———Sch. II, Paras 5 (1) (a) and 4—*Misconduct—Arbitrator giving evidence.*

The fact that one of three arbitrators gave evidence before the others, does not constitute misconduct on the part of the arbitrators so as to vitiate their award. Where one of the parties to an arbitration deliberately absents himself from the hearing, the award concluded on the hearing in his absence is not bad. (*Beachcroft and Walmsley, JJ.*) HARIDAS DUTTA *v.* BAIDYA NATH GHOSE. 40 I. C. 646 : 29 C. W. N. 895.

———Sch. II, Para. 5 (1) (b)—*Arbitrators—Refusal of one to act—Appointment of new arbitrator.*

The appointment of a new arbitrator, in place of one who refused to act must be made by both the parties and not solely by the party who has been served with a written notice under the concluding portion of Para. 5 (1) of Sch. II of the

C. P. CODE (V OF 1908), Sch. II, Para 5 (i) (b) (ii).

Code. (*Shaw Din, J.*) CHARTA RAM *v.* SAJAN MAL. 112 P. R. 1918 : 48 I. C. 395 : 139 P. L. R. 1918.

———Sch. II, Para. 5 (i) (b) (ii)—*C. P. Code of 1882, S. 510—Decree in terms of compromise referring dispute to arbitration—Refusal of arbitrator to be nominated—Procedure—No power to supersede arbitration.*

According to the true construction of S. 510 of the C. P. Code of 1882 (Sch. II, Para. 5), the Court may appoint a new arbitrator in the place of one who has refused nomination, for that is a refusal to act within the meaning of the section. 6 Mad. 414 ; 18 Cal. 324 overruled. Where a partition suit was compromised by the parties agreeing to refer the matter to arbitration and the Court passes a decree thereon the court cannot supersede it and proceed with the suit, for there is no suit in existence. (*Lord Shaw*). SACLIK HUSAIN *v.* KANIZ ZAHRA BEGAM. 33 All. 743 : 38 I. A. 181 : 15 C. W. N. 1005 : (1911) 2 M. W. N. 132 : 10 M. L. T. 173 : 13 Bom. L. R. 826 : 14 C. L. J. 313 : 8 A. L. J. 1164 : 14 O. C. 289 : 12 I. C. 15 : 21 M. L. J. 1151 (P. C.).

———Sch. II, Para. 5 (i) (b) (ii)—*Appointment of fresh arbitrator without notice—Irregularity.*

A court appointing fresh arbitrator, on refusal of first arbitrator, without issuing notice to the other party acts with material irregularity. (*Lindsay, J.*) ABDUL GHANI *v.* DINDAYAL. 1 U. P. L. R. (H. C.) 25 : 50 I. C. 655 : 17 A. L. J. 643.

———Sch. II, Para. 5 (i) (b) (ii)—*Refusal to act—Non-submission of the award within time fixed.*

An arbitrator failing to submit his award within the time fixed may be held to have refused or neglected to act within Para 5 (b) (ii), of Sch. II, C. P. C., so that if another arbitrator is appointed without formally discharging the former, the appointment cannot be questioned. (*Mookerjee and Beachcroft, JJ.*) NARENDRA NATH DEY *v.* BROJESHWARI DASI. 23 I. C. 842.

———Sch. II, Para. 5 (i) (b) (ii)—*Arbitration—Arbitrators—Withdrawal of one procedure*

Where two arbitrators were appointed to decide a case and one of them withdraws pending the arbitration the remaining arbitrator cannot proceed with the case and file an award. The Court should in such a case either appoint another arbitrator in place of the arbitrator who withdraws or supersedes the arbitration and decide the case on the merits. (*Wilberforce, J.*) THAKAR DAS *v.* NARAIN. 56 I. C. 644 : 2 Lah. L. J. 637.

———Sch. II, Para. 5 (i) (b) (ii)—*Arbitration—Agreement to refer—Arbitrators appointed without their consent and unwilling to act—Effect.*

An agreement to refer matters to the arbitration of three persons nominated without their knowledge and two of whom refused to act when informed thereof is *ab initio* void if the agreement contained no provision to appoint an arbitrator in the place of the person not willing to act. (*Sankaran Nair and Napier, JJ.*) GAITUM BI *v.* NABI SAHEB. 12 M. L. T. 346 : (1912) M. W. N. 957 : 17 I. C. 389 : 24 M. L. J. 15.

C. P. CODE (V OF 1908), Sch. II, Para. 5 (i) (b) (ii).

———**Sch. II, Para. 5 (1) (b) (ii)**—*Refusal to accept—Procedure.*

Under the Old Code, under S. 510 new arbitrators cannot be appointed when the arbitrators have never consented to act as such. [This difficulty has been removed by the New Code, for it would come under Para. 5]. 17 M. 498. 18 C. 324 Foll. A refusal to accept by some arbitrators makes the award of the rest illegal. Under the Old Code, S. 507 if the arbitrator refuses to accept the arbitration, a new arbitrator can be appointed by the Court only if the parties so desire under S. 510. When the arbitrator refuses to act, the Court may at its discretion appoint a new arbitrator. Under the New Code Para. 5, however, in both cases, the Court can appoint only on application of either party, and after notice to the other side. 6 M. 414 Foll. (*White, C.J., Krishnaswamy Iyer and Ayling, JJ.*) TALLAPRAGADA SURYANARAINA *v.* TALLAPRAGADA SARABAYA.
9 M. L. T. 251 : 21 M. L. J 263 : 9 I. C. 173 : (1911) 1 M. W. N. 151 (F. B.).

———**Sch. II, Paras. 5 (2) and 8**—*Order of supersession—Dismissal of suit.*

When a dispute is referred by the Court to arbitration, the Court cannot proceed with the suit until it supersedes the arbitration. A suit was referred to the arbitration of two arbitrators and one umpire. When issuing notices to the arbitrators the Court informed the parties that if no award was filed within the period fixed by the Court, the parties ought to attend with their witnesses and be prepared to proceed with the case. The award was not made by the date fixed by the Court and as plff. did not appear in Court with his witnesses his suit was dismissed without superseding the arbitration. *Held*, that the Court cannot pass the order whether it was an order dismissing the suit in default or a decision against the plff. on the merits, on the ground of his failure to prove his case without finally superseding the arbitration. (*Chamier and Piggott, JJ.*) GANESH PRASAD *v.* DAMODARDAS.
16 I. C. 177 : 10 A L. J. 23.

———**Sch. II, Para. 7**—*Examination of witnesses on oath.*

There is nothing illegal in the parties to an arbitration agreeing before the Panchayatdars to have evidence taken after the administration of any reasonable form of oath to the witnesses. 4 A 283 Foll. (*Sadasiva Aiyar, J.*) MUTHUKARUPPA KONE *v.* VEERABHADRA KONE.
17 M. L. T. 241 : 29 I. C. 49 : 2 L W. 320.

———**Sch. II, Para. 8**—*Supersession—Grounds for.*

If the arbitrators do not submit their award within time the Court may supersede the arbitration and proceed with the suit. (*Teunon and Newbould, JJ.*) HRISHIKESH DAS *v.* LAL MOHAN DAS.
57 I. C. 890.

———**Sch. II, Para. 8**—*Extension of time for making award—Limitation Act, Art. 158.*

The time for filing an award may be extended by the Court either before or after the expiration of the period fixed for the making of the award.

C. P. CODE (V OF 1908), Sch. II, Para 8.

But the extension must he made before the award is delivered. Where the parties signed a consent order before the award was made for extension of the period, but the order was signed only after the making of the award, *held*, that the Court's signature related back to the date of application and that the award could not be objected to on the ground that it was made after the expiry of the period fixd by the Court. (*Macleod, C. J. and Shah, J.*) GOPALAJI KALLIANJI *v.* CHHAGANLAL VITHALJI.
45 Bom. 1071 : 63 I. C. 929 : 23 Bom. L. R. 614.

———**Sch. II, Para. 8**—*Extension of time—Procedure.*

An order of a Court permitting the arbitrator to enlarge time for making an award is not *ultra vires* and there is no objection to the Court's delegation, with the consent of parties, functions regarding enlargement of time. An arbitrator has no authority to extend time, after the fixed period for making an award had elapsed, he being *functus officio*, afterwards. His award must be set aside though made within the time extended by arbitrator after the fixed period, as made without jurisdiction. (*Chitty, J.*) CO-OPERATIVE HINDUSTAN BANK, LTD. *v.* BHOLA NATH.
31 I. C. 597: 19 C. W. N. 165.

———**Sch. II, Paras. 8 and 15**—*Award made in time—Filing of—Order to be filed within a specified date—Award made by that date but filed two days later—Validity.*

A Court allowed the arbitrators to file their award within a certain time and used the word 'file' instead of the word 'make.' The award was made in Hindi and signed before the specified date but was filed in Court 2 days later owing to the time taken in translating it into English and the parties also agreed before the arbitrator not to raise any objection, *Held*, that the award was made within time and was valid. 38 C. 522 Doubted. 13 A. 300 Dist. (*Chitty, J.*) SRI LAL *v.* ARJUN DAS.
27 I. C. 233 : 18 C. W. N. 1325.

———**Sch. II, Paras 8 and 15**—*Award made after time fixed.*

An award which is not delivered within the time fixed by the Court is a nullity. (*Le Rossignol, J.*) ZARIF *v.* GHARIB ULLAH.
55 I. C. 221.

———**Sch. II, Para. 8**—*Extension of time—Irregularity—Waiver.*

After arbitration and before the award, the Junior Judge before whom the case was pending took leave. The Senior Judge ordered that the case should be brought in his Court. The case was retransferred by the Senior Judge to the Junior Subordinate Judge on his return from leave. *Held*, that the order of the Senior Judge retransferring the case to the Junior Judge was *ultra vires* but the parties having acquiesced in the jurisdiction of the Junior Judge, after the case was transferred to him could not subsequently object to it. When once the Court became seized of the case, it had full power to extend the time for filing the award, even though the time originally fixed had expired and the

C. P. CODE (V OF 1908), Sch. II, Para 8.

award was a valid one and the Court was right in passing a decree in accordance therewith. (*Scott-Smith, J.*) KISHEN LAL *v.* JAI LAL. **52 I. C, 352.**

———**Sch. II, Para. 8**—*Award filed after the time fixed—Not a nullity—Agreement.*

On the date fixed for the hearing of a second appeal, parties presented an application in writing signed by themselves and their respective counsel to the effect that they have appointed two persons as sole arbitrators and have authorised them to decide all matters and that their award will be binding on both parties and that they would have no objection whatever to their award. The Court directed that all the matters should be referred to arbitrators who were to determine the same and to make an award within one month from the date of the order. The arbitrators made an application for the extension of the period to make an award, the application was granted, and the award was made. Appellant filed written objections to the award and claimed that the award should be set aside for (*a*) the award was submitted after the time fixed had expired, and (*b*) the arbitration were guilty of misconduct :

Held, (1) that the mere fact that the award was filed after the time fixed did not make it nullity. (2) That having regard to the agreement, the appellant is debarred from objecting to the award of the arbitrators. (*Rattigan, J.*) KHAN SINGH *v.* MOHAN LAL. **44 P. W. R. 1916 : 34 I, C. 177 : 56 P. L. R. 1917.**

———**Sch. II, Para. 8**—*Supersession— Award not submitted within time—No formal order superseding arbitration--Court proceedings its suit effect of.*

When the court without extending the time for submission of an award proceeded to deal with the suit, there was in effect an order superseding arbitration and no formal order to the effect was necessary. 24 A. 312 Dist. : 17 I.C. 177 Not foll. (*White, C. J. and Oldfield, J.*) N. P, CHOKKAPPA MUDALIAR *v.* S. M. AHMED ULLAH SAHIB.
14 M. L. T. 388 : 21 I. C. 558 : (1913) M. W. N. 863.

———**Sch II, Para. 8**—*Supersession.*

Where an order of supersession was passed on the date fixed but the award reached the court that same day after passing of the order the Court would be justified in setting aside its order of supersession. (*Kanhaiya Lal, A. J. C.*) LALA *v.* ABDUS SAMED. **17 I.C. 320: 16 O. C. 94.**

———**Sch. II, Para. 8**—*Extension of time—Procedure.*

Under S. 3, the Court itself should fix a date for the award and if the award is not completed within that time the Court should in extending the time under S. 8, fix a particular date for making the award and not leave it to the discretion of the arbitrator. Time can be extended only before the award has been made and filed. (*Lindsay, A. J. C.*) GUR DAS *v.* GARUL DHUL. **9 I. C. 241.**

———**Sch. II, Para. 8**—*Date fixed for filing of award—Non-appearance of parties—Dismissal of suit is bad.*

C. P. CODE (V OF 1908), Sch. II, Para 10.

Where a judge dismissed a suit for failure of the parties to attend on the date fixed for filing of the award even though the award was not filed on that date, the order of dismissal is improper and would be set aside. Since the filing of an award is an act of the arbitrator, the parties need not be present in court. A court has no power to supersede an arbitration in anticipation that the award will not be filed before the due date. (*Das, J.*) MAHARAJ BHAGAT *v.* HARIHAR BHAGAT. **3 Pat. L. T. 346 : 65 I. C. 144. 1923 P. 115.**

———**Sch. II, Para. 8**—*Supersession—Failure of arbitrators to act.*

Where in a case in which the arbitrators to whom a reference has been made, have returned the record without having made an award, and have declined to act, and the parties have expressed their unwillingness to have the dispute decided by the arbitrators, the Court has jurisdiction to proceed with the trial without expressly superseding the arbitration. (*Jwala Prasad and Adami, JJ.*) MANGER SAHU *v.* BHATOO SINGH. **5 P. L. J. 672 : 57 I. C. 473 : 1 P. L. T. 416.**

———**Sch. II, Para. 8**—*Extension of time—Discretion.*

The power of extending time vested in court, is permissive and discretionary and the provision does not negative the right to extend time by agreement and acquiescence of parties. (*Atkinson and Das, JJ.*) PATEO KUMARI *v.* UPENDRA NATH. **50 I. C. 52 : 4 P. L. J. 265.**

———**Sch. II, Para. 8**—*Reference—Revocation—Delay in making an award.*

Where parties submit their difference to arbitration, they cannot be allowed to revoke or withdraw from the submission except for very good cause. Delay in making an award by the arbitrators caused by the voluntary absence of one of the parties who now seek to impugn the award is not enough to justify the court in refusing to file the award on the ground of delay. (*Miller, C. J. and Mullick, J.*) KUNJI LAL *v.* BANWAR LAL. **48 I. C. 711 : 4 P. L. J. 394.**

———**Sch. II, Para. 8 (2)**—*Refusing to give evidence—Scope and meaning of.*

The words 'refusing to give their evidence' in Sch. II, Para. 8 (2) of the C. P. C. are intended to refer to the case of a person who refuses to give evidence when placed on oath and required to answer questions put to him ; it has no reference to a case where a party elects not to produce any evidence at all in his case. (*Chamier, J.*) JANAN *v.* NARAIN DAS. **11 I. C. 259 : 8 A. L. J. 929.**

———**Sch. II, Para. 10**—*Award signed by arbitrators—Subsequent change of opinion by one of them—Legality.*

Where a memorandum of award was prepared and signed by the arbitrators, but before engrossing the same on stamp paper, one of the arbitrators finds that owing to a misunderstanding of the language adopted in the memorandum, his opinion has to be changed, his refusal to sign the original memorandum engrossed on stamp

C. P. CODE (V OF 1908), Sch. II, Para 10.

paper is perfectly legal: when the memorandum was drawn up and signed there was no completed award in the strict sense, so as to exhaust the powers of the arbitrators to deal further with the matter. (*Mookerjee and Caspers, JJ.*) RAMJI RAM *v.* SALIG RAM.

11 I. C. 481 : 14 C. L. J. 188.

——**Sch. II, Para. 10**—*Notice—Necessity.*

Notice under Para. 10 is not necessary where the parties are present in Court when the award if filed or where they have come to know of the award otherwise. (*Kensington and Beadon, JJ.*) GHULAM MUSTAFA *v.* HALIMA BIBI.

176 P. W. R. 1913 : 21 I. C. 298 : 310 P. L. R. 1913.

——**Sch. II, Para. 10**—*Decree not to be passed before* 10 *days.*

The Court cannot pass a deceee in terms of an award before the expiry of 10 days allowed by Art. 158 of the Limitation Act. An agreement not to object to the award does not cover illegalities. The rejection of an application for further time to file objections does not amount to an application to set aside the award. 1912 M. W. N. 1232 Foll. (*Odgers, J.*) RANGIAH CHETTY *v.* GOVINDASAMI. **(1921) M. W. N. 793 : 15 L. W. 160 : 45 Mad. 466 : 71 I. C. 266 : 1922 M. 179.**

——**Sch. II, Para. 10**—*Decree on award without notice is bad.*

A decree passed on award without notice to the opposite party and before the expiration of the time allowed by Art. 158 of the Limitation Act is bad in law. (*Kanhaiya Lal, A. J. C.*) MANI RAM *v.* RAM ASRAY. **24 O. C. 234 : 64 I. C. 90 : 8 O. L. J. 626.**

——**Sch. II, Para. 10**—*Notice of filing of award before passing a decree is necessary.*

Under Para. 10, a Court must give notice to the parties of the filing of the award, before passing a decree in its terms, and such notice to the deft. is necessary though he failed to appear before the arbitrators or the Court. (*Lindsay, J. C.*) SOHAN LAL *v.* MUNNA LAL. **62 I. C. 849 : 24 O. C. 263 : 8 O. L. J. 280.**

——**Sch. II, Para. 10**—*Notice.*

The provisions are mandatory. (*Stuart, J. C.*) MUHAMMAD HUSAIN *v.* LAHTU.

17 I. C. 430 : 15 O. C. 294.

——**Sch. II, Paras. 10 and 16**—*Signing of award—Award not signed by arbitrators before filing—Decree in terms of award.*

Under S. 10 as it is imperative on all the arbitrators to sign an award before it is filed in Court and as the Court has no power to allow any of them to sign thereafter, a decree passed in accordance with an award not so signed is illegal and invalid. (*Atkinson and Jwala Prasad, JJ.*) KHUDIRAM *v.* CHANDI CHARAN.

1 P L. J. 306 : 35 I. C. 358 : 2 P. L. W. 377.

——**Sch. II, Paras. 10 and 16**—*Signing of award—Award signed by majority—Refusal of minority to sign—Minority taking part.*

C. P. CODE (V OF 1908), Sch. II, Para. 12.

Where the parties agree to be bound by the decision of the majority of arbitrators, the refusal of the minority to sign the award will not invalidate the proceedings provided there was a decision of the majority after full discussion by the whole body of arbitrators. (*Sharfuddin and Roe, JJ.*) RAM NARAIN RAM *v.* PATTI RAM TEWAR.

1 P. L. J. 90 : 34 I. C. 105 : 2 P. L. W. 411.

——**Sch. II, Para. 12**—*Award—Reference to Commissioner for taking accounts—Report—Procedure bad.*

On a reference by the Court, the arbitrators prepared their award and submitted it to the court. Both parties filed objections and Court remitted the award to the arbitrators for rectification under Para 13. The arbitrators considered the objections and submitted their opinion regarding the alleged errors. The Court however appointed two Commissioners to examine the accounts prepared by the arbitrators to see if they involved arithmetical or clerical error. The Commissioners did so and made a report which supported the opinion of the arbitrators. When the report came up to the Court, it reversed the report on certain disputed items and asked the Commissioners to recalculate on the basis of its judgment. On the report finally made by the Commissioners the Court passed its decree. *Held*, that a decree must be passed in terms of the arbitrators' award, that from the very commencement the Court had followed an absolutely wrong procedure under Para. 12 since it could neither be said that the Court had amended an obvious error which could be amended without affecting such decision, nor could it be said that the Court had rectified a clerical mistake or an error arising from an accidental slip or omission. (*Macleod, C. J. and Fawcett, J.*) GOPAL *v.* GANESH.

22 Bom. L. R. 1416 : 59 I. C. 785 : 45 B. 512.

——**Sch. II, Para. 12**—*Dissolution of partnership—Power to award interest.*

In a suit for dissolution of partnership and for accounts, the plaintiff claimed interest but defendant denied it. The matter was referred to arbitration, one of the points referred being whether the deft. was liable to pay any money and, if so, the amount due. *Held*, that the arbitrator could include in his award the sum payable by the deft. as interest both on sums advanced to the firm and on those advanced to deft. for his personal use, and also for the period before and after the suit and up to the date of the award. (*Teunon and Beachcroft, JJ.*) JAHARMAL DEBI DUTTA *v.* BIRINCHI BHUSAN NANDI.

56 I. C. 941.

——**Sch. II, Para. 12**—*Award—Review.*

An arbitrator has no power to review his own award. (*Chevis and Shadi Lal, JJ.*) AMAR NATH *v.* ISHAR SINGH. **99 P. R. 1917 : 43 I. C. 350 : 173 P. W. R. 1917.**

——**Sch. II, Paras. 12 and 16**—*Extent of Court's power to modify award.*

Material irregularity on the part of the Court in dealing with objections to an award of arbitrators is a ground for revision though the arbitrators being guilty of some misconduct and the

C. P. CODE (V OF 1908), Sch. II, Para. 12.

Court's wrong adjudication upon the objections raised regarding that misconduct, are no grounds for revision. Modifications and corrections of the award by the Court must be confined to Para. 12 and if a Court goes beyond that and makes substantial modifications because it takes a different view from that held by the arbitrator as to what was just and fair in this or that set of circumstances, it acts without jurisdiction. (*Johnstone, C. J.*) PARMA DAT *v.* BIPJU. **78 P. R. 1916 : 124 P. W. R. 1916 : 35 I. C. 887 : 40 P. L. R. 1917.**

——— **Sch. II, Para. 12**—*Mistakes—Correction.*

The Court is bound to correct any obvious mistakes or slips in an award as in the case of decrees. The award in accordance with which the Court has to pronounce judgment is the one that embodies the real intention of the parties. (*Bakewell, J.*) HYDER SAHIA *v.* GIRIA CHETTIAR. **(1913) M. W. N. 338 : 13 M. L. T. 349 : 19 I. C. 496 : 24 M. L. J. 483.**

——— **Sch. II, Para. 12**—*Award partly valid—Effect.*

All the matters in dispute between the parties need not be referred to arbitration. Sch. II, Para. 1, C.P.C. provides clearly that where all the parties interested agree that any matter in difference between them shall be referred to arbitration, they may apply to the Court to that effect, while sub-clause 2 provides that the application shall mention the matter desired for reference. It is quite possible that each of the party has his own differences to be settled before an arbitration. The award is valid if the reference is legal and binding. If some portion of the award refers to extraneous matters it can be separated from other portion, provided it does not attack the decision relating to matters of reference. Under the circumstances, the court may modify or correct the award. (*Miller, C. J. and Kulwant Sahay, J.*) RAGHUNATH SUKUL *v.* RAM RUP RAUT. **2 Pat. 777 : 1923 Pat. 225 : 76 I. C. 2 : 2 P. L R. 76 : 5 Pat. L. T. 239 : 1924 P. 33.**

——— **Sch. II, Paras. 12 and 14**—*Private reference—Award of Court.*

Paras. 12 and 14 do not apply to an award made without the intervention of the Court. In such a case the Court has no power to amend or remit the award. 27 A. 526 approved. (*Mc Coll, J. C.*) NGA TOK *v.* NGA KASIM. **14 I. C. 978 : 5 Bur. L. T. 55.**

——— **Sch. II, Para. 13**—*Costs—Prior to arbitration—Inclusion in award.*

The costs incurred in the processes of obtaining an order from the court are within the discretion of the Court and outside the province of arbitrators but an award is not bad merely because of their inclusion (*Crouch, A.J.C.*) J. M. LANG *v.* MESSRS. HOLLAND & MOSS, LTD. **27 I. C. 526 : 8 S. L R. 136.**

——— **Sch. II, Para. 13**—*Costs.*

The Court can award arbitration fees as costs in a suit where no award is made or where it is silent though an award has been made. (*Pratt, J.C. and Crouch, A.J.C.*) GURDINOMAL *v.* WADHUMAL. **19 I. C. 611 : 6 S. L. R. 226.**

C. P. CODE (V OF 1908), Sch. II, Para 14.

——— **Sch. II, Paras. 14 and 15**—*Evidence taken by some only of the arbitrators--Award is invalid.*

Where a dispute was referred to a group of six arbitrators, the parties agreeing to abide by the decision of the majority and two of the arbitrators withdrew after recording the evidence of the parties and the remaining arbitrators after notice to the defts. but in their absence allowed the plff. to adduce fresh evidence and pronounce an award, *Held* that such award was invalid as it was based on fresh evidence not taken by all the arbitrators (*Tudball and Abdul Raoof, JJ.*) KALICHARAN PANDE *v.* GUPTA NATH MISRA. **45 I. C. 34 : 16 A. L. J. 307.**

——— **Sch. II, Paras. 14 and 15**—*Error of law—Illegality—Bombay Cattle Trade Association's—Rules 23 and 25--Vendor and purchaser—Person committing breach of contract—Damages.*

Where an award imposes a liability on a party which cannot possibly be said to have been provided for by the contract between the parties on a proper construction of its terms, there is an error patent upon the face of the award which entitles the Court to set it aside. If an award misconstrues the contract and correspondence between the parties, there is an error of law patent on the face of the award. The Court could set aside an award if there was an error of law patent on the face of it. (*Macleod, C. J. and Heaton, J.*) JIVRAJ BALOO SPINNING & WEAVING CO., LTD. *v* CHAMSAY BHARA & CO. **44 Bom. 780 : 53 I. C. 799 : 21 Bom. L. R. 1037.**

——— **Sch. II, Paras. 14 and 15**—*Misconduct—Acting on evidence adduced by one party behind the back of the other.*

If an arbitrator receives documents from one party and bases his award upon those documents without giving the other party an opportunity of seeing those documents and of meeting the inferences deducible therefrom, he is guilty of breach of duty and the other party can appeal to have the award set aside on that ground. (*Martineau, J.*) DELHI CLOTH & GENERAL MILLS CO. *v.* KIDARI PERSHAD. **4 U. P. L. R. (Lah.) 15: 64 I. C. 363 : 22 P. L. R. 1922.**

——— **Sch. II, Paras. 14 and 15**—*Award—Construction of—Arbitration—Reference.*

Where an arbitrator divides property in a particular manner or in dividing lays down certain directions such as directing the income of the property to be applied in a particular manner, his act is well within his authority and the Court cannot interfere with the award on its merits. Where parties agree to refer their dispute to an arbitrator they ought not to be allowed to resile from the position which they took at the time of the reference. Merely technical objections should not be allowed to disturb an award, which is fairly made and which, when the real nature of the dispute is looked into, might reasonably be considered as directed to a decision on the matters in dispute. (*Lindsay, J. C.*) LAL BEHARI LAL *v.* RAM DAYAL. **15 I. C. 321.**

——— **Sch. II, Paras. 14, 20 and 21**—*Award—Partly in excess of reference—Filing of a portion of the award.*

C. P. CODE (V OF 1908), Sch. II, Para. 14 (a).

Where a portion of the award is in excess of the reference, it is open to the Court to pass a decree and enforce the award so far as it relates to the dispute between the parties. (*Brown, A. J. C.*) MAUNG TIN *v.* MAUNG POYA.
1 Bur. L. J. 265 : 72 I. C. 193 : 4 U. B. R. 157 : 1923 Rang. 130.

———Sch. II, Para. 14 (a)—*Withdrawal of certain questions—Effect of.*

Where the parties to arbitration withdraw certain questions, they cannot be allowed to say that they are not decided. (*Tudball and Piggott, JJ.*) HARI KUNWAR *v.* LAKSHMI RAM. **38 All. 380 : 35 I. C. 833 : 14 A. L. J. 481.**

———Sch. II, Para. 14 (a)—*Award—Interest—Whether invalidates award.*

Arbitrators have jurisdiction to decide whether they should award interest and an award of interest does not invalidate the award. (*Rankin, J.*) UTTAMCHAND *v.* MAHMOOD. **46 Cal. 534 : 54 I. C. 285 : 23 C. W. N. 704.**

———Sch. II, Paras. 14 (a) and 15—*Award—Conformity to terms of submission—Excess—Void as to the portion.*

An award must conform both in form and substance to the submission and it is void in so far as any portion thereof is in excess of a submission if such portion is separable from and independent of the remainder. (*Mookerjee and Roe, JJ.*) JUGGOBUNDHU *v.* CHAND MOHAN.
31 I. C. 33 : 22 C. L. J. 237.

———Sch. II, Paras. 14 (a) and (c) 15, 20 and 21—*Error of law—Private reference.*

Mistake of law on a legal point referred to an arbitrator does not vitiate his award but if the point was not referred and the decision is wrong in law, the Court will not file the award. Where any of the grounds mentioned in Paras. 14 and 15 is proved, a Court cannot proceed to file the award if the matter was referred without the Court's intervention. Even if the invalid portion is separable, the award would not be enforceable. 3 M. 68 Rel. on. (*Holmwood and Carnduff, JJ.*) DINABHANDU *v.* CHINTAMANI.
26 I. C. 697 : 19 C. W. N. 476.

———Sch. II, Para. 14 (a)—*Award beyond scope of reference.*

An award is bad if it goes beyond the scope of the reference. (*Chaudhri, J.*) JAGAT HARI *v.* MORAN & CO. **26 I. C. 73.**

———Sch. II, Para. 14 (a)—*Award—Refusal to remit—Appeal.*

A Court may under Para. 14 remit an award on ground of some matters being left out; but if the objection is overruled no appeal lies therefrom. (*Imam and Chapman, JJ.*) ANANDA PRASAD *v.* JOGESH CHANDRA. **23 I. C. 862.**

———Sch. II, Para. 14 (a)—*Procedure of arbitrator—If can go beyond reference.*

An arbitrator is not bound by the rules of practice adopted in Courts but he cannot go beyond the questions submitted to him. So where he was asked to see if the plaintiff had a right of way over a particular strip of land he cannot lay out a

C. P. CODE (V OF 1908), Sch. II, Para. 14 (b).

new path, (*Mookerjee and Carnduff, JJ.*) NARSING NARAYAN SINGH *v.* AYODHYA PRASAD SINGH.
15 C. L. J. 110 : 13 I. C. 118 : 16 C. W. N. 256.

———Sch. II, Para. 14 (a)—*Mining of matters—Award can be remitted for correction.*

The arbitrators, who were three in number, were to report their decision *qua* the Tohana house in question to the Court, and the parties were to be bound by the award *qua* the other property. The award filed was remitted as it was considered that the arbitrators should omit that part which related to the Kabai property. *Held*, when an award deals which a matter extraneous to the reference which matter can be separated therefrom the Court may modify the award or may remit it to the arbitrators for correction. (*Broadway, J.*) MANSA RAM *v.* KARLA RAM.
76 I. C. 1007 : 1923 Lah. 411.

———Sch. II, Para. 14 (a)—*Private award.*

The rule that under Para. 14 (*a*) a valid portion of an award which is separable from the invalid portion ought to be accepted by the Court is not generally applicable to private awards and hence the award must be accepted in entirety or rejected in *toto*. (*Shadi Lal and Le Rossignol, JJ.*) AHMED DIN AUISUL RAHMAN *v.* ATLAS TRADING CO.
66 P. R. 1915 : 31 I. C. 80 : 146 P. W. R. 1915.

———Sch. II, Paras. 14 (a)—*Scope of enquiry.*

An arbitrator appointed to decide whether a sale should be set aside is competent to set it aside if the vendor repays the purchase money. *Obiter*: A refusal of a Court to remit an award under Sch. II, Para. 14, is unappealable. (*Sundara Iyer and Ayling, JJ.*) VENUSAMI GAVARAMA *v.* CHILUKURI PITCHAMMA. **15 I. C. 573 : (1912) M. W. N. 901.**

———Sch. II Para. 14 (a) and 15—*Valid and invalid parts separable—Misconduct.*

When the valid part of an award is separable from the invalid part the award should be declared valid to that extent: but where misconduct is proved, the whole award is invalid. (*Maccoll, J. C.*) NGA TOK *v.* NGA KASIM. **14 I. C. 978 : 5 Bur. L. T. 55.**

———Sch. II, Para. 14 (a)—*Scope of inquiry—Dispute between firms—Jurisdictions.*

When arbitrators have to decide disputes between firms they must inquire who the partners are, to discover whether they have jurisdiction. whom they must serve with notices and the scope of their inquiries. The decision as to the liability of any individual as partner of a firm is a decision on a question of their own jurisdiction. The fact that the arbitrators have taken evidence which proved to cover matters outside their jurisdiction will not necessarily invalidate the award or make the proceedings improper, if the award is within jurisdiction. (*Cohen, A. J. C.*) GRAHAM & CO. *v.* KEWAL RAM. **9 I. C. 712 : 4 S. L. R. 196.**

———Sch. II, Para. 14 (b)—*Award—Validity of—Award against a firm.*

An award against a firm is not bad and is governed by the provisions relating to the execution of a decree against a firm. (*Rankin. J.*) LOUIS DREYFUS & CO. *v.* PURUSHOTAMDAS NARAIN DAS. **56 I. C. 325 : 47 Cal. 29.**

C. P. CODE (V OF 1908), Sch. II, Para. 14 (b).

——Sch. II, Para. 14 (b)—*Award against firm—Validity.*

The Code provides that suits can be instituted against a firm in the firm's name and decrees may be granted against a firm in the firm's name, and therefore an award made against the name of a firm without ascertaining who the parties liable were, is not bad. (*Chaudhuri, J.*) GHAZNAVI & Co. *v.* BUDGE-BUDGE JUTE MILLS.

25 I. C. 955.

——Sch. II, Para. 14 (b)—*Rules for calculation given—But no result—Effect of.*

Where the arbitrators give rules for calculation without giving the actual result, it can be considered as sufficiently certain because the actual result may be worked out. (*Mookerjee and Carnduff, JJ.*) MANINDRA NATH *v.* MOHANUNDA ROY.

13 I. C. 161 : 15 C. L. J. 360.

——Sch. II, Para. 14 (b)—*No decision on cardinal point.*

An award should be a final decision on all matters referred to the arbitrator. Where it leaves undecided one of the cardinal points in controversy the award is bad. (*Mookerjee and Teunon, JJ.*) GANESH NARAIN SINGH *v.* MALID KOER.

10 I. C. 450 : 13 C. L. J. 399.

——Sch II, Paras. 14 (b) and 15-A—*Conditions necessary for validity of.*

The award to be valid must dispose of all the matters referred to arbitration and it should be signed by all the arbitrators at the same time and place. (*Rattigan and Scott-Smith, JJ.*) BHAGWAN DAS *v.* SHIV DIAL. 92 P. R. 1913 : 22 I. C, 811 : 109 P. L. R. 1914.

——Sch. II, Paras. 14 (b) and 15—*Uncertain award—Setting aside of.*

Where an award made out of Court is uncertain and does not specify either the amount or the land awarded or does not give directions sufficient to enable the court to ascertain or identify it, such award is liable to be set aside on account of uncertainty. An award to be capable of execution by a Court, should be certain, so that no reasonable doubt can arise upon the face of it, as to the arbitrator's meaning or as to the rights and duties of the parties thereto. The Court has no power to remit an award made out of Court for the reconsideration of the arbitrator, though it is open to the parties to go back to him and ask him to make it a complete award, treating the arbitration as still pending. (*Stuart and Kanhaiya Lal, A.J.Cs.*) LAL JAGROOP SINGH *v.* BANKATESHWAR RAWAN.

34 I. C. 355 : 3 O. L. J. 137.

——Sch. II, Paras. 14 (b) and 21—*Private arbitration—Omission to determine some of the questions—Court not empowered to remit—Refusal.*

In cases of a reference to arbitration by the order of the Court, the Court can remit the award for determining the matter left undermentioned under Para. 14 but in the case of an arbitration without the intervention of the Court, the Court cannot exercise such power and if any of the matters referred to in Para. 14 is proved, the Court must refuse to file the award. (*Miller, C. J. and Mullick, J.*) BABU KUNJ LAL *v.* BABU BANWARI LAL. 48 I. C. 711 : 4 Pat. L. J. 394.

C. P. CODE (V OF 1908), Sch. II, Para. 14 (c).

——Sch. II, Paras. 14 (c) and 15—*Illegality—Compulsion of Court.*

A Court has no power to compel an arbitrator to give a decision against his will, if the arbitrator after deciding some of the issues refuses to arbitrate further. Where a Court passed an order threatening the arbitrator with contempt proceedings and thereby forced out an award from him, the award is invalid and will be set aside on revision. (*Sulaiman and Kanhaiya Lal, JJ.*) BASDEO MAL *v.* KANHAIYA LAL. 18 A. L. J. 952 : 59 I. C. 667 : 43 All 101.

——Sch. II, Paras. 14 (c), 15 and 20—*Illegality—Apparent on the face—Arithmetical error.*

On an application to file the award it was contended that the award was bad, as (1) the arbitrator had allocated funds or property to persons not parties to the reference, (2) the arbitrator had first allotted the residential houses to one party and payment of compensation to another and then changed his decision, (3) the award purported to divide the houses in equal shares though it was clear on the face of the award that he had not done so and had awarded compensation to one party in excess of his proper share. *Held*, the award was good and was not vitiated by any illegality apparent on the face of the award. The arbitrator had not travelled outside the reference and what looked like, an arithmetical error in the award did not render the award invalid. 10 Bom. H. C. R. 391 and 27 All. 526 Ref. (*Piggott and Walsh, JJ.*) SHYAM LAL *v.* PARSHOTTAM DASS.

42 All. 277 : 2 U. P. L. R. (A) 104 : 58 I. C. 585 : 18 A. L. J. 241.

——Sch. II, Paras. 14 (c) and 15—*Omission of one of the arbitrators to sign.*

Where an award of the arbitrators of both parties represents their decision, the failure of the arbitrator of one party to sign, does not render it invalid. (*Walsh, J.*) MANPHOOL *v.* SAHI RAM.

43 I. C. 154.

——Sch. II, Para. 14 (c)—*Award—Absence of party intentional.*

When a party's absence is intentional at the time of the delivery of the award, the award is vitiated by such absence. (*Tudball and Walsh, JJ.*) JOSHI DAMODARJI *v.* JOSHI RAM NATH.

33 I. C. 467.

——Sch. II, Para 14 (c)—*Award given after a long time—Revocation of submission—Effect of.*

Where an award was not given for a very long time and the plaintiff gave a notice of revocation but the arbitrators met, did their business in a most business like manner and gave an award, *held*, that the lapse of time did not invalidate their award. (*Richards, C. J. and Banerji, J.*) JANKI DAS *v.* TIKA RAM. 13 I. C. 48.

——Sch. II, Para. 14 (c)—*Parties—Legal representatives—Written reference.*

In a suit by plaintiff as mutwalli for certain pots and pans, the judge was requested by the community to arbitrate. An award was passed and a decree also. The appeal from it was treated as revision and the decree set aside as without jurisdiction because there was no written reference

C. P. CODE (V OF 1908), Sch. II, Para. 14 (c).

and it was made by persons not parties to the suit and it also included matter not in dispute between the parties. The award having been passed in June 14, 1904, and the application for the decree being made only in 1909, the application was barred. The award was also bad as the plaintiff having died, no legal representative was brought on the record and the suit had abated. (*Beaman and Hayward, JJ.*) MERALI VISRAM *v.* DEVJI.
36 Bom. 105: 12 I. C. 687 : 13 Bom. L. R. 1017.

——— Sch. II, Para. 14 (c) and O. 9, R. 9—*Award* ex parte—*Application to set aside—Revision.*

Where a reference to arbitration provided that if one of the parties failed to appear, the arbitrator should proceed to hear the reference *ex parte*, and one of the parties failed to appear, on the day fixed for hearing, the arbitrator could not make the award without taking any evidence but should have proceeded to hear the evidence of the other side. An award so made without taking any evidence could not be set aside by the Court on an application under O. 9, R. 9, but should be remitted under Para. 14 for reconsideration, and for that purpose, the High Court could interfere. (*Fletcher and Smither, JJ.*) GOPAL CHANDRA DAS *v.* KASHETA MOHUN.
46 I. C. 195 : 22 C. W. N. 933.

——— Sch. II, Para. (14) (c)—*Award—Notice to one of the parties—Absence of—Enforcement of—Costs of award.*

The absence of a written notice to one of the defts. as provided in the reference does not necessarily invalidate an arbitration proceeding when the parties had oral notice. Where an order for costs made in an award on a private reference could be expunged and the remaining award would thereby remain unaffected the award could be enforced to that extent. *Quaere*—Whether the principle that when a suit has been referred to arbitrators, they have authority to deal with the costs of the award can be extended to private reference. (*Mookerjee and Beachcroft, JJ.*) MOHENDRA NATH *v.* MOHILA.
43 I. C. 770 : 27 C. L. J. 104.

——— Sch. II, Paras. 14 (c) and 17—*Award by some of the arbitrators.*

Where two of the five arbitrators did not attend all the meetings and the award was signed by only three of them. *Held*, that although the agreement contained authority to make a majority award there was no valid award as there was no unanimous participation by the arbitrators in deliberating upon the award and the parties had not the benefit of the presence and the effect of the arguments, experience and judgment of each arbitrator which they had a right to expect. 7 A. 523 Fol. 6 W. R. 95 Dist. (*Mookerjee and Cuming, JJ.*) ABU HAMID *v.* GOLAM. 25 C L. J. 396 : 40 I. C. 422 : 22 C. W. N. 301.

——— Sch. II, Paras. 14 (c) and 15—*Waiver of—Objection.*

Mere submission to an arbitration is not a waiver of an extrinsic objection to an award on the ground that the award is illegal because based on an illegal act or subject-matter. (*Mookerji and Beachcroft, JJ.*) SOUDAMINI *v.* GOPAL CHANDRA. 19 C. W. N. 948: 28 I. C. 557: 21 C. L. J. 273.

——— Sch. II, Para. 14 (c)—*Award in excess of claim—Validity.*

An award in excess of the claim cannot be sustained, and must be remitted for reconsideration. (*Choudhuri, J.*) NABIN CHANDRA SAHA *v.* SINCLAIR MURRAY & CO. 25 I. C. 951.

——— Sch. II, Paras. 14 (c), 15 and 16—*Award—Decree—Validity of—Extension of time after filing of award—Error on the face of the record.*

An extension of time cannot be sanctioned after the arbitrators have made and filed their award. 13 A. 300 Foll. A dispute was referred to arbitration and the arbitrators were directed to submit their award on or before March 15, 1912. On that date the award was not filed, but an application was made for further time and the case was adjourned to April 3. On April 3, both parties were absent, their pleaders stated they had no instructions and no communication had been received from the arbitrators. The court adjourned the case till April 9 and ordered the arbitrators to return the papers with or without their award on or before that date. On April 9 it was given out that the arbitrators had submitted their award. The Court made a decree in accordance with it. *Held*, that the award was made without authority and could not be used as the basis for a valid decree. It was not an important circumstance that the objection was not taken before the Court below, as the objection was apparent on the face of the record and went to the root of the matter. It was the duty of the Court to satisfy itself that a legal award existed whereon a valid decree, could be founded. (*Mookerjee and Holmwood, JJ.*) DIGAMBARI BEWA *v.* JOY NARAIN DAS. 16 I. C. 223 : 16 C. L. J. 573.

——— Sch. II, Paras. 14 (c) and 15—*Refusal to take evidence—Signing at different times.*

A judicial act to be valid must be performed by all arbitrators and the reception of a written statement by one of the arbitrators is not a judicial act. In order to invalidate an award it must be shown that the question was specifically stated before the arbitrator and that he did not consider it. To impeach an award on the ground of improper refusal by the arbitrator to take the evidence, it must be shown that the witnesses were distinctly tendered before the arbitrators. An award not signed by all the arbitrators at the same time and place is not void. (*Mookerjee and Carnduff, JJ.*) MANINDRA NATH *v.* MOHANNUNDA. 13 I. C. 161 : 15 C. L. J. 360.

——— Sch. II. Paras 14 (c) and 15—*Award embodying agreement between parties.*

Though an award embodies an agreement arrived at between the parties, it is not less valid and binding. 22 A. 224 Foll. An award is binding on the parties after it is delivered. (*Shadi Lal and Broadway, JJ.*) DARBARI LAL *v.* WASU MALIK. 56 I. C. 115.

——— Sch. II, Para. 14 (c)—*Signing of award—Award not signed at same time on the same day by all the arbitrators.*

C. P. CODE (V OF 1908), Sch. II, Para. 14 (c).

An award is not invalid simply because it was not signed at the same time on the same day and at the same place by all the arbitrators. The Court is bound to pass a decree in accordance with the award. 12 M. 113 ; 7 A. 523 Dist. (*Scott-Smith and Abdul Raoof, JJ.*) ABDUL RAHMAN *v.* SHAHABUD-DIN. **55 I. C. 883: 1 Lah. 481.**

——Sch. II, Paras. 14(c) and 15—*Compromise between parties—Acceptance of.*

The report of the arbitrators embodying a compromise arrived at between the parties subsequent to the reference is not an award. (*Abdul Raoof, J.*) GHULAM RASUL *v.* BEGUM. **55 I.C. 218.**

——Sch. II, Paras. 14 (c) and 15—*Restriction on alienation—Effect of.*

A term in an award which restricts the alienability of property for an indefinite period is not binding upon a person or a class of persons not expressly mentioned as being bound by it. (*Rattigan, C. J. and Shah Din, J.*) DIWAN CHAND *v.* HAKIM RAI. **39 P. R. 1918 : 37 P. L. R. 1918 : 43 I. C. 674 : 28 P. W. R. 1918.**

——Sch.II, Paras. 14 (c), 15 and 16—*Evidence—Closing of case—Estoppel—Decision of issues.*

On a reference to arbitration of a whole case, the arbitrator need not give a finding on each issue though he is bound to decide the whole case substantially and when the parties close their case they cannot contend afterwards that there was insufficient inquiry. (*Johnstone, J.*) NARPAT RAI *v.* DEVI DAS. **14 I. C. 371 : 13 P. W. R. 1911.**

——Sch. II, Paras. 14 (c) and 15—*Compromise—Award on—Validity—Consent of parties—Decision.*

An award is not open to objection on the sole ground that it merely reproduces an agreement come to between the parties only, when the consent of the parties is regarded by the arbitrators as evidence that the settlement proposed is fair to all. (*Oldfield and Bakewell, JJ.*) VENKATA KRISHNAMACHARULU *v.* PERUNDEVANAMMA. **56 I C. 593.**

——Sch. II, Paras. 14 (c), and 15—*Majority award—Concurrence of arbitrators.*

An award to be valid must be the award of all the arbitrators without difference. Where there is an uneven number of arbitrators, there is no presumption that a majority award shall be binding. 42 B 668 dist. (*Bakewell and Odgers, JJ.*) AIYASWAMI *v.* APPANDE NYNAN.
54 I. C. 912 : 38 M. L. J. 145.

——Sch. II, Paras. 14 (c) and 15—*Reference to three persons—Award signed by two—Application to set aside award—Lim. Act, Art.* 158.

An award is invalid unless the arbitrators had been present at all the meetings including the last and heard the evidence and consulted each other as to the result. The period of limitation under Art. 158, Lim. Act. does not apply to proceedings under Para. 12 o Para. 14 and there is no limitation for making applications to remit award for reconsideration of the arbitrators owing to some objections to the legality of the award being apparent on the face of it. (1913) M. W. N. 338 foll. The fact that an award bore only the signature of two out of three arbitrators is an illegality apparent on its face. 33 Cal. 498 foll. (*Spencer, J.*) MAMIDI APPAYYA *v.* YEDAM VENKATASWAMY.
24 M. L. T. 102 : 8 L. W. 171 : 47 I. C. 597 : (1918) M. W. N. 477.

——Sch. II, Para. 14 (c)—*Error of law—Giving life—Interest to excluded heir.*

An award cannot be set aside on the ground that the arbitrator has given an erroneous decision on a question of law. Para. 14 (c) can be applied in setting aside an award where the arbitrator manifestly misapplies a rule of succession or applies to the parties a rule by which they are not bound. Where an arbitrator gives a life-interest in a share of property to a blind heir who is excluded from inheritance theaward is not bad. (*Seshagiri Aiyar and Napier, JJ.*) MADAPALLI VENKATASWAMI *v.* MADAPALLI SURAMMA.
41 Mad. 1022 : 34 M. L. J. 323 : 24 M. L. T. 60 : 8 L. W. 202 : 45 I. C. 644 : (1918) M. W. N. 482.

——Sch. II, Para. 14 (c)—*Performance of.*

The fact that the obligations imposed under the award have been performed between the date of the award and the date of application to file it, is no ground for attaching the award though it may be a valid defence against an execution application. (*Sadasiva Aiyar and Moore, JJ.*) ANNAMALAI *v.* RAMASWAMI. **(1916) 1 M. W. N. 203 : 33 I. C. 67 : 19 M. L. T. 228.**

——Sch II, Para. 14 (c)—*Error of law—Evidence.*

A decision of an arbitrator should not be set aside under S. 115, C. P. C., on the ground of errors in the admission of evidence where such admission does not materially affect his decision. 9 M. L. T. 273 ; 11 C. 6, P. C.: 30 C. 397 ; 17 M. 410 (F. B.) Foll. (*Oldfield, J.*) VENKATACHALAM PATTAR *v.* PARASU. **16 M. L. T. 156 : 26 I. C. 106 : (1914) M. W. N. 614.**

——Sch. II, Paras. 14 (c) and 15—*Contents of award—Consultation*

An award need not be a reasoned judicial decision and the arbitrators need not even give their reasons for their conclusions. 29 C. 854 Rel. Arbitrators can get the help of others' opinions in arriving at their own opinions provided they do not thereby delegate or surrender their own judgments. (*Miller and Sadasiva Iyer, JJ.*) NANJAPPA *v.* NANJA RAO. **23 M. L. J. 290 : 12 M. L. T. 133 : 16 I. C. 478 : (1912) M. W. N. 1091.**

——Sch. II, Para. 14 (c)—*Refusal to act by some arbitrator.*

A refusal by some arbitrators to act makes the award of the rest illegal. 12 M. 113 and 7 A. 523 foll. (*White, C.J., Krishnaswami Iyer and Ayling, JJ.*) TALLAPRAGADA SURYANARAYANA *v.* TALLAPRAGADA SARBAYA. **9 M. L. T. 251 : 21 M. L. J. 263 : 9 I. C. 173 : (1911) 1 M. W. N. 151 (F. B.).**

——Sch. II, Paras. 14 (c) and 15—*Adoption of compromise.*

The mere approval of a compromise arrived at between the parties before an arbitrator is not

an award. (*Mitra, A. J. C.*) SHANKER *v.* GOVINDA. 54 I. C. 311.

——Sch. II, Para. 14 (c)—*Questions of law referred—Finality.*

When points of law are referred to, arbitrator's award thereon cannot be impeached as being not in accordance with the received interpretation of law. (*Stuart, A. J. C.*) CHHAB LAL *v.* PARBATI. 33 I. C. 737 : 19 O. C. 48.

——Sch. II, Para. 14 (c)—*Material irregularity.*

An order setting aside an award on the ground that the Court did not fix the date for award in the order of reference and that there was failure of notice to plff. of the date of the award is unsustainable. Mere opinion on a point unsupported by reasons is not a decision of that point. (*Kanhaiya Lal, A.J.C.*) ABDUL KARIM *v.* MUHAMMAD HUSSAIN. 32 I. C. 345 : 2 O. L. J, 495.

——Sch. II, Paras 14 (c) and 12—*Defect in reference—Effect.*

A defect in the order of reference not affected by the arbitrator's jurisdiction or authority to make the award is not fatal to its validity. 9 I. C. 241 Dist. (*Lindsay and Kanhaiya Lal, A. J. Cs.*) BHAGWAN DIN SINGH *v.* FAKIR SINGH. 20 I. C. 773 : 16 O. C. 233.

——Sch. II, Para. 14 (c)—*Illegality apparent on face of award—Duty of Court.*

Where the illegality is apparent on the face of the award, the court should take judicial notice even though no objections had been filed within the period prescribed by Art. 158, Lim. Act. (*Kanhaiya Lal, A. J. C.*) LALA *v.* ABDUS SAMED. 17 I. C. 320 : 16 O. C. 94.

——Sch. II, Paras. 14 (c) and 15—*Award—Setting aside of.*

When an award is good on the face of it the parties cannot object to and the Court will not interfere on the ground of a mere mistake. (*Lindsay and Rafique, A. J. Cs.*) BADRUDDIN HASAN *v.* AMIR BEGAM. 13 I. C. 520 : 14 O. C. 308.

——Sch. II, Para. 14 (c)—*Award not properly made.*

An award not properly made and filed according to the judgment is a nullity and a decree passed on the basis thereof should be set aside. (*Lindsay, O, A. J. C.*) GUR DAS *v.* GARUL DHUJ. 9 I. C. 241.

——Sch. II, Para, 14 (c)—*Award made out of time.*

An award made after the allotted time, is binding if not impeached within 10 days or if the parties attend and acquiesce in the arbitration after the prescribed time. (*Atkinson and Das, JJ.*) PALTO KUMARI *v.* UPENDRA NATH. 50 I. C. 52 : 4 Pat. L, J. 265.

——Sch. II, Para. 14 (c)—*Award—Signing of—Minute of dissent by one of the arbitrators, after signing award.*

Until an award is communicated there is nothing to prevent an arbitrator changing his mind.

He cannot be said to be *functus officio* until the pronouncement is actually made though he may sign the award. This does not preclude him from further considering the matter, and if he thinks fit, recording a note of dissent. (*Roe and Coutts, JJ.*) BARUA LAL *v.* BADRI LAL. 49 I. C. 522.

——Sch. II, Paras. 14 (c) and 15 — *Award — Validity—Execution outside British India.*

The validity of an award does not ordinarily depend upon the place in which it is executed. (*Chamier, C. J. and Sharfuddin, J.*) BHAJ KISHORE NATH *v.* MUSST. PARASAN KOER. 2 Pat. L. W. 156 : 42 I. C. 617 : 1917 Pat. 241.

——Sch. II, Para. 14 (c)—*Decision of arbitrators—Not to be questioned by Court.*

A fair decision of arbirators, who are final Judges of all matters of fact, acting within their authority, cannot be questioned by a Court on the ground of insufficiency of evidence to justify their conclusions ; nor can a Judge refuse to enforce their award merely because in his opinion sufficient attention was not paid to S. 110, Evidence Act. The impeachment of an award for not examining witnesses is possible only on evidence of distinct tender of witnesses to the arbitrators. (*Rigg, J. C.*) MA SEIN MYA *v.* SWAMI. 37 I. C. 807.

——Sch. II, Para. 14 (c)—*Award after suit—Fair copy.*

An award duly made and signed by the arbitrators but intended to be fair-copied on a stamped paper is valid and the defect as to stamp can be cured. 1 M. H. C. R. 178 foll. If a reference to named arbitrators has been made, it is no valid objection to the award that a suit was filed before that award was made. 7 S.L.R. 1 foll. (*Fawcett, A.J.C.*) RAMCHAND *v.* GABINDRAM. 53 I. C. 337 : 13 S. L. R. 75.

——Sch. II, Para. 14 (c)—*Single award—Contracts involving common question.*

Where disputes under several contracts involving questions common to all are referred by one submission, a single award is not invalid by reason of covering the subjects of many agreements especially, where the defendants have not been prejudiced. (*Cohen, A. J. C.*) GRAHAM & Co. *v.* KEWAL RAM. 9 I. C. 712 : 4 S. L. R. 196.

——Sch. II, Paras. 15 and 16—*Decree on award—Appeal—Suit for partition—One of the defendants not a party to arbitration—Objections to award by plaintiff.*

In a suit for partition all the parties excepting one of the plaintiffs and one of the defendants agreed to refer the litigation to arbitration. An award was given and the plaintiff who was a party to the arbitration preferred objections to the award. The Court, however, passed a decree in terms of the award. *Held*, that there was no appeal from the decree on the award. 39 A. 69 followed. (*Rafique and Lindsay, JJ.*) HARI SHANKER *v.* RAM PYARI, 45 A. 441 : 21 A. L. J. 326 : L. R. 4 A. 543 : 74 I. C. 834 : 1923 A. 502.

——Sch. II, Para. 15 — *Setting aside of award—Minor—Duty of Court.*

C. P. CODE (V OF 1908), Sch. II, Para. 15.

A suit by some minors was referred to arbitration which ended in an award in their favour. Before the objections of the defendant were taken up for consideration, on an oral request of the parties, the court set aside the award and referred the matter to the counsel of the parties for fresh arbitration. *Held*, the award was valid and binding, unless set aside for one of the reasons mentioned in the C. P. Code. The Court ought to have addressed itself to the question whether the next friend of the minors could so compromise the disputes as to give the court no option but to accept the compromise and therefore to preclude the court from considering if it was to the benefit of the minors. Jurisdiction of equity courts over the interests of minors adverted to. (*Piggott and Walsh, JJ.*) JHINKU SINGH *v.* SITAL SINGH.

45 A. 263 : 21 A. L. J. 81: L. R. 4 A. 329 : 74 I. C. 133 : 1923 A. 267 (2).

——Sch. II, Para. 15 — *Misconduct—Private enquiries by arbitrator—Effect of.*

Where the parties had given the arbitrator the widest possible powers and had expressly bound themselves to abide by his decision in whatsoever manner he might see fit to arrive at, the arbitrator cannot be said to be guilty of misconduct if he bases his award on private inquiries and the court acts without jurisdiction if it refuses to pass a decree in terms of the award on that ground. (*Piggott and Walsh, JJ.*) HAJI HUSAIN BAKSH *v.* FIRM OF LACHHMAN DAS MATHURA DAS.

20 A. L. J. 125 : 64 I. C. 934 : L. R. 3 A. 106: 1922 A. 69.

——-Sch. II, Para. 15—*Misconduct—Private enquiry by arbitrator.*

Where the terms of a reference to arbitration do not authorise the making of private enquiries by the arbitrator behind the back of the parties, the arbitrator making such inquiries is guilty of misconduct. If a court in such a case supersedes the arbitration, it cannot be said to act illegally or with material irregularity. (*Piggott and Walsh, JJ.*) GANGASAHAI *v.* BALDEO SINGH.

20 A. L. J. 117 : L. R. 3 A. 104 : 65 I. C. 779 : 1922 A. 64.

——Sch. II, Para. 15—*Misconduct — Private communication with parties.*

An award can be justifiably set aside if in the course of the arbitration proceedings the arbitrator makes a private communication with one of the parties unknown to the other. The arbitrator renders himself guilty of legal misconduct except when such communication has been authorised by the reference itself. 4 A. L. J. 159 foll. (*Piggott and Walsh, JJ.*) SIA RAM *v.* CHET RAM.

L. R. 3 A. 84.

——Sch. II, Para. 15—*Objection to proceedings before reference cannot be made.*

After an order of reference to arbitration is made, neither party can object to the form of proceedings anterior to the reference or to the form of issues. (*Piggott and Walsh, JJ.*) KANHAIYA LAL *v.* JAGANNATH PRASAD HANUMAN PRASAD.

43 All. 305 : 60 I. C. 857 : 19 A. L. J. 33.

——Sch. II, Paras. 15 and 16—*Award—Acquiescence—Objection to jurisdiction.*

C. P. CODE (V OF 1908), Sch. II, Para. 15.

Where parties submitted themselves to the decision of arbitrators and a decree was passed in terms of the award, it was not open to them to seek to reverse the award on the ground of want of jurisdiction. (*Piggott and Kanhaiya Lal, JJ.*) SUKHNATH RAI *v.* NEHALCHAND.

42 All. 661 : 18 A. L. J. 644 : 59 I. C. 801 : 2 U. P. L. R. (All.) 240.

——Sch. II, Para. 15—*Misconduct—Not hearing parties.*

The ordinary rule is that the enquiry before the arbitrator is assimilated nearly to the proceedings on a trial in the courts. If irregularities in procedure can be proved which would amount to no proper hearing of the matters in dispute there would be misconduct sufficient to vitiate the award without any imputation on the honesty or impartiality of the arbitrator. Therefore if the parties are not informed of any meeting, in the ordinary case that would clearly amount to misconduct on the part of the arbitrators. (*Fawcett, J.*) TYEBBHAI ESSUBHAI *v.* ABDUL HUSEIN.

25 Bom. L. R. 392 : 1924 Bom. 149.

——Sch, II, Para. 15—*Award—Application to set aside—Form of.*

No form is prescribed for an application to set aside an award. It is sufficient if some notice of the objections to an award is given to the proper office or Court. (*Macleod, C. J. and Shah, J.*) GOPALJI *v.* CHHAGAN LAL. **45 Bom. 1071 : 63 I. C. 929 : 23 Bom. L. R. 614 :**

——Sch. II, Para. 15—*Arbitrators—Joint deliberation essential—Absence of one or some of the arbitrators—Effect on award—Waiver.*

No doubt all the arbitrators must be present during the whole of the deliberations but it is open to the parties to waive the absence of one of them both at the time when the evidence is taken and the time when their conclusion is reached. (*Greaves and Ghose, JJ.*) RAMA NATH MISRA *v.* RAMRANIAN MISRA. **67 I. C. 866 : 1922 Cal. 181.**

——Sch. II, Para. 15—*Misconduct— Private enquiries—Making of—When objectionable.*

Where the parties produced no evidence and the arbitrators made enquiries from the neighbours of the parties and there was nothing to show that the inquiries were not made in the presence of the parties, the award, though no doubt based on hearsay and conjecture must be upheld. (*Le Rossignol, J.*) BUDH RAM *v* CHANDU.

67 I.C. 866 : 1922 L. 480.

——Sch. II, Para. 15— *Misconduct—Private enquiries—Legality of.*

It is in no case open to an arbitrator to make private enquiries. It may be that in some cases the parties contemplate that the arbitrator should do so. Even if the parties did not contemplate it where the Court below has found as a fact that the decision of the arbitrator was based exclusively on the evidence which he recorded in the presence of both parties there is no ground for interference. (*Daniels, A. J. C.*) SHEO PALTAN *v.* SUKHDEO SINGH. **26 O. C. 107 : 74 I. C. 401: 1923 Oudh 235.**

C. P. CODE (V OF 1908), Sch. II, Para. 15.

——Sch. II, Para. 15—*Misconduct-Arbitration—Reference—Dispute as regards management—Scheme—Arbitrators appointing themselves as managers—Propriety of—Delegation of functions.*

Where the parties referred a dispute as regards the management of a trust to arbitration the arbitrators instead of deciding the dispute in favour of one or other of the parties appointed themselves into a committee of management *Held*, that the arbitrators were not themselves the best judges of whether they were fit persons to be members of a committee of management and it was impossible for them to avoid personal considerations when they came to consider the suitability of themselves as members. The award was therefore bad. An arbitrator may delegate to a third person the performance of acts of a ministerial character but this doctrine cannot be invoked to cover a case where evidence was taken in the absence of one or more of the arbitrators. (*Ashworth and Simpson, A. J. Cs.*) PANDIT SANKATA PRASAD *v.* JAGANNATH. **9 O. L. J. 410 : 26 O. C. 1 : (1922) Oudh 276.**

——Sch. II, Paras. 15 and 8—*Award made out of time—Validity—Court competent to set aside.*

An award made out of time is not necessarily void; it is only voidable and becomes binding if not sought to be set aside within ten days after it is filed. It is the Court which can extend time under Para. 8 and though its power under it is discretionary, extension of time by agreement of parties, is not negatived thereby. Parties, who acquiese in the making of the award by arbitrators having power to make one even out of time, cannot impeach it on the ground that it was made out of time. The determination by Court as to the validity of an award made out of time, though erroneous, will not be interfered with by Civil Court under S. 115. (*Atkinson and Das, JJ.*) BIBI PATTA KUMARI *v.* UPENDRA NATH GHOSH. **50 I. C. 52 : 4 Pat. L. J. 265.**

——Sch. II, Para. 15—*Arbitration—Irregularity—Waiver.*

Where a party to an arbitration proceeding has condoned an irregularity on the part of the arbitrators by taking part in the subsequent proceedings before them, he must be deemed to have waived all objections on that account and he cannot object to the award on the ground of such irregularity. (*Heald and May Oung, JJ.*) U. GUNUWA *v.* PYINNYADIPA. **1 R. 15 : 2 Bur. L. J. 30 : 74 I. C. 6 . 1923 Rang. 187.**

——Sch. II, Paras. 15 (1) and 16—*Objection to award—Which Court to decide.*

Objection to an award as to its validity is to be decided by the court making the reference and if no objection is made there, it cannot be made before the Appellate Court. Though leave of Court was not obtained for a reference to arbitration on behalf of a minor, he cannot appeal on that ground if that objection was not taken in the trial court. (*Richards, C. J., Banerjee and Ryves, JJ.*) LATAWAN *v.* LACHIYA. **36 All. 69: 21 I. C. 989 : 12 A.L.J. 57. (F. B.)**

——Sch. II, Para. 15 (1)—Ex parte *hearing—Arbitrators when justified in hearing case* ex parte.

C. P. CODE (V OF 1908), Sch. II, Para. 15 (1) (a).

The arbitrators must see before they proceed *ex parte* that the parties had sufficient notice to enable them to appear and put their case before the arbitrator. But when a person is guilty of a final, irrevocable or conclusive refusal to have anything to do with an arbitration, the arbitrators, need not give notice but may proceed *ex parte*. (*Rankin, J.*) LOUIS DREYFUS & CO. *v.* PURSHOTTUM DAS NARAIN DAS. **56 I. C. 325: 47 Cal. 29.**

——Sch. II, Para. 15 (1)—*Objection—"Waiver".*

Where a party to arbitration raised objection to the appointment of an umpire but did not press the objection forcibly and submitted to the proceedings without protest. *Held*, that the party cannot object to the appointment of the umpire or the regularity of the proceedings. (*Kensington and Beadon, JJ.*) JAGAN NATH *v.* NANAK CHAND. **9 P. R. 1913 : 16 I. C, 996 : 248 P. L. R. 1913.**

——Sch. II, Paras. 15 (1), 12 and 14—*Correction of award.*

An application to set aside an award falls within Para. 15 and does not include proceedings under Paras. 12 and 14. (*Bakewell, J.*) HYDER SAHIB *v.* GIRIA CHETTIAR. **(1913) M. W. N. 338 : 13 M. L. T. 349: 19 I. C. 496 : 24 M. L. J. 483.**

——Sch. II, Para. 15 (1)—*Objection to award.*

A clause in a compromise petition providing that any of the parties thereto may object to the award on any account is contrary to the procedure in Sch. II, especially Para. 15 thereof in respect of arbitration proceedings, in a pending suit. (*Atkinson and Jwala Prasad, JJ.*) KHUDIARAM MAHTO *v.* CHANDI CHARAN. **1 Pat. L. J. 306: 35 I. C. 358 : 2 Pat. L. W. 377.**

——Sch. II, Paras. 15 (1) (a), 16 and 20—*Misconduct—Irregularity—Corruption—Proof—Portion of an award bad—Remainder, if good can be maintained.*

If irregularities in the procedure of an arbitrator can be proved which would amount to no proper hearing of the matters in dispute, it is sufficient misconduct to vitiate the award, without any imputation of dishonesty or partiality to the arbitrator. It is desirable that an arbitrator should make and retain for subsequent use, notes of proceedings before him ; but even in their absence an award should not be set aside at the instance of one of the parties who must be held to have known the general course of procedure and who did not make any protest until after the making of the award with the terms of which he was not satisfied. An arbitrator selected by the parties comes within the general obligation of being bound to give evidence, and where a charge of dishonesty or partiality is made, any relevant evidence which he can give is properly admissible. But such evidence cannot be used to scrutinise his decision on matters within his power and on which his decision is final, *e.g.*, to criticise methods adopted by him in determining valuations for purposes of partition. Apart from examining its bearing on the charge of corruption, the Court cannot scrutinise the estimate of value appearing

on the face of the award. (*Lord Parmoor*). AMIR BEGAM *v.* BADR-UD-DIN HUSAIN ALI.
36 All. 336 : 17 O. C. 120 : 18 C. W. N. 755 : 1 O. L. J. 249 : 12 A. L. J. 537 : 16 Bom. L. R. 413: (1914) M. W. N. 472 : 16 M. L. T. 35 : 23 I. C. 625 : 27 M. L. J. 181 : 19 C. L. J. 494 (P. C.).
[On appeal from 13 I. C. 520 : 14 O. C. 308].

———Sch. II, Para. 15 (1) (a)—*Duty of arbitrator—Breach of contract.*

Where the agent of one of the parties is made an arbitrator under a contract between the parties, he must act justly and scrupulously. An award given without applying the mind to the question really involved in the case is not binding. (*Lord Atkinson*). BOMBAY BURMA TRADING CORPORATION CO., LTD. *v.* AGA MAHOMED.
34 Mad. 453 : 38 I. A. 169 : 15 C. W N. 981 : (1911) 2 M. W. N. 111: 10 M. L. T. 150 : 13 Bom. L. R. 813 : 14 C. L. J. 326: 8 A. L. J. 1208 : 12 I. C. 44 : 21 M. L. J. 1110 (P.C.).

———Sch. II, Para. 15 (1) (a)—*Misconduct of the arbitrator.*

Where after a reference to arbitration and before the making of award, the parties make an agreement about the matter in controversy and the arbitrator omits to decide that matter or record the agreement as part of the award, such omission does not amount to a misconduct on the part of the arbitrator nor does the award become invalid. (*Mears, C. J. and Ryves, J.*) HARAK RAM JANI *v.* LAKMI RAM JANI.
43 All. 108 : 2 U. P. L. R. (All.) 310 : 60 I. C. 626 : 18 A. L. J. 960.

———Sch. II, Para. 15 (1) (a)—*Decision without taking evidence.*

In the absence of any agreement that an arbitrator should decide a dispute upon his own knowledge of the facts and without taking any evidence an arbitrator's so deciding a dispute is fatal to award. (*Lindsay, J.*) LACHMI NARAIN *v.* SHEO NATH PANDEY. 42 All. 185: 18 A. L. J. 78 : 54 I. C. 443 : 1 U. P. L. R. (H.C.) 177.

———Sch. II, Para 15 (1) (a)—Ex parte *procedure—Misconduct.*

Where an arbitrator takes evidence or hears arguments in the absence of one of the parties without giving due notice of the time and place for the meeting, he is guilty of misconduct. Absence of a party due to want of notice at a preliminary meeting in which no evidence is taken and no arguments are heard, does not vitiate the award. An arbitrator need not give any further notice when the deft. knew that the arbitrator was proceeding in spite of repeated notices of withdrawal. (*Tudball and Walsh, JJ.*) JOSHI DAMODARJI *v.* JOSHI RAM NATH. 33 I. C. 467.

———Sch. II. Para. 15 (1) (*a*)—*Misconduct—Personal knowledge—Arbitrators deciding on personal knowledge of trade usages.*

Arbitrators with expert knowledge of the particular trade in relation to which a question is pending before them can use their personal knowledge of the usages of that trade, and, when

their reference allows, impose by their award on the purchaser the obligation of accepting for reduced price goods not according with the sample. (*Scott, C. J. and Heaton, J.*) RUTTONSEY ROWJI *v.* BOMBAY UNITED SPINNING MANUFACTURING COMPANY, LTD.
41 Bom. 518 : 37 I. C. 271: 18 Bom. L. R. 532.

———Sch. II, Para. 15 (1) (a)—*Admission of evidence—Mistake.*

The honest though mistaken admission or evidence in violation of a rule of evidence would not be a ground for setting aside an award. (*Scott, C. J. and Chandavarkar, J.*) AISHABAI *v.* ESSAJI TAJ BHAI.
38 Bom. 60 : 19 I. C. 934 : 15 Bom. L. R. 392.

———Sch. II, Para 15 (1) (a)—*Misconduct—Admission of evidence.*

The Court cannot interfere with an arbitrator's decision on the ground that it is incorrect or partial. An award will be set aside at once on the slightest irregularity inconsistent with general principles of equity and good conscience but not for a mere technical irregularity. On a reference through the Court, there was express direction by Court not to consider a certain adjustment between parties. The arbitrator admitted it at the request of one party and under protest by the other. *Held*, the error prejudiced the case and amounted to misconduct. (*Davar, J.*) HAJI AHMAD *v.* ESSAJI TAJBHOY.
17 I. C. 696 : 14 Bom. L. R. 1007.

———Sch. II. Para. 15 (1) (a)—*Refusal to summon witnesses—Arbitratoin and award.*

The refusal of an arbitrator to summon witnesses cited by a party does not vitiate the award where there is nothing to show that the arbitrator was not acting within his powers and where in the exercise of a wise and prudent discretion, he declined to summon the witnesses. When a sum is awarded by the arbitrator, the court to which application is made to file the award and pass a decree on it, cannot disallow the sum. If it comes to the conclusion that the party is not legally entitled to the same, it ought to remit the case to the arbitrator. A pleader is not incompetent to be an arbitrator simply because on some occasions he was engaged by one of the parties as his pleader. There is no reason to think that merely on that ground the gentleman appointed as arbitrator will not honestly and fairly determine the suit. (*Fletcher and Newbould, JJ.*) RAJENDRA NATH DAS *v.* ABDUL HAKING KHAN.
39 I. C. 767.

———Sch. II, Para. 15 (1) (a)—*Personal interest—Arbitrator.*

An arbitrator having a personal interest, unknown to one of the parties, cannot act as such unless his interest is very small and apparently unknown even to himself. (*Chitty, J.*) CO-OPERATIVE HINDUSTAN BANK, LTD. *v.* BHOLA NATH.
31 I. C. 597 : 19 C. W. N. 165.

———Sch. II, Para. 15 (1) (a)—*Delegation of functions—Misconduct.*

An arbitrator is guilty of misconduct if he delegates his functions which are not ministerial and his award is invalid. An arbitrator should

be helped by experts in technical matters in ariving at an independent judgment. (*Mookerjee and Roe, JJ.*) JUGGOBUND *v.* CHAND MOHAN.
31 I. C. 33 : 22 C. L. J. 237.

——Sch. II, Para. 15 (1) (a)—*Omission to disclose evidence.*

An arbitrator acts illegally in not disclosing to the parties the documents on which he acts. (*Chandhuri, J.*) JAGAT HARI BEPIN BEHARY PODDAR *v.* MORAN AND CO. 26 I. C. 73.

—— Sch. II, Para. 15 (1) (a)—Ex parte *proceedings—Right to be heard when lost.*

By a contract between parties, a dispute was referred to arbitrators by one party and the other was repeatedly written to, but refused to do anything. The arbitrators were not bound to further give him an opportunity to be heard. (*Chaudhuri, J.*) NABIN CHANDRA *v* SINCLAIR MURRAY AND CO. 25 I. C. 951.

——Sch 1I, Para. 15 (1) (a)--*Delivery of award —Power to correct.*

After the delivery or publication of the award the arbitrators have no power to correct or alter the same. An irregularity in the course of the reference on the part of the arbitrator will not vitiate the award where the parties knowing of such irregularities, have chosen to waive their objections on that score. An award must be a final decision of all matters requiring determination ; otherwise the award may be completely vitiated except where the arbitrator is empowered to make several awards. In the case of an award pertaining to taking of, and, examining accounts, the accounts should be taken as a whole and not piecemeal, and the rights of the parties determined with reference to the whole. (*Mookerjee and Caspersz, JJ.*) RAMJI RAM *v.* SALIG RAM.
11 I. C. 481 : 14 C. L. J. 188.

——Sch. II, Para 15 (1) (a)—*Misconduct*—Ex parte *proceedings.*

Taking evidence in the absence of a party and using private information amount to misconduct. (*Banerji, J.*) BECHAI SINGH *v.* SHAMI NATH,
10 I. C. 450 : 13 C. L. J. 399.

——Sch. II, Para 15 (1) (a)—*Misconduct— Arbitrator taking interest in plff's. case—Fact not disclosed to defendant.*

There must be the greatest good faith on the part of the parties in relation to the selection of an arbitrator and every disclosure which might affect the minds of those who are proposing to submit their dispute to the arbitrament of any individual, as regards his selection ought to be made. Where the arbitrator had acted as an adviser of the plaintiff, before the deft. to whom this matter was not disclosed, agreed to refer the dispute to his arbitration, *held*, that it amounted to misconduct within Para. 15 (1) (*a*) of. Sch. II, C.P.C. (*Shadi Lal, C. J.*) MADHOMAL KISHORE CHAND *v.* GURDIAL RADHA KISHEN.
63 I. C 1007.

——Sch. II, Para 15 (1) (a)--*Private enquiries without evidence in presence of parties.*

An arbitrator must come to his decision on evidence taken in the presence of both the parties

or after giving both parties an opportunity of being present at the enquiry. The making of private enquiries by the arbitrator amounts to legal misconduct and is sufficient to vitiate the award. (*Chevis and Broadway, JJ.*) KANHAIYA LAH *v.* KHAIRATI LAL. 49 I. C. 303 : 9 P. W. R. 1919.

——Sch. II, Para 15 (1) (a) and (b)—*Waiver of objections—Agreement not to object to—Effect of.*

Agreement not to object to an award does not preclude parties from objecting on the ground of fraud or bad faith of arbitrators. Where the agreement of arbitration authorised the arbitrators to partition the property in dispute in unequal shares the giving, of a mere life-interest in a small piece of land to one entitled to a "share" is a violation of the agreement and the award is liable to be set aside. If the arbitrators imported their personal knowledge without giving an opportunity of testing such knowledge, it is misconduct on their part. (*Johnstone, C. J. and Shadi Lal, J.*) (RAM JAWAYA *v.* DEVI DITA. 107 P. W. R. 1916 : 117 P. R. 1916 : 34 I. C. 192 : 70 P. L. R. 1917.

——Sch. II, Para 15 (1) (a)—*Irregularities in procedure—Waiver.*

Irregularities in the procedure of an arbitrator may be waived by the parties provided they knew of them. (*Kumaraswami Sastri, J.*) RATHAMALI SERVAI *v.* RAMASWAMI SERVAI.
51 I. C. 53 : 10 L. W. 57.

——Sch. II, Para. 15 (1) (a)—*Personal knowledge—Award of an arbitrator.*

If the decision of the matter depends on expert knowledge only, the award by an expert arbitrator made on his own expert knowledge is valid. But the arbitrator is not justified in making an award on his own personal knowledge especially when the parties intend to tender evidence. Such an award may be rightly refused to be filed. (*Drake-Brockman, J. C.*) BARI BAHU *v.* PRATAP SINGH.
57 I. C. 604.

——Sch. II, Para 15 (1) (a)—*Absence of one arbitrator--Parties not given notice to be present.*

Where arbitrators took evidence in the absence of parties, communicated the substance to the head arbitrator who was absent at one sitting and obtained his opinion without allowing the parties to present their respective cases before all arbitrators. the award could not be sustained. (*Stuart and Kanhaiya Lal, A. J. Cs.*) LEKHA SINGH *v.* BODIL SINGH. 30 I. C. 384 : 2 O. L. J. 365.

——Sch. II, Para. 15 (1) (a)—*Misconduct— Award vitiated.*

Where one of the arbitrators is guilty of misconduct and corruption the award is unsustainable. (*Stuart and Kanhaiya Lal, A. J. Cs.*) RAHMATULLAH KHAN *v.* IBADULLAH KHAN.
18 I. C. 92.

——Sch. II, Para. 15 (1) (a)—*Procedure—Inquiry.*

An arbitrator can conduct business in any way he thinks best and is not fettered by any rules of practice or procedure obtaining in Courts. (*Lindsay and Rafique, A. J. Cs.*) BADRUDDIN HASAN *v.* AMIR BEGUM. 13 I. C. 520 : 14 O. C. 308.

C. P. CODE (V OF 1908) Sch. II, Para. 15 (1) (a).

——Sch. II, Para. 15 (1) (a)—*Absence of the arbitrators from a meeting—Effect of.*

The presence of all the arbitrators, where there are more than one, at all meetings and above all at the last meeting when the final act of the arbitration is done is essential to the validity of the award. (*Roe and Coutts, JJ.*) BABUA LAL *v.* BADRI LAL. **49 I. C. 522.**

——Sch. II, Para. 15 (1) (a)—Ex parte *proceeding—Effect on award.*

Omission by the arbitrators to give notice of their own meeting to a party who has, prior to such meeting, notified to the arbitrator his withdrawal from the submission, does not invalidate the award. Neither party to a submission can revoke it unless for good cause shown and a mere arbitrary revocation is not permitted. The arbitrators are not bound to discuss in the presence of the parties what award they are going to make. (*Shaw, J. C.*) NGA HLA GYAW *v.* MA YA PO. **7 Bur. L. T. 279 : 27 I. C. 31 : (1914) II U. B. R. 26.**

——Sch. II, Para. 15 (1) (a)—*Misconduct—Perversity.*

Perversity is misconduct within Para. 15. When a reference provides that the matter should be decided according to Muhammadan Law, but the arbitrators did not profess to decide by that law and their decision was contrary to the rules of that law, *Held*, that their decision was perverse. (*Mc Coll, J.C.*) NGA TOK *v.* NGA KASIM.
14 I.C. 978 : 5 Bur. L.T. 55.

——Sch. II, Para 15 (1) (a)—Ex parte *procedure.*

Though the Evidence Act does not apply to proceedings before the arbitrators, yet the latter must not receive or act upon evidence or decide upon grounds which would render their award utterly unfair and worthless. An arbitrator can act *ex parte* in some cases without thereby being guilty of misconduct. There is an implied condition in the submission of the parties to the arbitration that the award shall dispose of all matters referred. (*Fawcett, A.J.C.*) RAMCHANDRA *v.* GOBINDRAM. **53 I.C. 337 : 13 S.L.R. 75.**

——Sch. II, Para. 15 (1) (a)—Ex parte *award—Notice.*

The arbitrators can make an *ex parte* award if the parties do not attend the hearing after receipt of sufficient notice. Costs incurred in proceedings in Court are in the discretion of Court and outside the province of the arbitrator, but an award is not bad merely because of their inclusion. (*Crouch, A.J.C.*) J. M. LANG *v.* MESSRS. HOLLAND AND MOSS. **27 I. C. 526 : 8 S. L. R. 136.**

——Sch. II, Para. 15 (1) (a)—*Misconduct—Effect of—Award not set aside.*

Fraud or dishonesty on the part of an arbitrator is not sufficient to render his award a nullity, and does not deprive him of his jurisdiction to make the award ; it merely amounts to misconduct and may afford good cause for the Court to set aside the award. Where a party has not taken steps to get an award set aside within the

C. P. CODE (V OF 1908), Sch. II, Para. 15 (1) (c).

prescribed period, he cannot object to the award on the ground of fraud or dishonesty of the arbitrator or his failure to decide all the matters in dispute. 25 B. 337, Ref. An arbitrator is not bound to determine a matter not filed as a matter in difference which is merely a collateral question, though it may be necessary to dispose of it to decide the main dispute. To deprive an award of its binding effect, there must be positive evidence that both parties agreed that the former state of things should be restored. 19 M. 290, foll. (*Pratt, J.C. and Fawcett, A. J C*) KHANCHAND *v.* KODUMAL.
15 I. C. 819 : 5 S. L. R. 240.

——Sch. II, Para. 15 (1) (b)—*Minor—Arbitration—No representation of minor.*

The principles of O. 32, R. 11, apply to references to arbitration made out of Court on behalf of a minor. A minor can sue to set aside an award made at the instance of a guardian who was grossly negligent and acted fraudulently in conducting the proceedings. The award is invalid if the minor who is a party is not properly represented and a Court can set it aside. The Court can refuse to file the award on objection being taken by the minor. The words "or otherwise invalid" in Para 15 are not *ejusdem generis* with the other cases mentioned therein but are meant to include all cases of invalidity on grounds other than those mentioned. An award cannot be said to be *ipso facto* invalid because it is not shown to be advantageous or beneficial to the minor. (*Abdur Rahim and Oldfield, JJ.*) LAKSHMINARAYANA *v.* RAMACHANDRA TANTRI. **34 M. L. J. 71 : 45 I. C. 763 : 23 M. L. T. 89.**

——Sch. II, Paras. 15 (1) (c) and 20—*Misconduct—Error of law.*

An arbitrator has powers to determine a matter relating to a joint family business and to award a share in favour of even a stranger when the finding is recorded with the full consent of the parties, who referred the case to him. The only condition is that the portion allotted to the stranger must be separate from the rest. (*Piggott and Walsh, JJ.*) SHYAMLAL *v.* PARSHOTTAM DASS. **18 A.L.J. 241 : 2 U.P.L R. (A.) 104 : 58 I.C 585 : 42 All. 277.**

——Sch. II, Para. 15 (1) (c)—*Award after time—Provision for extension.*

The mere fact that the award is not given within the specified time is not sufficient for refusing to file the agreement in Court, especially where there is a provision in the agreement by which extension of time is allowed. (*Scott-Smith and Dundas, JJ.*) SRI RAM *v.* SORABJI.
55 P.W.R. 1919 : 51 I.C. 636 : 155 P.R. 1919.

——Sch. II, Para 15 (1) (c)—*Award after supersession.*

Award after supersession by Court can be set aside under Para. 15 (1) (*c*). (*White, C. J. and Krishnaswami Iyer and Ayling, JJ.*) TELLAPRAGADA SURIANARAYANA *v.* TELLAPRAGADA SARABAYA. **21 M. L. J. 263 : 9 I.C. 173 : 9 M.L.T. 251 . (1911) 1 M. W. N. 151 (F. B.).**

——Sch. II, Paras. 15 (1) (c) and 16—*Judgment according to—Award—No appeal.*

C. P. CODE (V OF 1908), Sch. II, Para. 15 (2).

The words "being otherwise invalid" in Sch. II, Para 15 (1) (*c*) are intended to give effect to the principle of finality to awards. Where the judgment is according to the award there is no appeal nor a revision. 29 C. 167 Ref. (*Kennedy, J.C. and Raymond, A.J.C.*) EMNABAI *v.* FAKIR MAHOMED. **65 I.C. 50 : 15 S.L.R. 165 : 1922 S. 1.**

——Sch. II, Para. 15 (2)—*Arbitration—Reference under compromise decree—Failure of arbitration.*

Where the parties to a suit, compromise it by referring to arbitration and a decree is passed thereon, and the arbitration fails, the Court cannot supersede the decree and try the suit. (*Lord Shaw.*) SADIK HUSAIN *v.* KANIZ ZEHORA BEGAM. **33 All. 743 : 38 I.A. 181 : 15 C.W.N. 1005 : 10 M.L.T. 173 : 18 Bom. L.R. 826 : 14 C.L.J. 313 : 8 A.L.J. 1164 : 21 M.L.J. 1151 : 12 I.C. 15 : 14 O.C. 289: (1911) 2 M.W.N. 132 (P.C.)**

——Sch. II, Para. 15 (2)—*Appeal—Order setting aside award.*

An order of a Court setting aside an award as being invalid because of the misconduct of the arbitrators is appealable. 28 A. 408: 4 A. L.J. 256 Not appr : 8 C.W.N. 390 : (1908) A.W.N. 242 ; 26 B. 551 : 31 M. 345 Referred to. (*Chamier and Tudball, JJ.*) RAM AUTAR *v.* DEOKI. **13 A.L.J. 653 : 29 I.C. 411 : 37 All. 456.**

——Sch. II, Para. 15 (2)—*Arbitration—Revocation—When either party can revoke agreement to refer—When Court can revoke.*

Neither party to an agreement made out of Court to refer to arbitration can revoke it except for good and sufficient cause. But a reference to arbitration directed by Court can be superseded only by an order of court on the ground of misconduct or corruption of the arbitrator, and only after the award has been received, but not during the pendency of proceedings before the arbitrator. (*Rafique and Piggott, JJ.*) CHATUR BHUJ *v.* RAGHUVEER DAYAL. **12 A.L. J. 529 : 23 I.C. 758 : 36 All. 354.**

——Sch. II. Para. 15 (2)—*Setting aside arbitration—Decree.*

An appeal lies against an order setting aside an arbitration as the proceeds amount to a "suit" on which decree should follow. The mere fact that an appellant frames his appeal as an appeal from an order, when the order complained against is really a decree in a suit, does not put him out of Court as it is only a mistake on the part of his legal advisers, 28 I.C. 60 dist. The rejection of an award is not open to revision. 31 I.C. 80 foll. (*Johnstone, C. J. and Shadi Lal, J.*) RAM JAWAYA MAL *v.* DEVI DITTA MAL. **107 P.W.R. 1916 : 117 P.R. 1916 : 34 I.C. 192 : 70 P.L.R. 1917,**

——Sch. II, Para. 15 (2)—*Suit to set aside award—Review.*

An award which was impeached subsequently owing to the defendants having given false evidence supporting fraudulent accounts given before arbitrator, which fact was based on a document of which plff. had possession before award, was held not liable to be set aside by a subsequent suit but open to review only. *Quaeree—*

C. P. CODE (V OF 1908), Sch. II, Para. 16.

Whether an award could be set aside by separate suit. *Obiter*:—A suit to set it aside will lie for fraud if a party falsely personates in arbitration proceedings or has no notice of proceedings. (*Johnstone, C. J. and Le Rossignol, J.*) SKINNER *v.* BADRI KISHEN. **98 P. R. 1915 : 31 I. C 196 : 179 P. W. R. 1915.**

——Sch. II, Para. 15 (2)—*Arbitration—Order superseding—Decree—Appeal.*

A reference to arbitration by Court was superseded and the case decided on the merits. The order of supersession was confirmed on appeal. In the meantime on an appeal from the decision, the Appellate Court held that an award having been made, the arbitration could not be superseded and that a decree must be passed in accordance with the award. *Held*, that a second appeal lay against the decision of the Appellate Court and that the order superseding the arbitration having been confirmed on appeal the Appellate Court was precluded from re-opening the question. (*Adami and Sultan Ahmed, JJ.*) SHONE THAKUR *v.* CHANDESHAWAR JHA. **55 I.C. 1 : 2 U. P. L. R. (Pat.) 57.**

——Seh II, Para 15 (2)—*Appellate Court—Power to go behind the order setting aside the award.*

A Court of appeal has power to consider the validity of an order setting aside an award and to restore the award if it has been set aside on insufficient ground. (*Barton, J. C.*) NARANJAN SINGH *v.* GUJARI. **15 I. C. 928 : 236 P. L. R. 1912.**

——Sch. II, Paras. 16, 12, 17, 18, 19 and 20—*Reference by Court—Application under Para. 20—Defective award—Joint application for reference by Court—Award.*

Where in proceedings under Para 20 the defective award was set aside by a joint application of the parties and the matter was referred to new arbitrators who delivered their award in time and the Court passed a decree on the award. *Held* that the award was made on an order of reference by the Court on an agreement by the parties to refer to arbitration ; Paras 17 to 19 applied to the case and no appeal lay from the decree. (*Reid, C. J. and Beadon, J.*) WALI MUHAMMAD *v.* BAHAWAL BAKSH. **28 P. R. 1914 : 14 P. L. R. 1914 : 21 I. C. 925 : 20 P. W. R 1914.**

——Sch II, Para. 16—*Reference to arbitration—Decree on award—Appeal.*

Held, on the facts that there was substantially though not in form a reference to arbitration by Court with the consent of parties and consequently no appeal lies against the decree passed in terms of the award. *Per Napier, J.* Any of the parties interested in any matter of difference in the suit may get the matter referred to arbitration without all the parties joining in the reference. (*Sadasiva Aiyer and Napier, JJ.*) VENKATACHALAM *v.* RAMANATHAN CHETTY. **15 L. W. 111 : 31 M. L. T. 52 : 70 I. C. 410 : (1922) M. W. N. 423 : 1922 M. 429.**

——Sch II, Para. 16-*Limitation Act, Art. 158—Award—Decree without allowing time for objections liable to be set aside.*

C. P. CODE (V OF 1908), Sch. II, Para 16.

A decree passed on an award before the expiration of the time allowed by the law to a party for taking objection to the award is liable to be set aside. (*Wallis, J.*) VELU PILLAY *v.* APPASAWMI PANDARAM. (1911) 1 M. W. N. 141 : 9 M. L. T. 301 : 9 I. C. 197 (2) : 21 M. L. J. 444.

——Sch. II, Para 16—*Award—Objection to, to be investigated—Jurisdiction—Revision.*

A dispute was referred to arbitration in connection with a pending suit, an award was made, and a decree was passed in accordance with the award under Para. 16 of the second schedule of the Code of Civil Procedure. Where the Court has considered the objections to the award on the merits and come to what the applicant contends is a wrong decision as to whether there had been an irregularity on the part of the arbitrator, it is clear that the case will not come within the provisions of S. 115 and that no revision will lie. It was the clear intention of the legislature that objections to the award on the ground of invalidity from any cause whatsoever should be decided by the Court which had made the order of reference and by no other Court. (*Daniels, A. J. C.*) SHEO PALTAN *v.* SUKHDEO SINGH. 26 O. C. 107 : 74 I. C. 401 : 1923 Oudh 235.

——Sch. II. Para 16—*Oral award—Effect of—Bar to fresh suit.*

In law, an oral award is good and binding on the parties to the reference. Where the actual award is an oral award the drawing up of a formal award is purely a subsidiary act for giving effect to the previously completed judicial act. If the parties desiring to have the award, made a decree of the Court, it may be necessary for them to get the award reduced to writing to be filed in Court ; but so far as the effect of the award on a subsequent suit dealing with the subject-matter of the award is concerned, the award will bar the suit whether it be oral or whether it be in writing. (*Robinson, C. J. and May Oung, J.*) MA MYA *v.* KO.PO SA. 2 Bur. L. J. 163 : 1924 Rang. 60.

——Sch. II. Para 16 (1)—*Objectors—Dismissal for default—Decree in accordance with award—Restoration—Application for.*

Where a suit was referred to the arbitration and the arbitrators made an award, against which the plff. filed certain objections, and the objections being subsequently dismissed for default, and the Court having passed a decree in accordance with the award the plff. applied for restoration of his petition of objections, *held*, that the passing of the decree is no ground for refusing to entertain the application for restoration on its merits. (*Ryves and Gokul Prasad, JJ.*) MAKUND RAM *v.* NAUBAT SINGH. 18 A. L. J. 756 : 57 I. C. 200. 2 U. P. L. R. (A) 253.

——Sch. II, Para 16 (1)—*Effect of award* Res judicata—*Subsequent suit for possession.*

An award given by arbitrators in a mutation proceeding does not bar a subsequent suit for possession in a Civil Court. (*Walsh, J.*) GIRDHARI CHAUBE *v.* RAMBARAN MISIR. 32 I. C. 761 : 14 A. L. J. 85.

C. P. CODE (V OF 1908), Sch. II, Para 16 (1).

——Sch. II, Para 16 (1)—*Award without giving time for objections—Revision.*

Where a Court receives an award, and without allowing time to parties to make objections, passes immediately decree in its terms, no appeal can lie from the decree so made ; but the High Court can under S. 115, C. P. C., set aside the decree and send the case back to the first court to enable the parties to file their objections to the award. 29 All, 584 not foll. (*Macleod, C. J. and Fawcett, J.*) RAVJIBAI KASHIBAI *v.* DAHYABHAI ZAVERBHAI. 22 Bom. L. R. 1454 : 59 I. C. 811 : 45 Bom 832.

——Sch. II, Para 16 (1)—*Effect of award—Extension of time after award.*

A valid award on a voluntary reference is final and conclusive on all the parties and the Court cannot interfere with any portion of it, *e. g.*, extending the period of time in the award. (*Fletcher and Newbould, JJ.*) ABINASH CHANDRA DAS *v.* HEM KUMARI DASI. 40 I. C. 609.

——Sch. II, Para 16 (1)—*Scope of.*

The words "No application has been made to set aside an award" cover the case of an application for setting aside on the ground that there was no valid award and refers to a contingency other than the remission of an award. (*Mookerjee and Holmwood, JJ.*) SURYA NARAIN JHA *v.* BANWARI JHA. 17 I. C. 7 : 18 C. L. J. 35 : 18 C. W. N. 626.

——Sch. II, Para 16 (1)—*Effect of award—Defence to a civil suit.*

An award can be put forward as a defence in a civil suit regarding a matter in respect of which the award was made. (*Chevis and Shadi Lal, JJ.*) AMAR NATH *v.* ISHAR SINGH. 173 P. W. R. 1917: 43 I. C. 350: 99 P. R. 1917.

——Sch. II, Para 16 (1)—*Time for objections—Filing of award before time.*

The submission of an award will be regarded to have been made only on the date fixed by the Court for filing it and the time for filing objections is to be counted from such date. (*Johnstone, C.J.*) JAWAHAR SINGH *v.* MEHR SINGH. 34 I. C. 250 : 14 P. W. R 1916.

——Sch. II, Para 16 (1)—*Objections—Order refusing to investigate objections as time-barred—Revision.*

An order refusing objections to an award without adequate inquiry, apparently under the impression that these were not raised within time, cannot hold good and hence liable to be set aside in revision. (*Shah Din, J.*) SAHIB RAI *v.* CHAIT RAM. 96 P. L. R. 1915: 28 I. C. 427 : 30 P. W. R. 1915.

——Sch. II, Para 16 (1)—*Time for objections—Award accepted by both parties.*

It is not necessary to allow ten days for objections where an award has been accepted by the parties. (*Scott-Smith, J.*) SOHAMARI BAI *v.* CHATTARAM. 27 P. W R. 1914 : 23 I. C. 591 : 69 P. L. R. 1914.

——Sch. II, Para 16 (1)—*Effect of award—Merger of claims in—Binding on parties.*

C. P. CODE (V OF 1908), Sch. II, Para 16 (1).

A valid award operates to merge and extinguish all claims embraced in the submission and the award furnishes the only basis for determining the rights of the parties. Such an award is operative and binding on parties to reference even though neither party sought to enforce it by suit or application. 33 C. 881 Rel. 37 C. 63 appr. (*Agnew and Shadi Lal, JJ.*) MULCHAND *v.* UTTAMCHANDU. **156 P. W. R 1913: 20 I. C, 185: 275 P. L. R. 1913.**

——**Sch II, Para 16 (1)**—*Separation of valid part of award.*

Court can separate the valid part from the invalid part of an award. (*Robertson and Beadon, JJ.*) AMOLAK SHAH *v.* CHARAN DAS. **16 P. W. R. 1913 : 52 P. R. 1913 : 17 I. C. 684 : 14 P. L. R. 1912. (Sup.)**

——**Sch II, Para 16 (1)**—*Objections to award* —Ex parte *award.*

Party against whom an arbitrator has proceeded *ex parte* has every right to an opportunity to file objections to the award. His objections cannot be summarily rejected on the ground that the arbitrator has proceeded *ex parte.* (*Shah Din and Scott-Smith, JJ.*) DILA RAM *v.* MUKUND RAI. **229 P. W. R. 1912 : 15 I. C. 57 : 1 P.L.R. 1913.**

——**Sch. II, Para. 16 (1)**—*Effect of award—Decree not passed—Effect—Breach of covenant—Damages.*

The award of the arbitrators is as binding on the parties as the decree of Court, but it cannot be executed unless it is made a decree of Court. If one of the parties to the award takes an objection and covenants to indemnify another, there is a cause of action to the latter for damages on breach of the covenant. (*Seshagiri Iyer and Moore, JJ.*) KALAVAKOLANU SEETAMMA *v.* NARAYANAMURTI. **57 I. C. 982 : 38 M. L. J. 470.**

——**Sch. II. Para 16 (1)**—*Effect of award—Decree passed on—Whether majority can alter the conditions,*

Per Abdur Rahim, J. (*Napier, J.* contra).—A decree passed on an award is on the same footing as a contract and the mode of management of temple properties laid down therein can be altered by the majority of the members owning the properties. 23 M. 265: 28 M. L. J. 488: 21 W. R. 41 cons. (*Abdur Rahim and Napier, JJ.*) YAGNARAMA DIKSHITAR *v.* ESOPALA PATTAR. **41 I. C. 738 : (1917) M. W. N. 595.**

——**Sch. II, Para 16 (1)**—*Effect of award—Agreement—Tender in pursuance of—When defective.*

An award is an agreement settled for parties by arbitrators and is subject to all the incidents of a private contract. When money is payable under it on a specified date, tender of the amount to the party entitled, absolves the person making it from payment of interest. (*Ayling and Seshagiri Aiyar, JJ.*) BIDURUKOTA PEDDA VEERANNA *v.* GOUDIMALLA VEERANNA. **5 L. W. 718 : 38 I. C. 295 : (1917) M. W. N. 308.**

——**Sch. II, Para 16 (1)**—*Effect of award—Matters not covered by arbitration.*

C. P. CODE (V OF 1908), Sch. II, Para 16 (1).

The principle of finality which attaches to a decree passed in accordance with an award given on arbitration does not affect matters which are outside the arbitration proceedings. (*Ayling and Tyabji, JJ.*) DAVULURU VIJAYA RAMAYYA *v.* DAVULURU VENKATTASUBBA RAO. **39 Mad. 853 . 32 I. C. 881 : 30 M. L. J. 465.**

——**Sch. II, Para 16 (1)**—*Court appointed arbitrator—Award—Remedy of aggrieved party.*

Where the Court itself is appointed arbitrator no separate award need be passed inviting objections before passing a decree, Such an award is itself a decree and the remedy of the aggrieved party is by way of appeal and not by applications to the Court itself *Sadasiva Iyer, J.*) NIMMAGADA PEDDA NAGANNA. *In re,* **26 I. C. 355.**

——**Sch. II, Para 16 (1)**—*Limitation-Award —Application for correction of.*

No specific provision is made in the Limitation Act for applications to correct an award. (*Bakewell, J.*) HYDER SAHIB *v.* GIRIA CHETTIAR. **(1913) M. W. N. 338 : 13 M. L. T. 349 : 19 I. C. 496 : 21 M. L. J. 483.**

——**Sch. II, Para 16 (1)**—*Time for objections —Decree in terms of award before expiry of 10 days.*

A decree in terms of the award before 10 days from the date of the submission of the award is invalid and should be set aside. It is doubtful whether there is an appeal from such decree but undoubtedly there will be revision, An appeal against such decree can be treated as a revision. 29 A, 584 ; 29 C. 167. (*Benson, C. J. and Napier, J.*) SURAPPARAJU *v.* NARAYAN RAJU. **(1912) M. W. N. 1232 : 17 I. C. 431 ; 12 M. L. T. 608.**

also (*Wallis, J.*) VELU PILLAY *v.* PANDARAM. **(1911) 1 M. W. N. 141: 9 M. L. T. 301 : 9 I. C, 197 : 21 M. L. J. 444.**

——**Sch. II, Para 16 (1)**—*Time for objections --Court, if can extend time.*

A Court has no power to extend the time for filing objections to an award. 2 B.H.C.R. 270 . 18 C. L. J. 35 Foll, (*Pridcaux. O.A J.C.*) SITARAM *v.* RUPRAM. **42 I.C. 266 : 13 N. L. R. 172.**

——**Sch. II Para 16 (1)**—*Objections--Evidence in support of—Court's duty.*

When a party to a suit objects to the award of arbitrators to whom the suit was referred, he should be given an opportunity to support his objections by appropriate evidence ; and it is a material irregularity not to afford such opportunity. (*Lindsay, J. C.*) BETANA *v.* KEDAR NATH. **37 I. C. 400 : 3 O. L. J. 583.**

——**Sch. II, Para 16 (1)**— *Construction of award—Execution.*

The fact that a particular expression in the award is capable of many interpretations does not show that it is indefinite and it should be interpreted in the execution proceedings of the decree following the award. (*Stuart and Kanhaiya Lal, A. J. Cs.*) RAGHURAJ BAHADUR SINGH *v.* RAJESHWAR BALI. **35 I. C. 761 : 3 O. L. J 258.**

C. P. CODE (V OF 1908), Sch. II, Para. 16 (1).

———Sch. II, Para 16 (1)—*Effect of award—Filing not done in Court.*

An award, though not filed in Court or though no deed of conveyance had been executed to give effect to its terms is valid so as to vest title in parties. (*Stuart, J. C. and Mohamad Ali, A. J. C.*) MOHAMMAD HADI *v.* SAIYAD TAKI.
32 I. C. 465 : 18 O. C, 282.

———Sch. II. Para 16 (1)—*Effect of award—Oral award.*

An oral award is as good as a written award. But until an award has been made a rule of Court, so as to give it the force of a decree, it cannot operate to transfer property. 33 A. 356 Ref. (*Lindsay, J. C.*) DILIPAT SINGH *v.* KASHI NATH.
24 I. C. 542 : 17 O. C. 108.

———Sch. II, Para 16 (1)—*Enquiry-arbitrator—How and what to be examined.*

An arbitrator can be examined with reference to any matter of law or other things with a view to know if he has used his discretion rightly. (*Lindsay, J.C. and Rafique, A. J. C.*) BADRUDDIN HASAN *v.* AMIR BEGUM.
13 I. C. 520 : 14 O. C. 308

———Sch. II, Para 16 (1).

A valid award ordinarily operates to merge and extinguish all claims raised in the submission and after the award has been made, the submission and the award are the only basis by which the rights of the parties are governed and they bar a suit on the original cause of action, (*Fawcett, A J. C.*) RAMCHAND *v.* GOBINDRAM.
53 I. C. 337 : 13 S. L. R. 75.

———Sch. II, Para 16 (1)—*Minor—Sanction—Time for objections—Passing of decree before expiry.*

A judgment ordering a decree in terms of an award on receipt of the award and before the expiry of the time allowed for making an application to set aside the award is illegal, notwithstanding that before the expiry of such time an application may have been made to set aside the award or that the parties may have stated that they had no objections to urge. A decree passed on an award will not be binding on a minor who is a party, unless, the Court considered and found that its terms were beneficial to the minor and the Court is not absolved from this duty by reason of its having considered it prior to the reference. (*Pratt, J. C. and Boyd, A.J.C.*) SRI KISHEN *v.* RELOMAL PERIOMAL.
34 I. C. 845: 9 S. L. R. 183.

———Sch. II, Para 16 (1)—

A valid award merges andextinguishes all claims embraced in the submission and after it is made, the submission and the award are the only basis governing the rights of the parties. They thus bar a suit on the original cause of action. (*Pratt, J. and Fawcett, A.J.C.*) KHANCHAND *v.* KODUMAL.
15 I. C. 819: 5 S. L. R. 240.

———Sch. II, Para 16 (1)—*Objections—Decision on question of jurisdiction.*

The decision of the arbitrators on a question of their own jurisdiction is not final and can be raised in the objections to the filing of the award.

C. P. CODE (V OF 1908), Sch. II, Para. 16 (2).

This does not however imply the counter proposition that arbitrators must not consider or decide how far their Jurisdiction extends. (*Walcy Cohen, A. J.C.*) GRAHAM & Co *v.* KEWAT RAM.
9 I. C. 712 : 4 L. R. 196.

———Sch. II, Para 16 (2)—*Decree—Costs—Fee not fixed before decree—Power of Court.*

Where an award provides for the payment by the plaintiff of the costs including the arbitrators' fee but the Court omits to fix the fee before the decree is prepared, it is open to the Court to fix the fee after the preparation of the decree. (*Stuart and Wallach, JJ.*) WILSON *v.* JAGMANDIR DAS BALDEO SINGH.
52 I. C. 653 : 17 A. L. J. 1053.

———Sch, II, and Paras 16 (2), 20, 21—*Appeal—Award by arbitrator—Right of appeal.*

Where the parties to a suit got frequent adjournments stating that the dispute had been referred to an arbitrator, no appeal lies against the decree passed by the Court in terms of the award unless it is in excess of or not in accordance with the award, inasmuch as the orders passed by the Court on the various applications for adjournments amounted in substance to a reference of the dispute between the parties, by the Court to arbitration. (*Piggott and Walsh JJ.*) KULSUM FATIMA *v.* ALI AKBAR.
15 A. L. J. 452 : 39 I. C. 730 : 39 All. 401.

———Sch. II, Para 16 (2)—*Appeal—Private award—Filing.*

An appeal lies from an order directing a private award to be filed even though the Court has passed a judgment and decree upon the award not in excess of the award. (*Tudball and Piggott., JJ.*) HARI KUNWAR *v.* LAKSHMI RAM JANI.
38 All. 380 : 35 I. C. 833 : 14 A. L. J. 481.

———Sch. II, Para 16 (2)—*Decree in accordance with award—No appeal lies.*

A decree which is in accordance with an award and is not in excess of it is not appealable. (*Karamat Husain and Tudball, JJ.*) NARAIN DAS *v.* RAM PRASAD.
14 I. C. 455 : 9 A. L. J. 258.

———Sch. II, Para 16 (2)—*Appeal—Want of consent of parties interested.*

An appeal lies against a decree made in accordance with an award where the reference itself is impugned for want of consent of the parties interested. (*Chitty, J.*) DWARAKANATH ROY *v.* FANINDRANATH ROY.
49 I, C. 262.

———Sch.II, Para 16(2)—*Appeal—Two awards one modifying the other.*

A decree setting forth two awards by the same arbitrator, one modifying the other should be set aside. (*Chatterjee and Walmsley, JJ.*) PURNA CHANDRA *v.* KUNJA BEHARI.
46 I. C. 477 : 28 C. L. J. 275.

———Sch. ,II. Para 16 (2)—*Award—Decree on—Appeal.*

No appeal lies from a decree based on an award though the award could have been set aside by reason of its having been made beyond the time allowed. (*Jenkins and Woodroffe, JJ.*) SHIB KRISTO DAW & CO. *v.* SATISH CHANDRA.
18 I. C. 69 : 39 Cal. 822.

C. P. CODE (V OF 1908), Sch. II, Para. 16 (2).

——— **Sch. II, Para 16 (2)**—*Appeal—Award—Objection.*

A decree based on an award is not open to appeal on the ground that there was no valid award in law or that the arbitration was guilty of misconduct. 29 Cal. 167 Foll. 13 All. 300, Dist. (*Mookerjee and Holmwood, JJ.*) SURYA NARAIN JHA *v.* BANWARI JHA. **18 C. L. J. 35 : 17 I. C. 7 : 18 C. W. N. 626.**

Also (*Harrington and Carnduff, JJ.*) RAM BHAJAN PANDAY *v.* UDIT PANDAY. **19 I. C. 405.**

———**Sch. II, Para 16 (2)** —*Appeal—Void award.*

An award which does not comply with the provisions of Sch. II is void, the subsequent embodiment of the decision of the arbitrators on certain papers which already bore the signature of one of them and were signed subsequently by the others, vitiates the award, as also the absence of one of the arbitrators from a part of the hearing. (*Ameer Ali and Pratt, JJ.*) BENODE LAL *v.* PRAN CHANDRA. **11 I. C. 898 : 14 C. L. J. 143.**

———**Sch. II, Para. 16 (2)**—*Appeal—Revision—Decree on award without hearing objections.*

Decree on an award overruling the objections of a party without giving him an opportunity to substantiate them by evidence, is revisable but not appealable. 89 P. R. 1902 foll. 12 A. 422, 29 A 584 dist. (*Abdul Raoof, J.*) BHAGAT DARBARI RAM *v.* BHIKHA RAM. **3 Lah. L. J. 487 : 20 P. L. R. 1922.**

———**Sch. II, Para 16 (2)**—*Award—Revision—Omission of sanction under O. 32, R. 7—Agreement to refer signed by agent, validity of—Other remedy open—Revision.*

Where a decree is in accordance with an award there is no appeal therefrom. The omission of sanction under O. 32, R. 7, is no ground for revision. Where the guardian of the minor signs the agreement to refer, through an authorised agent, it is a valid reference. Even if the award is not binding on the minors they have a right to set it aside on attaining majority and where such a remedy exists, the Chief Court will not interfere in revision. (*Johnstone, C. J. and Le Rossignol, J.*) GHULAB KHATUN *v.* CHAUDURI.
99 P. R. 1915 : 32 I. C. 250 : 207 P. W. R. 1915.

———**Sch. II, Para. 16 (2)** — *Appeal — Invalid award—Revision—When lies—No proper appointment of arbitrators.*

No appeal lies against a decree based on an award except when it is not based on a valid award ; but a Court will revise judgments or orders, not appealable, passed on award on the ground of material irregularity committed by the Court passing order or judgment using such revisional jurisdiction sparingly. *Obiter.*—If there is no legal appointment of arbitrators, the award is nullity and appeal lies against the decree. 25 I. C. 583. Diss. (*Johnstone, C.J. and Chevis, J.*) KANHYA LAL *v.* NARAIN SINGH.
11 P. W. R. 1916 : 31 I. C. 700 : 28 P. R. 1916.

C. P. CODE (V OF 1908), Sch. II, Para. 16 (2).

———**Sch. II, Para. 16 (2)**—*Decree dismissing suit—Appeal.*

Where the Court on an objection to the award that the Court had no jurisdiction to try the suit, dismissed the suit, an appeal lies, but where the Court separates the award where it is separable and passed a decree in accordance with the valid part of the award, no appeal lies especially where the party affected did not object to such separation. (*Robertson and Beadon, JJ.*) AMOLAK SHAH *v.* CHARAN DAS. **52 P. R. 1913 : 16 P. W. R. 1913 : 17 I. C. 684 : 14 P. L. R. 1912, (Sup).**

———**Sch. II, Para. 16 (2)**—*Appeal—Award—Setting aside—Objection to.*

The appellant can traverse the order of the Court setting aside an award of the arbitrators for misconduct in appeal from the final decree. 28 All. 408, Diss. (*Robertson and Rattigan, JJ.*) JUMA *v.* MUBARAK KHAN. **106 P. W. R. 1912 : 133 P. L. R. 1912 : 15 I C. 62 : 97 P. R. 1912.**

———**Sch II, Para 16 (2)**—*Revision.*

A decree based upon an award is not appealable but if the Lower Court acted without jurisdiction or failed to exercise a jurisdiction or acted with material irregularity in dealing with the award, the High Court can revise such an order. 29 Cal. 167 (P. C.) Expl. (*Abdur Rahim and Spencer, JJ.*) ARAMANAI RAJAGOPALA *v.* ARAMANAI RANGASAMI. **31 I. C. 458.**

———**Sch II, Para. 16 (2)**—*Objections to award—Ex parte deft.—Invalid award.*

A person is not a party interested within the meaning of Para. 16, if he did not concur in the reference to arbitration and if he remained *exparte* at the hearing he is not entitled to appeal against the decree. A person's remaining *ex parte* deprives him of any equitable right to have it set aside. Per *Phillips, J*:—No appeal lies against a decree even embodying an invalid award except according to Para, 16 (2). Per *Tyabji, J* :—An appeal lies against a decree on an award purporting to bind a person who was not a party to the submission or when the award is made without any agreement to refer at all. (*Tyabji and Phillips, JJ.*) VYTHINATHA AIYAR *v.* VAITHILINGA MUDALIAR.
18 M. L. T. 374 : 2 L. W. 960 : 31 I. C. 206 : (1915) M. W. N. 847.

———**Sch. II. Para. 16 (2)** — *Award—Application to set aside award dismissed—Appeal is not maintainable.*

There is no right of appeal against a decree passed upon an award of arbitration after dismissal of an application to set it aside. (*Sadasiva Aiyar and Spencer, JJ.*) HANUMANTHAPPA *v.* DODDAPPA. **29 I. C. 512.**

———**Sch. II, Para 16 (2)**—*Appeal—Arbitrator appointed without agreement of parties—Decree—Revision.*

No appeal or revision will lie against the decree based on an award on the ground that the arbitrator was not properly appointed. 29 Cal. 167 : 32 Mad. 510 : 21 M. L. j. 263 : 25 M. L. J. 507.

C. P. CODE (V OF 1908), Sch. II, Para 16 (2).

Foll ; 12 M. L. J. 77 (P. C.), Foll. (*Oldfield, J.*) NIDAMURTHI KRISHNAMURTHI *v.* GARGIPARTHI GANAPATHI LINGHAM.

25 I. C. 583 : (1914) M. W. N. 865.

——Sch. II, Para. 16. (2)—*Appeal—Judgment and decree—Finality of award—Revision.*

A judgment and decree passed on an award under Para. 16 are neither appealable nor open to revision ; to secure finality for a judgment and decree passed on an award the conditions are that no application has been made within 10 days for setting aside an award, or such an application has been refused. 29 Cal. 167 ; 21 M. L. J. 444 ; 32 Mad. 510. Ref. (*White, C. J, and Tyabji, J.*) BATCHA SAHIB *v.* ABDUL GUNNY.

38 Mad. 256 : 14 M. L. T. 314 : 25 M. L. J. 507 : 21 I. C. 308 : (1914) M. W. N. 142.

——Sch. II, Para 16 (2)—*Appeal—Time for objections.*

A decree in accordance with the award is not appealable unless it exceeds or is not in accordance with the award. The High Court will not interfere in revision with the Court's order granting or refusing time to object to an award if the Court has taken due care and attention. (*Chamier, C. J. and Jwala Prasad, J.*) KHARGANATH MISRA *v.* NAKCHEDDI JHA. **35 I. C. 914.**

Also (*Drake Brockman, J. C.*) SHIVAPRASAD SINGHI *v.* LACHMANPRASAD. **46. I. C. 785.**

Also (*Lindsay, J. C.*) CHET KUNWAR *v.* PUTTU SINGH. **17 O. C. 386 : 27 I. C. 424: 2. O. L. J. 129.**

——Sch. II, Para. 16 (2)—*Appeal—Objections to the validity overruled.*

Though a Court referring matter to arbitration can set aside an invalid award, yet when it overrules the objections to its validity and passes a decree in terms of such award, no appeal lies from such a decree except when the decree is in excess of or not in accordance with the award. 29 C 167 foll. (*Atkinson and Jwala Prasad, JJ.*) KHUDIRAM MAHTO *v.* CHANDI CHARAN. **1 P. L. J. 306 : 35 I. C. 358 : 2 P. L. W. 377.**

——Sch, II, Para 16 (2)—*Appeal— Order recording award.*

There is no appeal against the order of a Court recording an award. 29 C. 167 Foll. (*Sharfuddin and Roe, JJ.*) RAM NARAIN RAM *v.* PATTI RAM TEWARY. **1 P. L. J. 90 : 34 I. C. 105 : 2 P. L. W. 411.**

——Sch. II. Para 16 (2)—*Suit to set aside—Award—Decree on.*

No suit to set aside an award is maintainable the proper way being an application to the Court to set the award aside, (*Twomey, C. J. and Robinson, J.*) SHWE HPAN *v.* MA. CHIT NYEIN.

56 I. C 677 : 13 Bur. L. T. 34: 10 L. B. R. 106.

——Sch. II, Para. 16 (2)—*Objections to award.*

Under cl. 15 (1) all questions affecting the validity of an award are to be determined by the Court in which the award is being filed. No appeal lies and a revision application seems to have been also prohibited. 29 Cal. 167 (P.C.) ref. (*Pratt, J. C. and Boyd, A. J. C.*) SRIKISHEN *v.* RELUMAL PERIOMAL. **34 I. C. 845 : 9 S. L. R. 183.**

C. P. CODE (V OF 1908), Sch. II, Para 17.

——Sch. II, Para. 16 (2)—*Appeal—Award—Old and New Code.*

Where a reference to arbitration was made under S. 506 (Code of 1882) and an award made and decree passed thereon after New Code came into force; the latter Act must decide the question of appeal. A decree passed in terms of an award under the Old Code would be appealable if the award is void *ab initio*. A Court passing a decree under Para. 16 in terms of an invalid award, must be presumed to have decided that it was valid since the Court has jurisdiction to decide whether or not it has jurisdiction and that decision is final. (*Pratt, J.C. and Crouch, A.J.C.*) ALIM *v.* MOLEDIO No. **19 I.C. 348 : 6 S. L. R. 168.**

——Sch. II, Para 16 (7)—*Effect of award—Bar to action on original demand.*

All claims embraced in the submission, are put an end to by a valid award and the award furnishes the only basis for determining the rights of the parties and constitutes a bar to any action on the original demand. (*Twomey, J.*) SAN NYEIN *v.* MA KYAW. **33 I. C. 554 : 8 L. B. R. 157.**

——Sch. II, Para. 17—*Minor—Mahomedan minors—Mother* de facto *guardian—Not competent to agree to reference to arbitration affecting minor's property—Consent invalid—Subsequent consent by certificated guardian—Effect of.*

Mother though *de facto* guardian of Muhammedan minors is not competent to agree to reference to arbitration affecting minors' property. (*Teunon and Beachcroft, JJ.*) MOHSINUDDIN AHMED *v.* KHABIRUDDIN AHMED. **57 I.C. 945 : 26 C. W. N. 246 : 47 Cal. 713.**

——Sch. II, Para. 17—*Right to obtain reference through court.*

Where a party has gone to arbitration in which if he had refused to go to arbitration an order of reference would have been made under para. 17 Sch. II, C.P. Code, it is too late for him, when a difficulty arises at a later stage of the proceedings which has not been provided for unless an order of reference has been made to dispute the right of his opponent to obtain an order of reference under para 17 Sch. II, C. P. Code, (*Walsh and Ryves, JJ.*) FAZAL ILAHI *v*, PRAG NARAIN. **44 A. 523 : 20 A. L. J. 327 : L, R. 3 A. 434 : 4 U. P. L, R. (A) 156 : 67 I. C, 739 : 1922 All. 133.**

——Sch. II, Paras. 17 and 20—*Reference to arbitration after suit—Procedure.*

Where parties to a suit agree to refer the matters in dispute to arbitration without the intervention of the Court they may make the agreement an order of Court and if they do not do so, they cannot file the agreement under Para 17, nor can they file the award (if made) under paras. 20 and 21. If the parties accept the award they can get a consent decree in terms there of. If one party disputes the award the other party can plead the award as an adjustment binding on the plff. Either party can also file a suit to enforce the award and apply for a stay of the Original Suit. (*Macleod, C. J. and Fawcett, J.*) MANILAL MOTILAL *v.* GOKALDAS ROWJI. **45 Bom. 245 : 59 I. C. 53 ; 22 Bom. L. R. 1048.**

C. P. CODE (V OF 1908), Sch. II, Para 17.

———Sch. II, Para 17—*Resignation of one of the arbitrators is no ground for not filing agreement.*

The resignation of one of the arbitrators does not render the agreement void nor is the resignation sufficient to justify refusal to file the agreement in Court where there is a distinct provision that the party who has selected the arbitrator would be competent to appoint another in case of the disability of the resignation or death of any arbitrator. 71 P. R, 1918 dist. (*Scott Smith and Dundas, JJ.*) SRI RAM *v.* SORABJI.
3 Lab. L. J. 276.

———Sch. II, Paras. 17, 20 and 21—*Scope of—Application to file award—Material irregularity—Revision.*

Sch, II. Para. 20 applies to an application for filing an award already made without the intervention of the Court and not to an application for filing an award which has not been passed even till the date of the application. Para 17 is applicable to the latter case. A revision lies against a decree based upon an arbitration award on the ground of material irregularity with reference to the proceedings of the Lower Court and not with reference to the proceedings of the arbitrators. (*Scott Smith, J.*) ALLAH DIN *v.* BADSHA BEGAM.
45 I. C. 647 : 90 P. W. R. 1918.

———Sch. II, Para. 17—*Agreement for reference in respect of agricultural land—Application to file cannot be entertained by Civil Courts.*

Where a person applied under Sch. II. Cl. 17, C. P.C. for permission to file an agreement for reference to arbitration and prayed that certain cattle and agricultural land belonging to the parties to the agreement in respect of that land, should be distributed between them through arbitrator. *Held* that such application could not be entertained by the Civil Court inasmuch as it was for partition of agricultural land and was for the purposes of S. 158 (2), Punjab Land Revenue Act. (*Rattigan, J.*) FAZILDIN *v.* SHAH NAWAZ.
46 P. L. R. 1914 : 22 I. C. 381 : 55 P. W. R. 1914.

———Sch. II, Para 17—*Jurisdiction—Arbitration—Agreement to refer disputes under contract.*

A clause in a contract to deliver wheat at Lahore providing that disputes arising under the contract would be referred to arbitration in Karachi, cannot be enforced in the case of a dispute as to non-delivery of wheat. (*Kensington, J.*) CHARLES LOUIS DREYFUS *v.* JAI CHAND.
54 P. W. R. 1913 : 18 I. C. 316 : 124 P. L. R. 1913.

———Sch. II, Para 17—*Arbitration—Reference to—Application is not a suit—Award set aside—Court if can proceed.*

An application under Para. 17 (1) of Sch. II, though it has to be registered as a suit, is not in fact a suit within the meaning of the Code. Where in such a case the reference proves abortive, the Court has no power to make a fresh reference. The Court has no discretion to refuse to make the reference to the arbitrators nominated by the parties. It is only when the parties cannot agree that it can exercise any discretion in

C. P. CODE (V OF 1908), Sch. II, Para 17 (1).

the matter. (*Das and Ross, JJ.*) SATISH CHANDRA BOSE *v.* PALIRAM. 2 P. L. T. 277 : 61 I. C. 390 : 6 P, L. J. 287 : 1921 Pat. 170.

———Sch. II, para 17—*Death--Refusal of arbitrator—Effect.*

Apart from any enactment an agreement to refer a matter to certain specified arbitrators becomes void and of no effect if one or more of the arbitrators die or refuse to act and thus make the agreement incapable of performance. The Court has no jurisdiction under clause 4 to make an order of reference except to all the specified arbitrators. (*Ormond, O. C. J. and Parlett, J.*) MABA *v.* MAUNG PE SAN. 42 I. C, 911 (1): 11 Bur. L.T. 160.

———Sch. II, Para. 17—*Reference signed only by some of the parties is null and void.*

In cases of reference to arbitration to make it binding and enforceable all parties should consent to it, by signing it. In cases where it is not so executed it is null and void even as to those who have executed it. The authority of the arbitrator begins from the time when reference to arbitration is executed by all the parties. (*Mc Coll, A. J. C.*) NGA THA ZAN *v.* NGA KAYAN KAING.
38 I. C. 577 : 9 Bur. L. T. 258.

———Sch. II, Para 17 (1) and 18—*Parties prosecuting case before arbitrators--Cannot challenge award on ground of jurisdiction.*

Where the parties accepted the decision of the Court who referred the matter in suit to arbitrators and appeared and fully prosecuted their case before the arbitrators. They could not afterwards challenge the award on the ground of want of jurisdiction in the tribunal chosen by themselves. 41 Mad. 115 Ref. (*Piggott and Kanhaiya Lal, JJ.*) SUKHNATH RAI. *v.* NEHAL CHAND. 42 All. 661; 18 A. L. J. 644 : 59 I. C. 801 : 2 U. P. L. R. (A.) 240.

———Sch. II, Para 17 (I)—*Agreement by guardian.*

Where one of the two appointed guardians consents to the agreement to refer to arbitration subsequently but not at the time of the agreement the agreement is not valid. (*Teunon and Beachcroft, JJ.*) MOHSENUDDIN AHMED *v.* KABIRUDDIN AHMED.
47 Cal. 713 : 57 I. C. 945 . 26 C. W. N. 246.

———Sch. II Paras 17 (1)—*Consent to reference obtained by misrepresentation.*

A party induced by misrepresentation to refer a dispute to arbitration is at liberty to revoke the reference : such an agreement cannot be filed in Court. (*Rattigan, C. J.*) GANESH DAS *v.* KESHO DAS.
50 I,C. 637.

———Sch. II, Para. 17 (1)—*Civil Court—Jurisdiction—Application to file agreement for reference to arbitration—Partition of agricultural land involved in agreement.*

A Civil Court has no jurisdiction to entertain an application under Sch. II, Cl. 17 of the C. P Code for filing in Court an agreement for reference to arbitration, where the application related to the partition of revenue paying land. (*Le Rossignol, J.*) JWALA SHAH *v.* NIHAL CHAND.
91 P. L. R. 1917 : 42 I. C. 261 (1) : 166 P. W. R. 1917.

C. P. CODE (V OF 1908), Sch. II, Para 17 (1).

——Sch. II, Paras. 17 (1), (4) and 20—*Arbitration and award—Effect—Powers of arbitrator—Right of parties.*

Where the reference to arbitration is valid the parties may go to Court and pray for filing the agreement and take action under it or on their own account to call the arbitrator to give a decision. If the arbitrator makes an award, the party in whose favour it is made, can sue for a decree in terms of the award. 20 Mad. 490 : 77 P. R. 1882: 33 Cal. 881. Ref. Where there has once been a valid reference to arbitration, the arbitrator is entitled to proceed with it, even if one of the parties refuses to submit to his arbitration. A party cannot knowingly take advantage of a clerical error in the notice given to him by the arbitrator as regards the date of enquiry. A party may for just cause rescind a contract to refer to arbitration but is not entitled to do so without any cause whatsoever. There can be no objection to a suit on an award with an alternative prayer for decision on the merits since such a combination is convenient and prejudices no one. (*Johnstone and Chevis, JJ.*) NATHUMAL *v.* MUHAMMAD SHAFI.
39 I. C. 349 :12 P. R. 1917.

——Sch. II, Paras. 17 (1) and 20 —*Pending suit—Agreement to refer—Bar—Award.*

Paras. 17 and 20 apply only to cases when there is no suit relating to the same matter already pending between the parties who are affected by the agreement to refer or by the award. The previously instituted suit is not barred by reason only of an agreement being made between the parties for reference to arbitration without the intervention of the Court. An award in pursuance of such an agreement without reference to the Court cannot be taken cognizance of by the Court so as to be made the basis of a proceeding under Para 20. (*Shah Din and Smith, JJ.*) DHAN SINGH *v.* KAHN SINGH. 115 P. R. 1912 : 191 P. W. R. 1912 : 15 I. C. 140 : 6 P. L. R. 1912 (Sup)

——Sch. II, Para. 17 (1) — *Arbitrators not named.*

Cl. 17 does not require that arbitrators should necessarily be named, in the agreement. (*Rattigan, J.*) DREYFUS &. Co. *v.* GURDITTA MAL.
35 P. R. 1911 : 70 P. W. R. 1911 : 9 I. C 655 : 85 P. L. R. 1911.

——Sch. II, Para. 17 (1)--*Agreement in writing—Pending suit.*

Quaere :—Whether a petition for reference of a pending suit to arbitration is an agreement within the meaning of Para, 17. (*Johnstone, J.*) MIRAN BAKSH *v.* SHER MUHAMMAD.
17 P. R. 1911 : 50 P. L. R. 1911 : 9 I. C. 195 : 39 and 200 P. W. R. 1911.

——Sch. II Para. 17 (1) — *Pending suit — Agreement to refer.*

A private agreement to refer to arbitration certain matters, some of which form the subject of pending suits is not interdicted but where an application is made to file it in Court the order of reference must be confined to matters not covered by the pending suits unless such suit have been meanwhile withdrawn or stayed pending reference. 29 Cal. 167 (P. C), Expl (*Stuart and Kanhaiya Lal, A. J. Cs.*) RAHAT ULLAH KHAN *v.* IBAD ULLAH KHAN. 40 I. C. 38 : 4 O. L. J. 131.

C. P. CODE (V OF 1908), Sch. II, Para 17 (4).

——Sch. II, Para. 17 (1)—*Dispute as to right to public trust.*

A dispute as to which of several claimants is *mutawalli* to a public trust cannot be settled by arbitrators and should be decided by Court. (*Chamier, C. J. and Sharfuddin, J.*) MUHAMMAD KABIRULHUQ *v.* HASSAMUDDIN MUHAMMAD.
1 P. L. W. 260 : 38 I. C. 296 : 1917 Pat. 93.

——Sch. II, Para 17 (1)—*Agreement to refer—Cross-contracts containing similar provisions—Effect.*

Where there is a contract for the sale of goods and a subsequent cross-contract containing the same clauses, for the same quantity of goods of the same kind and for the same delivery the earlier contract is extinguished by the later cross-contract which has the effect of fixing the difference to be paid by one party to the other. The parties to the earlier contract cannot claim arbitration as there is no difference which is referable to arbitration ; mere non-payment is not such a difference. 30 Bom. 205, Ref. (*Crump and Kemp, A. J. Cs.*) FIRM OF POKERDAS KISHANDAS *v.* FIRM OF VISHNJI GORDHANDAS.
56 I. C. 514 : 14 S. L. R, 18.

——Sch. II, Para. 17 (1)— *Future differences—Reference.*

Per *Pratt, J. C.*—Though parties may agree to refer future differences to arbitration yet no actual reference can be made until such differences have arisen and are still subsisting. (*Pratt, J. C and Crouch, A. J. C.*) DIPCHAND *v.* SAHIB DINO. 12 I. C. 639 : 5 S. L. R. 92.

——Sch. II. Para 17 (4)—*Death of party — Refusal to proceed.*

During the pendency of the arbitration proceedings on a private reference, one of the parties died and the arbitrator refused to go on with the arbitration. On an application for filing the agreement, *held*, the Court could not order the arbitrator to carry on the arbitration proceedings. (*Lindsay and Ryves, JJ.*) AHMAD NOOR KHAN *v.* ABDUL RAHIMAN KHAN. 1 U. P. L. R. (H. C.) 67 : 18 A L. J. 76 : 54 I. C. 366 : 42 A. 191.

——Sch. II, Para. 17 (4) — *Refusal of one of the arbitrator to act—Effect of.*

An agreement to refer a dispute to arbitration does not become incapable of performance by the refusal of one of the arbitrators to act where there is a distinct provision by which a party is authorised to appoint another arbitrator in his place. 44. I C. 866 ; 42 I. C. 911, Rel. (*Scott Smith and Dundas, JJ*) SRI RAM *v.* SORABJI.
51 I. C. 636 : 155 P. R. 1919 : 55 P. W. R. 1919.

——Sch. II, Para 17 (4)—*Death of two arbitrators—Rejection of application to file agreement.*

An agreement to refer to arbitration becomes *ipso facto* inoperative by the death of some of the arbitrators before the agreement is made a rule of the Court. Where the agreement became incapable of performance it could not be filed in Court, 21 M. L. J. 1151, Dist. (*Scott Smith and Le Rossignol, JJ.*) MOHAN LAL *v.* DAMODAR DAS.
44 I. C. 866 : 71 P. R. 1918.
See also. (*Ormond, O. C. J. and Parlett, J*) MABA *v.* MAUNG PE LEN. 42 I. C. 911 : 11 Bur. L. T. 160.

C. P. CODE (V OF 1908), Sch. II, Para 17 (4).

——Sch. II, Para. 17 (4)—*Duty of Court — Terms of agreement.*

In acting under Cl. 17, the Court must refer the matter to arbitration in accordance with the terms of the agreement. A Court acts with material irregularity if it does not strictly comply with the terms of the agreement to refer to arbitration. (*Ratligan, J.*) DREYFUS & Co GURDITTA MAL. **35 P. R. 1911 : 70 P. W. R. 1911 : 9 I. C. 655 : 85 P. L. R. 1911.**

——Sch II. Para. 17 (4)—*Reference to arbitration—Inaction of parties—Agreement to refer —Filing of.*

The conduct of the parties, coupled with the long and unexplained delay of six years amounted to a cancelletion of the agreement to refer their disputes to arbitration and the agreement could not be filed. (*Prideaux, A. J. C.*) MADHO KASHINATH *v.* SAMBASHIVA. **54 I. C. 126.**

——Sch. II, Para. 17 (4)—*Arbitrator refusing to act—Power to substitute.*

Where after the filing of an agreement under Para. 17, Sch. II, C. P. C. one of the arbitrators refuses to act as such, the Court has power under Para 19, read with Paras 5 and 9 Sch, II to substitute another in his place, (*Stuart and Kanhaiya Lal, A. J. Cs.*) RAHAT ULLAH KHAN *v.* IBAD ULLAH KHAN **40 I. C. 38 : 4 O. L. J. 131 :** [*See* contra—**42 I. C. 911 : 11 Bur. L. T. 160.**]

——Sch. II, Paras 17 (4) and 19—*Suit—Reference—Order setting aside award—Decree—Appeal.*

A suit is a process for the recovery of a right or claim and can be prosecuted either in a regular Court of law or partly before a private tribunal and partly in a Court of Law. An application to Court asking for assistance to prosecute a claim before a private tribunal cannot be converted iuto a 'suit' by the mere process of numbering and registering the application as a suit. An order setting aside an award is not a decree and is not appealable. (*Pratt, J. C. and Crouch, A. J. C.*) SHEOMAL NIHAL CHAND *v.* MULOMAL RAHUMAL. **28. I. C, 60 : 8 S. L. R. 260.**

——Sch. II, Para. 18—*Suit after—Reference —No application for stay by deft.*

Where after a reference to arbitration one of the parties brings a suit against the other and the latter deliberately refrains from applying for stay of the suit be must be deemed to have waived his right to arbitration. 47 Cal. 752, 41 Mad 115 not foll. (*Piggott and Walsh, JJ.*) CHIMAN LAL POSTI MAL *v.* FIRM PHOOL CHAND FATEHCHAND. **44 A. 292 : L, R, 3 A. 96: 65 I. C. 795 : 20 A. L. J. 128 : 1922 All. 48.**

——Sch. II, Paras. 18 and 22—*Effect of award—Sp. Rel Act, S. 21.*

A party to an agreement to refer a dispute to arbitration is not debarred from bringing an independent suit on title. (*Piggot, J.*) SHEOBABU *v.* UDIT NARAIN . **24 I C. 490 : 12 A.L.J. 757.**

——Sch. II, Paras 18 and 22—O. 17, R. 3—*Reference to arbitration—Stay of Suit.*

C. P. CODE (V OF 1908), Sch. II, Para 18.

Where in spite of an agreement to refer to arbitration the plff. filed the suit and after it was stayed by the Court one of the arbitrators refused to act, *Held*. that the plff. is entitled to a removal of the stay. The suit was not barred by the agreement to refer to arbitration. (*Macleod, C. J. and Shah, J.*) LAXMAN *v.* MANJUNATH. **45 Bom. 1181: 64 I.C. 289 : 23 Bom. L. R. 511.**

——Sch. II, Para 18—*Agreement to refer to arbitration after institution of suit—If adjustment within meaning of O. 23, R. 3—Stay of suit*

Para. 18 is restricted to cases in which a suit is instituted after an agreement to refer to arbitration. When the Court is seized of a case, its jurisdiction cannot be ousted by the private and secret act of the parties. If they wish to alter the tribunal they must proceed under Sch. II. Paras. 1 to 16. C. P. C. A private agreement between parties to a suit entered into, after institution of the suit to refer their dispute to an arbitrator is not a valid ground for staying the suit. (*Beaman and Hayward, JJ.*) VYANKATESH MAHADEV *v* RAMCHANDRA KRISHNA. **38 Bom. 687 : 27 I. C. 46 : 16 Bom. L. R. 653.**

—— Sch. II, Paras. 18 and 20—*Award—Institution of suit pending arbitration—Effect of —Power of arbitrators.*

If the Court has refused to stay the action or if the defendant has abstained from asking it to do so, the Court has seisin of the dispute and it is by its decision and by its decision alone that the rights of the parties are settled. As soon as the suit is instituted the arbitrators lose their authority. If the defendant still desires that the controversy should be decided by arbitration, he must endeavour to obtain a stay of the suit by an appropriate application under para. 18. If the application is refused by the Court in the exercise of its discretion, the remedy by arbitration ceases to be available. If the suit is stayed, two possible contingencies may require consideration. If the arbitrators have not yet made an award they are free to bring their proceedings to a termination and make an award in accordance with law. If on the other hand the arbitrators have made an award after the institution of the suit, the award cannot be pleaded as an effective bar to the suit. The award so made should be brought up before the Court under para 20 : the Court will refuse to enforce it under para. 21 read with para 14 (c) ; and as the award will thus stand cancelled because made without jurisdiction the arbitrators will be left free thereafter to resume their proceedings on the basis of the original reference. If this view were not adopted, the result would follow that a party to a submission who had appeared throughout and had taken his chance before the arbitrators might at the very last moment, when the award, possibly an adverse award, was about to be made and when there would be no time left for his opponent to obtain a stay order, institute a suit and thereby render infructuous the entire proceedings. Where the defendant did not take recourse to the proper procedure namely, to apply for stay of the suit, cancellation of the award as made without jurisdiction and thereafter remission of the matter to the

arbitrators, even if his failure was possibly attributable to ignorance of the law. *Held*, the agreement to refer to arbitration not having provided for reconstitution of the committee of arbitrators, if one of them should die, the award must be rejected as made without jurisdiction, and the suit should be tried on the merits by the Court. (*Mookerjee and Cholzner. JJ.*) SARAT CHANDRA SEN *v.* RAJKUMAR MOOKERJEE.

69 I. C. 863 .
26 C.W.N. 967 : 35 C.L.J. 432 : 1923 Cal. 135 (2).

——Sch. II. Para. 18—*Arbitration—Agreement to refer—Suit in contravention—Reference—Procedure—Specific Relief Act*, S. 21.

A deft. who was to party a contract to refer present or future differences to arbitration cannot seek specific performance of the arbitration agreement, nor set it up as a bar to suit brought against him in contravention of the agreement. When the Court is informed that a suit has been instituted in contravention of the arbitration agreement the Court has a discretion to stay the suit. The deft. can obtain a stay of the suit and either party can then apply under para. 17 (1) for a reference to arbitration by the Court under Para. 17 (4). 12 A.L.J. 757; 33 M.L.J. 177, Rel. (*Mookerjee Chitty and Walmsley, JJ.*) DINABANDHU JANA *v.* DURGA PRASAD JANA.

46 Cal. 1041 : 23 C. W. N. 716 : 51 I. C. 80 :
29 C. L. J. 399

——Sch. II, Para. 18—*Arbitration—Stay of of pending suit.*

Para. 18 does not apply if an order for stay of a suit is vacated owing to the refusal of one of the arbitrators to act and the suit is proceeded with. The question whether the arbitration agreement and the proceedings had thereunder formed a bar to the suit will have to be determined in the suit itself. (*Woodroffe and Shamsul Huda, JJ*) SHASIMUKHI DEBI *v.* PARBATI SUMKER ROY. 5 0I. C. 879 : 23. C. W. N. 293.

——Sch. II, Para. 18—*Contract providing for arbitration of disputes—Contract impeached—If arbitration should be stayed.*

Where a contract between plffs. and defts, providing for reference to arbitration in case of disputes arising out of the contract, is impeached by a suit by the plffs. on equitable grounds, arbitration proceedings which had commenced should be stayed pending the disposal of the suit. (*Sanderson, C. J. and Woodroffe, J.*) GAJANAND MASCARA *v.* TALEB JALALUDIN.

46 I. C. 173 : 22 C. W. N. 535.

——Sch. II, Para 18—*Stay of suit—Arbitration clause in indent—Bills of Exchange—Acceptance by buyer.*

A buyer placed an indent for the purchase of certain cotton goods with the seller, who, after shipment of the goods drew bills of exchange against the buyer. The buyer accepted the bills but subsequently refused to pay. In a suit by the sellor upon the accepted but unpaid bills, the buyer relied on a clause in the indent that if any claim or dispute arose in connection with the contract itshould be referred to arbitration and applied for stay of proceedings under Sch. II, para 18 of the C. P. Code. The seller relied on a clause in the indent to the effect that the bills drawn by the sellers on the buyers must be accepted and paid at maturity notwithstanding any objection the buyers may have regarding any variation in the terms of the indent *Held*, that the buyer could not claim a stay of proceedings in the suit. 2 Lah, 19 dist. (*Scott Smith and Abdul Qadir, JJ.*) RADHA BIHARI DIWAN SINGH *v.* G. B. ALEXANDER. 66 I. C. 43: 2 Lah. 335 :
1922 Lah. 353.

——Sch. II. Para 18—*Suit in contravention of agreement—Court can stay.*

A Court has discretion to stay a suit instituted in contravention of an arbitration agreement unless there is sufficient reason and the burden of proving that there is sufficient reason lies on the plaintiff. (*Leslie Jones and Broadway, JJ.*) VOLKART BROTHERS *v.* FATEH MUHAMMED.

61 I. C. 322 : 3 U. P. L. R. 48 (Lah.).

——Sch. II. Para. 18—*Suit in contravention of an agreement to refer—Stay.*

Where a suit is filed in contravention of the arbitration agreement and the Court comes to know of the agreement, it may stay the suit and in such case, the plff. has to prove sufficient reasons for filing the suit and the deft. is not bound to show absence of such reason. (*Shadilal, C. J. and Leslie Jones, J.*) GANESA DAS ISAR DAS *v.* DURGA DATTA JAGAN NATH.

2 Lah. 19 : 60 I. C. 776 : 3 Lah. L. J. 61.

——Sch. II, Para. 18—*Power of Court—Appeal, when lies.*

A Court can only take action under Para. 18 in the case of a subsisting agreement to refer to arbitation. Both parties need not admit that there is an agreement to refer. It is for the Courts to decide whether or not such an agreement had as a matter of fact been made. Where a Judge finds that there was no such agreement and therefore a suit was not liable to be stayed under para, 18, this order is appealable under S. 104 (*e*). C.P.C. (*Shadi Lal and Broadway, JJ.*) FIRM SHEO PRASAD RADHA KISHEN *v.* INDORE MALWA UNITED MILLS. 39 I. C. 508 :
62 P. R. 1917 : 65 P. W. R. 1917.

——Sch. II, Para. 18—*Stay of suit—Power of Court discretionary—Application by party to suit necessary—Application which should be made.*

The power vested in a Court to stay a suit under Para 18 is purely discretionary and can be exercised only on an application made for that purpose by one of the parties to the suit at or before the settlement of issues. (*Rafique and Scott Smith, JJ.*) BHAGWAN DAS *v.* SHIV LAL.

22 I. C. 811 : 92 P. R. 1913 :
109 P. L R. 1914.

——Sch. II, Paras. 18 and 19—*Reference—Parties to—Resiling from—Effect.*

When one of the parties to reference to an arbitration subsequently resiles from it and files a suit in respect of the subject matter, the arbitrator became *functus officio* on the filing of the suit and the award subsequent to it is *ultra vires* and a decree embodying the award could not legally be passed. The legislative provisions relating to

C. P. CODE (V OF 1908), Sch. II, Para 18.

arbitration do not affect a party's right to go to proper Courts but the Court has a discretion in a given case of reference to ask the arbitrator to give a decision if it finds that they could decide the case better than the Court itself. (*Ayling and Seshagiri Aiyar, JJ.*) APPAVU *v.* SEENI.
42 I. C. 514 : 41 Mad. 115 : 6 L. W. 243 : 33 M. L. J. 177.

See contra (*Pratt, A.J.C.*) MA HLA YE *v.* MAUNG TUN MAUNG. 57 I. C. 894 : (1920) 3 U B. R. 210.

——Sch. II, Para. 18—*Arbitration—Pendency of—Institution of suit—Effect of.*

The institution of a suit does not by itself supersede a previous reference to arbitration, dealing with the same subject matter ; but if after the institution of the suit neither party applies for a stay of the hearing of the suit under Sch. II para. 18 either at the time of the settlement of issues or before, such a failure has the effect of superseding the arbitration for good ; and any decision which might be arrived at in that suit would be binding on the parties as if no such reference to arbitration had been made prior to the suit. 41 Mad. 115, 12 A. L. J. 75 ref. If an application is made under Sch. II, para. 11 for the stay and the stay is granted, the arbitration can proceed ; but if such stay is refused and the order refusing the stay becomes final, the arbitrator becomes *functus officio*. There is, however, a third contingency, *viz*, where no application for stay is made within the time allowed by law. The effect of the institution of the suit and its decision would in such a case equally be to supersede the arbitration and render any award made therein after the institution of the suit unenforceable at law. (*Kanhaiya Lal, J. C.*) ZAINAB *v.* BUDHUA.
65 I. C. 235 : 25 O. C. 63 : 1922 Oudh 158.

——Sch, II, para. 18—*Stay of suit.*

The existence of the award is a complete bar to the suit until the award is set aside by a court of competent Jurisdiction. (*Pratt, A. J. C.*) MA HLA YE *v.* MAUNG TUN MAUNG. 57 I. C. 894 : 3 U. B. R. (1920) 210.

——Sch. II, para. 18—*Effect of award—Bar—Specific Relief Act, S. 21.*

An award extinguishes all claims embraced in the submission, and afterwards furnishes the only basis on which the rights of the parties can be determined, and constitutes a bar to any action on the original demand apart from S.21 of the Sp. Rel. Act which to some extent is replaced by Para 18. Sch. II, C. P. C. (*Twomey and Partett, JJ.*) R. M. A. R. FIRM *v.* M. R. M. S. FIRM,
25 I. C. 220 . 7 Bur L. T 308.

——Sch. II, Para. 18—*Stay of suit—Grounds.*

In case of an agreement to allow disputes to be tried by another tribunal the court will take into consideration all those grounds as in a case of submission to arbitration. Where the plffs. residence, place of contract and the inspections of the ship happen to be in one place there are no grounds for staying the suit or refusing to entertain it at that place. (*Grouch, A. J. C.*) KURSESHI AND SONS *v.* SOOMAR HAJI. 15 S. L. R. 88.

C. P. CODE (V OF 1908), Sch. II, Para 20.

——Sch.II, Para. 19—*Order filing or refusing to file award—Appeal lies.*

Under S. 104 (1) (*f*) of the C. P. Code, an appeal lies from an order filing or refusing to file an award without the intervention of Court, but no appeal lies from an order filing an award made in pursuance of an order of reference by a Court and filed under Para. 19. The section applies to an award filed under Para 21. (*Shadi Lal, C J. and Wilberforce, J.*) TEHLAMAL *v.* DHANAMAL.
60, I.C. 590.

——Sch. II, para. 19—*Provisions of C.P.Code apply to proceedings under.*

C. P. Code Sch. II is not complete in itself. Per *Macpherson, J.* The provisions of C. P. Code apply as far as possible, to the proceedings under Sch. II, of the Code. (*Coutts and Macpherson, JJ.*) MAHABIR PRASAD *v.* BAL KISHAN DAS.
62 I. C. 927.

——Sch. II, Para. 19—*Remission of award.*

A mere declaratory award is incomplete and should be remitted to arbitrators for completion. It cannot be executed. (*Pratt, J.C. and Hayward, A.J.C.*) SHEO KARAM *v.* MALADA SINGH.
6 S. L. R. 146 : 19 I. C. 374.

——Sch.II, Paras. 20 and 14—*Order rejecting an application to file an award—Effect.*

An order rejecting an application to file an award is not a decision that the award is bad in law. (*Mears, C. J. and Ryves, J.*) HARAKH RAM JANI *v.* LAKSHMI RAM JANI.
43 All 108 : 2 U. P. L. R. All. 310: 60 I. C. 626: 18 A.L.J. 960.

——Sch. II, Para. 20—*Limitation.*

An application under Cl. 20, Sch. II to a Civil Court for filing an award by the arbitrator beyond six months after date of award is barred by Art. 178 of Sch. I of the Limitation Act. *Held* in the circumstances of the case that S. 5 and S. 14 of the Lim. Act did not apply. (*Tudball and Piggott JJ.*) RAM UGRAH *v.* ACHRAJ NATH. 38 All. 85: 31 I. C, 899: 13 A.L.J. 1115.

——Sch. II, Para. 20—*Suit to enforce award—Award not filed.*

An award was made on an arbitration out of Court. An application to file was numbered as a suit but was summarily rejected as being time-barred. Plff. filed a regular suit to enforce the award. *Held* that the bar of *res judicata* did not apply. (*Macleod, C. J. and Fawcett, J.*) RAJMAL *v.* MARUTI. 22 Bom. L. R. 1377: 59 I. C. 755 : 45 Bom. 329.

See also (*Mears, C. J. and Ryves, J.*) HARAKH RAM JANI *v* LAKSHMI RAM JANI. 18 A.L.J. 960.

——Sch. II, paras. 20 and 21—*Matters referred already—Subject-matter of suit—Paras do not apply.*

Paras. 20 and 21 do not apply were the matters referred to arbitration are already the subject matter of a suit between the parties to the reference. (*Macleod, C. J. and Fawcett, J.*) MANILAL MOTILAL *v.* GOKALDAS ROWJI. 45 Bom. 245: 22 Bom. L.R. 1048: 59 I. C. 53.

C. P. CODE (V OF 1908), Sch. II, Para 20.

———Sch. II, Para. 20—*Jurisdiction—Subject-matter lying within the jurisdiction of two or more Courts—Power of Court to file award.*

Per Sadasiva Iyer, J.—Para. 20 was devised for the purpose of enabling any Court having jurisdiction, where the subject-matter of the award lies within more than one jurisdictions, to direct the award to be filed. The Para does not suggest any disability of the kind that arises on a consideration of S. 9 of the Code, provided there is something to arbitrate on, that there is a reference and an award then the policy of the law is that that award should be given effect to, without minute inquiry by the Court. (*Heaton and Ros, JJ.*) RAGHAVENDRA *v.* GURU RAO. **37 Bom 442: 19 I. C. 882 : 15 Bom. L. R 362.**

———Sch. II, para. 20—*Absence of arbitrator—Objection—Waiver.*

If a party to an arbitration proceeding fails to take an objection to the absence of one out of several arbitrators, he will be deemed to have waived his right to take objection to the whole of the irregularity caused thereby and the award must be filed. (*Greaves and Ghose, JJ.*) RAMNATH MISRA *v.* RAMRANJAN MISRA. **67 I. C, 866 : 1922 Cal. 181 (1).**

———Sch. II, Paras. 20 and 21—*Remedy by suit—Suit to enforce favourable part of award.*

A plff. who has not carried out what he was directed to perform under the award cannot sue to enforce that part of the award which is favourable to him. (*Mookerjee and Walmsley, JJ.*) KUNJO BEHARI BARDHAN *v.* GOSTO BEHARI BARDHAN. **22 C. W. N. 66: 42 I. C, 590: 27 C. L. J, 486.**

———Sch. II, Para. 20—*Jurisdiction—Bengal Civil Courts Act, (XII of 1887), S. 21 Sub-S. (1), Cl. (a)—Disputes referred to arbitration—Application to file award—Value—Appeal.*

Where disputes relating to mutual money claims were referred to a private arbitration and the arbitrator awarded a sum of Rs. 2.000 as due by one party to the other and an application to file the award was allowed by the Subordinate Judge, an appeal against that order lies to the district Court and not to the High Court under S. 21, Sub-S. (1), Cl. (a) of the Bengal Civil Courts Act, 1887. (*Carnduff and Richardson, JJ.*) MOHESH CHANDRA KUNDU *v.* AMARCHAND KUNDU. **19 C. L. J. 260: 22 I. C. 793: 18 C. W. N. 867.**

———Sch. II, Paras. 20 and 21—*Award on Private reference—Institution of suit prior to commencement of proceedings by arbitrators—Jurisdiction of arbitrators—Legality of the contract of submission—Enquiry into—Suit to set aside the award—Maintainability.*

Where an action has been commenced on a contract containing a provision for reference to an arbitrator of any dispute arising under the contract and is pending, no application to stay the action having been made or such application having been made and refused, an award made by the arbitrator under the provision for reference upon the subject matter of the action, subsequent to the commencement thereof and without the consent of the plaintiff is invalid and will not afford defence to the action. When the same matter comes before two tribunals a public tribunal appointed by the sovereign and, domestic forum chosen by the parties, and no order is made staying the proceedings before the one or the other the public tribunal alone must decide that matter and cannot be hampered by any adjudication by the private tribunal. Neither can that adjudication be pleaded as a bar to the action, nor can it be allowed to affect the merits of the decision given by the public tribunal. The law does not permit the same question to be decided by a court of law as well as by an arbitrator, and it is only when the dispute between the two tribunals is identical that a decision given by the arbitrator must be treated as *ultra vires*. There is no authority in support of the proposition that an award made after the commencement of an action must be treated as invalid even though the award deals with a question which is not in controversy in the action. 47 C. 752 ; 47 C. 849; 41 M. 115; 56 I. C. 150 dist. An award made after the commencement is not invalid if it deals with a question not in controversy in the action. (*Shadi Lal, C.J. and Campbell, J.*) JAI NARAIN BALEN LAL *v.* NARAIN DAS JAINI MAL. **3 Lah. 296 : 69 I. C. 583 : 1922 L. 369.**

C. P. CODE (V OF 1908), Sch. II, Para 20.

———Sch. II, Para 20—*Applicability—Loss of award.*

When an award has been reduced to writing and has been lost, the special procedure provided by Sch. II, Para 20. C.P.C, cannot be resorted to and the parties should be referred to a regular suit. 12 Mad. 331: 66 P. R. 1913. Ref. (*Broadway, J.*) MUSSAMAT KHODEJA *v.* GHULAM NABI. **1 Lah. 45 : 63 P.L R. 1920 : 55 I.C. 845. 59 P. W. R. 1921 :**

———Sch. II. Para. 20—*Jurisdiction—Civil Court—Private reference—Partition—Settlement of shares.*

On a private reference to arbitration an award which is passed by the arbitrators and which does not partition agricultural land but only settles the shares of the parties can be validly filed in the Civil Court. (*Scott Smith, J.*) GOVIND LAL *v.* MUNNILAL **81 P. W. R. 1918 : 45, I. C. 166 : 79 P. L. R. 1918.**

———Sch. II, Para. 20—*Remedy by suit—Award alleged invalid—Decree on original cause of action.*

Where the plaintiff alleges an award to be invalid but seeks its enforcement in case it is found to be invalid or in the alternative prays for a decree on the original cause of action in case the award is found to be invalid the Court must determine the validity of the award and pass a decree in its terms if it finds it to be valid or to adjudicate on the original cause of action if the award is found to be invalid. (*Shadi Lal and Jones, JJ.*) FIRM OF SHAMSUDDIN CHIRAGH DIN *v.* FIRM OF MUHAMMAD HUSSAIN MUHAMMAD SADIQ. **33 I. C. 494 : 68 P. W. R, 1916.**

———Sch. II, Para. 20—*Notice—Issue of.*

Para. 20 does not limit the time for the issue of notice thereunder. (*Kensington and Beadon, JJ.*) GHULAM MUSTAFA *v.* MUSSAMMAT HALIMA BIBI. **176 P. W. R. 1913 : 21 I. C. 298 : 310 P.L.R. 1913.**

C. P. CODE (V OF 1908), Sch. II, Para 20.

———Sch. II, Para. 20—*Award—Unstamped—Admissibility in evidence after paying penalty.*

In proceedings under S. 20, an unstamped award may be admitted in evidence and filed in Court after paying the penalty under the Stamp Act. 12 Mad. 331, Dist; 20 I. C. 491, Ref. (*Shah Din and Chevis, JJ.*) GOWARDHAN *v.* KESHO RAM.
66 P. R. 1913 : 291 P. L. R. 1913 : 20 I. C. 491 : 181 P. W. R. 1913.

———Sch. II, Para 20—*Effect of award—Binding character.*

A settlement made by arbitrators cannot be re-opened in order to show errors in the account except on the ground of fraud. (*Abdur Rahim. O. C. J. and Ayling, J.*) RAMANATHAN *v.* MUTHIA,
38 M. L J. 247 : 27 M. L. T. 242 : (1920) M. W. N. 270 : 11 L. W. 405 : 56 I. C. 358 : 43 Mad. 429.

———Sch. II, Paras. 20 and 21 — *Mediator — Record of settlement dispute made by the parties—Effect of—Contract.*

A settlement recorded by a person asked to act as mediator and, agreed on by the parties, is not an award and if at all it is operative it is so only as a contract as between those who have signed it. It is wholly impossible against persons who never joined it. 22 All. 224, Dist. (*Abdur Rahim and Oldfield, JJ.*) SUBRAMANIA *v.* KALIANASUNDARAM.
53 I. C. 283 (Mad.).

Also. (*Scott Smith, J.*) KISHEN NARAIN *v.* PURAN CHAND.
48 P. L. R. 1915 : 28 I. C. 298 : 238 P. W. R. 1915.

———Sch. II, Para. 20— *Jurisdiction — Small Cause Court—Jurisdiction to file award.*

It is not within the jurisdiction of a Small Cause Court to file an award which, though it directs payment of money within the limits of its pecuniary jurisdiction, goes on to declare the dissolution of marriage between the parties. The jurisdiction of the Court to file an award depends on the reliefs awarded. A party cannot get the award filed under Para. 20 where the other reliefs granted are beyond the competency of the Court. 22 I. C. 793 ; 37 Bom. 442, Ref. The expression "subject-matter of the award" means the whole matter dealt with and decreed by the award, and not any particular portion. (*Kumaraswamy Sastri, J.*) RETHAMALI SERVAI *v.* RAMASWAMY SERVAI
51 I. C. 53 : 10 L. W. 57.

———Sch, II, Para. 20—*Remedy by suit—Non-compliance with—Effect of.*

A suit lies on an award even though it has not been filed in Court under Para. 20 within 6 months as required by Art. 178 of the Limitation Act. (*Sadasiva Aiyar, J.*) MUTHUKARUPPA *v.* VEERABHADRA.
2 L. W. 230 : 17 M. L. T. 241 : 29 I. C. 49.

See also. (*Kanhaiya Lal, A J. C.*) SHUBRALI *v.* HAFIZAN,
42 I. C. 116 : 4 O. L. J. 487.

Also. (*Shaw, J. C.*) NGA HLA GYAW *v.* MI YA PO,
(1914) II. U. B. R. 26 : 27 I. C. 31 : 7 Bur. L. T. 279

———Sch. II. Paras 20 and 21 — *Validity of award of arbitrator—Decision — Contents of — Revision.*

C. P. CODE (V OF 1908), Sch. II, Para 20.

Arbitrators need not even give reasons for their decision and are not even bound to record anything of the proceedings. They may even ignore any position advanced by the parties, as an award is not a judicial decision. 23 M. L. J, 290 ; 38 Cal, 143. Ref. Arbitrators are not bound to decide a point if the parties show by their conduct that they did not want a formal decision thereon. *Per Sundara Iyer, J*:—Arbitrators are bound to decide all matters in dispute in their award and their failure to do so cannot be condoned because the Court does not sustain a contention not dealt with by them (*Sundara Iyer and Sadasiva Iyer, JJ.*) PURUSHOTMA DAS PRAGJI SAIT *v.* JELUS BHAI NAGJI. 17 I. C. 33 : (1912) M. W. N. 1076.

———Sch II, Para. 20—*'Person interested'—Stranger to arbitration.*

A person who is a stranger to the submission to reference and under no obligation to abide by the award could not avail himself of it and could not be said to be a person interested in the award within Sch. II. para 20 C.P. Code. (*Ashworth and Simpson, A. J, Cs.*) PANDIT SANKARA PRASAD *v.* JAGANNATH.
9 O. L. J. 410 : 69 I, C. 714 : 26 O. C. 1 : 1922 Oudh 276.

———Sch. II, paras. 20 and 21—*Private reference—Compromise modifying award — Decree on award—No appeal lies.*

Held by Daniels and Lyle, A. J. Cs. (*Kanhaiya Lal. J. C. dissenting*) that a court is competent on an application under Sch. II para. 20, C. P. C. to pass a decree on an award as modified by a lawful compromise filed by the parties and that from a decree so passed no appeal lies except in so far as the decree is in excess of or not in accordance with the award so modified. 31 C. 516 : 45 B. 245: 37 B, 639 : 2 Lah. 114 : 27 A' 526 : 29 M. 303 : 4 Pat. L. J. 394; 30 P. R. 1914; 21 C. L. J. 248 Ref. (*Kanhaiya, Lal J. C. and Daniels, A.J.C.*) HAKIM FAZAL AHMAD *v.* ENAYAT AHMAD.
25 O. C. 213 : 9 O. L. J 219 : 68 I, C. 209 : 1922 Oudh 189.

———Suh. II, Para. 20—*Jurisdiction—Demarcation of boundaries—Revenue Court.*

A Civil Court can accept the award passed on reference to arbitration by parties in a dispute as to the demarcation of boundaries under S. 41, U. P. Land Revenue Act, (1901), (*Stuart, J. C.*). JHURI SINGH *v.* DWARKA SINGH.
50 I. C. 193 : 60. J. 84.

———Sch. II, Para. 20—*Filing of award—Court functus officio.*

The powers of the Court in a proceeding under Para. 20, Sch. II are exhausted as soon as the Court decides either to file the award or refuses to file it. (*Kanhaiya Lal, A.J.C.*) GUR BAKSH SINGH *v.* CHUTTA SINGH.
47 I. C. 960 : 5 O. L. J. 471.

———Sch. II, Paras. 20 and 14—*Remission of private award—Provision.*

An award made in arbitration cannot be remitted to the arbitrators without the intervention of the court (*Parlett, J.*) SUBRAMANIAN CHETTY *v.* VELIAN CHETTY.
7 Bur. L. T. 287: 24. I, C. 132 : 8 L, B, R 58.

C. P. CODE (V OF 1908), Sch. II, Para 20.

———**Sch. II, Para. 20**—*Subject of reference.*
The word "matter" is not wider than the expression "matter in difference" in Para.1 of the same schedule. (*Pratt, J. C. and Crouch, A. J. C.*) DIPCHAND *v.* SAHIB DINO. **12 I. C. 639: 5 S L. R. 92.**

———**Sch. II, Para. 20 (2)**—*Application to file an award—Limitation Act, S. 6 is not applicable.*
An application to file an award does not become a suit by the provision of para. 20 (2), Sch II, C. P. C. and hence the applicant cannot claim the benefit of S. 6 of the Limitation Act. (*Pratt, and Carr, JJ.*) MA THEIRN TIN *v.* MAUNG BA THAN. **1 R. 256 : 76 I. C. 493 : 1923 R. 226**

———**Sch. II, Para. 21**—*Finality of award.*
Three brothers appointed an arbitrator by whose award they bound themselves in regard to a partition of joint family property. The award which was duly made stated that all the cash had been divided and that thence forward no co-sharer was entitled to demand accounts from another. Some years after, the sons of one of the brothers filed a suit for an account from his uncle with regard to certain property and monies which they averred were to remain joint until realised. *Held*, that the plaintiffs could not go behind the award which was final and that they were not entitled to claim an account as the award expressly stated that no co sharer had a right to demand an account thereafter. (*Mr. Ameer Ali.*) SHEO NARAIN SINGH *v.* BISHUNATH SINGH.
17 O. C. 33: 18 C. W. N. 426: 1 O. L. J. 159: 22 I. C. 315 : 27 M. L. J. 128 (P. C)

———**Sch. II, Para 21**—*Award must be enforceable at law.*
A Court must, before enforcing award, satisfy itself that it is enforceable in the same way as a decree is enforceable if it were a decree. Where an award is a mere declaration of the respective rights and liabilities of the parties or is an attempt to pass a sort of order for specific performance in a matter where no such decree can be passed in law, it would not be enforceable. (*Piggott and Walsh, JJ.*) SUKHAMAL BANSIDHAR *v.* BABULAL. **42 All 525: 18 A. L. J. 652: 59 I. C. 75: 2 U. P. L. R. (All.) 243.**

———**Sch. II, Para. 21**—*Validity of award—Majority decision.*
In the absence of a contrary provision, parties, agreeing to settle their differences by the judgment of a body made up of an uneven number of persons are presumed to imply that they would accept the decision of the majority. (*Beaman, J.*) MAHOMED ALI ADAMJI *v.* SECRETARY OF STATE.
42 Bom. 669 : 41 I. C. 264 : 19 Bom. L. R. 618.

———**Sch. II, Para 21**— *Award— Subsequent suit to set aside the award does not lie.*
Matters heard and determined in proceedings under para 21 cannot be reopened in a subsequent suit between the same parties brought for the purpose of setting aside the award and the decree following upon the judgment delivered in accordance therewith. 25 C. 757 Ref. (*Teunon and Richardson, JJ.*) GURU CHARAN SIRCAR *v.* UMA CHARAN SIRCAR. **70 I. C. 985 : 26 C. W. N. 940.**

C. P. CODE (V OF 1908), Sch. II, Para 21.

———**Sch. II, Para 21**—*Award—Death of parties pending hearing—Minor representatives not impleaded—Effect of—No prejudice.*
The parties to a dispute referred it to arbitration agreeing that they and their heirs would be bound by the award. The adult parties adduced all the oral evidence and filed all the documents before the arbitrators. During the hearing of the arguments it was brought to the notice of the arbitrators that one of the parties had died, thereupon the arbitrators gave time to bring on record the minor representatives of the deceased and for appointment of a guardian. Nothing was done within the time and thereupon the arbitrators gave their award. On an application to the court to file the award, it was objected that the award was not binding because the minors had not been represented in the proceedings. *Held* that having regard to the terms of the reference and to the fact that the interest of the minor were properly represented by the other parties on record, the award was binding on all the parties. It is true as a general principle that a person who is not a party to or properly represented in any proceedings should not be bound by those proceedings. But proceedings before arbitrators are not intended to be carried on according to the rules of procedure contained in the C. P. Code. If there is a binding reference to arbitration all that is necessary to be seen is that there is a substantial representation of the different interests before the arbitrators. There is no rule of procedure by which the arbitrators could substitute the legal representatives of a deceased party or appoint guardians-ad-litem for infants. If it be held that the arbitrators could not go on with the arbitration if the representatives or some other persons did not chose to come before the arbitrators, the result would be that although the reference would not abate on the death of a party under the law the arbitrators would in fact be unable to make an award and the arbitration would come to an end. The question therefore whether the award given in the absence of the representatives of a deceased party would be binding or not depends on the circumstances of the case. If there has been a substantial representation of the interests of the legal representatives by the other parties on the record and if the enquiry is full and fair, the award will be binding and a decree could be passed thereon. 31 All. 572: 15 C. L. J. 360 dist. (*Woodroffee and Ghose, JJ.*) BINAYAKDAS AOHARYA CHOWDHURY *v.* NALINI KUMAR CHAKKERBUTTY.
26 C. W. N, 804 : 1922 Cal. 226.

———**Sch. II. Para 21**—*Validity of award—Disputes arising from contract—Power of arbitrator to determine existence of contract.*
Where a contract provides for submission of disputes to arbitration it is competent for the arbitrators under the terms of the submission to decide whether or not an alleged interpolation was in the contract as originally made. (*Greaves, J.*) *In the matter of an Arbitration between*, ALIBHOY MAHOMMAD AND BAIJA NATH.
59 I. C. 439 : 24 C. W. N. 567.

———**Sch. II Para. 21**—*Effect of award—Right to rely on—Conditions of.*

C. P. CODE (V OF 1908), Sch. II, Para 21.

A party relying on an award must prove that he has abided by its conditions. (*Fletcher and Newbould, JJ.*) RAJ CHANDRA MANDAL *v.* RAGHUNATH DAFADAR. **41 I. C. 245.**

———Sch. II. Para 21—*Validity of award—Arbitration—Reference—Capacity to make—Executor—Power of appeal from award.*

Capacity to make a submission to an arbitrator is co-extensive with capacity to contract and so in the case of persons whose capacity to contract is restricted, the power of making a submission, is in the same manner and to the same extent limited. Consequently, if parties enter into a submission concerning a subject-matter over which one or other has no authority or only a restricted power of disposition, an award ordering such a party to do that which he cannot lawfully do, will have no legal effect whatever. Pure questions of law may be referred for the decision of an arbitrator. As a submission only refers to the arbitrator, questions between the parties, the moment he touches the interest of strangers, he exceeds his authority and his award is void. Submission to an arbitration does not operate as a waiver of an extrinsic objection that the award is illegal because based on an illegal act or subject-matter. The fact that a decree is drawn up on the basis of the judgment which follows the order filing an award in an arbitration without the intervention of the Court cannot take away the right of appeal of the party aggrieved by the order. If the appeal is allowed the decree will become infructuous ; the whole foundation of the decree will disappear and the Appellate Court can declare the decree vacated. (*Mookerjee and Beachcroft, JJ.*) SOUDAMINI *v.* GOPAL CHANDRA. **19 C. W. N. 948: 28 I. C. 557 : 21 C. L. J. 273.**

———Sch. II, Para. 21—*Remission of award—Power of Court to file private award.*

Under Para. 21 a Court can direct a private award to be filed if the grounds mentioned in Paras. 14 and 16 are not established. If such grounds are established the Court must refuse to file the award. A private invalid award cannot be remitted to the arbitrators to enable them to make it proper award. An award on a reference made out of Court is bad if it decides questions not referred and leaves questions within the authority undecided. If an award is open to objection in material particulars, the entire award must be deemed null and void. An invalid portion of an award may be separated and enforced apart from the objectionable part. (*Mookerjee and Beachcroft, JJ.*) SAVITRI DEBI *v.* PROMODO PRASAD. **21 C. L. J. 248: 19 I. C. 941.**

———Sch. II, Para. 21—*Filing of award—Portion alone filed.*

A Court has no power to direct the filing of an award which is open to attack in part 6 Bom. 663: 3 Mad. 68, 29 Mad. 303: 27 All 526, Rel. (*Mookerjee and Carnduff, JJ*) NARASING NARAYAN SINGH *v.* AJODHYA PRASAD SINGH. **15 C. L. J. 110: 13 I. C. 118 : 16 C. W. N. 256.**

———Sch. II, Para. 21—*Order filing award—Appeal lies.*

Under S. 104(1) (f) of the C. P. Code, an appeal lies from an order failing or refusing to file an award without the intervention of Court, but no appeal lies from an order failing an award made in pursuance of an order of reference by a court and filed under para. 19. The section applies to an award filed under Para 21. (*Shadi Lal, C. J. and Wilberforce, J.*) TEHLAMAL *v.* DHANAMAL. **60 I. C. 590.**

———Sch. II. Para. 21—*Award made after long delay and under suspicious circumstances—Right of parties to call upon arbitrator to decide within time.*

It would not be in consonance with either equity or law to direct the filing of an award which had not been promulgated till 5 years after the reference which would probably not have been made at all but for the defendant's agent having brought a criminal complaint against one of the arbitrators on that date. The period of time which should be allowed for arbitrators issuing their award is a matter which must be decided with reference to the facts of each case and it is always open to either party to call on the arbitrators either to give their award or to renounce their appointment (*Le Rossignol and Martineau, JJ.*) MAHOMED RAMZAN KHAN *v.* MUSSAMMAT SARDAR. **52 I. C. 847 : 71 P. R. 1919.**

———Sch. II, Para 21—*Validity of award—Award deciding matters not referred to—Whether legal.*

A private award which decides matters not referred to arbitration cannot be filed and no decree can be passed thereon though such matters are separable from the rest of the award. A plea based on the deft.'s acquiescence in the2award can be raised in a regular suit but not in proceedings under paras 25 and 21. (*Johnstone and Beadon, JJ.*) DHAUPAT RAI *v.* KAHN DEVI. **30 P. R. 1914 : 11 P. W. R. 1914 : 23 I. C. 422 : 31 P. L. R. 1914.**

———Sch. II, Para. 21—*Validity of award—Compromise during suit—Court's duty to inquire if parties are bound by compromise set up by one of them.*

The plff. based his claims on a balance of account struck by deft. The claim was held as not proved and hence it was dismissed. The deft subsequently put in applications wherein they stated that under pressure of people in the village, there was a compromise between the parties. In appeal, the merits of the case were not considered and claim was decreed for the sum settled by the compromise. *Held* that the Appellate Court was bound to inquire as to whether the compromise was binding between the parties or whether the plff. had proved his case on the merits. (*Johnstone, J.*) NARAYAN SINGH *v.* LAL SINGH. **63 P. L. R. 1912 : 15 I. C. 478 : 142 P. W. R. 1912.**

———Sch. II, Para. 21—*Oral award—Effect of—Transfer of property—Writing and registration.*

An award by arbitrators may be either oral or in writing, and both are equally binding on the parties. An award may be enforced us an oral partition which is effective without writing or registration. An award by arbitrators is binding on the parties as a judgment of Court and a right of

C. P. CODE (V OF 1908), Sch. II, Para 21.

suit accrues to a party when a bond is allotted by virtue of such award. An award is sufficient to pass title to property. The Transfer of Property Act is not exhaustive of the modes of transfer. A suit on a hypothecation bond allotted to the holder by an oral award is maintainable without the execution of further instruments. (*Seshagiri Aiyar and Napier, JJ.*) AMIR BIBI *v.* AROKIAM.
45 I. C. 813 : 34 M. L. J. 184.

——**Sch. II, Para. 21**—*Inquiry into merits—Award.*

An award is not in the nature of a foreign judgment and a Court is therefore not entitled to go into the merits of the same. (*Sadasiva Aiyar, J.*) MUTHU KARUPPA *v.* VEERABHADRA.
17 M. L. T. 241 ; 29 I. C. 49 ; 2 L. W. 320.

——**Sch. II, Para 21**—*Validity of award—Bad in part—Splitting up of—Signing of award.*

It is permissible to separate such portion of the award as goes beyond the powers of the arbitrator, and to maintain the remainder if good. Ordinarily an arbitrator after he had delivered his award is *functus officio* but if the parties after delivery of his award again make a reference and ask for a reconsideration of a part of the award, the arbitrator thereupon can reconsider it and amend it accordingly. The basis of the binding force of the award to the previous submission and consequent signature in token of consent does not affect its character. (*Miltra and Prideaux, A. J. C.*) KISHEN CHANDRA *v.* RAMLAL. **53 I. C. 992.**

—— **Sch. II, Para. 21**—*Decree on award.*

Where a person was a party to arbitration but was not a party to the decree which followed upon the award he could not enforce the decree. (*Daniels, A. J. C.*) BAJRANG LAL *v.* BRHAHMA DAT.
52 I. C. 849 : 6 O. L. J 322

——**Sch. II, Para. 21**—*Validity of award—Persons not party—If can enforce—Parties to reference—Award.*

The award of an arbitrator on a question of partition when all the members of the joint family are not parties to it is invalid. (*Roe and Coutts, JJ.*) CHOTTEY LAL *v.* MADAO BIBI. **48 I. C. 953 : 1919 Pat. 141.**

——**Sch. II, Para. 21**—*Decree on award—Duty of Court.*

Before passing a decree in accordance with the award of arbitrators appointed without the intervention of the Court, the court should satisfy itself that the reference was *bona fide* made to the arbitrators. (*Pratt, J. C. and Crouch, A. J. C.*) DIPCHAND *v.* SAHIB DINO. **12 I. C. 639 : 5 S. L. R 92.**

——**Sch. II, Para. 21 (1)**—*Filing of award—Refusal.*

The Court cannot refuse to file an award by imposing conditions beyond those mentioned in Para 21 (1). (*Sadasiva Aiyar and Moore, JJ.*) ANNAMALAI *v.* RAMASWAMI. **(1916) 1 M. W. N. 203 : 33 I. C. 67 : 19 M. L. T. 228.**

——**Sch. II, Para. 21 (2)**—*Appeal—Award.*

An order directing an award to be filed is appealable. The mere drawing up of a decree in

C. P. CODE (V OF 1908), Sch. II, Para 21.

terms of the award has not the effect of taking away the right of appeal against the order. (*Lindsay, J.*) LACHMI NARAIN *v.* SHEO NATH PANDEY.
18 A. L. J. 78 : 54 I. C. 443 : 1 U. P. L. R. (H.C.) 177.

But *see* (*Chamier, J. C.*) CHANKARA BAKSH *v.* SHRINARAN SINGH.
1 I. C. 693 : 12 O. C. 40 : 42 A. 185.

——**Sch. II, Para. 21 (2)**—*Appeal—Refusal to set aside*—Ex parte *award.*

An order refusing to set aside an *ex parte* decree passed in accordance with an award is appealable. (*Piggott and Walsh, JJ.*) NEHAL SINGH *v.* KHUSHAL SINGH. **38 All. 297 : 33 I. C. 80 : 14 A. L. J. 332.**

——**Sch. II, Para. 21 (2)**—*Revision—Punjab Courts Act, S. 70—Decree based on private award.*

A decree based on a private award filed in Court is not open to revision by the Chief Court under S. 70 of the Punjab Court's Act, amended. (*Johnstone, J.*) THAKAR DAS *v.* RAMADAS.
13 P. W. R. 1914 : 23 I. C. 950 . 114 P. L. R. 1914.
See also (*Chevis, J.*) MAYAWANTI *v.* TULSI DAS.
49 I. C. 979 : 31 P. W. R. 1919.

——**Sch. II, Para 21 (2)**—*Appeal—Award—Decree—Private reference—Order filing award.*

An appeal lies under S. 104 (*f*), C.P.C., from an order filing an award in an arbitration without the intervention of the Court, in spite of the fact that the Court has under Cl. 21 (1) proceeded to pronounce judgment according to the award. (*Reid, C. J. Kensington and Rattigan, JJ.*) RAM DITTI *v.* AMAR SINGH. **123 P. R. 1912 : 103 P.W.R. 1912 : 10 I. C. 512 : 172 P. L. R. 1911.**
See also (*Teunon, J.*) GANES NARAIN SINGH *v.* MALIDA KOER. **10 I. C 454 : 13 C. L. J. 399.**

——**Sch. II, Para. 21 (2)**—*Appeal—Revision.*

There should be no interference with a decree passed in accordance with an award by way of appeal or revision after an application under S. 325. (*Chevis and Williams, JJ.*) RAM SARAN DAS v. MUHAMMAD NAWAZ KHAN.
7 P. W. R. 1911 : 9 I. C. 38 : 14 P. L R. 1911.

——**Sch. II, Para 21 (2)**—*Appeal—Privy Council—Appeal to.*

The provisions of Para 21 (2) do not affect the right of applicant to go in appeal to the Privy Council. (*Piggott, J. C. and Lindsay, A. J. C.*) AMEER BEGAM *v.* BADRUDDIN HUSAIN.
15 I. C. 2 : 15 O. C. 55

——**Sch. II, Para. 21 (2)**—*Decree under — C. P. Code, O. 9, R. 13 applies.*

A decree passed under Sch. II, Para. 21 (2) is a 'decree' and the provisions of R. 13 of O. 9 apply to it. (*Coutts and Macpherson, JJ.*) MAHABIR PRASAD BHAGAT *v.* BAL KISHAN DAS.
62 I. C. 927.

——**Sch. II, Para. 21 (2)**—*Award—Suit to set aside—Dismissal, effect of.*

If a suit is filed before the award is made and the award is attacked as invalid, if the objections fail, the suit must be dismissed, and the plff. cannot claim a decree on the basis of the award. 6 Bom. H.C.R. 231 Ref.; 11 M.I. A 7, Foll. (*Fawcett, A.J.C.*) RAMACHAND *v.* GOBIND RAM.
13 S. L. R. 75: 53 I. C. 337.

C. P. CODE (V OF 1908), Sch. II, Para 22.

——— **Sch. II, Para. 22**—*Specific Relief Act*, S. 21.

The scope of S. 21 of the Specific Relief Act is limited by paragraph 22 Sch. II of the C. P. Code. (*Mukerjee and Fletcher, JJ.*) ABDULLAH *v.* SAFIULLAH. **64 I. C. 204.**

———— **Sch. II, Para. 22**—*Sp. Rel. Act*, S. 21.

After Para. 22 was enacted, S. 21 of Specific Relief Act has no application to any agreement to refer to arbitration or to any award to which the schedule applies. (*Twomey, J.*) MA YON *v.* MAUNG KIYA GAING. **9 Bur. L. T. 98 : 35 I. C. 710.**

———— **Sch. III, Para. 1**—*Powers of Civil and Revenue Courts.*

When a decree is transferred to the Collector for execution he can send back papers, if he fails in effecting a sale of the property. For good reasons the Court which passed the decree can also send back the papers to the Collector without fresh application for execution. In this case the Court enforces what it has already ordered. (*Viscount Haldane*). SATGUR PRASAD *v.* RAJ KISHORE LAL. **42 All. 152 : 11 L. W. 384 : 24 C. W. N. 394 : 38. M. L. J. 259 : 2 U. P. L. R. (P. C.) 55 : 55 I. C. 487 : 22 Bom. L. R. 451 : 18 A. L. J. 235 : 1920 M. W. N. 3 (P. C.).**

———— **Sch. III, Para. 1**—*Decree for joint possession—Revenue paying estate—Duty of Collector to allot—Reference to Civil Court.*

After a Civil Court passes a decree for joint possession of a revenue paying estate the Collector not only has to make allotment but to complete the partition by delivery of possession and he fails to exercise a jurisdiction vested in him by law if he refers the parties to the Civil Court for this purpose. After allotment. the parties cannot claim to be joint owners of the property though the partition proceedings are not completed according to law. (*Mittra, Offg, J. C.*) MUNAWAR ALI *v.* TAIYABALI. **56 I. C. 806.**

———— **Sch. III, Para 7 (1) (b)**—*Interest—Up to date of application.*

Under S. 7 (1) (b) of Sch. III, C. P. C. the Collector has to take into account the whole decretal amount with interest. That includes not merely interest upto the date of *darkhast* but also interest which runs according to the decree upto the date of payment, in spite of an omission by the decree holder to mention in his application the claim for further interest. The Collector cannot return the decree as satisfied till the whole amount including interest upto date of satisfaction has been paid. (*Chandavarkar and Batchelor, JJ.*) BHURCHAN HANSRAJ *v.* VIRA KHAMPA. **37 Bom. 32: 17 I. C. 142: 14 Bom. L. R. 787.**

———— **Sch. III, Para 11**—*Transfer in Contravention of—Void — Incompetent— Meaning—C. P. Code* (1882), *S.* 325 *A.*

A transfer made in contravention of the provisions of S. 325-A of the C. P. Code of 1882 (C. P. C.) Sch. II, Para 11, is absolutely void and of no legal effect whatsoever. It is not merely void against the Collector and those claiming

C. P. CODE (V OF 1908), Sch. III, Para 11.

under him. The word 'incompetent' in the section is to be read in the exact and plain sense that the word implies. 36 Bom. 510 Disappr. 13 N. L. R. 130 (F.B.) Appr. (*Lord Shaw.*) GAURI SHANKAR BALMUKUND *v.* CHINNUMIYA.

46 Cal. 183: 45 I. A. 219 : 14 N. L. R. 181 : 35 M. L J. 733: 16. A. L. J. 993. 25 M. L. T. 64: 23 C.W.N. 350: 29 C.L.J. 201: 1 U.P.L.R. (P.C.) 14 : 21 Bom. L. R. 541: 9 L. W, 327: 48 I. C. 312 (P. C.).

———— **Sch. III, Para. 11**—*Object of—Attachment before judgment—Mortgage during pendency of.*

The object of Sch. III, para 11, C.P.C., is to protect the debtor as far as possible from the risk of losing his property wholly or for all time and mere attachment before judgment cannot defeat that object for by such attachment alone the property is not exposed to the risk of such loss. Attachment before judgment is not a process in execution of decree for at the time of attachment there is no decree and no process that could be issued in execution of the same is consequently an attachment before judgment is not prohibited by Sch III, para 11 C.P.Code, 26 C. 531 Ref. (*Kotval, A. J. C.*) BANSILAL *v.* SITARAM. **68 I.C. 188: 1922 Nag. 238.**

———— **Sch III, Paras 11 and 7**—*Execution before Collector—Exclusion of time—When permissible.*

The period during which execution proceedings are pending before the Collector can be excluded only in cases where a provision has been made under Sch. III, para 7, for the satisfaction of the decree and where the decree-holder has in consequence been temporarily deprived of his remedy. Where no such provision is made for the payment of a decree, the mere fact that the Collector is taking steps to satisfy another decree-holder who had attached the same property is no ground for excluding time. 1 N L.R. 180 Dist. (*Dhobley. A, J. C.*) BHAURAO *v.* LAHANU. **64 I. C. 855.**

———— **Sch. III, Para. 11**—*Lessee from Collector—Rights of.*

The incompetency created by S. 325 A, C. P. C. 1882 does not extend to the lessee from the Collector. An alienation by such lessee would be binding upon him for the term of the lease even though the lease may contain conditions making the transfer voidable at the instance of the lessor. 14 N. L. R. 181 (P. C.) Ret. (*Mittra and Pridеaux. JJ.*) MOTIRAM *v.* RAM GOPAL. **53 I. C. 776.**

———— **Sch. III, Para 11**—*Sale-deed—Permission after execution and before registration.*

Where during the pendency of the execution proceedings but after the attachment of the property the judgment debtors sold the property without the permission of the Court or Collector but before the sale-deed was executed permission was obtained. *Held*, under the circumstances the sale was a valid transaction. (*Batten, A. J. C.*) PARWAT *v.* RAMJI RAO. **45 I. C. 240.**

———— **Sch. III, Para. 11**—*Transfer when voidable.*

A party seeking to avoid transfer, under para. 11, must show that on the date of transfer the Collector was exercising powers under the Code

C. P. CODE (V OF 1908), Sch. III, Para 11.

and the decree was still unsatisfied. The incompetency under the section relates to the period during which the Collector is executing the decree. If by lease of property he has satisfied the decretal amount, the judgment-debtor may sell the property subject to the lease. (*Sianyon, A. J. C.*) SONBA *v.* GANESHA.
17 I. C. 887 : 8 N. L. R. 182.

——Sch. III. Para 11—*Execution of decree by Collector—Power of debtor to alienate property—Scope of the restriction—Permission of Collector.*

While a decree is under execution by the Collector it is illegal for a civil court to issue process against the property and this illegality is not cured by the mere fact that subsequently the Collector ceased to have charge of the execution proceedings. The permission of the Collector for a mortgage by the judgment debtor need not take the form of a certificate under O, 21, R. 83, C. P. Code. It is enough if the Collector knows of the mortgage and gives sanction to it in writing. (*Daniels, J. C. and Dalal, A. J. C.*) SHEIKH MAHOMED MUZAFFAR ALI *v.* BHAGWATI PRASAD SINGH. 66 I. C. 642 : 8 O. L. J. 358.

——Sch. III, Para. 11 (3)— *Limitation—Period prescribed by* S. 48, *C. P. Code.*

The words "period of limitation" in Para 11 (3) apply to the restrictions placed upon the right of a decree-holder to take out execution of his decree both by the Act and S. 48, C. P. C. (*Banerjee and Piggolt, JJ.*) SHYAM KARAN *v.* THE COLLECTOR OF BENARES.
17 A.L.J. 1140 : 52 I, C. 742 : 42 All. 118.

——Sch. III, Para. 11—*Judgment debtor—Incompetency to transfer.*

The Collector's powers under Para. 11 do not come to an end as soon as the property is sold by auction and fetches more than the decretal amount. They exist, at least till the confirmation of the sale. (*Mitra, A. J. C.*) MAHDEO *v.* KRISHNAJI. 60 I, C. 310 : 16 N. L. R. 194.

——Sch. III, Para 47—*Sale by Collector—Objection—Effect of Suit by purchaser for title—If barred by* S. 47.

If an objection has been raised as to a sale by a Collector, his powers to confirm the sale are suspended and he must refer the objector to the Civil Court. A purchaser's suit to establish his title to the property sold, is not barred by S. 47 of the Code. (*Macleod, C. J. and Shah, J.*) BALWANT DASS *v.* UMABAI SHANKAR RAO.
45 Bom. 812 : 61 I. C. 287 : 23 Bom. L. R. 254.

CIVIL RULES OF PRACTICE.
See UNDER THE RESPECTIVE PROVINCES.

CIVIL SUIT. *See* C. P. CODE, S. 9, PRACTICE.

CLAIM. *See* C. P. CODE O. 21, RR. 58 TO 63,

CLAIM PETITION. *See* C. P. CODE, O. 21.

CLASS—Gift to a class. *See* T. P. ACT, S. 15.

CLERICAL MISTAKE. *See* C.P. CODE, S. 152.

CLIENT.
See (1) EVIDENCE ACT, Ss. 126—129.
(2) PRACTICE.

COLLATERAL—Security.

CLOG.

——On the equity of redemption.
See (1) DEED—CONSTRUCTION.
(2) MORTGAGE—REDEMPTION.
(3) T. P. ACT, S. 60.

CLUB.
See (1) ASSOCIATION.
(2) COMPANY.
(3) COMMUNITY.
(4) CORPORATION.

CO-ACCUSED.
See EVIDENCE ACT, S. 30.

COASTING VESSELS ACT (XIX OF 1838).

——S.13—*Vessel registered in name of father of joint Hindu Family—Death of father—Son plying without license—Offence.*

Where after father's death his son continued to ply a vessel without fresh registry, he commits an offence under S. 13 of the Coasting Vessels Act on account of change of ownership by the father's death. (*Batchelor and Shah, JJ.*) EMPEROR *v.* HARIDAS. 38 Bom. 111: 14 Cr. L. J. 653 : 21 I. C. 893 : 15 Bom. L. R. 994.

CO-DEFENDANTS.
See C. P. CODE, S. 11, O. 41, R. 22.

CODICIL.
See (1) SUCCESSION ACT.
(2) WILL—CONSTRUCTION.

CODIFICATION.
See INTERPRETATION OF STATUTES.

COERCION.
See (1) CONTRACT ACT, S 16.
(2) PARDANASHIN LADY.
(3) WILL.

CO-EXECUTORS.
See (1) EXECUTORS,
(2) PROBATE AND ADMINISTRATION ACT.

CO-HABITATION.
(1) MAHOHMEDAN LAW, MARRIAGE.
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CO-HEIR.
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——Counterfeiting of.
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COLLECTION.

———Charges.

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(2) CONTRACT ACT.
(3) PRINCIPAL AND AGENT.

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See (1) EVIDENCE ACT.
(2) EVIDENCE, CIRCUMSTANTIAL EVIDENCE.

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See C. P. CODE, SS. 68—72, 92, SCH. III.

COLLISION.

See ADMIRALTY.

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See (1) BENAMI.
(2) BENAMIDAR.
(3) PRACTICE.

COLOURABLE.

———Imitation.

See (1) COPYRIGHT ACT.
(2) PENAL CODE.

———Transaction,

See (1) BENAMI.
(2) FRAUDULENT TRANSFER.
(3) PENAL CODE.
(4) T. P. ACT, S. 53.

COMMENSALITY.

See HINDU LAW—JOINT FAMILY—PARTITION.

COMMERCIAL DOMICILE.

———*Prize of war.*

Every act of claimant at the time of the breaking of the war was consistent with intention to retain his commercial domicile at Constantinople and inconsistent with any intention to divest himself of it. He did his best to continue the voyage of the "Kare Deniz" to a Turkish port although he was not able to show that there was any particularly pressing commercial object in sending her to Busra where there was no cargo engaged where no agent had been appointed and where there was no trade to be expected, he being in the Piraeus and his ships being in the hands of the Turkish Government. *Held* the claimant had not discharged the burden of proof which lay upon him of showing that he was no longer commercially domiciled in Turkey as he had been before. The condemnation must therefore stand. (*Lord Sumner.*) SOCRATES ATYCHIDES *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

25 Bom. L. R. 116: 18 L. W. 664: (1923) M. W. N. 846: 32 M. L. T. (P.C.) 81: 27 C. W. N, 557: (1922) P. C. 371.

COMMERCIAL INTERCOURSE WITH ENEMIES ORDINANCE (VI of 1914).

The ordinance is not retrospective, and to establish an offence under it the court can look to such acts only as took place after its passing. (*Woodroffee, Beachcroft and Greaves, JJ.*) INDER CHAND *v.* EMPEROR. **42 Cal. 1094: 19 C. W, N 1239: 33 I, C, 289: 17 Cr. L, J. 113.**

COMMON—Employment.

———S. 3—*Jurisdiction of Court—Obtaining, meaning of.*

The accused, a British subject in Madras, ordered certain goods from Germany before the war, and the goods were received in London by his agent after the outbreak of the war, but before the passing of the 'Ordinance,' The agent sent the goods to the accused after the date of the Ordinance. *Held, Per Curiam*, that the offence of 'obtaining' was complete in England, if at all and British Indian Courts had no jurisdiction to try the same. *Per Wallis, C. J.* That the goods were ordered before the war though received after the Ordinance, and therefore there was no 'obtaining' of the goods after the war. *Per Wallis, C.J.* (*Coutts Trotter, J.Dubitante*). 'Obtaining' in the proclamation is used in its ordinary sense and includes procuring or ordering the goods from an enemy as well as taking delivery of them on arrival and if the goods had been ordered before the date of the Ordinance, it is no offence to take delivery of them after that date as a person cannot be charged with obtaining goods from himself or of obtaining them twice. Once a person is charged with an offence under the Ordinance, the High Court will not convert the charge into one under common Law as it stood before the Ordinance. The Ordinance VI of 1914 is not retrospective and does not penalise acts done before its date of operation. (*Wallis, C. J. and Coutts Trotter, J.*) FREDERICK EDMED HOOPER *v.* KING-EMPEROR.

40 Mad. 34: 17 Cr. L. J. 321: 31 M. L. J. 178: 20 M. L. T. 180: (1916) 2 M W. N. 161: 35 I. C. 497: 4 L. W: 82.

COMMISSION.

See (1) C. P. CODE.
(2) CONTRACT.
(3) CONTRACT ACT.
(4) PRINCIPAL AND AGENT.

COMMISSION AGENT.

See (1) CONTRACT.
(2) CONTRACT ACT, S, 182.
(3) PRINCIPAL AND AGENT.

COMMISSION.

———For Examination of Witnesses.

See C. P. CODE, O. 26.

———To executor.

See (1) MAHOMEDAN LAW—WILL.
(2) WILL.

———To Trustees.

See (1) TRUST,
(2) TRUSTS ACT.

COMMISSIONER.

See C, P. CODE, O. 26.

COMMON.

———Ancestor.

See HINDU LAW.

———Carriers

See (1) CARRIERS
(2) CARRIERS ACT.
(3) RAILWAYS ACT.

———Employment

See MASTER AND SERVANT.

COMMON

——**Land.**

See (1) CO-SHARERS.
(2) DEEDS, CONSTRUCTION.
(3) PARTITION.

——**Law.**

See (1) CO-SHARER.
(2) PRACTICE, PRECEDENTS.
(3) SHAMILAT LAND.

——**Manager.**

See (1) ADVERSE POSSESSION, ETC.
(2) BENGAL TENANCY ACT, SS. 93—100.
(3) CO-SHARER.

COMMUNICATION—

See CONTRACT ACTS, S. 2

COMMUNITY—

See also (1) ADVERSE POSSESSION.
(2) CUSTOM, PUNJAB.

——*Representation—Minor members.*

It would require very strong and cogent reasons, that would compel the Court to hold an arrangement so extremely reasonable and wise, and so much in the interests of all the villagers as that effected by appointing on behalf of the whole village two or three trusted and responsible inhabitants to act on their behalf, to be bad, simply because some of the villagers happened to be infants (*Lord Buckmaster.*) INDRIS *v.* MRS JANE SKINNER. **82 P. R. (1919) : 56 I. C. 723 (P.C.) : 45 P. W. R. (1919).**

CO-MORTGAGEES.

——*Property of Caste--Right to own property.*

Ownership of property by a fluctuating body of persons is recognized in Hindu Law and though there is no case there are observations tending to show that such a body of persons is capable of owning property. 28 Bom 20 ref. The fact found in the present case that the *Akhra* and its property were enjoyed by the Dhobi community of Narainda from time immemorial pointed to a legal origin and any objection that a right cannot be acquired by a fluctuating body of persons by prescription was inapplicable to the case. L.R.3 Exche D 361 ref. (*Chatterjee and Panton, JJ.*) PROBHAT CHANDRA *v.* HARI MOHAN. **54 I. C. 742 : 24 C. W. N, 206.**

——*Village* abadi—Thakia—*Cannot be converted into a mosque.*

Where a *thakia* is used by all the sections of the community and is not a mosque, a small section of the community have no right to appropriate it entirely. Others have a right to object to such appropriation. A *thakia* cannot be converted into a mosque as it is likely to deprive a considerable section of the community of its use for which it is converted. (*Dundas,J.*) MAULA BAKSH *v.* DASONDHI. **3 Lah. L. J. 17.**

COMMUTATION.

See (1) LANDLORD AND TENANT, RENT.
(2) MADRAS ESTATES LAND ACT, SS. 40 AND 41.

CO-MORTGAGEES.

(1) CONTRACT ACT, SS 38 AND 45.
(2) MORTGAGE.
(3) T. P. ACT, S. 60.

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——— **S. 28**—*Transfer of shares—Registration—Necessity for.*

Every share-holder in a company has an absolute right to transfer his share to another and the transfer is complete on the day the deed is signed by both parties. The provision in the Articles of Association that no transfer would be valid and recognised unless registered in the books and that the company could refuse to register a transferree without assigning reasons is one for the protection of the company and does not prevent the passing of title. (*Broadway and Abdul Quadir, JJ.*) FIRM OF SAWAN MAL GOPI CHAND *v.* SHIV CHARAN DAL. 71 I. C, 814 · 1924 Lah. 173.

——— **S. 169**—*Limitation—Application to set aside exparte order.*

S. 169 of the Companies Act is no bar to an application to set aside an exparte order. 16 A. 53 followed. (*Piggott and Walsh, JJ*) SHAH MUHAMMAD ESHANULLAH *v.* THE PEOPLES INDUSTRIAL BANK, LTD., ALLAHABAD 9 O. & A. L. R. 477 : 72 I. C. 106 : L. R. 4 A. 154 : 1923 A. 429.

———**S. 169**—*Interpretation—"Notice"—Limitation for appeal—Extension of time.*

In connection with the liquidation of a Company an order was passed by the Court on 6—2—1914. The Official Liquidator applied for leave to appeal the same day and got it and on 18—2—1914 gave notice under S. 169 of the Act to the opposite party that the order would be appealed against. The appeal was actually filed on the 20th May, 1914. It was objected that the appeal was time-barred under S. 169 of the Act, *held*, that the literal construction of S. 169 makes the Act unworkable in practice and that in any event the Official Liquidator having done all he could in reason, to comply with the provisions of the law was entitled to an extension of time under that section. (*Walsh and Ryves, JJ.*) THE PEOPLES INDUSTRIAL BANK. *v.* GOVINDAS DUBE. 63 I.C. 607 : 19 A, L. J. 371.

——— **S. 169**—*Appeal—Time for—Delay when excused—Sufficient cause.*

The carelessness or ignorance of a Pleader is not a sufficient reason to extend the time fixed by S. 169 of the Companies Act. Appeals under the Indian Companies Act 1882 ought to be filed with such promptitude as to render service of notice upon the respondent possible within three weeks prescribed by S, 169 of the Act, and the Appellate Court will not extend the time for appealing unless the delay is caused either by the conduct of the respondent or by mistake of the officials of the Appellate Court. (*Broadway, J.*) NARINDRA NATH SAHU *v*, KISHEN LAL. 73 I. C. 211 (2): 1924 Lah 379.

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———(VII OF 1913)

——— **S. 2**—*Informal transfer of shares invalid—Transferor remains a contributory.*

A transfer of shares if not made according to the requisite formalities by a Director, is not *bona fide* and hence will not be recognized ; hence a transferor nevertheless remains a contributory if the transfer is made informally. The Directors may and ought to refuse registration of transfer of shares when the company is insolvent though the winding up is not commenced. (*Shadi Lal, J.*) HAKIM RAI *v.* PESHAWAR BANK, LTD. 31 I. C. 865 : 162 P. W. R. 1915.

———**Ss. 2 (9) and 87**—*Manager, meaning of.*

Unless a person is in charge of the entire business of a company he cannot be deemed to be a manager thereof. A mere branch manager does not come within S. 87 of the Companies Act. (*Scott Smith and Shadi Lal, JJ.*) BASANT LAL *v.* EMPEROR. 43 I C. 791 : 19 Cr. L. J. 215 : 47 P. R. Cr. (1917).

———**S. 4**—*Unregistered Company of more than 20 persons is illegal.*

A Company of more than twenty members, if unregistered under S. 4 of the Act is an association prohibited by law and is therefore illegal. (*Gokul Prasad and Lindsay, JJ.*) RAM KUMAR *v.* NEMCHAND. 64 I. C. 447 : 19 A. L. J. 836.

———**S. 4 (1)**—*Partnership—Test of—Debtor and creditor—Agreement between creditors interest.*

The word " partner" or " partnership" in an agreement between several persons jointly advancing money does not necessarily show that there was a partnership between them. The parties may call themselves partners, but if one party is to do nothing more than advance money to the other and is to be repaid by a share of the profits they must be treated as debtor and creditor. 4 All 74 foll. (*Dhobley, A. J. C*) MAHOMED JUSUF *v.* PIR MAHOMED. 65 I. C. 368 . 1922 Nag. 67.

———**S. 4**—(1882). **S 4**—*Association of firms—Registration is necessary—Person—Meaning of.*

An association of several firms consisting of more than twenty persons formed with the object

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of acquiring gain is essentially within the perview of S. 4 and requires registration. The word 'persons' in S 4 denotes individuals and does not include bodies of individuals whether corporate or not, since any such extended definition would be repugnant to the subject and context of the section. (*Stanyon, A. J. C.*) AKOLA GIN COMBINATION *v.* NORTHCOTE GINNING FACTORY.
26 I. C. 613 : 10 N. L. R. 98.

——— S. 4—*Association—Meaning of—Chit fund.*

To constitute an association, it is necessary that there should be more than twenty persons so associated as to create a legal relation, giving rise to joint and mutual rights and obligations. A chit fund creates no legal relation between the subscribers *inter se* but only as between the manager and the subscriber. If is not an association within S. 4 and the manager can sue and be sued though the chit fund is not registered under the Companies Act. (*Maung Kin, J.*) NAIDU T. P. *v.* MUDALIAR. **50 I. C. 513 : 11 Bur. L. T. 255.**

———S. 5—*Lawful purpose—Proprietors of zamindari forming company—Legality.*

It is not opposed to public policy for the proprietors of Zemindari, who were numerous and whose interests were minute, to form themselves into a company if the means adopted for the management of property are beneficial. (*Coxe and Teunon, JJ.*) LALGOPAL DUTTA *v.* KHOROORIAH MAJOZILLA ZEMINDARI SYNDICATE, LTD.
13 I. C. 673 : 16 C. W. N. 297.

———Ss. 10, 12 and 14—*Alteration of memorandum of association—Revocation of appointment of managing agent—Confirmation by Court.*

The only power that the court has to confirm resolutions of a company in regard to an alteration of the memorandum of association is in respect of matters covered by S. 12. The memorandum of association of a company formed for the purpose of carrying on a banking business had a clause appointing a particular person as agent, principal and secretary to the bank and he was given powers to enter into any agreement contract or transaction with other banks or traders. Subsequently by a special resolution, the company purported to alter the clause by removing the agent and applied for confirmation of the special resolution under S. 12 of the Companies Act. *Held* that the court should not confirm the resolution, Firstly the clause was not one relating to the objects of the Company alterable under S. 12 (1) (a) of the Companies Act as one relating to a detail of management but was a condition under S. 10 of the Act. Secondly even if the clause related to the object of the Company, the Court had a discretion in confirming it and the court did not think it beneficial to the interests of the shareholders to confirm the resolution. (*Schwabe, C. J. and Ramesam, J.*) VENKATARAMA AIYAR *v.* THE COIMBATORE MERCANTILE BANK, LTD.
18 L. W. 304 : (1923) M. W. N. 568 : 74 I. C. 966 : 1924 M. 126

———S. 21—*Share-holder — Debtor — Charge on shares for debts.*

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The person owing money to a registered company who becomes a shareholder and bound by the articles of the association, becomes also bound by the provision (where it exists) in the articles by which any debt due by a shareholder to the company is made a first charge on the share. (*Spencer and Krishnan, JJ.*) CHUNDOOR PUNNIA *v.* SREE VENUGOPALA RICE FACTORY, LTD.
22 M. L. T. 520 : 7 L. W. 114 : 43 I C. 508 : (1918) M. W. N. 51.

———S. 24—(1882) Ss. 6 and 41—*Finality of—Matters proceeding to registration—Compliance with.*

A certificate of incorporation of a company under the Companies Act (VI of 1882) is conclusive as to the fact of incorporation and that all the previous requisites of the Act in respect of registration have been complied with. The statutory condition that the memorandum of association must be signed by seven persons is as much a condition of registration as any other requisition to be found in the Act which is preliminary to registration and apparently essential L. R. 2 Ch 674 appr. (*Lord Macnaghten.*) MOOSA GOOLAM ARIFF *v.* EBRAHIM GULAM ARIFF. **40 Cal 1 : 39 I. A. 237 : 16 C. W. N. 937 : 23 M. L. J. 215 : 16 C.L.J. 642 : 14 Bom: L.R. 1211 : 12 M.L.T. 449 : 5 Bur. L. T. 211 : (1912) M. W. N. 1097 : 10 A. L. J. 486 : 16 I. C. 70 (P. C.) : 6 L. B. R. 119.**

———S. 28—*Transfer of shares.*

The transfer of shares of a company is incomplete until the name of the transferee is entered in the Company's Register. Such a transfer does not operate as a declaration of trust. (*Rankin, J.*) AMERENDRA KRISHNA DUTT *v.* MONIMUJARY DEBI, **66 I. C. 586 : 48 Cal 986.**

———Ss. 28 and 34—*Transfer of shares—Formalities necessity for—Inchoate transfer—Rights of transferee—Discretion of directors in recognising transfer.*

A deed of transfer of shares in a company not complying with the formalities prescribed by the Indian Conpanies Act and the Articles of Association of the Company, is invalid as against a person, who has purchased the shares in a sale in execution held under the provisions of the C. P. Code. When the law prescribes a mode of transfer for shares in a limited company, compliance with that mode is necessary before property can pass so as to confer title on the transferee as against third persons. A transfer of shares in a company otherwise than as is provided by the Indian companies Act and the Articles of Asscciation, may confer a right in equity on the transferee to compel the vendor to execute a proper conveyance and the transaction evidenced by transfer can be regarded as an agreement to convey capable of being perfected into an absolute conveyance by compliance with the prescribed formalities. Until then, the transfer is inchoate and transferee cannot claim priority over a court auction purchaser of the shares. (1902) 2 K. B. 427 and 40 Mad. 1134 foll. 31 Bom. 76 not foll.

Obiter :—It is open to the Directors of a Company in the *bona fide* discretion vested in them under the Indian Companies Act and the Articles

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of Association. to refuse to recognise the purchaser of the shares of the company in a Court auction, as a share-holder in the company. (*Kumaraswami Sastri and Devadoss, JJ.*) TADEPALLI NAGABHUSHANAM *v.* SRI RAM RAMACHANDRA RAO
45 M. 537 : 15 L. W. 470 : 30 M. L. J. 231 : 42 M. L. J. 449 : 70 I. C. 659: (1922) M. W. N. 331 : 1923 Mad. 241.

——S. 30—*Member—Shares applied for on conditions—Conditions not fulfilled -Applicant's position.*

Where a person subscribed for a share but did not pay the value because the company was not started, he was not a member of the company but was only a creditor, (*Tudball and Rafique, JJ.*) MANENDRA GOPAL *v.* LACHMAN PRASAD.
21 I. C. 915 : 35 All. 538 : 11 A. L. J. 924.

——S. 32—(1882), Ss. 48 and 50—*Liability of Manager.*

Person who acts as director or manager of a company cannot refuse in answer to a penalty that be was legally a director or manager. The obligation of a company and its directors and managers to forward to the Registrar, the summary and list specified in S. 48 of the Company's Act does not come to an end on the date on which by default on their part, the penalty begins to accrue. Under the Punjab Government Notification No. 3, dated the 23rd February, 1910, the Registrar of the Joint Stock Company can authorize any person to institute complaints of offences. Therefore a complaint instituted against the accused by a clerk acting under the instructions of the Registrar is good in law. 8 I. C. 190 dist. (*Rattigan, J.*) TOTA RAM *v.* EMPEROR
14 P. R. (Cr.) 1916 : 17 Cr. L. J. 242 : 34 I. C. 962 : 38 P. W. R. (Cr.) 1916.

——S. 32—(1882), Ss. 48 and 50—*Officers of company resigning their posts but not the directorships—Liability.*

The fact that the Managing Director and Chief Secretary of a company who were prosecuted for an offence under S. 48 and convicted under S. 50 resigned their posts as such, before prosecution was started, but not their directorships, will not absolve them from liabilily. Ignorance of law is no ground of exemption. (*Kensington, C.J. and Rattigan, J.*) CHHAHILDAS *v.* EMPEROR.
164 P. L. R. 1914 : 17 P. R (Cr.) 1914 : 15 Cr. L. J. 300 : 23 I. C. 508 : 38 P. W. R. (Cr.) 1914.

——S. 34—*Transfer of share—Registration.*

If it is provided by the articles of a company that a transferee of a shareholder shall not be regarded as a shareholder until his name has been registered as such, after approval by the Directors, a title prior in date prevails in case of two claimants to a share unless the second claimant shows that all formalities save only a ministerial act were gone through as between himself and the company and that consequently he had acquired the full status or nearly so, of a shareholder, before the company received notice of the claims of the prior claimant and in such case he can be regarded to have an unconditional right

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to have his name entered into the register of the shareholders. But a transferee even under a transfer of right under every point of law cannot contend that immediately on the execution of the transfer and on sending in, the same to the company, all formalities were gone through and only a ministerial act remained to be done. (*Scott, C.J. and Batchelor, J.*) R. D. SETHNA *v.* NATIONAL BANK OF INDIA, LTD.
12 I. C. 581 : 13 Bom. L. R. 998 : 36 B. 334.

——S. 38—*Court not bound to try serious question of title—Appeal—Duty of Company.*

A Judge is not bound to decide in a proceeding under S. 38 of the Act, a serious question of title. An appeal lies on a point of law, from an order passed under the section. A Company has always a right to waive compliance with its rules. (*Walsh and Wallach, JJ.*) UNION SUGAR MILLS CO., LTD. *v.* JAI DEO.
19 A. L. J. 937 : 65 I. C. 291 : 44 A. 151 : L.R. 3 A. 56 : 1922 A. 258.

——Ss. 38 and 91 (b) — *Allotting unissued shares to some directors.*

By one resolution three shares were allotted by five directors to three directors *Held*, that allotment of shares is but a contract and where three shares were allotted by one vote recorded in one resolution the one vote is not divisible into three votes. Because it is really one vote and not three votes and because each of the allotments was not considered separately on its own merits and because each director was interested in the allotments to the other two and probably voted for them in consideration of an allotment to himself. A quorum of three directors being necessary the directors in whose favour the allotment was made could not validly vote and thus the remaining two directors could form no quorum and the resolution and the allotment were therefore invalid. (*Pratt, J.*) SIR HORMUSJI A. WADIA, *In re.*
64 I. C. 933 : 23 Bom. L. R. 1104.

——S. 38—*C. P. Code, S. 103—Conditions for right to appeal under S. 38 of the Act.*

A direction by the lower Court of an issue for trial involving a question of law, and a decision actually arrived at on such issue are necessary for a right to appeal under S. 38 of the Act, and the appeal from such a decision can be based on the grounds mentioned in S. 100, C.P.C. The proviso to S. 38 must be read with reference to all the clauses of the section. 26 C. 944 ref. to. A purchaser of shares at an execution sale has no right to compel the transfer of the shares to his name by the company, there being no difference between a private purchaser and a purchaser at a Court sale. 1 Indian Jurist (N. S.) 258 Dist. (*Batchelor, A C. J. and Shaw, J.*) MANILAL BRIJLAL SHAH *v.* GORDON SPINNING AND MANUFACTURING CO., LTD.
41 Bom. 76 : 37 I. C. 666 : 18 Bom. L. R. 982.

——S. 38—(1882), S. 58—*Company—Register of shareholders—Rectification — Company not guilty of default or unnecessary delay—Liquidation—Liability of transferee as contributory.*

A company went into liquidation before the transfers lodged with it for registration were approved of by the Board of Directors and the

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names of the transferees substituted in place of the applicant on the register of the sharebolders. In the liquidation proceedings on the contention that the register should be rectified by the Court, *Held*, that as the applicant had not shown any absence of sufficient cause or any default or unnecessary delay on the part of the company in dealing with the transfers, his contentions could not prevail. (*Scott, C.J. and Dawar, J.*) THE INDIAN SPECIE BANK, LTD., *In re.*

40 Bom. 134 : 28 I. C. 983 : 17 Bom L. R. 342.

———**S. 38**—*Application for removal of name —Mortgagee of the uncalled share capital can oppose.*

If a shareholder applies to have his name removed from the Register of Members, the mortgagee of the uncalled share capital can oppose the application. Though persons are not entitled to an order *ex debito justicae*, the discretion of the Court under S. 38 is unlimited and should be used according to the circumstances of each case. (*Mookerjee and Fletcher, JJ.*) RAMESH CHANDRA MITTER *v.* JOGINI MOHAN CHATTERJI. **60 I. C. 946 : 47 Cal. 901**

———**S. 38**—*Rectification of register—Discretion.*

A person who claims to have been misled by fraud or false representation into taking shares in a company, should raise the objection without delay. The power to take summary action under S. 38 is discretionary. (*Shadi Lal, J.*) JAGANNATH *v.* GOPI CHAND. **110 P. L. R. 1915 : 29 I. C. 770 : 249 P. W. R. 1915.**

———**S. 38**—*Register—Power to rectify.*

The power to order rectification of the register of a company is entirely a matter of discretion for the Court. It ought not to be exercised when the only object of the application is to save the expense of taking out Letters of Administration and of legal transfer of the shares to the applicant's name. (*Robinson, J.*) G. M. ARIFF *v.* SURATEE BARA BAZAAR CO., LTD.

55 I. C. 751 : 12 Bur L. T. 194.

———**Ss. 38 and 107**—*Rectification of Registrar—Table A—Dividends, to be paid out of profits.*

The Directors of Company declared no dividend for several years, but purchased shares of the Suratee Co., Ltd., out of the profits and credited the shares so purchased to the reserve fund. At a meeting of the shareholders, it was resolved that the amount standing to the credit of the reserve fund be retransferred to the profit and loss account, and a certain amount be distributed as bonus amongst share-holders. Forty-eight shares of the Suratee Bara Bazaar Company, Ltd., were transferred to one of the shareholders out of the reserve fund account, but the Suratee refused to register the transfer on the ground that it was *ultra vires*. *Held*, that the reserve fund represented undivided profits and not capital, and that the company should rectify its register of members by entering the name of the transferee in the register of members. (*Maung Kin, J.*) H. G. ARIFF *v.* SURATEE BARA BAZAAR CO.

49 I. C. 288 : 11 Bur L T 156.

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———**S. 38—(1882), S. 58**—*Transfer of shares —Articles of Association—Powers of Directors—Lien—Waiver—Reasons for refusal to register.*

The registration of a transfer of shares sanctioned by one Director of a company is not invalid. When one of the articles of association of a company declared a company's lien on all the shares of each member for his debts to the company but provided that unless otherwise agreed, the registration of a transfer of shares shall operate as waiver of the company's lien on these shares, and the company registered a certain transfer, *held*, that the company is estopped from claiming a lien on the shares transferred for debts due by the transferor and cannot refuse to register a transferee from such transferee. A refusal to register transfers should not be arbitrary, capricious or wanton. The Court can and should consider the ground of refusal where these are disclosed. (*Robinson, J.*) MATHESON *v.* NATH SINGH OIL CO., LTD. **5 Bur L. T. 271 : 18 I. C. 481 : 6 L. B. R. 152.**

———**Ss. 48 and 50**—*Liability under S. 50—Position as—Not affected by resignation of the Chief Secretary or Managing Director—Plea of ignorance of law.*

Where two persons in their respective capacities as 'Chief Secretary and Managing Director' were prosecuted for having knowingly or wilfully authorised or permitted a default in complying with provisions of S. 48 of the Act but the accused pleaded that they had resigned their posts as paid Chief Secretary and Managing Director before the prosecution was started, *Held*, that as they had not resigned their posts as directors, their liability continued and the plea of ignorance could not be accepted, and they were liable to be convicted under S. 50. (*Alfred Kensington, C.J., and Ratligan, J.*) CHHABIL DAS *v.* EMPEROR.

164 P. L. R. 1914 · 15 Cr. L. J. 300 : 17 P R. 1914 (Cr.) : 23 I. C. 508 (2) : 38 P. W. R. 1914 (Cr.).

———**S. 55—(1882) S. 249**—*Companies Act (1886)—Buying in shares.*

Neither S. 249 of the new Act, nor the old Act prevent buying in of shares nor do they expressly empower the Company to do so. Hence a provision in the articles that a shareholder should give notice to Directors of his intention to sell his share is *ultra vires*. (*Beaman, J.*) CANJI CURSONDAS *v.* THE COLABA PRESS COMPANY, LTD.

16 I. C. 49: 14 Bom. L. R. 521.

———**S. 73**— *Promissory note—Signed by Secretary, Treasurer and agent—Liability of company.*

A company purchased certain machinery and in lieu thereof one of its secretaries and treasurers executed a pronote signing it in his own name. The pronote was on a sheet of paper printed with the name of the company and bearing a stamp impression of the company. *Held*, the pronote was signed on behalf of the company and it was therefore liable on the note. (*Macleod, C. J.*

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and Coyajee, J.) POONA CHITRASHALA STEAM PRESS v. GAJANAN INDUSTRIAL AND TRADING CO.
24 Bom. L. R. 355: 67 I. C. 941: 1923 Bom. 29.

——— **Ss. 76 and 131**—*Omission of Directors to hold general meeting—Effect of—Holding of extraordinary meeting—Offence.*

On 27 2-1920 the Standard Aluminium and Brass Works Company Ltd. was registered in Bombay. On 30-3-1921 the statutory meeting of the Company as required by S. 77 of the Companies Act was held. A general meeting was also held on that day. Subsequent to this there was no general meeting held nor was any balance sheet, audited by the auditors of the Company, prepared and read before the Company in a general meeting On the requisition of certain shareholders an extraordinary meeting was held on 29-6-1922. On a complaint being preferred against the directors of the Company for not complying with the requirements of S. 76 of the Companies Act, *Held* that the directors were guilty of an offence under the section and that the holding of an extraordinary meeting on the requisition of the shareholder was not a sufficient compliance with S. 76. *(Macleod, C.J. and Crump, J.)* EMPEROR *v.* NASURBHAI ABDULLABHAI
72 I. C. 349: 24 Cr. L. J. 349: 25 Bom L. R. 224 : 1923 Bom. 194 (2).

——— **Ss. 76 and 134 (a)**—*Conviction of Officer—Validity.*

Before an officer of a limited company can be convicted under S. 134 (4) for default in submitting the balance-sheet laid before the company at its general meeting, as a general meeting was not held, it must be shown with reference to S. 76 that the Officer was a party to the default in holding the general meeting. *(Teunon and Chaudhuri, JJ.)* RAJ KUMAR KUSARI *v.* REGISTRAR OF JOINT STOCK COMPANIES, BENGAL. **21 C. W. N. 840: 18 Cr. L, J. 325: 38 I. C. 437.**

——— **Ss. 76, 131—(1882), S. 74**—*Definition of Manager—Firm managing a company describing itself managing agents.*

Under S. 74 (1882) the word 'manager' includes every person or body of persons who conducts or conduct the affairs of the company and to whom its management, subject to the control of the Directors, is entrusted and a firm is as capable of manging a company as an individual and if it does so it surely cannot escape liability for its misfeasance or nonfeasance merely by calling itself "Managing Agent" instead of manager. *(Rattigan, J.)* TOTA RAM *v.* EMPEROR,
18 P. R. (1916) Cr: 143 P. L. R. 1916 : 35 I. C. 482: 17 Cr. L. J. 306.

——— **S. 76 (1)**—*General meeting—Default in holding.*

Under S. 76 of the Companies Act there is no difference between a general meeting and an extraordinary meeting of the company. Where an extraordinary general meeting of a company was held within fifteen months of the last general meeting, no offence had been committed under S. 76 (1) of the Act. *(Ryves, J.)* LACHMI NARAIN *v.* EMPEROR. **1 U. P. L. R. (H. C.) 171 : 54 I, C. 494: 21 Cr. L. J. 94.**

COMPANIES ACT, (VII OF 1913), S. 83.

——— **S. 77—(1882), S. 75**—*Offence punishable under the Act—Repeal of Act—Effect of.*

An offence punishable under an Act and committed while the Act is in force cannot be punished after the Act is repealed. *(Chevis, J.)* RAM RICHPAL *v.* EMPEROR. **18 Cr. L. J. 896: 41 I. C. 1008: 41 P. W. R. 1917 (Cr).**

——— **S. 30—(1882), S. 45**—*Shareholder--Minor—Capacity—Rights and liabilities.*

A minor may be a member of a limited company. A shareholder who was a minor at the date of allotment of shares but after attaining majority received dividends and raised no objection to his name being included in the register of members, is estopped from denying as between himself and the company's representatives that he is a shareholder. A registered shareholder has a vested interest in the property of the company and may be liable to pay calls in the future. Being a person entitled to contest the company's affairs, he is bound to bear the burden attached to it. *(Scott, C. J. and Davar, J.)* FAZUL BHOY JAFFER *v.* THE CREDIT BANK OF INDIA, LTD.
39 Bom, 331: 27 I. C, 335: 16 Bom. L. R. 730.

——— **Ss. 81, 203—(1882), Ss 77, 173 (b) and (c)**—*Liquidator—Appointment—Notice—Validity of liquidators, appointment.*

A notice was given calling an extraordinary general meeting of the shareholders of a limitey company, to consider the position of the compand and if necessary to pass a special resolution that the company be voluntarily wound up and liquidators appointed and that in the event of the said resolution being passed, a special meeting be held immediately after the extraordinary general meeting of the shareholders confirming the same. A resolution was passed for winding up of the company and liquidators were appointed; the resolution nota being a special resolution as defined by S.77 the voluntary winding up was not according to S. 173 Cl. (*b*) and the appointment of the liquidators was a nullity and they had no authority to exercise the statutory powers of a properly appointed liquidator. 1 Ch. D. 38, rel (*Harrington, J.*) *In the matter of* INDIAN TRADING ENGINEERING CO. LTD. **11 I. C. 975 : 15 C. W. N.1047.**

——— **S. 83—(1882), S. 58**--*Jurisdiction—Registration of name.*

One of the articles of the association of a company provided that the transferee of a share should be a proper person to transfer the share to his name. A transferee applied for registration of his name and the agent of the company refused preemptorily to register the transferee's name and the company approved the action of the agent. The transferee applied to the court for rectification of the company's register substituting his name in place of his transferor. *Held*, that the court had jurisdiction to determine whether the transferee had a right under the articles to get his name registered and, to determine whether he was a proper person. *(Chandavarkar and Batchelor, JJ.)* RAJ NAGAR SPINNING AND WEAVING MANUFACTURING CO LTD. *v.* MANI LAL MAGAN LAL
17 I. C. 640 : 14 Bom. L. R. 919.

COMPANIES ACT, (VII OF 1913), S. 85.

——S. 85 (2)—*Ceasing to hold qualification shares by a Director—Whether amounts to vacation of office—English Law—New Act VII of* 1913.

Under English Law and S. 85 (2) of the New Act VII of 1913, the mere ceasing to hold the necessary qualification shares involves vacation of his office by a Director though this is not precisely provided in Act VI of 1882. (*Kensington, C.J. and Rattigan, JJ.*) CHANDRA BHAN *v.* EMPEROR.
15 Cr. L. J. 380 : 39 P. W. R. 1914 (Cr.) : 23 I C. 748 : 250 P. L. R. 1914.

——S. 86—*Director—Irregular appointment—Allotment of shares—Delay—Notice of allotment.*

Under the articles of association if the quorum is of three Directors and two of these only are regularly appointed, the construction of the Board is irregular and its allotment of shares is invalid unless the articles validate an act of *de facto* Director done in good faith. Persons to whom no notice of allotment is served cannot be put on the list of contributories at the time of liquidation. (*Piggott and Rafique, JJ.*) CHANGA MAL *v.* PROVINCIAL BANK, LTD. **36 All, 412 : 25 I. C. 210 : 12 A. L. J. 667.**

——S. 86—*De facto and de jure Directors.*

As between a company and third persons the Directors *de facto* are directors *de jure*. (*Beaman, J.*) HOPEMILLS, LTD *v* SIR KOVASJI, J, READY MONEY. **10 I. C. 748: 13 Bom, L. R. 162.**

——S. 86—*Directors—Action of—When binding on members—Right to forfeit shares — Liability as contributory.*

A right to forfeit shares must, in order to be effectually exercised, be pursued with the greatest exactness by the proper parties, *i.e* by the Directors properly appointed and by the requisite number of them and in the proper manner and for proper cause. And the right must be exercised *bona fide* for the purpose for which it was conferred. Where the Managing Director forfeited the shares of a contributory on request of the Board of Directors to him to settle the matter with the party but he never laid before the Board the action he took, *Held* that the managing Director's action was altogether *ultra vires* and that, on the company going into liquidation, the appellant was rightly placed in the list of contributories and his name could not be removed. (*Shadi Lal, J.*) KANSHI RAM *v.* KISHORE CHAND.
37 P. R. 1915 : 101 P. W. R. 1915 : 29 I. C. 567 : 2 P. L. R. 1916.

——S. 86—*Act of Directors or Manager.*

Acts done *bona fide* by a Manager or Director or valid in spite of a defect in their appointment, not only between company and outsiders but between company and its members. (*Rattigan and Shah Din, JJ.*) RAM NARAIN *v.* RAM KISHEN.
108 P. W. R. 1911 : 179 P. L. R. 1911 : 10 I. C, 515 : 46 P. R. 1911

——S. 91-A—*Directors—Position of—Trustee.*

The Directors of the company are agents of the company and trustees for the shareholders and cannot enter into a contract with the company for personal benefit. (*Backwell, J.*) RAMASWAMI AIYAR *v.* MADRAS TIMES PRINTING AND PUBLISHING CO., LTD. **32 I. C. 350 : 38 Mad. 991.**

COMPANIES ACT, (VII OF 1913), S. 102.

——S. 93—*Director approved and recognized—Outsider cannot question.*

It is not open to an outsider to challenge the appointment of Director or to contest a Director's authority to act on behalf of the company when the company has recognized a person to be a Director for a long time without repudiating his acts on any single occasion. (*Rattigan and Shadi Lal, JJ.*)IMPERIAL OIL SOAP AND GENERAL MILLS CO. LTD. *v.* WAZIR SINGH, **31 I. C. 595 : 182 P. W. R. 1915.**

——Ss. 96 and 123—*Arbitration—Submission to—Contract not under seal.*

S. 96 of the Companies Act does not provide that an agreement to refer disputes must be under seal. A contract relating to the working of a certain machinery made not under seal and providing for reference of all future disputes to arbitration, is not illegal. S.123 of the Act applies only to those submissions to arbitration which have been made under the provisions of the Act. (*Richards, C.J. and Banerjee, J.*) GANGES SUGAR WORKS, LTD *v.* NURI MIAH. **37 All. 273 : 28 I. C. 384: 13 A. L. J. 312.**

——S. 102—*Allotment of shares—Managing Director—Delegation of power—Ratification — Rights of revocation.*

Where there is no valid delegation to the Managing Director of the power of allotting shares which was reserved to the Board of Directors by the Articles of Association the shares cannot be validly allotted by him. The applicant can revoke his application for the allotment of any shares before any valid allotment or ratification by the Board of Directors. (*Scott-Smith and Dundas, JJ.*) BANK OF PESHAWAR, LTD. *v.* MADHO RAM. **1 Lah. L. J. 1.**

——S. 102—*Application for allotment of shares—Invalid allotment—Revocation before ratification.*

Two Directors of the Bank had made a delegation of the power of allotting shares to the General Manager. Subsequently, these two (one representing a third Director by proxy.) together with a third, purported to confirm the decision of the previous week. Neither of these two Directors had paid their allotment money by the date. *Held*, that no proper meeting of the Directors could be said to have been held and that there was no valid delegation of the power of allotting the shares or any valid allotment of the shares to the defendants. It was open to the defendants to revoke his application for the allotment of any shares, anterior to the date of any valid allotment or ratification by the Board of Directors. (*Scott-Smith and Dundas, JJ.*) BANK OF PESHAWAR *v.* MADHO RAM. **52 P.W. R. 1919 : 51. I. C. 813.**

——S. 102—*Articles of Association —Allotment of shares by Secretary and Treasurer—Validity of.*

An allotment of shares by the Secretaries and Treasurers is valid if the Articles of an Association, not especially providing for allotment by

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the Directors, provide that the general management should be by Secretaries and Treasurers-subject to the Directors' supervision and that powers should be conferred upon the Secretaries by the Directors from time to time and if the form of application put forward the Secretaries as the persons to whom the application should be made. (*Sadasiva Aizar and Napier, JJ.*) PUSRALA SANYASI *v.* GUNTUR COTTON JUTE AND PAPER MILLS CO., LTD.

26 I. C. 349 : 16 M. L. T. 538.

——S. 104—(1882), S. 28—*Conditional agreement—Shares—Condition of taking profits.*

An agreement that the purchaser of shares in a company need not pay unless the company made profits and paid profits thereon, is in clear violation of S. 28, If an application for shares is subject to a condition preceding, that condition must be performed to create a liability to take them. But in the case of conditions subsequent, the liability arises though it is never complied with. (*Scott, C. J. and Russel, J.*) MOTI LAL CHUNI LAL *v.* THAKURLAL.

36 Bom. 557 : 14 Bom. L. R. 648 : 16 I. C. 696.

——S. 104—(1882), S. 28—*Contract to take shares—Winding up—Contributory—Set off.*

If before a contract to take shares be rescinded, a winding up be commenced or a concern ceases to be a going concern, the shareholder will be liable to be a contributory. It is only a debt due *in praesenti* from the company that can be set off for future calls on shares. The arrangement as to payment for the shares of a registered company by an agreement between the shareholder and the Company under which he is to receive fully paid up shares as part of an advance which the company has undertaken to make, is of the nature referred to in S. 28 and cannot be considered valid if it is not in writing and is not filed with the Registrar of Joint Stock Companies. (*Scott-Smith and Shadi Lal, JJ.*) LACHMAN SINGH *v.* LIQUIDATIONS OF THE INDUSTRIAL EAST CO., LTD

102 P. W. R. 1914 : 25 I. C. 672 : 201 P. L. R. 1914.

——S. 104 (1) (b)—*Allotment of shares as fully paid-up otherwise than in cash.*

Where under the Companies Act, 1913, it appeared the debenture deed provided that the registered holder thereof shall, while the same remains in force and upon giving previous notice in writing, be entitled to surrender this debenture and receive in consideration thereof one fully paid ordinary share of Rs. 100 of the company forming part of or ranking *pari pasu* with the shares of the original capital and, upon the surrender of this debenture under this condition the holder will not be entitled to proportionate interest thereon and the ordinary share so allotted in exchange shall rank for dividend from and after the half-year in which the registration is made. *Held*, that the share allotted in those circumstances was allotted as fully paid-up otherwise than in cash. (*Wallis, C. J. and Oldfield, J.*) THODAPUZHA RUBBER CO., LTD *v.* REGISTRAR JOINT STOCK COMPANIES, MADRAS.

41 Mad. 307 : 33 M. L. J. 474 : (1917) M. W. N. 776 : 42 I. C. 674 : 6 L. W. 706.

COMPANIES ACT (VII OF 1913), S. 131.

——— S. 120—(1882) S. 68—*Explanation—Charge on Company's property in favour of Secretary—Omission to register—Enforcement.*

Under S. 68 explanation when a charge specifically affecting the property of a company has been granted in favour of an officer of the company, he cannot avail himself of it unless it is registered under S. 68, though he has ceased to be an officer at the time when the charge is sought to be enforced. The words 'as such' are unnecessary though not insensible. The construction of the explanation must depend on its terms and no theory of its purpose can be entertained unless it is to be inferred from the language used. (*Viscount Finlay.*) KRISHNA *v.* NALLAPERUMAL.

12 L. W. 92 : 47 I. A. 33 : 28 M. L. T. 28 : (1920) M. W. N. 419 : 2 U. P. L. R. (P. C.) 118 : 56 I. C. 163 (P. C.) : 43 M. 550 : 38 M. L. J. 444 : 22 Bom. L. R. 568 : 18 A. L. J. 489.

——S. 120—(1882), S. 68—*Floating charge—Provision for cessation of authority to carry on business on default—Charge in favour of officers for salary—Non-registration.*

Where the debenture-deed after charging the assets of the company provided that notwithstanding such charge, the company should carry on business and deal with the assets of the company until default was made for six months in the payment of the principal, and that from and after the happening of such default the company should not carry on business and the charge created by the debenture should be immediately enforceable, but notwithstanding such default the debenture holder allowed the business to go on, *Held*, that a charge created in favour of the Secretary and Manager of the Company for their salary could not be avoided though the floating charge had already crystalized and that the charge being in favour of the officers of the company, they could not take advantage of it, as it was not registered as required by S. 68. (*Wallis, C. J. and Seshagiri Aiyar, J.*) GOPALA KRISHNA *v.* KANDASWAMY.

32 I. C. 91.

——S. 120—(1882), S. 68—*Scope.*

Where a debenture-deed charged all assets of company as floating charge and provided that the company shall carry on business and deal with assets till default is made for six calendar months in paying the principal and the company carried on business in spite of the default and created charges even after default, *Held*, the company's right continued till the debenture-holder showed his desire to stop it as by applying for Receiver and that the charges were not void. (*Wallis, C. J. and Tyabji, J.*) NALAPERUMAL *v.* KRISHNA

30 I. C. 286 : 29 M. L. J. 110. Affirmed on appeal 56 I. C. 163 (P. C.) : 43 M. 550.

——S. 131—(1882) S. 74—*Summary trial—Jurisdiction—Cr. P. C. Ss. 5, 260, and 262.*

A Magistrate of the First Class can try an offence under S. 74 of the Companies Act in a summary way but he cannot inflict a lesser punishment than a fine of Rs. 1,000. The Magistrate should exercise a wise discretion in trying a case summarily and ordinarily he ought to restrict

COMPANIES ACT (VII OF 1913), S. 131.

such trials to simple cases. (*Tudball, J.*) DINA NATH *v.* EMPEROR. **35 All 173 : 11 A. L. J 196 : 18 I. C. 665 : 14 Cr. L. J. 105.**

——S. 131—(1882), S. 74—*Filing balance sheet within one year—Director resigning before the year—Whether liable for failure.*

A company is not by law obliged to file a balance sheet within one year from its registration and a Director resigning within that year cannot be fined under S. 74 of the Act for failing to file the balance sheet. (*Kensington and Ratligan, JJ.*) CHANDRABAN *v.* EMPEROR. **39 P.W.R. 1914 (Cr) : 250 P.L R. 1914 : 23. I. C. 748 : 15 Cr. L. J. 380.**

——S. 131--(1882), S 74—*Penalty of Rs.* 1,000 —*Whether a lesser fine can be imposed.*

Under S. 74 the fine of Rs. 1,000 being a fixed one, a lesser fine cannot be imposed where the offence is proved; if it were less, the Chief Court has power to enhance it, in revision (*Johnstone, J.*) EMPEROR *v.* HARIKISHEN LAL. **37 P.L.R. 1914. 16 P.W.R. Cr. 1914 : 15 Cr. L.J. 260 : 23 I.C. 468 · 19 P. R. Cr. 1914.**

——S. 134 (4)—*Balance-sheet not filed by Director—Offence—Plea of no meeting being held—Territorial jurisdiction.*

The Director of a Company cannot plead that no meeting was held and that no balance sheet was laid before the meeting and that it was impossible to comply with the section. The Presidency Magistrate in Calcutta could try a charge under the section, even when the company is situated outside Calcutta, as the balance-sheet was to be filed in the office of the Registrar which was in Calcutta. (*Teunon and Richardson, JJ.*) DEBENDRANATH DAS GUPTA *v.* REGISTRAR, JOINT STOCK COMPANIES, BENGAL. **45 Cal. 486 and 490 : 18 Cr. L.J. 787 : 22 C.W.N. 96 : 41 I.C. 307 : 27 C.L J. 85.**

——Ss. 147 and 169—*Liquidation—Bankruptcy rules—Applicability of.*

A Company in liquidation becomes solvent when it has paid of its liabilities existing at the date of the winding up order; ordinary bankruptcy rules are applicable to companies in liquidation and when the liabilities existing at the date of the winding up order have been discharged, creditors are entitled to subsequent interest on debts carrying interest. (*Scott-Smith and Wilberforce, JJ.*) DEVI DITTA MAL *v.* THE OFFICIAL LIQUIDATION OF THE AMRITSAR BANK, LTD. **56 I.C. 69 : 1 Lah. 368.**

——Ss. 150 and 166—*Order for payment—Right of transferee to enforce—Dissolution—Liquidation—Effect of.*

A person to whom the liquidator has transferred a payment order made by the court under S. 150 of the Companies Act against a contributory is entitled to invoke the summary jurisdiction of the court for the purpose of recovering money due from the latter. The circumstance that tht company has been finally dissolved does not prevent the assignee from seeking relief from the liquidation Court and render it necessary for him to bring an action for the recovery of the money. (*Shadi Lal, C. J. and Wilberforce, J.*) BAWA PARDUMAN SINGH *v.* PIONEER JEWELLERY COMPANY, LTD. **67 I. C. 443 : 3 Lah. L. J. 382.**

COMPANIES ACT, (VII OF 1913) S. 153.

——S.150—*Payment order when can be made —Validity of a payment order.*

The Court in liquidation proceedings should realize the assets and discharge liabilities of a company as far as possible but it is not bound to help third persons who have purchased the debts, to realize them. The court cannot evidently make a payment order in respect of a debt which has been sold to a third person. A payment order, similar to a decree, can be disregarded by the Court which is applied for execution provided the order is nullity. (*Scott-Smith, J.*) SALIG RAM *v.* OFFICIAL LIQUIDATOR INDIAN EXCHANGE BANK. **60 I.C. 506 : 3 Lah, L.J. 178.**

——S. 150—*Payment order who can obtain.*

A Liquidator of a Bank transferred with the Court's sanction certain book debts, to certain persons and subsequently agreed with the vendors to execute power-of-attorneys in their favour to enable them to obtain a payment order. The vendees applied under S. 150 for an order of payment, *Held*, that as the application was made for the benefit of third parties and not 'in the name and on behalf of the company', it was not maintainable. (*Abdul Raoof and Martineau, JJ.*) DOABA BANK, LTD. *v.* KUNDUN LAL. **3 L.L.J. 80 : 59 I.C. 588 : 18 P.W.R. 1921.**

——S. 153—*Company — Compromise or arrangement among creditors—Sanction of Court--Date when arrangement becomes operative.*

The compromise or arrangement contemplated by S. 153 of the Indian Companies Act becomes binding from the date when it is arrived at, subject to the sanction by court. If that sanction be refused, the agreement is without effect ; but if sanction is given the agreement takes effect not from the date of sanction, but from the date when it is made, (*Viscount Haldane.*) RAGHU BAR DAYAL *v.* BANK OF BURMA.

46 I.A. 135 : 36 M.L.J. 526 : 17 A L.J. 533 : 23 C.W.N. 697 : 21 Bom. L R. 481 : 22 O.C. 106: (1919) M.W.N. 500 : 1. U.P.L.R. (P.C.) 51 : 30 C. L. J. 214 : 26 M.L.T. 178 : 6 O.L.J. 423 : 50 I. C. 429 (P. C.). : 10 L. W. 374

——S. 153—*Composition.*

A scheme sanctioned under S. 153 does not date back to the time when the Bank suspended payment but operates only from the date of sanction. Where before date of sanction a person was creditor to the extent of Rs. 4,000 and a debtor to the extent of R. 2,000 he must be relieved from liability as a debtor and must be deemed to be a creditor to the extent of Rs. 2,000. (*Shadi Lal and Le Rossignol, JJ.*) CHUNU LAL *v.* BANK OF UPPER INDIA, LTD., DELHI. **40 I. C. 904 : 106 P. W. R. 1917.**

——S. 153 (1882) S. 203—*Scheme—Sanction of.*

Under S. 203 of the Companies Act, court cannot sanction a scheme which is neither a *bona fide* nor a workable one. (*Wallis, C. J. and Seshagiri Aiyar, J.*) THE SOUTH INDIAN MILLS CO., LTD. *v.* BURN & CO., LTD. **30 I. C. 386.**

——S. 153—*Creditors and Shareholders—Meeting of—Arrangement— Acceptance by creditors not present at meeting—Effect.*

COMPANIES ACT (VII OF 1913), S, 153.

The written acceptance of the arrangement by those shareholders and creditors who are not present either in person or by proxy, cannot be taken into account to make up the majority in number representing three-fourths of the share-holders and creditors for a meeting under S. 153 (*Stuart, J. C.*) KASHMIRI BANK, LTD. *v.* GOKUL CHAND. **40 I. C. 57 : 4 0. L. J, 160.**

——— **S. 153**—*Creditors meeting of, after Bank stopped payment—Agreement by majority of creditors to re-open.*

At a meeting held under the provisions of S.153 of the creditors of a Bank stopping payment, a majority in number agreed to re-open and to conduct the business. The arrangement having been sanctioned by the High Court came into force. One of the creditors had between the date when the creditors voted upon the proposal and the date of the sanction of the High Court, obtained the decree in respect of his debt; *Held*, that the agreement was binding on him the agreement took effect from the date when it was arrived at and not merely from the date of sanction. (*Stuart and Mohommad Ali, A. J. Cs.*) RAGHUBAR DAYAL *v.* BANK OF UPPER INDIA LTD., LUCKNOW. **32 I. C. 451 : 18 0. C, 272.**

———**S. 156**—*Limitation Act, Art.* 112.

A member of a company is chargeable to the extent of his original share for all the charges if the company is wound up and must contribute his unpaid share to the company's assets to pay the creditiors and expenses of winding up of the company under S. 61 unless he proves as against the liquidator, that he should not be put on the list of the contributories. (*Piggott and Walsh, JJ.*) JAGANNATH PRASAD *v.* V. P. FLOUR AND OIL MILLS CO., LTD. **38 All. 347: 35 I C. 159: 14 A.L.J. 349.**

———**S. 156**—*Suit by contributories after winding up order.*

An action by the contributories after a winding up order, for the determination of their liability is not contemplated by the legislature. This matter cannot be decided by any other court than the court conducting the liquidation. (*Shadi Lal, J.*) AMRITSAR NATIONAL BANKING CO., LTD *v.* MOHAN LAL. **13 P. R. 1917 : 37 I. C. 791 : 29 P, L. R. 1917.**

———**S. 156**—*Contributory shares—Liability of purchaser.*

If a voidable contract be not rescinded before the winding up of a company, the shareholder will be liable as a contributory; and he cannot be allowed to allege fraud or misrepresentation after the company has been wound up except under special circumstances. (*Ratligan and Beadon, JJ.*) ALISTER WEST *v.* BENI PERSHAD. **165 P. L. R. 1914 : 69 P. R. 1914 : 24 I. C. 236 : 113 P. W. R. 1914.**

———**S. 156 (1882). S. 61**—*Set off—Preference to creditors.*

A member of a Joint Stock Company or friendly society with limited liability under liquidation cannot set off paid up calls or calls to be paid up against a debt due to the company and thus give a preference over the creditors. The principle applies equally to a set off claimed in court as to an attempted appropriation by way of set off out of court. (*Ayling and Seshagiri Aiyar, JJ.*) MYLAPORE PERMANENT BENEFIT FUND LTD *v.* AROGIASWAMI PILLAI, **40 M. 1004 : 21 M. L. T. 233: 38 I. C, 233 : 32 M. L. J. 528.**

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———**Ss. 158 and 269**—*Contributory.*

Contributory includes any person alleged to be contributory. Suit by a Company in spite of an order for winding-up after the commencement of the suit can be brought against a contributory. (*Shadi Lal, J.*) RUP RAM *v.* FAZAL DIN. **1 Lah. 237 : 57 I. C. 223 : 1 P. L. R. 1921.**

———**S. 158**—*Fully paid shareholder—Contributory—Petition for winding up.*

A fully paid up shareholder is a contributory within S. 158 and may apply for winding up of the company, *National Savings Bank Association in re* (1886) 1 Ch. Ap. 547 Ref. (*Shadi Lal, J.*, IMPERIAL OIL SOAP AND GENERAL MILLS & CO.) LTD., DELHI *v.* RAM CHAND. **36 I. C. 980 : 91 P. R. 1917.**

———**S. 162—(1882) S. 128**—*Company winding up—Grounds for.*

S. 128 clause (*a*) must be construed as *Ejusdem Generis* with clause (*a*) to (*d*). A shareholder's petition for winding up should be scrutinized more closely than a creditor's petition and it must allege one of the grounds under clauses (*a*) to (*c*) of S. 128. There is nothing in the Act to fetter the Court's discretion in admitting or rejecting a petition for winding up. (*Macleod, J.*) *In re* PIONEER BANK *In re* CHAIN RAI VELERAN. **39 B. 16 : 25 I. C. 264 : 16 Bom. L. R. 508.**

———**S. 162**—*Compulsory winding up—Majority of shareholders voting in favour of, is no ground for ordering it—Fraud in promotion is not a ground.*

Where the Judge had not decided whether there was a valid resolution for voluntary winding up; or that there was any valid ground for making a winding up order, but he directed the meeting of share-holders to be held and then, because there was a considerable majority of the share-holders who voted at that meeting in favour of winding up and then made the compulsory winding up order. *Held*: it was not a sufficient ground for the compulsory winding up order. The mere fact that a majority of the share holders, who voted at the meeting, where in favour of winding up the company either under supervision of the court or by the Court compulsorily is not sufficient to justify the court in making the compulsory winding up especially were there was no valid resolution for voluntary winding up.

The mere fact that there has been a fraud in the promotion or fraudulent misrepresentation in the prospectus, will not be sufficient to found a winding up order as the majority of share holders may waive the fraud. (*Sanderson, C. J. and Richardson, J.*) ORIENTAL NAVIGATION COY *v.* BANARAM AGARWALLA. **49 Cal, 399 : 69 I. C, 241: 1922 Cal. 865.**

———**S. 162**—*Interference by Court—Discretion when to be exercised.*

The Companies Act creates as between the share holders, a domestic tribunal, and unless

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a clear case is made out, the court will be slow to withdraw from it the decision whether the company's business shall or shall not be carried on. When an application to wind up a company is supported on the ground that the company has suspended business for a whole year, the power granted by the law to the Court to use its discretion while deciding whether such application should be refused or granted, should be exercised only when there is a fair indication that there is no intention to carry on business. If the suspension is satisfactorily accounted for and appears to be due to temporary causes, the order may be refused, Where the firm of managing agents of a company is dissolved, the fact that steps were taken since the dissolution, at extra ordinary general meetings to appoint new managing agents is sufficient to indicate that it is possible to carry on the business of the company and there is no complete deadlock, necessititang the compulsory winding up of the Company. The principle of 'substratum gone' cannot be applied to a case where it is not proved that the object of the company as set out in the Memorandum cannot be fulfilled in other ways or by the employment of other agencies. (*Mookerjee and Fletcher, JJ.*) MURLIDHAR ROY *v.* THE BENGAL STEAM-SHIP CO., LLD. **59 I. C. 542 : 47 C. 654.**

———**Ss. 162, 163 (1)**—*Application for winding up.*

A creditor must file a suit instead of making an application under S. 163 (i) when the company is solvent and there is ground to suppose the existence of a *bona fide* dispute of the substantial part of the debt, which cannot be called a neglected one. The court has inherent jurisdiction to stay the proceedings amounting to an abuse of its process. A creditor of a company, while two suits of certain claims were pending, filed an application in a court for the sake of winding the company's business. The company applied for its removal on the ground of the abuse of the court process and the ulterior object of the creditor being to force his terms of the settlement on the company. But the application was dismissed with permission to appeal against the order passed under S. 163 (i) under certain terms. *Held*, (i) the appeal against the order was competent under clause 15, Letters Patent, having regard to the terms of the order giving effect to the judgment. (ii) The judge's dismissal of the application in *toto* was not right, as he could have properly stayed the proceedings of winding up till the final determination of the two suits. (*Sanderson, C. J. and Woodroffee, J.*) THE COMPANY *v.* RAMESHWAR SINGH.
58 I. C. 561 : 23 C. W. N. 844.

———**S. 162 (vi)** — *Liquidation—Power of Court.*

The power of court to wind up a company given to a court by this section should not be exercised unless there is very strong ground for acting upon it because the Indian Companies are governed by a majority of their own members and where there is a domestic tribunal which has powers to decide upon a question, it should, if possible, be left to that domestic tribunal. **32 B. 415** R. If a company is not conceived and brought forth in fraud, or is not one whose substratum is gone, the mere fact the applicants apprehend a loss from a further working is no ground for winding up the company under this clause. (*Knox, J.*) IN THE MATTER OF MAHAMANDAL SHASTRA PRAKASHAK SAMATY, LTD., BENARES.
39 All. 334 : 39 I. C. 570: 15 A. L. J. 193.

COMPANIES ACT (VII OF 1913), S. 167.

———**S. 162 (6)**—*Scope of — Winding up—When to be ordered.*

Though S. 162 (6) need not be construed *eiusdem generis* with Cls (1) and (5) of the section it will yet require grounds of like magnitude before acting under the clause and it is only in extreme cases that a Court will at the suggestion of the minority disregard the wishes of the domestic forum and condemn the Company to extinction. (*Rutledge, J.*) B. COWASJI *v.* NATH SINGH OIL COMPANY, LTD. **13 Bur. L. T. 51: 59 I. C. 524.**

———**S. 164**—*Additional District Judge—Jurisdiction.*

The additional District Judge has jurisdiction to make all orders which the District Judge can make in the winding up of a company. (*Lord Phillimore.*) BEHARI LAL BULAKI RAM *v.* KUNDAN LAL. **32 M. L. T. 15: 27 C. W. N. 509: 69 I. C 356: 1923 M.W. N. 388 : 1922 P. C. 361.**

———**Ss. 164 and 200**—*Winding up—Reference to District Court—Contributories elsewhere.*

An order for the winding up of a company was made by the Chief Court and under S. 164 of the Companies Act subsequent proceedings were taken in the Court of the District Judge of Lahore against contributories residing in districts within the jurisdiction of the Allahabad High Court for enforcing these orders. *Held*, that the High Court had jurisdiction to enforce the orders by proceedings in execution before itself or to authorize the official liquidator to apply to the various District Courts in respect of each of the persons against whom orders for contribution had been passed according to the balance of convenience in each case. (*Piggott and Dalal. JJ.*) *In the matter of* THE NATIONAL INSURANCE AND BANKING COMPANY, LTD, IN LJQUIDATION.
54 I. C. 384: 1 U. P. L. R, (H. C.) 182.

———**S. 166**—*Petition to wind up—Opposition by other creditors.*

An application to wind up a company was adjourned to see if the agreement to sell the property would be effected to the advantage of the Majority of the creditors who opposed the petition of a creditors having interest. (*Beasley, J.*) IRRAWADDY FLOTILLA CO., LTD. *v.* MERGUI TIN DREDGING CO. **2 Bur. L. J. 296: 1924 Rang. 108.**

———**S. 167**—*Winding up—Dissolution—Disposal of books and papers—Order—Form of.*

The form of order under the Companies Act, 1913, was shown for the dissolution of a company in compulsory liquidation undistributed assets being in the hands of the liquidator. (*Greaves, J.*) *In re* SHRAEGARS, LTD. **47 Cal. 620.**

COMPANIES ACT (VII OF 1913), S. 167.

——— S. 167—*Winding up order—Secured creditor is not affected.*

In matters of liquidation the rules relating to bankruptcy are, as far as possible, applicable. When a company goes into liquidation a secured creditor may realise his security and prove for any outstanding balance. The remaining assets would be liable for such principal and interest as was due on the date of the winding up order. A secured creditor is in the case of liquidation on the same footing as in that of insolvency proceedings. The property hypothecated is liable for the whole claim, principal and interest, up to date of realization, and it is only the liability of the remaining assets that could be affected by the winding up order. 7 B. 455; 12 B. 272: 15 I. C. 860; 38 B. 359 Rel. (*Broadway and Martineau, JJ.*) RAM CHAND *v.* BANK OF UPPER INDIA. **3 Lah. 59 : 74 I. C. 187 : 24 P. W. R. 1922 : 5 L. L. J. 558 : 1922 Lah. 281.**

——— S. 168—*Petition by Creditors for winding up—Voluntary liquidation.*

Where a company went into voluntary liquidation during the pendency of a petition by the creditors for winding up the liquidators appointed by the company *Pendente Lite* cannot contest the order directing the compulsory winding up, in pursuance of the petition. (*Kensington, C.J. and Ratligan, J.*) PEOPLE'S BANK OF INDIA, LTD, *v.* NARAIN DAS. **73 P. R. 1914 : 25 I. C. 553 : 279 P. L. R. 1914.**

——— S. 169 (1882), S. 169—*Winding-up proceedings by creditor—Enforceability.*

Where a creditor's demand is in respect of a claim which the company honestly believes to be fraudulent and unsustainable in law, the court has to see whether the defence is a genuine one or is merely a cloak of the company's real inability to pay its first debts. A court should not allow a creditor to file in, a winding-up petition, with a view to bring the presence of insolvency proceedings to bear upon the company in order to make it pay cheaply and expeditiously, a heavy debt which the company desires to dispute in the Civil Courts. Such a petition must be dismissed under S. 169 of the Companies Act. An appeal lies from an order refusing to wind up a company. (*Beaman and Hayward, JJ.*) TULSIDAS LALUBHAI *v.* THE BHARATKAND COTTON MILLS CO., LTD. **39 Bom. 47 : 27 I. C. 44 : 16 Bom. L. R 692.**

——— S. 169—*Review by liquidation judge of his order—Legality.*

A judge conducting the liquidation is not precluded from recalling a wrong order and rectifying a mistake. S. 169 of the Act was not intended to refer to cases in which a judge upon the discovery of fresh matter considers it expedient to pass a fresh order in the place of an order passed by him. 16 All. 63 foll. (*Shadi Lal, J.*) RALLA RAM *v.* THE AMRITSAR MUTUAL RELIEF FUND, LTD. IN LIQUIDATION. **51 I. C. 723 : 13 P. L. R. 1919.**

——— Ss. 169, 175—S. 134—*Liquidation inevitable—Company's suspending business—Provisional liquidator—Appointment justifiable.*

COMPANIES ACT (VII OF 1913), S. 171.

Where a company suspended business and is plainly, commercially and technically insolvent, a court is justified in appointing a provisional liquidator under S. 134, Company's Act of 1882. (*Rattigan, J.*) THE PEOPLE'S BANK OF INDIA, LTD. *v.* MESSRS. NARAIN DAS BHAGWAN DAS. **337 P. L. R. 1913 : 206 P. W. R. 1913 : 21 I. C. 577 : 31 P. R. 1914.**

——— S. 169—*Notice of Appeal—Extension of time—Carelessness or negligence is no ground for.*

If a party wishes to appeal against the decision or order of a district court, under the Companies Act he must give a notice of the same within three weeks from the date of such order, or decision or the appeal will not be heard. A party is not entitled to claim extension of time under S. 169 merely on the ground of carelessness or ignorance of his pleader. Inasmuch as extension of time under S. 169, is granted at the expense of the other party, it will not be granted if sufficient cause is not shown. (*Chevis, J.*) HIRA LAL *v.* HIMALAYA GLASS WORKS CO. **100 P. W. R. 1911 : 10 I. C. 433: 176 P. L. R. 1911.**

——— S. 171 (1882) S. 130.

A court only, or, with its leave, others, can institute suits or applications under the Act to wind up a company's business. The principal court with original civil jurisdiction at the company's business place, is the court to deal with the matter. (*Knox, J.*) ALI AKHTAR *v.* PEOPLE'S INDUSTRIAL BANK, LTD. **18 A. L. J. 296 : 58 I. C. 607 : 2 U. P. L R. All. 82.**

——— S. 171—*Leave under—Meaning of—C. P. C., S. 47.*

Leave under S. 171 of Companies Act means leave by the winding up court and when once given includes all subsidiary legal proceedings. An application by a transferee of a decree against a company since gone into liquidation, for substitution of his name as decree-holder, must be made under S. 47 (3), C. P. C. to the executing court and not to the winding-up court. (*Piggott and Walsh, JJ.*) KASHI PRASAD *v.* UNION BANK OF INDIA, LTD., DELHI. **41 All. 432 : 50 I. C. 115 : 17 A. L. J. 464.**

——— Ss. 171 and (1882) S. 136—*Unsuccessful claimants—Suit—C. P. Code, O. 21, R. 63.*

A suit by unsuccessful claimants against a company in liquidation must commence after obtaining leave of the liquidation Judge. 38 M. 535 ; 62 P. R. 1918 dist. (*Shadi Lal and Wilberforce, JJ.*) BHAWANI SHANKER *v.* INDUSTRIAL BANK OF INDIA LTD. LUDHIANA. **4 P. W. R. 1919 : 31 P. L R. 1919 : 50 I. C. 645 : 70 P. R. 1919.**

——— S. 171—*Liquidation—Leave to continue suit against company.*

Under S. 171 of the Companies Act, leave to continue an action should as a general rule be given only where some question arises which cannot satisfactorily be determined in the winding-up proceedings. (*Broadway, J.*) JAWAHIR SINGH *v.* SPINNING AND WEAVING FACTORY MILLS CO., LTD. **93 P. R. 1918 : 101 P. L. R. 1918: 47 I. C. 1005 : 170 P. W R. 1918.**

COMPANIES ACT (VII OF 1913), S. 171.

——S. 171—*Appeal suit brought by—Company—Leave of liquidating Court—Necessity.*

An appeal or application brought by a company does not come within S. 171 of the Act and can be instituted or proceeded with, without the leave of the court, 91 P. R. 1916 diss. (*Chevis, Shadi Lal and Broadway, JJ.*) KISHAN SINGH *v.* INDUSTRIAL BANK OF INDIA. **62 P. R. 1918 : 47 I. C. 392 : 32 P. L. R. 1918 : 186 P. W. R. 1918 (F. B.).**

——Ss. 171, 225—*Permission to institute suit against company after winding-up—Interference by Appellate Court.*

An order giving permission to continue a suit against a company, after the winding-up order has been made, does not amount to a permission to institute the suit. Unless the lower court's order is altogether wrong, its discretion, in permitting an action to be continued against a company which is being wound up will not generally be disturbed by the Appellate Court. (*Shadi Lal, J.*) AMRITSAR NATIONAL BANKING CO., LTD. *v.* MOHANLAL.

13 P. R. (1917) : 37 I. C. 791 : 29 P. L. R. 1917.

——S. 171—(1882) S. 136—*Revision against decree in favour of a bank which became insolvent pending revision—Leave of Court.*

The People's Bank of India, Ltd, sued the petitioner for a certain sum due to the company and obtained a decree which was confirmed on appeal. Petitioner then filed a revision in the Chief Court. Pending determination of his petition the Bank became insolvent, and the District Judge passed a winding-up order. *Held*, that the revision proceeding against the decree was a proceeding against the 'company' as under S. 136 court's leave must be obtained. (*Chevis and Le Rossignol, JJ.*) MILAWA RAM *v.* PEOPLE'S BANK OF INDIA.

91 P. R. (1916) : 36 I. C. 618 : 80 P. L. R. 1917.

——Ss. 171, 175—Ss. 137 and 141—*Company, winding-up order—Effect—Discharge of servants of company—Appeal against order appointing Official Liquidator—Managing Director, if can appeal on company's behalf.*

A Director of a company cannot institute proceedings for the company after a winding-up order has been made. *Fowler v. Bread Patent Night Light Co.* (1893) I Ch. 724, *Messrs Brothers, Ltd., v. Measurest* (1910) I Ch. 336 ref.—Managing Director of a Company which has been wound up cannot appeal against an order appointing an Official Liquidator and an order refusing re-hearing of the appointment proceedings. (*Oldfield and Sadasiva Aiyar, JJ.*) SOUTH INDIAN MILLS CO., LTD. *v.* SHIVOLAL MOTILAL.

40 Mad 706 : (1916) 2 M. W. N. 250 : 36 I. C. 617 : 4 L. W 226.

——S. 171—*Suit—Against liquidators after winding-up order.*

After a court's order for winding-up a Bank, no suit can be brought against the voluntary and official liquidators without leave of the court conducting liquidation proceedings, under S. 171 of the Act which applies to such a case. (*Lindsay, J. C.*) JIWAN LAL *v.* RADNA NATH DAS.

37 I. C. 427 : 3 O. L. J. 641.

COMPANIES ACT (VII OF 1913), S. 184.

——Ss. 174, 202—Ss. 140 and 169—*Jurisdiction of Court.*

The court has full discretion in spite of S. 140 in appointing an Official Liquidator while trying a suit to wind up a business. The Appellate Court can interfere in special circumstances. (*Fox, C. J. and Hartnol, J.*) NOBLE *v.* BANK OF BURMA, LTD. **17 I. C. 853 : 5 Bur. L. T. 193.**

——S. 176—(1882) S. 142—*Official Liquidator Resignation without leave of liquidating Court—'Validity'—Court's acceptance of resignation—Legality.*

An official liquidator cannot resign at will without securing the concurrence of the liquidating court. He cannot resign on caprice or resentment at enquiries regarding the nature of his past operations and if he does so, he is liable to forfeit pay. (*Le Rossignol and Wilberforce, JJ.*) DIGNASSE *v.* CHAJJU RAM. **53 I. C. 649 : 51 P. R. 1919.**

——Ss. 177 and 232—*Sale—Assets of a company—After winding up order—Validity.*

A sale of the assets of a company after the winding-up order, in execution of decree passed before the order, without permission of court is voidable at the instance of the Liquidator. (*Chamier, C.J. and Roe, J.*) BULDEO NARAYANSING *v.* UNITED INDIA BANK, LTD. **2 Pat. L. J. 77 : 1 Pat. L. W. 241 : 38 I. C. 91 : 1917 Pat. 315.**

——Ss. 178 and 215—*Voluntary winding-up—Order staying proceedings.*

Courts in India have the power to make an order for the stay of the proceedings under a voluntary winding up under S. 215 read with S. 175. The court has to see whether a stay of the proceedings will be conducive or detrimental to commercial morality and to the interest of the public at large (1903) 2 Ch. 174 foll. Having regard to the fact that the company in question was insolvent and that the resolution of the company to be wound up was passed with a view to the Bank being started after the claims of the creditors had been satisfied, proceedings should be stayed subject to the condition that all the shareholders should be given the option of retiring from the company or continue to be its members. (*Shadi Lal and Martineau, JJ.*) THE PUNJAB CO-OPERATIVE BANK, LTD., *In re.* **49 I.C. 412 : 24 P.W.R. 1919.**

——S. 179 (c) — *Sale — Lessee as buyer—Validity.*

In the course of the winding up a company the official liquidator found it convenient to let out a mill for a fixed period, and sell it when the market was favourable. Before the expiry of the lease circumstances occurred which made a sale necessary and so the court gave the lessees an option to purchase and sanctioned a sale. *Held*, under the circumstances, it was the only possible course for the court to follow. (*Lord Pillimore.*) BEHARI LAL *v.* KUNDAN LAL. **69 I. C. 356 : 27 C.W.N. 509 : 1923 M.W.N. 388 : 32 32 M.L.T. 15 : 1922 P. C. 361 (P. C.)**

——Ss. 184 and 186—*Liquidation—Suit by Official Liquidator to recover money due on promissory note—Set-off—Summary procedure.*

COMPANIES ACT (VII OF 1913), S. 184.

Held, that the defendants as were debtors on promissory notes were creditors in respect of the money deposited as security. They were therefore entitled to raise the plea of set-off. The defendants not being contributories of the Bank and the court conducting the liquidation had no jurisdiction to recover by a summary process the money due from them on the promissory note. An opinion expressed by the liquidation Judge with regard to the plea of set-off is not *res judicata*. (*Shadi Lal and Martineau, JJ.*) OFFICIAL LIQUIDATOR, INDUSTRIAL BANK OF INDIA LTD. *v.* KESHO DAS.

53 I.C. 653.

——Ss. 184, 186—(1882) Ss. 147 and 150—*Suit by liquidator—Set-off.*

In a suit by liquidator of a bank for recovery of a sum of money from the defendant, the latter claimed a set-off on account of a fixed deposit. *Held*, the suit was an ordinary suit to which Sections 147 and 150 of the Companies Act (VI of 1882) did not apply and the set-off could be pleaded. (*Rattigan and Shadi Lal, JJ.*) MEHAR CHAND *v.* AMRITSAR BANK. 69 P.W.R. 1915 : 28 I.C. 975 : 89 P.L.R. 1915 : 63 P.R. 1915.

——S. 184—*Contributory—Shareholder—Liability of.*

If a person has been treated as a shareholder, though there may have been irregularities in the issue of shares to him, and the shareholder has acted like a shareholder such as attending meetings, accepting dividends, he will be bound by his acts and will be estopped from denying that he was a shareholder. A shareholder who seeks to be discharged, should have repudiated the contract and taken some proceedings before the commencement of the winding up order, to show his intention. A person cannot be settled on the list of contributories if, before the beginning of the winding-up proceedings he has not only repudiated his shares but has asserted his right in an action by the company to enforce calls upon him. (*Shadi Lal, J.*) PLARASINGH *v.* PESHAWAR BANK, LTD. IN LIQUIDATION. 22 P.L.R. 1915 : 54 P.R 1915 : 28 I.C. 53 : 235 P.W.R. 1915.

——S. 184—(1882) S. 147—*Company under liquidation—Liability of shareholder—If arises after liability of Directors.*

The proposition, that before the appellant, who had agreed to purchase shares in the company under liquidation can be held liable as a contributory, the late Directors of the company should be called upon to liquidate the demands of the company's creditors, is not based on any authority. Where shares are pledged with the company the legal owner thereof is the shareholder and not the company; he alone must be held liable for all unpaid calls thereon. (*Rattigan and Beadon, JJ.*) ALESTER WEST *v.* BENI PRASHAD.

165 P. L. R. 1914.
24 I.C. 236 : 69 P.R. 1914 : 113 P.W.R. 1914.

——S. 185—*Liquidation—Payment to creditor before order of winding-up but after resolution to stop payments—Right of Official Liquidator to recover the amount by summary order.*

COMPANIES ACT (VII OF 1913), S. 186.

An official Liquidator is not entitled by summary order to a refund of money realized by a creditor of the Bank before the order of winding up was passed but after the Bank had passed a resolution stopping payment of debts. The Liquidator has to file a regular suit like other claimants to recover the amount realized by such creditor of the Bank. (*Rattigan and Shadi Lal, JJ.*) TARA CHAND *v.* OFFICIAL LIQUIDATORS OF PEOPLE'S BANK OF INDIA, LTD.

90 P. L. R. 1915 : 46 P. R. 1915 : 29 I. C. 265 : 71 P. W. R 1915.

——S. 186—*Summary process—Recovering money from firm of which contributory a partner—Contract Act*, S. 43—*Applicability.*

The summary procedure under S. 186 Companies Act can be resorted to recover money from firm, by selecting from among the partners one who is a contributory and calling upon him to liquidate the whole debt. The principle of S. 43 Contract Act is applicable to such a case. (*Shadi Lal, C. J. and Le Rossignol, J.*) LIQUIDATOR, UNION BANK OF INDIA *v.* GOBIND SINGH,

4 Lah. 239 : 77 I. C. 338 : 1924 Lah. 148.

——S. 186—*Scope of—Contributory must be personally liable—List of contributories is final and cannot be questioned.*

In order to make a contributory liable, under S. 186 for payment of debts other than calls, the said debts must be due by the said contributory in his own personal capacity and not as a member of a firm, which is not a contributory. Where on liquidation of a company a shareholder is settled on the list of contributories he cannot, in proceedings under S. 186 plead that he was improperly so settled. (*Broadway, J.*) GOBIND SING *v.* UNION BANK OF INDIA.

71 I. C. 724 : 1923 Lah 85 : 4 Lah. 239.

See on appeal.

——S. 186 (1882) S. 150—*Transferee of payment Order—Can invoke summary process.*

A transferee from the liquidator of a payment order made by a Court under S. 150 against the contributory can invoke the summary jurisdiction for recovering the money due from the latter. (*Shadi Lal, C. J. and Wilberforce, J.*) PARDUMAN SINGH *v.* PIONEER JEWELLERY COMPANY.

3 Lah L. J. 382.

——S. 186—(1882) Ss. 150 and 144 (a)—*Application by transferees does not lie.*

An application by the transferees of debts and calls due from contributories as the attorney of the liquidator is not one on behalf of the Company or for his benefit and is therefore incompetent. (*Abdul Raoof and Martineau, JJ.*) THE DOABA BANK LTD, *v.* KUNDAN LAL.

18 P. W. R. 1921 : 59 I. C. 538 : 3 Lah. L. J. 80.

——Ss. 186, 199, 200 and 201—*Order of payment of under* S. 186—*Right to enforce of transferee—Application for recognition—C.P.C., O. 21, R. 16 Applicability.*

In the case of orders of payment under S. 186 of the Companies Act, the person to apply for the enforcement of an order or decree is the person in whose favour the order or decree has been made or passed.

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An assignee or transferee cannot make such an application and until his name has been substituted for that of the person in whose favour the decree or order has been passed or made. Ss 200 and 201 of the Companies Act, must be held to be subject to the special provisions of R. 15 of O. 21 of the C. P. Code. Therefore a transferee of an order under S. 186 of the Companies Act must, in the first instance, apply to the court which made the order. (*Broadway, J.*) THARYA RAM *v.* POPAT RAM. **92 P R 1918 : 47 I. C. 997 : 168 P.W.R. 1918.**

——S. 186—(1882), S. 150—*Debt due on a pro-note by contributory 'meaning of—'Enforceability.'*

Under S. 150 the court has summary power to direct the contributory to pay all moneys due from him whether as a contributory or in his private capacity, to the company. 'Debt due on a pro-note by contributory' comes under S. 150, Companies Act. The jurisdiction under the Act is permissive and ought not to be refused in the absence of cogent reasons, when a fit case is made out for its exercise. (*Ratligan and Shadi Lal, JJ.*) LAHORE BANK, LTD, *v.* KIDAR NATH. **4 P. W. R. 1916 : 36 P. R. 1916 : 31 I. C. 746: 45 P. L. R. 1916.**

——S. 186—(1882) S. 150—*Debts due from contributory.*

Under S. 150, Companies Act, a contributory can be required not only to meet calls made on him, but also to pay debts owing by him to the company, for recovery of which the court is not bound to proceed under S. 150, but may direct the liquidator to sue for it (*Shadi Lal, J.*) KAMTA PRASAD *v.* INDUSTRIAL BANK OF INDIA, LTD. **59 P. R. 1915 : 31. I. C. 54 : 139 P W. R. 1915.**

——S. 186. (1)—*Time-Barred debt—Cannot be enforced against contributory.*

S. 186 of the Companies Act does not override the provisions of the Limitation Act and does not enable the court to enforce by a summary order the payment of a debt which it could not have enforced in an action at law. The section does not create new liabilities or confer new rights. It merely provides a summary procedure for enforcing existing legal liabilities. The words "at any time" can only mean at any time in the course of liquidation proceedings commencing from the date of the winding up order. The section creates a new machinery for bringing in debts due by a contributory to the company and nothing more. (*Shadi Lal, C J. and Fforde, J.*) SRI NARAIN *v.* LIQUIDATOR UNION BANK OF INDIA **4 Lah. 109 : 74 I. C. 600 : 5 Lah. L. J. 569 : 1924 Lah. 53.**

——S. 187—*Limitation Act —Art.* 112.

The right enforced by a court in making calls from the contributories on the list prepared by the liquidator or an insolvent company is a statutory right of the creditors to enforce against the shareholders of the company, on its insolvency and not a right of the company being enforced by the liquidator. The calls are recoverable even though they are time-barred under Art, 112, Limitation Act. (*Piggott and Walsh, JJ.*) JAGANNATH PRASAD *v.* P. FLOUR AND OIL MILLS CO., LTD. **14. A. L. J. 349 :35. I. C. 159 : 38 All. 347.**

COMPANIES ACT (VII OF 1913), S. 195.

——S. 187 — *Sale of shares by Managing Director—Default of director—Winding-up—Calls money.*

A share-holder contracts to contribute a certain amount, to be applied in payment of the debts and liabilities of the company and it is inconsistent with his position as a shareholder, when he remains as such, to claim back any of that money, on the plea that the Managing Director falsely told him that the shares were sold. (*Scott, C J. and Heaton, J.*) NIROTAM *v.* INDIAN SPECIE BANK. **42 Bom. 264 : 41 I. C. 261 : 19 Bom. L. R. 615.**

—— —S. 187—(1882) S. 151—*Scope of.*

S. 151 of the Companies Act is not restricted to original calls but includes unpaid calls before the winding-up also. The balance of the price of shares for which a call has been made before liquidation, can be recovered by a summary action by the Official Liquidator. (*Johnstone and Chevis, JJ.*) DELHI WOOLLEN MILL CO., *v.* DURGA PRASAD. **67 P. R. 1911 : 12 I. C. 958 : 218 P. W. R. 1911.**

——S. 189—(1882) S. 153—*Arrangement among creditors—Retrospective effect.*

An arrangement, arrived at, in a meeting of three-fourths of the creditors of a company and subsequently sanctioned by High Court, takes effect from the date of meeting and not the date of sanction. (*Stuart and Mahomed Ali, A. J. Cs.*) RAGHUBAR DYAL *v.* BANK OF UPPER INDIA, LTD. **18 O. C. 272 : 32 I. C. 451: [Affd O. A. by Privy Council 50 I. C. 429 : 41 All. 566. Ed.]**

——S. 193—(1882) S. 158.

A charge in equity was created where a lease provided for payment of arrears of rent with interest from buildings erected on land. Although not amounting to a transfer or a mortgage, the charge gave a priority right to the landlords over the company's unsecured debtors. (*Scott, C. J. and Batchelor, J.*) KESHAVLAL HIRA LAL *v.* GIRDHARI LAL. **27 I. C. 34: 16 Bom. L. R. 643.**

——S. 194—(1882) S. 159—*Dissolution, effect of.*

The final dissolution of the Company does not preclude the assignee of a payment order from the liquidation Court, from seeking relief from that Court nor does it render necessary for him to bring an action for the recovery of the money. (*Shadi Lal, C, J. and Wilberforce, J.*) PARDUMAN SINGH *v.* PIONEER JEWELLERY CO. **3 Lah. L. J. 382.**

——S. 195—(1882) Ss. 162 and 163—*Director and Manager—Order for examination.*

An order for the discovery and inspection of the books and papers of a company in liquidation and for the examination of its Directors will be made only if the court is satisfied that the course is likely to lead to some benefit to the creditors and was not merely intended to harass and annoy the Directors. It is in the discretion of the court, in charge of the winding-up to determine whether it will exercise its powers under the sections; but the discretion should be exercised judicially. An appeal lies against an order if the appellant can show that the order impugned is vexatious or oppressive so far as he is concerned and that it is

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not just or beneficial for the purpose of the winding-up (*Kensington, C. J. and Rattigan, J.*) HARIKISEN LAL *v.* SWARASWATI RAM.

132 P. W. R. 1915 : 77 P. L. R. 1915 : 28 I. C. 286 : 40 P. R. 1915.

———S. 195—*Examination—Petitioning creditor should not be allowed to attend.*

The examination under S. 195, Companies Act, is a private one and petitioning creditor should not be allowed to attend the same, particularly when the creditor who seeks to attend is engaged in litigation with the company in liquidation. (*Beasley, J.*) MOOLLA DAWOOD COTTON MANUFACTURING COMPANY LTD. *In re.*

1 Rang. 384 : 1924 Rang. 24.

———Ss. 202, 284—(1882) S. 169—*Order directing preferential payment to creditor.*

Every company, the winding-up of which commenced before the Companies Act of 1913 came into operation, must be wound up in the same manner and with the same incidents as if the new Act had been passed. An order directing a preferential payment to be made to a creditor of a Bank in liquidation relates to and is an incident of the winding-up. In the case of a Bank winding-up of which commenced before the coming in to operation of the Act of 1913, an appeal against such an order without complying with the provisions of S. 169 of Act VI of 1882 cannot be given. (*Richards, C. J. and Banerjea, J.*) THE PEOPLE'S INDUSTRIAL BANK *v.* HARKISHAN LAL.

43 I. C. 642 : 16 A. L. J. 70.

———S. 202—(1882), S. 169—*Scope of.*

A right of appeal under S. 169 of the Companies Act is equal and similar to that under C. P. C. (*Piggott and Lindsay, JJ.*) SANTILAL *v.* INDIAN EXCHANGE BANK, LAHORE.

38 All. 537 : 35 I. C. 6 : 14 A. L. J. 722.

———S. 202—(1882) S. 169—*Notice of appeal—Power of Court.*

Where no notice is given under Section 169 of an intention to appeal against an order in the winding-up proceedings, the Appellate Court will not hear the appeal. (*Tudball and Rafique, JJ.*) G. J. BOWER *v.* IMPERIAL BANK, LTD.

35 All. 177 : 19 I. C. 53 : 11. A. L. J. 200.

———S. 202—(1882), S. 169—*Appeal, notice.*

An appeal against an order in the matter of the winding-up of the company, will not be heard without a notice as required by S. 169. (*Knox and Piggott, JJ.*) GHIRU MAL *v.* W. K. PORTER.

33 All. 641 : 10 I. C. 908 : 8 A. L. J. 719.

———S. 202—*Order in winding-up proceeding—Appeal—Limitation how completed—Cross-objection—Service of notice—Letters Patent, Cl. 15.*

The period of limitation of three weeks is to be completed from the date on which the order appealed against was actually pronounced though it might have been drawn up late. The sending of a memorandum of appeal to a respondent is not a proper notice, not being one given in the manner prescribed by the Civil Procedure Code ; a right of objection to such a notice is not affected by the respondent filing cross-objections. Section 169 in

COMPANIES ACT (VII OF 1913), S. 202.

no way derogates from the provision in Clause 15 of the Letters Patent, but it merely directs that an appeal from an order made in the matter of a winding-up of a company, shall not be heard unless notice is given in a certain manner. (*Scott, C. J. and Batchelor, J.*) *In re* LAKHINDAS KHUNJI SPINNING AND WEAVING CO., LTD

11 I. C. 562 : 13 Bom L. R, 558.

———S. 202—(1882) S. 169—*Appeal—Order of liquidation judge reducing remuneration.*

S. 169 of the Companies Act of 1882 is not applicable to an order of the Liquidating Judge reducing the remuneration of an employee of the Official Liquidators sanctioned by the predecessor of the Judge. No appeal from such an order can be entertained. (*Bevan-Petman. J.*) GHANSHAM DAS *v.* HINDUSTAN BANK, LTD.

1 Lah. 73 : 55 I. C. 928 : 90 P. L. R. 1920.

———S. 202—(1882), Ss. 150 and 169—Ex parte *order—Re-hearing—Order for payment—Setting aside.*

The re-hearing of any order made in the matter of winding-up of a company can only take place before a court of appeal. But an order which has been obtained *ex parte* or which is in truth a nullity may be discharged by the court which made it. S. 169 of the Companies Act, 1882, has no application to petitions for the setting aside of *ex parte* decrees. (*Scott Smith and Wilberforce, JJ.*) HINDUSTAN BANK. LTD *v.* MEHRAJ DIN.

1 Lah. 187 : 55 I. C. 820 : 2 Lah L. J. 291.

———Ss. 202 and 246—*Appeal — Person not complying with R.* 58.

A creditor or a contributory who has not complied with Rule 58 of the rules of the Chief Court under S. 254 of the Act and had not entered his name in the book and had not in fact attended the proceedings, cannot appeal against an order sanctioning a compromise between the liquidator and debtor. The court did not think it proper to treat the appeal as a peiition for revision. (*Chevis and Scott Smith, JJ.*) RUSTOMJI *v.* THE OFFICIAL LIQUIDATOR OF THE PEOPLE'S AND AMRITSAR BANKS, LTD. **79 P. R, 1919 : 49 I. C 381 : 12 P. W. R, 1919.**

———S. 202—*Service of notice of appeal after three months—Mistake of the officer of Court—Extension of time.*

Where a notice of appeal in the matter of the liquidation of a company was served upon respondents under Sec. 169 of Indian Comp. Act, after the expiry of three weeks owing to inadvertence on the part of the pleader for the appellant, time for the service of notice of appeal should be extended. (*Shadi Lal, J.*) KUNDAN LAL. *v.* THE OFFICIAL LIQUIDATOR OF THE DIAMOND JUBILEE FLOUR MILLS, LTD. **48 I. C. 919 : 7 P. W. R. 1919.**

———S. 202—*Company— Liquidation—Decision of Court—Suit to set aside.*

A question which has been settled by the liquidating court cannot be re-opened by a regular suit. (*Chevis and Shadi Lal, JJ.*) KISHEN DAS *v.* OFFICIAL LIQUIDATOR. **40 P.R. 1918 : 45 I. C. 84 : 60 P. W. R. 1918.**

COMPANIES ACT (VII OF 1913), S. 202.

——— S. 202—(1882), S. 169—*Extension of time—General Principles governing it.*

Extension of time ought not to be granted except under special circumstances, the object of act being to secure speedy settlement of matters and to curtail prolongation of winding up proceedings. An appellant will not be granted an extension of time under S. 169 unless the court is satisfied that he was diligent in the prosecution of the appeal and that delay was due to respondent's conduct, or action or inaction of the Lower Court. 95 P. R. 1908, 22 I. C. 795. 10 I. C. 433, 22 M. 291 : 19 M L.J. 511 refd. (*Rattigan and Shadi Lal, JJ.*) BISHEN DAS *v.* LIQUIDATOR, DOABA BANK, LTD. **5 P. W. R. 1916 : 31 I. C. 725 : 42 P. L. R. 1916.**

———S. 202 — (1882), S. 169—*Delay in appealing—Excuse of.*

Where the appellant showed due diligence but failed on account of circumstances beyond his control such as the court being closed on account of the vacations extension may be granted. A respondent is entitled to contest an *ex parte* order excusing delay. (*Rattigan and Shadi Lal, JJ.*) TARA CHAND *v.* OFFICIAL LIQUIDATORS OF THE PEOPLE'S BANK OF INDIA, LTD. **90 P. L. R. 1915 : 46 P. R. 1915 : 29 I. C. 265 : 71 P. W. R. 1915.**

———Ss. 202 and 284—*Liquidation— Commencement before new Act—Appeal—Limitation.*

Where the liquidation of a limited company has begun before the Companies Act of 1913 came into force, all the proceedings in the winding-up including the course of appeal are governed by the old law as provided for by S. 284 of the Act. An appeal is barred by time if notice of appeal is not served on the respondent within three weeks as provided for by S. 169 of the Companies Act of 1882. Once an appeal is presented within the prescribed period, the Appellate Court can extend the time, if required, for service of the notice. (*Shadi Lal, J.*) KHIALI RAM *v.* OFFICIAL LIQUIDATOR OF THE PEOPLE'S BANK OF INDIA. **113 P. L. R. 1915 : 183 P. L. R. 1915: 28 I. C. 600: 43 P. W. R. 1915.**

———S. 202—(1882), S. 169—*Settling list of contributories—Notice of forfeiture by company—Shareholder's failure to pay calls—Option of company to forfeit.*

To constitute a valid forfeiture of shares there must be power to forfeit, and intention to forfeit and a notice of that intention, and, further, the intention should be actually carried into effect. A default in payment of calls by a shareholder, does not *ipso facto* bring about a forfeiture nor does the intention to forfeit, not carried into effect, amount to a forfeiture. A company has got the option to forfeit or not, and unless the option is exercised, the defaulter continues to be a member of the company. Even if the articles provide for a forfeiture to take place *ipso facto* on default in the payment of calls, the defaulting shareholder cannot insist on the clause being acted upon. (*Shadi Lal, J.*) GOKAL CHAND *v.* LAHORE BANK. **31 P. W. R. 1915: 99 P. L. R. 1915 : 28 I. C. 431 : 36 P. R. 1915.**

COMPANIES ACT (VII OF 1913), S. 203.

———Ss. 202 and 165—(1882), Ss. 169 and 219—*Appeal, return of—Extension of time—Objections.*

When an appeal against the order of the District Judge was lodged in the Divisional Court within time which returned the appeal for want of judgment after a long time and was finally presented to the Chief Court (Punjab). *Held* that this was a fit case for extension of time under section 169, as it was filed within time in the Divisional Court in the *bona fide* belief that that Court had jurisdiction. (*Shadi Lal, J.*) GANESH SING *v.* SHANKAR LAL. **138 P.L.R. 1915 : 28 I. C. 142 : 56 P. W. R. 1915.**

———S. 202—(1882), S. 169—*Three weeks' notice of appeal—Essential—Appellant's duty to be prompt.*

An appellant desiring to contest an order passed under the Companies Act, must conform strictly to the provisions of S. 169 of the Act and should give notice of any appeal he may file within three weeks after the order complained of has been made. (*Rattigan and Beadon, JJ.*) SULTAN SINGH *v.* BADHAVA SINGH, **100 P. L. R. 1914 : 22 I. C. 795 : 68 P. R. 1914.**

———S. 202—(1882), S. 169—*Cause of appeal—Determination—Only one appeal—Limitation.*

Appeals on the winding-up of a company are governed by the same conditions in which appeals may be had from the decision or order of District Judge in cases within his ordinary original jurisdiction; the condition being that there is only one appeal. The limitation for appeals under S. 169 of the Companies Act, is three weeks from the date of the order of the District Judge. (*Robertson and Chevis, JJ.*) BASHESHAR NATH *v.* KANHYA **34 P. R. 1913 . 22 I. C. 250 : 45 P. L. R. 1914.**

———S. 202—(1882), S. 169—*Carelessness of pleader.*

Carelessness or ignorance of the pleader is not a sufficient cause for extending the period of three weeks for the notice as laid down by S. 169 of the Companies Act. (*Chevis, J.*) HIRALAL *v.* HIMALAYA GLASS WORKS CO. **100 P.W.R, 1911: 10 I. C. 433 : 176 P. L. R. 1911.**

———S. 202—(1882), S. 169—*Framing of issues—Appeal.*

The framing of issues by a court in a petition for the winding-up of a company under the Companies Act, 1882, is not an 'order' within S. 169 of the Act and is not appealable. (*Benson, C.J. and Natier, J.*) SOUTH INDIAN MILLS CO., LTD. *v.* BURN & CO., LTD. **16 I. C. 794.**

———S. 203 (3).

If an extraordinary resolution passed under the section does not provide that, by reason of its liabilities, the company cannot continue its business and that it is advisable to wind up, the defect is very serious. If, in passing an extraordinary resolution under the section directing a voluntary winding up the company, an irregularity is discovered after the supervision order has been made, the order may be discharged on application to the Appellate Court and, if necessary, the time for filing the appeal may be extended: (*Shadi Lal, J.*) RAMPRASAD *v.* UNION BANK OF INDIA. **13 P L R 1917: 38 I C 943: 35 P R. 1917.**

COMPANIES ACT (VII OF 1913), S. 207.

——Ss. 207, 208 and 186—(1882), Ss. 151, 173 and 177—*Revision of order—Jurisdiction of Court.*

An application, by the liquidator of a company voluntarily wound up, to call upon a contributory for payment of call money was dismissed by the District Judge who later on revised his order *suo motu* and directed the contributory to pay. *Held*, the District Judge had no power to alter his order *suo motu*, S 151 did not apply to the case of a company which was being voluntarily wound up (*Johnstone, J.*) NANAK SINGH *v.* EMPEROR
28 I. C. 281 : 13 P, L R. 1915 : 259 P. W. R. 1915.

——S. 207 (1)—*Bar to execution proceedings.*

S. 207 (1) does not bar execution proceedings against a company gone into voluntary liquidation, unless a competent court has granted leave for winding-up or stay of proceedings. A liquidator, or dissatisfied creditor can move the court. (*Piggott and Walsh, JJ.*) SURAJ BHAN *v.* BOOT AND EQUIPMENT FACTORY. **36 I C. 397: 38 All. 407: 14 A. L. J. 513.**

——S. 208—*Liquidator—Validity of appointment disputed—Duties of Liquidator.*

When a person is appointed liquidator of a company, however, imperfect he may consider his appointment to be, if he is nominally a liquidator and acts as such, he must carry out the duties or exercise the rights of a liquidator, and included in those duties is making a return of his appointment. On acceptance of the appointment as liquidator he must give notice of it according to law ; if he does not do so, then, unless there is some *bona fide* excuse he will be liable to a penalty. The penalty in the case was reduced to one anna. (*Walsh, J.*) SATIS CHANDRA *v.* EMPEROR.
39 I. C. 478 : 15 A. L. J. 346 : 18 Cr, L. J, 510 : 39 All. 412.

——Ss. 215, 196—*Company—Voluntary liquidation—Power to order public examination of Director.*

A voluntary liquidator is entitled to ask the court, under S. 215 of the Act, to make an order for the public examination of Directors, etc., which the court may make on the application of an Official Liquidator under S. 190 of the Act. (*Macleod, C.J. and Heaton, J.*) NOWROJI PUDUMJI *v.* LAXMAN. **55 I. C. 831 : 44 Bom. 659: 22 Bom. L R. 219.**

——S. 215 — *Winding-up proceedings in Courts against Company in liquidation—Stay of.*

The fact that a resolution for voluntary winding-up is passed does not, like an order of winding-up, by or under supervision of the Court, stay or invalidate any proceedings, executions, etc., or prevent actions being brought or continued against the company without the leave of the court. On application, however, the court can stay any action, upon such terms as it thinks fit. A liquidator, therefore may obtain a supervision order to protect him against actions which are threatened and so save the expense of applying for the stay or restraint of proceedings against the company. (*Shadi Lal, J.*) THE LIQUIDATORS OF THE MARWAR BANK, LTD *v.* KANSHI NATH.
30 I. C. 657 : 182 P. L. R. 1915 : 124 P. W. R. 1915.

COMPANIES ACT (VII OF 1913), S. 235.

——S. 215—*Winding-up Proceedings—Stay—Direction of Court.*

In the case of a compulsory liquidation, the creditor is debarred from proceeding by way of action unless he can show special grounds why he should be permitted to do so. In the case of voluntary liquidation, the *onus* is on the liquidator to show that an order should be made staying an action brought against the company, since *prima facie* the ordinary tribunal is the proper one to decide upon a claim against the company. The proceeding may be stayed when liability is substantially admitted and the dispute is only as to what is the exact amount due (*Shadi Lal, J.*) LIQUIDATORS OF THE MARWAR BANK, LTD. *v.* PANNA LAL. **19 P. L. R. 1915 : 31 P. R. 1915 : 27 I. C. 685 : 243 P. W. R. 1915.**

——S. 232—*Application for winding-up — Subsequent to attachment—Sale of property — Validity.*

Long before applying for winding-up, the immoveable property of the Company was attached in execution and it was sold after a winding up order had been passed. The Official Liquidator applied to have the sale set aside on the ground that the sale was a putting in force of an execution within S. 232, *held* that the sale was valid as the execution was put in force on the date of attachment which was long before the date of application for winding up. If a liquidator appeals in a case without the permission of the winding-up Court, he runs the risk of having had to pay the costs in case of failure (*Piggott and Walsh, JJ.*) OFFICIAL LIQUIDATOR, KAYASTHA TRADING AND BANKING CORPORATION *v.* SANT NARAIN SINGH,
19 A. L. J. 262 : 60 I. C. 763 : 43 All, 433.

——S. 234—*Compromise between liquidator and Contributory—When binding.*

Sanction by extraordinary resolution as under S. 234 is necessary in order that a compromise between a liquidator of a Company and a contributor though it might, if found, be binding on the former person, will be binding on the Company. (*Shadi Lal and Le Rossignol, JJ.*) LIQUIDATOR, UNION BANK OF INDIA *v* GOBIND SINGH.
4 Lah. 239 : 77 I. C. 338 : 1924 Lah. 148.

——S. 234 (ii)—*Compromise by liquidator—Validity.*

If a bank has gone into voluntary liquidation S. 234 provides that a liquidator could compromise all calls, liabilities to calls, debts, liabilities etc, with the sanction of an extraordinary resolution of the Company but if no such extraordinary resolution was passed sanctioning the compromise by the liquidator and if the compromise was actually entered into, the Bank should be held bound thereby so far as the debtor is concerned any loss occurring thereupon being recoverable from the liquidator, who had ignored or exceeded his powers (*Broadway J.*) GOBIND SINGH *v.* OFFICIAL LIQUIDATOR OF UNION BANK OF INDIA, LTD.
71 I. C. 724 : 1923 Lah. 85.

——S. 235—*Misfeasance — Claim for compensation—Limitation—Commencement—Limitation Act, Art.* 36—*Applicability.*

COMPANIES ACT (VII OF 1913), S. 235.

A claim for compensation for misfeasance under S. 235 of the Companies Act is governed by Art. 36 of the Limitation Act, the provisions of which are made applicable by S. 235 (3).

S. 235 does not create any new right or liability and time begins to run from the date of the misfeasance for which compensation is sought. (*Martineau, J.*) HUKAM CHAHD *v.* BANK OF MULTAN 69 I. C. 255 : 1924 Lah. 285.

——Ss. 235, 237—(1882), Ss. 214, and 216—*Proceedings against Directors when lie.*

Before taking any proceedings against the Directors of a company under Ss. 214 and 216 it must be shown that the company was prejudiced by the act of Directors. (*Johnstone C. J. and Le Rossignol, J.*) MATHRADAS *v.* ABDUL GHANI. 28 P. L. R. 1917 : 39 I. C. 769 : 23 P. W. R. 1917.

——S. 235—(1882), S. 214—*Misfeasance and Breach of Trust by Managing Director—Liability to pay compensation to shareholders.*

Where the Managing Director of a Bank induces the shareholders to pay a dividend partly out of what was really capital, he 'misapplied' the company money and is guilty of misfeasance and breach of trust and could be compelled by the court to contribute a reasonable sum by way of compensation. (*Johnstone and Shadi Lal. JJ.*) DAULAT RAI *v.* EMPEROR. 23 P. W. R. (Cr). 1915 : 167 P. L. R. 1915 : 16 Cr. L.J.473 : 29 I. C, 105. : 28 P.R. Cr. 1915.

——S. 235—(1882), S. 214—*Director's liability—Position of Director—Onus.*

S. 214 applies to the conduct of the Director *as such* and anything done by him during that period in his capacity *as a debtor* cannot be made a ground of liability under the section. A Director is n t a trustee of loans advanced by a company before his acceptance of office, as such. On an application under S. 214, the Liquidator sought to make an ex-Director liable on the ground that he did not at the time of his appointment as Director, disclose his indebtedness to the company, *held*, that it was the duty of the applicant to satisfy the court that loss or damage resulted to the company from the alleged non-disclosure. (*Shadi Lal, J.*) HANS RAJ *v.* THE LIQUIDATOR OF THE LAHORE BANK, LTD. 59 P. L. R, 1915 : 46 P. W. R. 1915 : 27 I. C. 594 : 60 P. R. 1915.

——S. 235—*Auditors of a Company—'Officers'—Test of.*

Whether the auditors of a company are its officers within S. 214 of the Companies Act must be decided with reference to the particular facts, and especially to the articles of association dealing with the duties of auditors and their relationship to the company.

An auditor doing the work of audit under an appointment as such by the company cannot be heard to say that his appointment was invalid and improper. (*White and Tyabji, JJ.*) MESSRS. LOVELOCK AND LEWES *v.* THE MALABAR TIMBER AND SAW MILLS, LTD. 18 I. C. 997 : 13 M. L. T. 282.

COMPANIES ACT (VII OF 1913), S. 269.

——S. 235—(1882), S. 214—*Auditor—Irregular appointment—Liability.*

Where an auditor was appointed at a general meeting of shareholders without proper quorum, it is a mere irregularity and does not vitiate the appointment ; so they are not only *de-facto* but also *de-jure* auditors and are liable for misfeasance (1897) 1 Ch D. 617, 66 L.J. Ch. 354, 76 L T, 239 ; 45 W. R. 418. Foll. (*Ormond and Twomey, JJ.*) STUART SMITH *v.* OFFICIAL LIQUIDATOR AND THE BANK OF BURMA. 7 Bur. L.T. 230 : 24 I. C, 431 : 8 L. B. R. 80.

——Ss. 237 and 238—*Person in two capacities—Manager and shareholder.*

The fact that one of the members of a firm acting as Managing Agents of a company was punished in his individual capacity as a Director of the company is no gronnd for not punishing him in his capacity as a member of the managing firm, (*Rattigan. J.*) TOTA RAM *v.* EMPEROR. 18 P.R. Cr. 1916 : 35 I. C 482 : 17 Cr. L.J. 3 06 : 143 P.L.R. 1 916.

——S. 243—*Power of liquidator after dissolution*

Even after the dissolution of a company the liquidator can take action in respect of the assets realized after the dissolution of the company. (*Johnstone, C.J. and Le Rossignol, J.*) MATHARA DAS *v.* ABDUL GHANI 28 P,L.R. 1917: 39 I. C. 769 : 23 P. W. R. 1917.

——S. 246—(1882) S 254—*Scope of—Power of High Court to make rules—Costs.*

The power of the High Court to make rules relating to company is limited to making rules concerning the mode of proceeding to be had for winding-up a company and for giving effect to the provisions contained as to the reduction of capital and the sub division of shares of company. For the purpose of regulating costs in other proceedings in company matters, recourse must be had to rules framed by the High Court under its general powers. (*Scott, C, J. and Batchelor, J.*) DAMODAR MOHOLAL GINNING AND MANUFACTURING CO., LTD. *v.* NAGINDAS MAGANLAL. 39 Bom. 383 : 28 I. C. 359 : 17 Bom. L. R. 207

——S. 246—*Company—Liquidation—Call on contributories—Notice—Necessity for,*

Before an order can be made for a call on contributories there should be a petition to the court as required by rule 633 of the rules made by the Chief Court and notice in form 34 should be served four clear days before the date of the hearing on each contributory, unless the Judge directs that personal service be dispensed with and advertisement in form 35 should be substituted therefor. In the latter case the advertisement should be published in sufficient time to enable absent contributories to come to the court in response to the general notice and show cause). If these essential rules are disregarded, the order for a call cannot be maintained. (*Shadi Lal, J.*) GIRJA NANDAN SINGH *v.* NATIONAL INSURANCE AND BANKING COMPANY. LTD. 44 I. C. 139 : 1 P. R. 1918.

——S. 269—(1882) S. 242—*Suit against registered company dismissed after liquidation—Res-judicata.*

COMPANIES ACT (VII OF 1913), S. 284.

The dismissal of a suit against a registered company after liquidation is no bar to the maintenance of the claim before the Official Liquidator. (*Rafique and Piggott, JJ.*) PEAREY LAL *v.* W. K. PORTER, OFFICIAL LIQUIDATOR.
24 I. C. 99.

——Ss. 284 and 171—*Winding-up under former Act—Application for leave of court for suit against company—Procedure.*

An order for the voluntary winding-up of a company was passed before the commencement of Act VII of 1913. In the course of the winding-up, the Official Liquidator sued *A* for the balance due from him on account of the price of the shares purchased by him, and obtained an *exparte* decree. In 1918 *A* instituted a suit against the company contesting his liability for the said balance. An objection was taken to the maintainability of the suit on the ground that the leave of the court required by the Companies Act for instituting the suit had not been obtained. Thereupon *A* applied in 1919, to the High Court under S. 171 of Act VII of 1913 for leave to proceed with the suit. *Held*, that under S. 284 of Act VII of 1913 the application for leave of the court in respect of the suit was governed by S. 156 of the Act VI of 1882 and not by S. 171 of Act VII of 1913 and did not therefore lie in the High Court. (*Knox, J.*) ALI AKHTAR *v.* THE PEOPLE'S INDUSTRIAL BANK, LTD. 18 A. L. J. 296 : 58 I.C. 607 : 2 U. P. L. R. (A) 82.

——S. 284—*Winding up commenced before new Act came into force—Procedure is that under the old Act.*

When proceedings in winding up were commenced Act VII of 1913 came into force. S. 284 lays down that for all purposes connected with the winding up, the old Act should be regarded as in force. An appeal against the order of the District Judge must be filed and notice served in such a case within 3 weeks of the order as laid down in S 169 of the old Act. (*Chevis, J.*) HEMRAJ *v.* PUNJAB TANNERY COMPANY.
68 I. C. 792 : 1923 Lah, 98.

——S. 284—*Pending proceedings, if affected by new Act.*

The plain and rational meaning of S. 284 is that the new Act operates on proceedings arising out of the windings up which commenced after its enforcement (*i. e.* April 1, 1914) and that no part of the Act applies to pending liquidations. (*Shadi Lal. J.*) DAULAT RAI *v.* WAZIR CHAND.
20 P. R, 1915 : 29 I. C. 272 : 35 P. L. R. 1916.

——Ss 284 and 202—*Appeal—Notice not served in three weeks—Second appeal—Procedure—Old Law.*

Section 284 of the Companies Act (VII of 1913) expressly provides that the old Act shall be deemed to remain in force in respect of pending proceedings. An appeal to the Divisional Judge was dismissed under Section 169 of the old Act because notices of appeals were not served upon the respondent within three weeks from the date of order of the District Judge. *Held*, no second appeal lay from the order of the Appellate Court.

COMPANY—Contract.

(*Shadi Lal, J.*) THAKAR DAS *v.* OFFICIAL LIQUIDATOR, THE PESHAWAR BANK, LTD.
225 P. W. R. 1915 : 28 I. C. 90 : 40 P. L. R. 1915.

COMPANY

Contract.
Director.
Liquidation.
Winding-up.
Miscellaneous.

Contract

——*Contract—Manager— Authority to buy liability of stranger or Manager or Manager's partner—Express or implied authority.*

The Manager or Managing Director of a Mill Company cannot purchase, on behalf of his mill, the liability of a stranger still less of their own manager or manager's partner in a private transaction of his own. (*Sir George Farewell.*) RAJA BAHADUR MOTILAL SHIVLAL *v.* THE BOMBAY COTTON MANUFACTURING CO., LTD. 28 M.L J. 596 : 19 C. W. N. 621 : 21 C L. J. 524 ; 17 M. L. T. 443 : (1915) M. W. N. 790 : 2 L. W. 560 : 30 I. C. 59 ; 17 Bom. L. R. 484 (P. C.)

——*Contract —Limited Company Individuals.*

A limited company is a distinct *persona* from the individuals composing it. (*Lord Shaw*) RAM KANAI SINGH *v.* MATHEWSON. 42 C. 1029 : 42 I. A. 97: 19 C. W. N. 585 : 17 M L. T, 377 : 13 A. L. J. 534 : 21 C. L. J. 446: 17 Bom. L. R. 449: 2 L, W. 555 : 31 I. C 55 (P. C.) : 29 M. L. J. 80.

——*Contract—Charge created by— Validity —Creation of charge in violation of prior agreement with third party—Plea of invalidity on ground of--Absence of resolution authorising charge—No existence of minimum number of Directors of company.*

In a suit to enforce a charge against a company the plea of the invalidity thereof was set up on the grounds that the same was created in violation of a prior agreement between itself and a third party that it should not create such charge while the loan to the third party remained unpaid, and that there was no prior resolution of the Company's Board of Directors authorising the creation of the charge in question and that at the time of the creation of the charge, the Board of Directors of the Company was defective in that there were not the minimum number of Directors, *held* (1) that whatever might have been the force of the plea put forward by the third party, the defendant company could not plead its own incompetency and as the plaintiff had no notice of the irregularities which formed the basis of the second plea the charge was not invalid and the defendant company could not plead their regularity as a bar to the enforcement of the charge. (*Davar, J.*) SHIVLAL *v.* TRICUMDAS MILLS CO., LTD. 14 Bom. L. R. 45 : 14 I. C. 353 : 36 Bom, 564.

——*Contract by promoters before incorporation—Cannot be ratified.*

A Company cannot ratify or adopt a contract entered into by a person on its behalf before

in corporation though it may enter into a new contract embodying the terms of the old one or adopting the old one. (*Chevis, J.*) SURENDRO AND COY *v.* PUNJAB TANNERY COY. 68 I. C. 787 : 1923 Lah. 100.

———*Contract—Alteration of.*

When once the rights of parties dealing with a registered company have become fixed by a contract, the company cannot by a special resolution subsequently passed, alter those rights. (1900) 1 Ch. 656 Ref. (*Ayling and Tyabji, JJ.*) KANJEEVARAM HODGSONPET THANARAKSHANA NIDHI *v.* KANDASWAMI NAYAKER. 28 I. C. 847.

Director.

———*Director—Payment by, of uncalled capital due.*

Where the Directors of a company knowing that the Company is insolvent make payment of money representing the uncalled capital due as shares, the payment must be treated as payment towards capital and not as loan to the company. (*Walsh and Ryves, JJ.*) HARI RAM *v.* THE COMMERCIAL BANK, LTD. 62 I. C, 889 : 19 A. L. J. 445.

———*Director—Powers—Articles of Association.*

Where the Articles provide for notice in writing to a member whose share the Company desires to forfeit, it cannot work forfeiture without such notice. The Director of a Company has no power to cancel or forfeit shares or release shareholders in the absence of such special power. A resolution authorizing the return of the money of those who have not paid the allotment money and who do not desire to remain as members is *ultra vires.* (*Walsh and Ryves, JJ.*) PEOPLES INDUSTRIAL BANK LTD. *v.* JALPA PRASAD.
3 U. P, L. R (All) 57 : 62 I, C. 450 : 19 A. L. J. 351.

———*Directors—Resignation by—Withdrawal of—Validity.*

One of the Articles of Association of a company provided that a Director might at any time give notice in writing of his intention to resign and after fifteen days from the service of such notice, his office should become vacant, *Held*, that after the expiration of the fifteen days a Director cannot be allowed to withdraw his resignation. (*Davar, J.*) SHIVLAL *v.* TRICHUMDAS MILLS CO., LTD.
36 Bom. 564 : 14 I. C. 253 : 14 Bom. L. R. 45.

———*Directors—Power of Directors to delegate their powers—Effect of allotment and remedies.*

The Directors cannot delegate their power of allotment of shares if the allotment requires the judgment of individual Directors by reason of special features. If the Directors have no right to delegate, a purely ministerial officer like the Secretary cannot allot. When the shares have been allotted and accepted the title of the allottee becomes complete and the right to rescind the contract on the ground of misrepresentation and fraud must be exercised at the earliest possible moment when the allottee becomes aware of it. Want of promptitude in repudiating, will always be held fatal to the claim. An allottee under an irregular allottment of shares can apply to have

his name removed from the register but he cannot do so after he has accepted the share-certificate. (*Sadasiva Aiyar and Napier, JJ.*) PUSARALA SANYASI *v.* GUNTUR COTTON JUTE AND PAPER MILLS CO, LTD. 26 I. C. 349 : 16 M. L. T. 538.

Liquidation.

———*Liquidation—Application for shares on condition.*

A person applying for shares in a company on a particular condition cannot, when the condition is not fulfilled, be treated as a share-holder. (*Beaman and Heaton, JJ.*) RAMANBHAI *v.* GHASHIKAM LADLIPRASAD. 42 Bom 595 : 46 I C 672 : 20 Bom L R. 692.

———*Liquidation—Share entrusted to manager for sale—Misrepresentation—Winding-up—Liability of shareholder.*

Plaintiff entrusted his shares in a Bank to the manager of the Bank for sale. After a few days the manager told that shares had been sold and credited to his account. Subsequently warrants for the dividend on the shares were sent to plaintiff who signed and returned them to manager to be handed over to purchaser. On the liquidation of Bank plaintiff, discovered that the shares had not been sold. He paid a call of the Liquidator and sued the Bank for recovery on the ground of neglect and misconduct of the manager. As the dividend warrant had been sent to plaintiff he had noticed that his name was still on the register of share holders and as he remainded owner of the shares he was not entitled to recover. (*Macleod, J.*) NAROTAR *v.* INDIAN SPECIE BANK.
38 I. C. 717 : 19 Bom, L. R, 186.

———*Liquidation--Shareholder--Right to have his name struck off the list of contributorics.*

In proceedings to wind up the affairs of a company, a shareholder is not entitled to have his name struck off the list of contributories on the ground that he was induced to purchase shares by false reports and balance sheets issued by the company. He should have taken steps to get his name removed before the commencement of winding-up ; otherwise he is too late. (*Macleod J.*) HIRJI KHETSEY *v.* THE INDIAN SPECIE BANK, LTD. 27 I. C. 505 : 17 Bom. L. R, 65.

———*Liquidation—Security deposit mixed with funds by agreement—Paymant of interest—Liquidation—Rights of depositors.*

In a liquidation of an insolvent Bank, if the occasion for realizing the security has not arisen and if with the consent of the giver of security, the security deposit is mixed with the funds of the Bank, without being earmarked and left alone as in going Banks, in consideration of an agreement to pay interest on it, the Bank is only a debtor and not a trustee. Where an agent of a Bank deposited as security a certain amount for the faithful discharge of his duties and the deposit carried an interest of 6 per cent for its use, the money being repayable if not forfeited for loss, etc., caused by the Agent's default, the Agent could only rank as an ordinary creditor and could not take preference over other creditors of the Bank in liquidation preceedings. (*Scott, C. J. and Davar, J.*) MALVANKAR *v.* THE CREDIT BANK OF INDIA, LTD. 27 I. C. 343: 16 Bom. L. R. 733.

COMPANY—Liquidation.

———*Liquidation—Position of.*

The Official Liquidator of a Bank cannot be looked upon as the Agent of the Bank. He is an officer of the court whose r'ghts depend on the terms of his appointment. (*Choudhri, J.*) DEUTCH ASIATISCHE BANK *v.* HIRALAL BURDHAN & SONS.
47 I. C. 122.

———*Liquidation—Landlords right after liquidation.*

The landlord of a company is entitled to be paid rent and royalties accruing due subsequant to liquidation if the liquidators remained in possession but where the landlord acquiesces in the liquidator's possession, he cannot claim as a secured creditor any rent or royalties due before or after the liquidation. (*Fletcher, J.*) CHARNOCK COLLIERIES CO LTD *v.* BOLLA NATH DHAR.
17 I. C. 976 : 39 Cal. 810.

———*Liquidation—Solvency, test of—Interest, proof of.*

The solvency of a company is established if surplus assets sufficient to pay up interest accruing due after commencement of liquidation are left after satisfying the principal and interest up to the date of the winding up. Interest is payable upon debts carrying interest out of surplus assets, if the company in liquidation turns out to be solvent. After the winding up, the creditor would get interest as incidental to his debts though not mentioned in order of adjudication ; no proof of it is necessary. (*Shadi Lal, J.*) GANESHAM DAS *v.* PUBLIC BANKING CO. 1 Lah. 154 : 56 I C. 251 :
2 Lah. L. J. 558.

———*Liquidation—Company accepting pro-note in lieu of premium—Suit on pro-note dismissed on merits—Res-judicata.*

Where a suit by the Liquidators of a company on a promissory note executed by a person for money due on shares is dismissed on the merits the same matter cannot be re-agitated in the liquidation court as the acceptance of the pro-note in lieu of shares amounted to a novation of the contract to pay the premium, and the suit on the pro-note was dismissed on the merits by a competent court. (*Shadi Lal, J.*) MATHRA DAS *v.* OFFICIAL LIQUIDATOR POPULAR BANK, LTD.
87 P W. R. 1918 : 46 I. C, 586 : 86 P. L. R. 1918.

———*Liq uidation—Contributory—Father purchasing share in the name of minor son—Liability.*

A father purchasing shares in a company in his minor son's name is personally liable on the shares and, in the iist of contributories the father's name can be substituted for the sons though the court has plenary powers to rectify the list of the contributories. (*Shadi Lal, J.*) BEHARI LAL *v.* OFFICIAL LIQUIDATOR, AMRITSAR BANK. 46 I. C. 432 :
51 P. R. 1918.

———*Liquidation—Contract to take shares—If can be repudiated after commencement of liquidation.*

A share-holder cannot have his contract to take shares, set aside, after the commencement of winding-np proceedings of a company, unless he has repudiated and taken proceedings to repudiate them before such commencement. (*Shadi Lal, J.*) HAKIM RAI & SONS *v.* KHARAK SINGH.
46 I. C. 21 : 42 P. R. 1918.

COMPANY—Winding up.

———*Liquidation—Deposit receipt in favour of several persons—Payment of dividend to one.*

A liquidator is not bound to pay a dividend to any one or more of the joint holders of a fixed deposit receipt in favour of several persons not payble to 'either or survivor' without obtaining a discharge (*Broadway, J.*) GOKAL CHANDA *v.* DOABA BANK, LTD. 48 P. R. 1918 : 44 I. C. 848 :
47 P. W. R. 1918.

———*Liquidation—Contributory—Objection.*

The court must inquire into and decide the objections raised by the contributories as to their liabilities as such. (*Shadi Lal, J.*) GANESH SING *v.* SHANKAR LAL. 138 P. L. R. 1915 :
128 I. C. 142 : 56 P. W. R. 1915.

———*Liquidation—Contributories— Question not to be reopened.*

An order passed by court bringing the name of a person as a contributory on the list of contributories, if not appealed against, is final and cannot be challenged barring the question as to the liability of such person as contributory, being reagitated. (*Shadi Lal, J.*) KANSHI *v.* THE PESHAWAR BANK, LTD. IN LIQUIDATION.
227 P. W. R. 1915 : 28 I. C. 95 : 41 P. L. R. 1915.

Winding up.

———*Winding up—Contributory—Application for allotment of shares under conditions—Non-compliance—Effect of.*

A person was induced by the Managing Director of a company to apply for certain additional shares on condition that he would be appointed a Director. The shares were allotted but the allotment money was never paid and the shareholder was never appointed a Director Shortly after this the company went into liquidation, *Held*, that the alleged shareholder could not be placed on the list of contributories as the condition on which he consented to become a shareholder had not been fulfilled. The mere omission to reply to or repudiate the allotment did not matter. (*Piggott and Walsh, JJ.*) POWELL *v.* DR. S. SEN. 40 All. 45 : 43 I. C, 134 :
15 A. L. J. 893.

———*Winding-up.*

Either a compulsory or a voluntary winding-up of a corporation does not dissolve it at the commencement. (*Fletcher and Smither, JJ.*) KUSUM KUMARI *v.* SURENDRA KRISHNA.
42 I. C. 455.

———*Winding-up—Private sale—Prejudicial to interests of creditors and contributors—Court entitled to set aside.*

Wbere a transaction by way of a compromise or alienation of the property of a company in liquidation is entered into, the court can set aside the transaction if it is detrimental to the interests of the creditors and contributories of the company. (*Shadi Lal, J.*) KUNDAN LAL *v.* THE OFFICIAL LIQUIDATOR OF THE DIAMOND JUBILEE FLOUR MILLS CO., LTD., DELHI.
48 I. C. 919 : 7 P. W. R. 1919.

COMPANY—Miscellaneous.

Miscellaneous.

———*Articles of Association—Construction—Application for transfer of shares in register—Death of Manager of a joint family—Right of succeeding Manager to be registered as shareholder.*

The manager of a joint Hindu family who was possessed of certain shares in a limited company died leaving his eldest son as the next manager and the son applied to be registered in the books of the company as the holder of the shares, *Held*, the son was entitled to be registered under Articles 9 and 30 of the Articles of Association. (*Walsh and Stuart, JJ.*) PEARY LAL *v.* MUIR MILLS CO., LTD., CAWNPORE. **41 All. 619 : 17 A. L. J. 783 : 51 I. C. 322: 1 U.P.L.R. (H.C) 75.**

———*Shareholders—Rights of--Courts when can interfere--Adjournment—Chairman's rights.*

Irregularity in the proceedings of a limited company are not a matter for the Court but it is dealt with by the majority of the shareholders. The Courts will interfere only if the rights of the share holders are infringed or if a case of fraud or *ultra vires* is made out Where the Articles of Association empower the Chairman to adjourn meetings with its consent, he is not bound to do it even if the meeting desires an adjournment. A shareholder is not entitled to operate as much as he pleases, but for a reasonable time. (*Pratt, J.*) PARSHURAM DATTARAM *v.* TATA INDUSTRIAL BANK, LTD. **47 Bom. 915: 25 Bom. L. R. 1083: 1924 B. 102.**

———*Liquidator—Attachment prior to liquidation.*

The property of a company of limited liability attached before its liquidation does not vest in the Liquidator, but the property of an insolvent vests in the receiver under similar circumstances (*Jenkins, C.J. and Holmwood, J.*) AMRITALAL *v.* ANKUL CHANDRA. **43 Cal. 586 : 34 I. C. 253 : 20 C. W. N. 358.**

———*Dealings with strangers.*

A stranger dealing with a Joint Stock Company may assume that all the acts of the company or on its behalf are regular and proper and a stranger is entitled in equity to have a charge on the property of the company though the loan advanced was not authorized by the Directors, since the Managing Agent had agreed to that effect. (*Fletcher, J.*) DHARNOCK COLLIERIES CO., LTD. *v.* BOLNATH DHAR. **17 I. C. 976 : 39 Cal. 810.**

———*Chairman--Position Suit—Share-holders.*

A Chairman of a meeting is neither wholly a ministerial nor a judicial officer and for his *bona fide* acts of excluding a shareholder from voting or from becoming Director he cannot be sued. Courts do not generally interfere with internal management of a company at the instance of a member unless there is something illegal, oppressive fraudulent, or *ultra vires* on the part of the company, An individual shareholder of a company is not competent to make use of the name of the company as plaintiff in an action and the rule is similar with regard to a number of share-holders. If they institute a suit in the name of the company they must show that they have been authorized by a majority at a general meeting of the company to do so, or that they have exhausted all reasonable means of obtaining the institution of the suit by the company on that the case is one of urgency, in which latter event they institute the suit at their peril and subject to their being able to satisfy the court that they have the support of the majority. The Court struck out the name of the Code as a co-plaintiff where plaintiff failed to satisfy any of the above conditions. (*Rattigan and Shah Din. JJ.*) RAM NARAIN *v.* RAM KISHEN. **46 P R. 1911 : 179 P. L. R 1911 : 10 I. C. 515 : 108 P. W. R. 1911.**

COMPARTMENT.

See RAILWAYS ACT.

COMPENSATION.

See (1) LAND ACQUISITION ACT.
(2) T.P. ACT, S. 51.

COMPETENT COURT.

See (1) CIVIL PROCEDURE CODE, S. 11.
(2) PRACTICE—JURISDICTION.

COMPETENT PERSONS TO DEPOSE AS WITNESSES.

See EVIDENCE ACT S. 118.

COMPLETION OF TRANSFER.

See T. P. ACT, S. 54.

COMPOSITION.

See (1) DEBTOR AND CREDITOR.
(2) T. P. ACT, S. 53.

COMPOUND INTEREST.

See INTEREST.

COMPROMISE.

See also (1) C. P. CODE, O. 23, R. 3.
(2) REGISTRATION ACT, S. 17 (2) (vi).

———*Effect on other suits.*

When parties are competent to put an end to litigations and do put an end to one litigation by which other litigations are also put an end to, no court with judicial notice of the compromise can proceed with the hearing in other suits. Where the filing of further and special vakalatnamas was intended in the minutes of compromise, but the parties knew what the terms were on which the suit was to be compromised and had assented to these terms and did not consider that it was necessary to file any further and special vakalat namas and treated the compromise as binding upon them and acted upon it. *Held*, that the compromise bound the parties. (*Sir John Edge.*) SOURINDRA NATH MITTRA *v.* HERAMBA NATH BANDOPADHAYA. **45 M. L. J.453 : (1923) M. W. N. 734 : 33 M. L. T. (H C.) 294 : L. R. 4 A. (P. C.) 138 : 1923 P. C. 98.**

———*Appeal—Waiver of plea of Limitation.*

Where the plea of limitation is waived though the suit is time-barred, the decree following is a consent decree and thus not appealable. (*Lord Buckmaster.*) RAMACHANDRA DEO GARU *v.* CHAITANA SAM. **12 L. W. 260 : 18 A. L. J. 625 : (1920) M. W. N. 366 : 39 M. L. J. 68 : 28 M. L. T. 97 : 24 C. W. N 1055 : 2 U. P. L. R. 122 : 56 I. C. 539 : 22 Bom. L. R. 1313 : 47 I. A. 200 (P.C.).**

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———*Effect of—Antecedent rights of parties not to be reopened— Rights enforceable only under compromise.*

An application by the widow of the last owner for probate of his will was opposed by the nearest male heir according to the rule of *primogeniture* which governed the estate. The male heir had also brought a separate suit against the widow for declaration of the invalidity of the will and in this suit the parties entered into a compromise under which the validity of the will was left unascertained but the interests of the parties during their lives were adjusted by consent, and the male heir was to be the absolute owner and occupy the Gaddi on the death of the widow. After the compromise the will was admitted to probate. *Held*, that the question whether the property went to the male heir with or without the incident of impartibility depended on the construction of the compromise and not upon the validity or otherwise of the will—the very thing which the agreement of compromise was made to avoid. The impartibility of the estate having been preserved by the compromise, the rights of the heir were not affected by the subsequent grant of probate of the will. (*Sir John Edge.*) LAKHRAJ *v.* HARPAL SINGH.

34 All. 65 : 39 I A. 10 : 11 M. L. T. 1 : (1912) M.W.N. 16 : 9 A L.J. 40 : 16 C.W.N. 217 : 15 C. L J 72 : 14 Bom. L. R. 33 : 13 I. C, 269 (P. C.) : 23 M. L. J. 1.

———*Limited owner—Family settlement.*

Where a compromise of disputed claims is arrived at with a limited owner on the antecedent title set up by the parties, the compromise is not an alienation by the limited owner but is a family settlement. The reversioners cannot question it as an alienation by the limited owner. (*M. Ameer Ali.*) KHUNNI LAL *v.* GOBINDA KRISHNA NARAIN.

33 All. 356: 38 I. A. 87: 15 C. W. N. 545: 8 A. L. J. 552: 13 C, L. J. 575: 13 Bom. L. R. 427: 10 M. L. T. 25: (1911) 1 M.W.N. 432 : 21 M. L. J. 645: 10 I.C. 477 : (P.C.).

———*Parties agreeing to abide by decision of Court—No Appeal.*

Where parties to a suit agree to abide by the decision of the Court it is not open to either to question the correctness of the decision in appeal. (*Banerjee and Gokul Prasad, JJ.*) SHAHZADI BEGUM *v.* MUHAMMAD IBRAHIM. **19 A. L. J. 14: 59 I. C. 787: 43 A. 266.**

———*Joint Hindu Family—Hindu widow.*

A compromise decree against a Hindu widow binds the reversioner if it is shown that alienation was made for purposes justifying a sale by Hindu widow. (*Piggott and Lindsay, JJ.*) KANHAIYA LAL *v.* KISHORI LAL. **38 All. 679: 35 I. C. 683: 14 A. L. J. 881.**

———*Construction—Will.*

Where a will under which the plaintiff was to keep the income in his hands, spend a certain sum on 'deorhi' expenses and pay the heirs of the deceased their proportionate shares of income, led to litigation which resulted in a compromise whereby the heirs got proportionate shares in the property and agreed to pay the expenses mentioned in the will. *Held* that plaintiff was entitled to recover the same and was bound to spend the money for the expenses, and was liable to account to the defendants for the expenditure. (*Richards, C. J. and Banerjee, J.*) ZAINULAB DIN *v.* ZAKIR HUSAIN. **25 I. C. 313 : 12 A. L J. 513.**

———*Power of Court—Mortgage.*

A court cannot, on proof of the genuineness of a compromise, go behind and enquire whether the mortgage created by the compromise is fictitious or not. (*Kyves and Lyle, JJ.*) RAM KUBER PANDE *v.* MUSAMMAT RAM DASI. **35 All. 428: 20 I. C. 44 : 11 A. L. J. 645.**

———*Penalty—Clause for forfeiture—Power of Court to relieve against.*

A consent decree provided that, if the plaintiff paid a certain amount to the defendant before October 4, 1917, the defendant should deliver possession of a field after harvesting the crop in February 1918, and that, if the payment was not made in time, the defendant would retain the field. The payment was not made within due date which was, October 4, 1917; but it was made on the November 26, 1917, the defendant contended that as the payment was not made within time he had become owner of the field :—*Held* though the plaintiff might have paid the amount decreed within the month allowed he would not have got possession until the February following and that was evidently the important date considered by the court and by the parties when they arranged the compromise and therefore, the field should not be allowed to be forfeited. (*Macleod, C. J. and Heaton, J.*) SUPPUDHODU GUJAR *v.* MADHAVA RAO JIVARAM GUJAR. **44 Bom. 544: 57 I. C, 534 : 22 Bom. L. R. 780.**

———*Effect of.*

Per Beaman, J.—The joint effect of Rajinama and Kabuliyat between a mortgagor and a mortgagee or between a mortgagor and a third party, is to indicate that in the first case the equity of redemption has been extinguished and that in the second case it has been transferred. 5-A 87 of 15 Diss, *S. A*, 87 of 1915, Diss. (*Scott, C.J. and Beaman, J.*) IMAM IBRAHIM *v.* BHAU *v.* APPAJI JADHAV. **41 Bom. 510: 40 I. C. 68 : 19 Bom. L. R. 329.**

———*One party agreeing to accept the other as tenant—Agreement to lease—Registration.*

A solenamah which was for all intents and purposes a mere record of certain agreement which the parties had come to out of court for the settlement of their differences existing at that time and whereby the plaintiffs agreed to accept the defendant as tenant with certain rights and a certain rate of rent and to give effect to which a formal document in the shape of a Kabuliyat would in future be executed by the defendants, is not a lease or agreement to lease and is not compulsorily registrable, 39 C. 663 Ref, The document was in effect merely a record of an oral agreement between the parties which was reduced to the form of writing only by way of a memorandum. (*Suhrawardy and Cuming, JJ.*) ALAM MULLA *v.* SURENDRA KUMAR KARFORMA.

71 I. C. 307: 50 Cal. 79 : 1923 C. 433.

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———*Matters outside suits.*

Compromise embodying terms beyond the subject matter of the suit may be recited in the decree which should be passed in accordance with that part of the compromise which relates to the suit. (*Mukerjee and Panton, JJ.*) JIVAN KRISHNA *v.* RAMESH CHANDRA DAS. 65 I. C. 47.

———*Construction of agreement not barred.*

Though a party to a compromise cannot contest its binding character, he is not precluded from raising a question which turns on the construction of the agreement then arrived at. (*Richardson and Huda, JJ.*) MATHURA DEBYA *v.* BEJOY SINGH. 62 I. C. 627

———*Penalty—Relief against forfeiture—Power of Court.*

The execution court may consider what the rights of the parties, equitable or otherwise, are which follow from the contract embodied in the decree on compromise. A compromise decree cannot alter the relation of the parties as they existed under the agreement and therefore if the right to relief is an incident of the compromise it will remain unaffected even after the decree had been passed. (*Chatterjee and Panton, JJ.*) SURENDRA NATH BANERJEE *v.* THE SECRETARY OF STATE FOR INDIA.
57 I. C. 643: 24 C. W. N. 545.

———*Effect of—Minor parties.*

A consent decree differs from a decree of Court in this, that no one is a party to the decree who has not willingly contracted to govern himself by the decree if *sui juris* and if he is not, the court must have declared the decree consented to for him by his guardian to be for his benefit. (*Holmwood and Imam, JJ.*) ABDUL HAKIM GAZI *v.* PANCHI DASI. 32 I. C. 849.

———*Meaning of.*

Settlement of a doubted claim is a binding arrangement which the parties thereto are not permitted to resile from. Real consideration of a compromise is the abandonment of a claim and not the sacrifice of a real right. (*Mookerjee, J.*) UPENDRA NATH *v.* BINDESHRI PRASAD.
20 C. W. N. 210: 32 I. C. 468: 22 C. L. J. 452.

———*Setting aside—Mistake.*

A compromise decree is only a mere formal expression of the contract between the parties and as such, is as capable of being rectified for an appropriate mistake as any other contract. (*Jenkins, C. J. and Holmwood, J.*) KUSADHJI BHAKTA *v.* BROJA MOHAN BHAKTA. 19 C. W. N. 1228: 31 I. C. 13: 43 Cal. 217.

———*Power of Court—Setting aside—Grounds*

A deliberate compromise with knowledge of all facts and under independent advice cannot be annulled. (*Holmwood and Chapman, JJ.*) BEJOY KRISHNA MAJUMDAR *v.* DWARKA KRISHNA MAJUMDAR. 25 I. C. 218.

———*Binding nature of--Alienation by widow—Suit to set aside—Compromise—Subsequent claimants when affected.*

A Hindu widow in possession of husband's estate alienated it in favour of her son-in-law. The reversioner brought a suit for declaration that the alienation was null and void. To avoid a costly and protracted litigation the parties entered into a compromise as a result of which they made certain arrangements for the enjoyment and disposal of the properties. *Held* that the compromise was valid and binding on persons deriving titles from the alienee. It was also not competent to plaintiff who had not been born at the date of the compromise to impeach it by a suit. (*Broadway and Abdul Quadir, JJ.*) MT. MALTO *v.* FAKIRIA.
4 Lah. L. J. 27: 1922 Lah. 115 (2).

———*Doubtful questions of law or fact—Waiver—Compromise.*

When doubtful questions of law or of fact have arisen between two parties and each of them has agreed to waiver what he honestly believes to be his lawful claim in whole or in part the transaction amounts to a Compromise, the waiver or abandonment on either side furnishing the consideration, provided of course that both parties had equal knowledge of the facts and equal opportunities of a scertaining their rights. A Compromise entered into in good faith and with belief that it is best in the circumstances by a collateral having right to object to an alienation, is binding on the persons succeeding to his interest. (*Broadway and Raoof, JJ.*) JAIRAM *v.* JELU. 67 I. C. 362: 1 L. L. J. 133.

———*Parties not objecting to it for a long time are bound by it.*

A compromise deed affecting immoveable property not only binds the parties signing it but it also binds other parties to the suit who stand by but do not object to it for a long time. (*Scott-Smith, J.*) MITHA-MAL *v.* SHIVRAM.
60 I. C. 484.

———*Setting aside—Mode of.*

A consent decree cannot be set aside by the consent of the parties. (*Wallis, C. J Sadasiva Aiyar and Spencer, JJ.*) YEGNARAMA DIKSHIDAR *v.* GOPALA PATTAR.
(1918) M. W. N. 595 : 47 I. C. 548 : 8 L. W. 357.

———*Effect of alienation—Nature of.*

Compromise does not stand on the same footing as alienation, and a compromise *bona fide* made, cannot be re-opened by any one. (*Abdur Rahim and Srinivasa Aiyangar, JJ.*) MUTHUKUMARASAWMY *v.* SUBRAMANIA AIYAR.
33 I. C. 687 : 31. M. L. J. 87.

———*Penalty—Relief against.*

The power of the court to grant relief against the enforcement of a penal clause is not confined to contracts between landlord and tenant but extends to a compromise decree also : 28 M.L.J. 488 : (1914) M. W. N. 92 Foll. (*Oldfield and Sadasiva Aiyar, JJ.*) JOGAMMA *v.* RAMALAKSHIMI.
30 I C. 248 : 2 L. W. 635.

———*Validity—Vakil exceeding power.*

Where a vakil entered into a compromise with the opposite party and without settling the matters in dispute, left the parties to fight out their rights in a fresh litigation and also surrendered the suit property to the adverse party. *Held*, that the vakil acted improperly and the compromise

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was invalid. (*Benson and Sundara Aiyar, JJ.*) MAKKA MUDALIAR *v.* DEVASIKAMANI.
13 I. C. 595 : (1912) M. W. N. 158.

———*Effect of—Disputed claim — Strangers' rights not affected.*

A widow adopted *B* as son and bequeathed her properties to plaintiff, *B* sued for possession of the estate but compromised the suit where by *B* executed a sale in favour of the Plaintiff of all his rights as an adopted son. Plaintiff sued to recover from the defendant upon three bonds executed by him in favour of the widow. The defendant pleaded that he had adjusted the claim by payment to *B*. *Held*. that as there was no admission by the plaintiff that B had any right to the widow's estate as adopted son, *B* had no right to give discharge to the defendant and consequently the adjustment with him could not be set up against the plaintiff. (*Kotwal, A.J.C.*) RAMLAL *v.* DATU. 55 I. C. 418.

———*Mislaken view of law.*

A compromise of a disputed title or a doubtful right is not rendered invalid because it proceeds on a wrong legal ground. The justification for the compromise is that the parties do not know what the courts will ultimately decide and prefer to settle the matter amicably and avoid the expense of further litigation. If a compromise could be attacked on the ground that if the issue had gone to trial the court would have decided it differently, the whole object of the agreement would be defeated and no compromise would be safe from attack. (*Daniels and Lyle, A. J. C.*) KUAR NAGESHAR SAHAI *v.* KUAR MATA PRASAD.
69 I. C. 730 : 25 O. C. 189 : 9 O. L. J. 235 : 1922 Oudh 236.

———*Admission—Evidential value is title.*

Where the compromise is not binding on the parties any recital in it is not of much value as evidence. Parties are often willing to make admissions for the purpose of effecting compromise, to which it would be unfair to hold them, if compromise falls through. (*Daniels and Lyle. A. J. Cs.*) KUAR NAGESHAR SAHAI *v.* SHIAM BAHADUR. 74 I. C. 255 : 26 O. C. 33 : 1922 O. 231.

———*Inchoate — Actings of the parties—Estoppel.*

Even where a compromise or settlement is considered to be defective or inchoate and insufficient to make a final and validly concluded agreement, the subsequent acts of the parties may be such as to supply all defects. In fact, when the actings and conduct of the parties are founded upon it, as in the case of a part performance of an agreement, the *locus penitentiae* which exists in a situation where the parties started upon nothing but an engagement which is not final or complete is excluded, for equity will, support a transaction, clothed imperfectly. in those legal forms to which finality attaches after the bargain has been acted upon. The conduct of minors however cannot be pleaded in defeasance of their rights to repudiate the act of their guardians during their minority. But if their guardians had acted for their benefit, and

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after attaining majority they continued to derive the benefit which the transaction conferred on them, it is not open to them to take advantage of the absence of registration, particularly when the parties can no longer be restored to their old positions without material prejudice to the interest of one of them. (*Kanhaiya Lal, J. C.*) RAGHUBAR *v.* RAM BHAROSE. 66 I. C. 412 : 8 O. L. J. 392 : 1922 Oudh 217.

———*Parties — Obligations — Conditional decree.*

Where several obligations are imposed upon parties to a compromise, who also get several rights, and a party comes to a Court to enforce his rights alone, the Court has power to pass a decree in his favour, conditional on his performing his obligations towards the other parties. (*Wazir Hasan, A. J. C.*) AMIR ALI *v.* IQBAL ALI.
24 O. C. 22 : 61 I. C. 312 : 8 O. L. J. 287.

———*Effect of—Parties cannot resile from.*

Where a dispute is settled and the terms of the settlement are embodied in a compromise, none of the parties can resile from the conditions. (*Daniels and Wazir Hassan, A J. Cs.*) RAMPAT *v.* DURGA BHARTI.
7 O. L. J. 547 : 60 I. C. 440 : 23 O. C. 303.

———*Construction—Granting—Allowances to partners—Party's right when commences.*

In the case of an application for execution of a compromise decree granting allowances to parties, there is a presumption in favour of the right ofthe actual parties to suit to claim those allowances from the date of the compromise, not merely from the date of the decree, in the absence, of anything to the contrary. (*Staurt, J, C. and Kanhaiya Lal, A. J. C.*) DIL ABZA BEGUM *v.* DEPUTY COMMISSIONER, BAHARAICH.
37 I. C. 133 : 3 O. L. J. 570.

———*Effect of—Antecedent rights not in force.*

A compromise between a mortgagee and his transferee to the effect that the latter was to be deemed to be the proprietor of the property, allowing the mortgagee a certain percentage of the Government revenue for his life, is binding on the heirs of the mortgagee whatever may be the nature of the transfer originally. (*Kanhaiya Lal, A. J. C.*) JIVA RAM *v.* SARNAM SINGH. 20 I. C. 61.

———*Partition of partition not comprised in compromise—Notice to defendants.*

Where a petition of compromise is filed by some defendants who had compromised, the court is not competent to partition properties not included in the petition of compromise without notice to the defendants who had compromised. (*Das and Kulwant Sahay, JJ.* SHAHDEO SHUKUL *v.* JAGESHAR PRASAD SHUKUL. 1923 P. 293.

———*Counsel exceeding power.*

Where the applicant challanged the consent decree on the ground that his counsel misapprehended against instructions:—*Held*, on the facts proved that the agent of the appellant acquiesced in the settlement though under protest proposed by the counsel in the interest of his chief and that he accepted it when every attempt to raise

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money necessary to satisfy Plaintiff's claim failed, the decree was binding on him. Two propositions are well settled ; first that express authority is not needed for a counsel to enter into a compromise within the scope of the suit and secondly where there is limitation of authority and that limitation is communicated to the other side, consent by counsel outside the limits of his authority would be of no effect. (*Das and Bucknill, JJ.*) NILMONI CHAUDHURI *v.* KEDAR NATH DAGA.
3 P. L. T. 371 : 1 P. 489 : 67 I. C. 96 : 1922 P. 232.

———*Execution.*

Consent decree stipulating execution on default of payment can be executed without attaching the property. (*Das and Adami, JJ.*) ARUNBATI KUMARI *v.* RAM NIRANJAN.
58 I. C. 299 : 2 P. L. T. 38.

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See also (1) C. P. Code, O. 23, R. 3.
(2) COMPROMISE.
(3) DECREE.
(4) REGISTRATION ACT, S. 2 (vi).

———*Settlement by Limited owner--Reversioner when bound.*

Settlement of *bona fide* dispute made on compromise by a limited owner is binding on reversioner. (*Ryves and Gokul Prasad JJ.*) NARAIN SINGH *v.* RAJ KUMAR.
20 A. L. J. 251: L. R. 8 A. 229: 66 I. C. 62 : 44 A. 428 ; 1922 A 217.

———*Setting aside—Compromise brought about by undue influence.*

A consent decree can be set aside by suit if it was brought about by means of undue influence. (*Karamat Husain and Chamier, JJ.*) SHAMINATH *v.* RAMJAS. 34 All. 143: 13 I. C. 80 : 9 A. L. J. 1.

———*Execution beyond time allowed by the decree is barred—Time of essence—Varying terms.*

It cannot be laid down in the hard and fast way as being a universal proposition capable of no explanation or deviation, that a consent decree differs from a contract in asmuch as its terms can never be varied except by consent. On January 29, 1920, the parties arrived at the compromise in question. There was a provision in that compromise for the payment by the defendant of a certain sum of money and the building of a new wall within two months from the date of that compromise. Admittedly the money was not paid nor the wall built within the two months. Nothing was done by either party until the defendant took out the execution. There was no evidence at all of any intervening acts of the parties after the date of the decree. There was therefore, a lapse of time of just over one year from the date fixed by the compromise for the performance of the acts. *Held* : That time was the essence of the contract ; the defendant was out of Court because he was a year out of time and no waiver or a new agreement had been shown to have taken place. But supposing time was not of essence of the contract the defendant could not even then, after an unexplained delay of one year obtain specific

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performance of this agreement. (*Marten and Fawcet, JJ.*) SHANKER SAKHARAM *v.* RATANJI PREMJI 47 B. 607; 25 B. L. R 328: 1923 B. 441.

———*Alteration—Powers of Court—Dek. Agri. Relief Act, S. 15-B.*

A Court cannot alter the terms of a consent decree. A consent decree made without complying with the special provisions of S. 15-B is not bad in law. (*Macleod, C. J. and Shah, J.*) MADHAV *v.* APPAJI. 45 Bom. 1123: 62 I. C. 634 : 23 Bom. L. R. 503.

———*Variation of—Execution.*

A consent decree can only be varied by consent. No modification of a consent decree can be allowed in execution on grounds not recognized in the decree itself as giving a right of such modification, 16 Bom. L. R. 670 Foll. (*Scott, C. J. and Beaman, J.*) LACHIRAM DAGDURAM MARWADI *v.* JANA YESU MANG. 27 I. C. 830: 16 Bom. L. R. 668.

———*Setting aside—Fraud — Procedure and Practice.*

A consent decree can be set aside on ground of fraud either by a regular suit or by an application for review of judgment, but not to by a rule on motion. (*Beaman, J.*) FATMABAI *v.* SONABAI.
36 Bom. 77 : 11 I. C. 568 : 13 Bom. L. R. 573.

———*Mortgage suit—No final decree necessary.*

Compromise decree makes it unnecessary to pass a final decree and property can be sold without a final decree. (*Ghose and Panton, JJ.*) HEMENDRA LAL SINGH DEO *v.* FAKIR CHANDRA DATTA. 27 C. W. N. 621 : 74 I. C. 929 : 50 C. 650. 1923 Cal. 626.

———*How far binding.*

A compromise decree is just as binding on the parties as a decree on contest but the decree has no grater validity than the compromise itself. (*Chatterjee and Panton, JJ.*) RAJENDRA KUMAR BOSE *v.* BISWARUP DEY. 35 C. L. J. 173 : 64 I. C. 603.

———*Matters not directly in issue.*

A compromise decree, as regards matters not directly in issue in the suit cannot be enforced in execution but the decree evidences the agreement entered into as regards those matters. (*Newbould and Suhrawardy, JJ.*) JAGABHANDU SAHA *v.* HARI MOHAN ROY. 62 I. C. 653.

———*Right to forfeiture -Equitable jurisdiction.*

Although a consent decree embodies a right to forfeiture, the Court can grant relief against forfeiture, as it would, in the absence of such a consent decree and in case of suit to enforce the compromise. Where a consent decree directs payment on a certain date, time is not the essence of the contract and the Court can extend time for payment. (*Mookerjee, A. C. J. and Fletcher, J.*) KANDAPA NAG *v.* BANWARI LAL NAG.
60 I. C. 864: 33 C. L. J. 244.

———*Binding force—Right of third party.*

The propriety of a consent decree can be questioned only by the parties thereto, 35 C. 420, 27. A. 271, 14 C. W. N. 191 Rel. The principle that a decree by consent was operative between the parties as long as it was not set aside in a proper judicial proceeding in the same manner, as if it

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were a decree upon contest, could not be applied to affect a stranger to the decree, who is entitled to show that the decre was fraudulent and collusive and does not affect his legal rights. (*Mookerjee and Beachcroft, JJ*) FATEH CHAND *v.* NAR SINGH DAS. **16 I. C. 988 : 22 C. L. J. 383.**

——*Setting aside—Fraud—Mistake.*

A consent decree has no greater validity than the compromise itself. A consent order is only the order of the court carrying out an agreement between the parties and as the agreement could be set aside, if it existed alone and the order was out of the way, the court has power to set aside the order founded upon the agreement, when it is proved that the agreement was invalid by reason of fraud, mistake or any other similar circumstances. (*Mookerjee and Beachcroft, JJ.*) KSHETRA MONI DASI *v.* AMODINI DASI.

16 I. C. 611.

——*Joint Hindu family.*

A consent decree by a Hindu widow bind parties to it only as an ordinary decree does. 6 C. L. J. 490 ; 13 C. W. N. 147; 9 M. I. A 539; 8 A 365; 5 Bom. L.R. 885; 29 A. 487 ; 30 A. 75 Ref. (*Mookerjee and Carnduff, JJ.*) RAJALAKSHMI DASEE *v.* KATYAYANI DASEE. **12 I. C. 464 : 38 Cal. 639.**

——*Setting aside — Effect of—Pleader's authority—Effect of setting aside a compromise decree.*

When a consent decree of a court is set aside in a separate suit by the same court on the ground that the pleaders acted beyond their authority in the first suit, the original suit revives (*Mookerjee and Coxe, JJ.*) RAJ KUMAR ROY *v.* HARA KRISHNA CHAKRAVARTI.

10 I.C. 355: 15 C.L.J. 217.

——*Setting aside—Fraud of Agent—Contents—Remedy by suit—Application for.*

An application under S. 151 for setting aside the decree on compromise, the consent of the party to which, was obtained by fraud of agent and in ignorance of the contents is not maintainable. The remedy open to the party is an application for review or separate suit. (*Oldfield and Venkatasubba Rao, JJ*) ALAMELU AMMAL *v.* RAMA IYER. **43 M.L J. 290 : 16 L.W. 440 : (1922) M.W.N. 495 : 70 I. C. 425 : 31 M.L T. 132 : 1922 M. 446.**

——*Setting aside—Effect of—Restoration of the appeal withdrawn—Under compromise.*

On principles of equity, a party prevented from enforcing his right should be restored to his original position when the party preventing him is permitted to recede from the compact wholly or in part. Where an appeal is withdrawn under a compromise between the parties but the compromise was afterwards set aside at the instance of an undivided son of one of the respondents. *Held*, that the appellant should thereafter be allowed to prosecute his appeal. (*Abdul Rahim, Offg, C. J. and Seshagiri Aiyar, J.*) VENKATA RAO *v.* TULJA RAM RAO. **(1917) M.W.N. 30 : 38 I.C. 270: 5 L.W. 482.**

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——*Penalty—Power to relieve.*

A provision in a compromise decree directing possession to be given to plaintiff in case the defendant failed to fulfil the terms, is penal and may be relieved against. Courts will generally relieve a party from a penal clause in a compromise decree where time is not of the essence of the contract, and where the interests of third parties are not affected. This is so, especially where a too strict adherence to the wording of the compromise will defeat the ends of justice. (*Seshagiri Aiyar and Kumaraswami Sastri, JJ.*) BHEEMA VENKATARAMANA *v.* BOMMINI GURAPPA. **28 M. L. J. 488 : 28 I. C. 970 : 2 L. W. 537.**

——*Setting aside—Settlement.*

A compromise decree is on the same footing as the settlement reached out of court, and it can be questioned on the grounds on which the settlement can be questioned. (*Wallis, C. J. and Hannay, J.*) ARUNACHELLAM CHETTIAR *v.* VELLAPPA THAMBIRAN. **28 M. L. J. 410 : 28 I.C. 337: 18 M.L.T. 135.**

——*Penalty—Provision for interest in decree.*

A provision in a decree for an enhanced rate of interest in case of default is not penal, if the enhanced rate is not unreasonable. (*Sankaran Nair and Ayling, JJ.*) RATNASWAMI CHETTY *v.* RATNAMMAL. **27 M.L J. 388: 15 M. L. T. 415 : 24 I. C. 135 : 1 L. W. 446.**

——*Penalty—Court's power to relieve.*

Courts in India have power to relieve against forfeiture or penalty even where a decree based upon compromise provides for such forfeiture. (*Sadasiva Aiyar and Spencer, JJ.*) ANA MOHIDIN *v.* VEDIVALAGIANAMBIA PILLAI. **22 I. C. 37 : (1914) M. W. N. 92.**

——*Date of operation of.*

A compromise becomes operative when it is embodied in the decree. Therefore if the compromise fixes any time for the doing of an act, the time is to be calculated from the date of the decree and not from the date of the compromise. (*Daniels, J.C.*) ILAHI RAZA KHAN *v.* MT. TAIBA BEGAM. **66 I.C. 273 : 9 O.L.J. 53.**

——*Extension of time to pay money—Power of Court.*

Where a compromise decree providing for payment of money on a prescribed date and in case of failure the forfeiture is to result, courts should consider in each case whether time was of the essence of the transaction and if relief against forfeiture should be given or not. If time is not of the essence courts have power on equitable grounds to extend the time. (*Mullick and Bucknill, JJ.*) MT. NAND RANI KUER *v.* DURGA DAS NARAIN. **2 Pat. 906: 1924 Pat. 122: 5 Pat. L.T. 401 : 1924 P. 387.**

——*Construction— Decree for delivery of lands with rents and profits—Collection of rent before such delivery—Liability to account.*

Where under a compromise decree the respondent undertook to deliver possession of certain lands as they then existed together with the rents

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and profits which had accrued till then, the respondent must be held to hold the property thereafter in a fiduciary capacity and for the purpose of handing over the property to the appellant. Where therefore the respondent cut down certain trees on the land and appropriated them to his own use then he was acting in breach of the obligation he was under by reason of the decree and was in fact committing a breach of trust. Further the respondent was liable to account to the appellant for all the rents that he had collected from the tenant since the date of the decree. (*Miller, C. J. and Jwala Prasad, J.*) MAHADEO PRASAD SAHU *v.* GAJADHAR PRASAD SAHU.

73 I.C. 359: 1 Pat. L.R. 145 : 1924 P. 362.

———*Registration—Execution.*

When a suit is disposed of according to the settlement which contains matters outside the scope of the suit, then registration of that settlement is not necessary. Consent decree stipulating execution on default of payment can be executed without attaching the property. (*Das and Adami, JJ.*) ARUNBATI KUMARI *v.* RAM NIRANJAN.

58 I. C. 299: 2 P. L. T. 38.

———*Effect of.*

If the parties to a suit agree to certain terms and these terms are embodied in a consent decree by a court having jurisdiction to deal with the suit, the decree if not set aside binds the parties and cannot be impeached on the ground that the court would not have passed it after contest. (*Pratt, J.C. and Cohen, A.J.C.*) AMIBAI *v.* MOOSO RAHIMTOOLA.

10 I.C. 982: 4 S.L.R. 271.

COMPROMISE PETITION.
See (1) C. P CODE, O. 23.
(2) COMPROMISE.

COMPULSION.
See (1) CONTRACT ACT, S. 16.
(2) PARDANASHIN LADY.

COMPULSORY DEPOSIT.
See C. P. CODE, O. 21, R. 84.

COMPUTATION OF TIME.
See LIMITATION ACT, S. 12.

CONCILIATION.
See (1) ARBITRATION.
(2) AWARD,
(3) C. P. CODE., SCH. II.
(4) DEKHAN AGRICULTURISTS RELIEF ACT.

CONCURRENT FINDINGS.
See (1) PRACTICE.
(2) PRIVY COUNCIL.

CONCUBINE.
See HINDU LAW—MAINTENANCE.

CONDITION.
See (1) DEED—CONSTRUCTION,
(2) EVIDENCE ACT, S. 92.
(3) SUCCESSION ACT, Ss. 99—124.
(4) TRANSFER OF PROPERTY ACT, Ss. 10—20.
(5) WILL—CONSTRUCTION.

CONSEQUENTIAL RELIEF.

CONDITIONAL GIFT.
See (1) SUCCESSION ACT, Ss. 113—124.
(2) T. P. ACT, Ss. 25—29.

CONDITIONAL SALE.
See (1) MORTGAGE.
(2) T. P. ACT, S. 58.

CONDUCT.
See EVIDENCE ACT, S. 115.

CONFESSION.
See EVIDENCE ACT, Ss. 24—30.

CONFIDENCE
See EVIDENCE ACT, Ss. 126—129.

CONFIDENTIAL COMMUNICATIONS.
See EVIDENCE ACT, Ss. 122, 126—129.

CONFIDENTIAL RELATION.
See (1) CONTRACT ACT, S. 16.
(2) EVIDENCE ACT, S. 111.
(3) TRUST.
(4) TRUSTS ACT.

CONFIRMATION OF AUCTION SALE.
See C. P. CODE, O. 21, RR. 90—92.

CONFISCATION.
See (1) ACT OF STATE.
(2) CROWN.
(3) GRANT.
(4) HINDU LAW—JOINT FAMILY.

CONFLICT.

———**of decision.**
See C. P. CODE, S. 11.

———**of Equity.**
See PRACTICE.

———**of Evidence.**
See PRACTICE.

———**of Laws.**
See (1) INTERNATIONAL LAW.
(2) INTERPRETATION OF STATUTES.
(3) NEGOTIABLE INSTRUMENTS ACT. Ss. 134—137.
(4) PRACTICE.

———**of Rulings.**
See PRACTICE—PRECEDENT.

CONJUGAL RIGHTS.
See (1) HUSBAND AND WIFE.
(2) RESTITUTION OF CONJUGAL RIGHTS,

CONNIVANCE.
See (1) ABETMENT.
(2) ACQUIESCENCE,

CONSENT.
See (1) ACQUIESCENCE.
(2) ESTOPPEL

———**Decree.**
See (1) C. P. CODE, S. 96 and O. 23, R. 3.
(2) COMPROMISE.

———**Order.**
See C. P. CODE, S. 96 and O. 23, R. 3.

CONSEQUENTIAL RELIEF.
See SPECIFIC RELIEF ACT, S. 42.

CONSIDERATION.

See (1) CONTRACT ACT, SS 2 AND 25.
(2) EVIDENCE ACT, SS. 102 AND 103.
(3) FAMILY ARRANGEMENT.

CONSIGNMENT.

See RAILWAYS ACT, S 72.

CONSIGNOR AND CONSIGNEE.

See RAILWAYS ACT, S. 72.

CONSOLIDATION.

See (1) MORTGAGES.
(2) T. P. ACT, SS. 60 AND 61.

CONSOLIDATION.

——**of appeals**

See C. P. CODE, S. 151.

——**Suits.**

See (1) C. P. CODE, S. 151.
(2) PRACTICE.

CONSPIRACY.

See TORT.

CONSTITUTIONAL LAW.

——*Parliament—Membership of—Disqualification — Contract with Secretary of State for India.*

A member of Parliament is disabled from sitting and voting in the House, if he or his firm (of which he is a partner) makes contracts with the Secretary of State for India in Council for or on account of the public service of the Crown in India. When the first section of the Act of Parliament, 1782 (22 Geo. II, Ch. 45) after enumerating several office holders proceed to add the words 'any other person or persons whatever' the doctrine of *ejusdem generis* applies. Any other person means any one who holds an office in the British Government of a similar kind to those enumerated. The 'public service' required by the Act need not be one either executed or requited within Great Britain or paid for out of any particular fund. The fourth section of 41 Geo. III, Ch. 52, passed in 1801 is not a surplussage. It enlarged the area of disqualification. (*Lord Chancellor.*) SIR STUART SAMUEL, *In the matter of,*

19 I. C. 765 : 17 C. W. N. 735 (P. C.)

CONSTRUCTION.

See (1) CONTRACT—CONSTRUCTION.
(2) DEED—CONSTRUCTION.
(3) HINDU LAW—WILL.
(4) LEASE—CONSTRUCTION,
(5) MORTGAGE—CONSTRUCTION.
(6) WILL—CONSTRUCTION.

CONSTRUCTION OF STATUTES.

See INTERPRETATION OF STATUTES.

CONSTRUCTIVE ESTOPPEL.

See (1) C. P. CODE, S. 11.
(2) EVIDENCE ACT, S. 115.

CONSTRUCTIVE NOTICE.

See T. P. ACT, S. 3.

CONSTRUCTIVE TRUST.

See (1) TRUST.
(2) TRUSTS ACT, SS. 80—94.

CONTEMPT.

CONSUMMATION OF MARRIAGE.

See MAHOMEDAN LAW—MARRIAGE.

CONTEMPORANEOUS AGREEMENT.

See (1) DEED—CONSTRUCTION.
(2) EVIDENCE ACT, S. 92.

CONTEMPT.

——*Judge—Public acts— Open to criticism by the public.*

No privilege or protection attaches to the public acts of a judge which shield him, in regard to these, from free and adverse criticism. (*Lord Shaw*) CHANNING ARNOLD *v.* EMPEROR.

41 Cal. 1023 : 41 I. A. 149 : 18 C. W. N. 785 : 26 M. L. J. 621 : 15 Cr. L. J 309 : 1 L. W. 461 : 7 Bur. L. T. 167 : (1914) M. W. N. 506 : 16 M. L. T. 79 : 12 A. L. J. 1042 : 20 C. L. J. 161 : 23 I. C. 661 : 13 Bom. L. R. 544 : 8 L. B. R. 16 (P. C.).

——*Imputation of illegality in procedure.*

If in an application for restoration of a case dismissed for default the plaintiff states that 'the order was against rules of law,' no contempt of Court is meant. (*Walsh, J.*) KADHORY *v.* EMPEROR. **42 All. 26 : 52 I. C. 279 : 17 A. L. J. 898 : 20 Cr. L. J. 615.**

——*Pleader—Verbal explanation.*

Where in proceedings for contempt of Court a pleader assured the Court that the words were not meant for the Court, his assurances should suffice for his acquittal. (*Knox, J.*) RAMBALI RAI *v.* EMPEROR.

14 Cr. L. J. 687 : 21 I. C. 1007 : 11 A. L. J. 955.

——*Newspaper criticism — Immediate apology—Effect of*

It is not always a defence to a rule for contempt of Court that a newspaper guilty of contempt immediately afterwards published an apology to the court. (*Macleod, C. J. and Crump, J.*) MARMADUKE PICKTHALL, *In re.* **25 Bom. L. R. 107 : 24 Cr. L. J. 313 : 72 I. C. 73 : 1923 Bom. 242.**

——*Criticism in newspaper -Imputing judicial dishonesty is contempt.*

Where the articles as a whole would leave on the mind of an ordinary reader the clear impression that injustice had been deliberately done on political grounds to some of the accused who were apparently, innocent, in other words, it attributes judicial dishonesty to the Judges. *Held*, such an article constitutes a contempt of Court. The court has to consider the natural and probable effect of the article and not only the intention of the editor. Any unfair criticism of Courts or Judges constitutes such an interference with the administration of justice as should be punished. The tendency of such criticism is to undermine the dignity of the Court and in the end to embarrass the administration of justice. The High Court will not act so much to protect the dignity of its Judges, as in the interest of the administration of justice (1899) A. C. 549 ; (1900) 2 Q. B. 33 ; 33 Bom. 240 Foll. (*Shah, A. C. J and Crump, J.*) EMPEROR *v.* MARMADUKE PICKTHALL.

24 Cr. L. J. 289 : 72 I. C. 17 : 25 Bom. L. R. 15 : 1923 Bom. 8.

CONTEMPT.

———*Scandalous attacks on Court's integrity —High Court can committ for contempt.*

In matters of contempt the court acts not to defend the dignity of any Court or Judge but to safeguard the proper administration of justice and to ensure that the confidence of the public in that administration shall not be in any way impaired. The High Court has jurisdiction to punish for contempt a person who makes scandalous attacks on its integrity and impartiality. (*Marten and Crump, JJ.*) SATYABODHA RAM CHANDRA ADA BADDI, *In re.* **24 Bom. L. R. 928 : 23 Cr. L.J. 644 : 69 I, C. 84 : 47 Bom. 76 : 1922 Bom. 426.**

———*News paper comment—Contempt of lower court—Jurisdiction of High Court to take action in respect of.*

The opponent, the editor of a weekly newspaper issued at Dharwar, published an article commenting on certain proceedings in the Court of the First Class Magistrate at Dharwar. The comments attributed partiality to the Magistrate in favour of the prosecution, criticised the proceedings in his Court in an unfair manner, and suggested that he acted under the instructions of the District Magistrate and not in accordance with his own conscience. The Government of Bombay applied to the High Court for a rule calling upon the opponent to show cause why he should not be committed for contempt of Court in respect of the publication of the article. At the hearing of the rule the opponent raised a preliminary objection that the High Court had no jurisdiction to deal with the contempt of inferior Criminal Courts. *Held*, that the comments constituted a contempt of the Magistrate's Court, that the publication of the article constituted also a contempt of the High Court as tending to impede the due administration of justice and that, therefore, the opponent was liable to be dealt with by the HighCourt. Per *Macleod, C. J.*—The High Court possesses the same powers of punishing for contempt as the Court of the King's Bench Division by virtue of the Common Law of England. Per *Shah, J.*—The High Court has no power to punish for contempt of Criminal Courts subordinate to it. It is difficult to hold that because a contempt of Court is punishable under the English Common Law it is punishable as such in India even though the Indian Law does not make it punishable. It would be in effect creating a new offence to hold that a contempt of a subordinate Court as such is punishable. The High Court has no powers with reference to the contempts of other Courts similar to those of the King's Bench in England, which it exercises under the Common Law of England. It has no powers such as the Court of King's Bench in England as being the *custos morum* of all the subjects of the realm under the Common Law of the land. The mere fact that the High Court has powers of superintendence over the subordinate courts does not give to it any such jurisdiction. (*Macleod, C. J. and Shah, J.*) EMPEROR *v.* BALKRISHNA GOVIND KULKARNI. **46 Bom. 592 : 24 Bom. L, R. 16 : 23 Cr. L. J. 177 : 65 I. C. 753 : 1922 Bom. 52.**

———*Publication of proceedings pending leave of Court—Comments—Jurisdiction of High Court in respect of contempt of inferior courts.*

CONTEMPT.

Comments on or extracts from any pending proceedings before a Court cannot be published unless the leave of the Court be first obtained before decision. Any act done or writing published, calculated (*a*) to obstruct or interfere with the due course of justice or the lawful process of the Court, or (*b*) to bring a Court or a Judge of the Court into contempt or to lower his authority is a contempt of the Court. The High Court has power to protect in a proper case courts in the mofussil over which it exercises supervision against contempt. (*Martin, Hayward and Kajiji, JJ.*) MOHANDAS KARAMCHAND GANDHI AND MAHADEO HARIBHAI DESAI, *In re.*

21 Cr. L. J. 835: 58 I, C, 915: 22 Bom. L, R. 368.

———*Summary procedure—Fine*—Ultra vires.

An order of Court summarily finding a person for contempt, for not appearing, as directed by a notice to appear is *ultra vires*. (*Richardson and Huda, JJ.*) CHOGMAL *v.* EMPEROR.

50 I. C. 981 : 20 Cr, L. J. 373 : 23 C. W. N. 389.

———*Pending case—Comments by paper likely to prejudice trial—Punishment.*

To make comments on a pending case, when the comments have the effect of prejudicing the fair trial of an accused person amounts to contempt of Court. When during the pendency of a trial on a serious charge the whole thing is treated by a journalist as a humorous event on which the public are invited to laugh, it is a matter that must be dealt with seriously. The power of committing a citizen or a journalist to jail or of inflicting a fine or punishing him in any other way, such as, making him pay costs, should be exercised with the greatest caution. Contempt matters are matters not between the parties but are matters between the respondents and the Court can accept an apology which it considers sufficient. (*Davar, J.*) CLARIDGE, *In re.*

13 Cr. L, J. 461 : 15 I. C. 93 : 14 Bom L. R, 231.

———*What is—Newspaper article—Power of High Court.*

Contempt of Court by a speech or writing may be (1) by scandalizing the Court itself or (2) by abusing parties to an action or (3) by prejudicing the public in favour of or against a party before the cause is heard. Proceedings for contempt by scandalizing the Courts are never obsolete. Contempt of Court is of two kinds, Civil contempt and criminal contempt. A criminal contempt is conduct that is directed against the dignity and authority of the Court. A civil contempt is a failure to carry out the orders of the Civil Court. The primary purpose in a criminal contempt is the vindication of public authority by the punishment of an Act directed against the Majesty of the law, and the proceedings conform as nearly as possible to proceedings in criminal cases, while contempt in civil cases is at the instance of a private party. The nature of proceedings in a civil contempt is civil in the beginning and criminal in the end.

CONTEMPT.

A proceeding for contempt has the essential qualities of a criminal proceeding. High Courts in India are Courts of Record and have summary powers of punishment for contempt combined against the Court or the judges when the Court is not sitting. The printer and publisher of a newspaper is liable for contempt even though he was not aware of the subject-matter constituting such contempt. The question whether Directors of a Newspaper Limited Company are responsible for the contemptuous articles appearing in their paper is a question of fact, and it cannot be held as a rule of law that they are responsible In cases of contempt of Court, the question is not whether the articles did in fact obstruct but whether they are calculated to obstruct or interfere with the due course of justice. In ascertaining the meaning of articles and the intention with which they are used, the Courts will give the words their natural meaning and put a fair interpretation on the language used. Mere disclaimer on the part of the publisher about the intentional disrespect is not a good defence, when the purpose and intention of the articles and their meaning is obviously of a contrary import. (*Sanderson, C.J., Woodroffe, Mookerjee, Chitty and Fletcher, JJ.*) TARIK KANTI BISWAS, *In the matter of.* **45 Cal. 169 : 26 C. L. J. 459 : 19 Cr. L. J. 530 : 45 I. C. 338 : 21 C. W. N. 1161 (F. B.).**

———*Summary proceedings — High Court—Demonstration against a Judge—Advertisement.*

The High Court has power to take proceedings for contempt of Court whether the contempt is committed in the Court during the pendency of a proceeding or not. The mere offer of an apology does not entitle a person accused of contempt to be discharged. To say that the sentence is 'Cruel' may be contempt but it would not be a contempt if it were said that the sentence is severe; advertisement in a newspaper for demonstration against a judge is contempt of Court but not so, if it were published for obtaining an expression of public opinion. (*Peacock, C. J. and Macpherson, J.*) BANKS AND FENWICK, *In the matter of,* **19 Cr, L. J. 449 : 45 I. C. 113 : 26 C. L. J. 401.**

——*What is—Duty of Court—Court of Record—Power to commit—Procedure—Libel—Liability of author, printer and publisher—Commitment for contempt—Jurisdiction.*

Courts of justice ought to preserve their proceedings from being misrepresented ; and the minds of the public should not be prejudiced against persons concerned as parties in causes before the cause is finally heard. The misrepresentation need not be wilful. To charge a judge with tyranny in the mode of disposing the cases or to cast unjust and defamatory imputations on a judge, without foundation constitutes gross contempt. In the case of a libel the Court has no cognizance, unless it is a contempt, by being an abuse of its proceedings. A Court of record has power to punish by commitment for contempt, a libel published while the Court is not sitting. A printer and publisher of a newspaper is as much liable to be punished for contempt as the author who sent the libellous writing to the printer's office. The printer of a newspaper who publishes with the name of the author attached to it is responsible, if he cannot, when required, prove that it was published with the authority of the person by whom it purports to have been signed. If a printer publishes defamatory and contemptuous libels sent to him for publication by a person beyond the jurisdiction of the Court or if a printer refuses to give the name of the real author of the libel, his case is different from that of the printer who apologises and gives the name of the author. The High Court can proceed for contempt in two ways: (1) by a rule calling upon the guilty person to show cause why he should not be adjudged guilty of contempt of the Court : (2) by attachment. An attachment is a process that issues at the discretion of the judges of a Court of Record against a person for some contempt for which he is to be committed, and may be awarded, by them upon a bare suggestion, or on their own knowledge without any appeal, indictment or information (*Peacock, C. J. and Mitter, J.*) WILLIAM TAYLOR, *In the matter of,* **19 Cr. L. J. 402 : 44 I. C. 930 : 26 C. L. J. 345.**

———*Injunction—Breach of—Firm—Liability of servants.*

Neither the assistants nor the agents and servants of a firm are liable to be punished for contempt of Court for disobeying an injunction granted by the Court restraining the firm from dealing in any manner with the goods mentioned in the injunction if no mention is made in the injunction of the assistants or the servants or the agents of the firm. (*Jenkins, C.J., Woodroffe and Mookerjee, JJ.*) MARSHALL *v.* VENKATARATNAM. **21 C.L.J. 578 : 30 I. C. 4 : 42 Cal. 1169.**

———*Criminal offence—Comment of pending case—Proof by legal evidence—Statement on information and belief.*

A contempt of Court for making comments in a newspaper on a pending case is a criminal offence, and no one can be punished for it unless that offence is proved by legal evidence. The conviction of the accused with the articles impugned must be proved by legal evidence. A statement on information and belief is not legal evidence in such a case. 5 Moo. P. C. 111 Ref. (*Jenkins, C. J. Stephen and Mookerjee, JJ.*) GOVERNOR OF BENGAL *v.* MOTI LAL GHOSH. **17 C.W.N. 1253 : 18 C. L. J. 452: 20 I. C. 81 : 14 Cr. L. J. 321 : 41 Cal. 173.**

———*Rule issued by High Court—To stay proceedings before Munsif--Refusal of Munsif to stay proceedings, if tantamount to contempt.*

The act of a Munsif in proceeding with a case and passing final orders, when the proceedings had been stayed by an order of the High Court, amounts to a contempt of the authority of the High Court and his order is absolutely without jurisdiction. (*Mookerjee and Caspersz, JJ.*) SATI NATH SIKDAR *v.* RATAMMANI NASKAR. **14 I.C. 808 : 15 C.L.J. 335.**

———*Newspaper article reflecting on party pending suit, if a contempt.*

It is a contempt of Court to publish a newspaper article reflecting on a party especially when he is a witness under cross-examination. (*Fletcher, J.*) WESTON *v.* EDITOR OF THE BENGALEE. **11 I. C. 499 : 15 C.W.N. 771.**

CONTEMPT.

———*Disobedience of order of Court—Communication—Absence of formal order—Effect.*

The High Court stayed proceedings in a criminal trial. A telegram was sent by the vakil and this was supported by an affidavit, but still the Magistrate proceeded with the trial. *Held*, even in the absence of a formal communication of the stay order, the magistrate was bound to obey the order of the High Court. He would be guilty of contempt if he wilfully disobeyed the same. Where there is possible to construct two inferences upon the magistrate's conduct, the inference which discloses favourable view should be taken. (*Venkatasubba Rao, J.*) PONNUSWAMI AIYAR *v.* GANAPATHY AIYAR. **45 M. L. J. 742 : 33 M. L. T. (H. C.) 130 : (1923) M. W. N. 919 : 18 L. W. 809 : 1924 M. 393.**

———*Commitment—Official Referee—Disobedience to order—Madras High Court Rules (Original Side), R. 119.*

A Judge sitting on the Original Side of the High Court has power to commit a person for contempt for disobeying an order of the Oificial Referee of the Court to produce certain accounts in his possession. (*Wallis, C. J. and Napier, J.*) ORIGANTI VENKATARATHNAM *v.* K. DESIKACHARI. **36 M. L. J. 461 : 52 I. C. 448 : (1919) M. W. N. 368.**

CONTENTIOUS SUIT.

See T. P. ACT, S. 52.

CONTINGENT BEQUEST.

See (1) SUCCESSION ACT, S. 111.
(2) T. P. ACT, SS. 21—26.
(3) WILL—CONSTRUCTION.

CONTRACT.

C. I. F. Terms.
Consideration.
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C. I. F. Terms.

———*C. I. F. Terms—C.I.F. S. W.—Delivery of goods—Payment—Conditions precedent—Survey of goods—Right to.*

It is the duty of the consignors of goods under a C. I.F.S. W contract to tender to the consignee the bill of lading and insurance policy before the price is demanded and a delivery telegram sent by the shipping company is not equivalent to the bill of lading. In the absence of the usual documents of title the consignee is entitled to inspect the goods and satisfy himself as to the same. (*Mulla, J.*) STEEL BROTHERS & CO., LTD. *v.* DAYAL KHATAV & CO. **47 Bom. 924: 25 Bom. L. R. 1063: 1924 B. 247.**

CONTRACT—C. I. F. Terms.

———*C. I. F. Terms—Indent—Construction.*

If the importer buys on his own account as well as for his constituent he ought to make clear what is liabilities are under his contract with them. If he does not do so he cannot afterwards as the market fails decide whether he shall deliver goods bought on his own account or goods which he says he has brought against a particular indent. The importer may, however, confine himself to buying only against orders received. He may in this case undertake to supply at the indent price charging his own profit and commission as agreed. Or he may establish direct connection with the vendor in which case he only gets his commission. Whether he gets from both the vendor and the purchaser or from one of them is immaterial for determining whether privity of contract exists between vendor and purchaser. (*Macleod, C. J.*) N. ROY & CO. *v.* SURANA DALAL & CO. **64 I. C. 935 : 23 Bom. L. R. 1119.**

———*C.I.F. Terms—Bill of exchange presented with shipping documents—Outbreak of war—Arrest of ship as prize—Bill presented without shipping documents*

Ordinarily a seller on C.I.F. terms is entitled to be prepaid by his buyer on presentation to the latter of valid and legal shipping documents. On July 16, 1914, the first consignment of goods ordered by defendants was shipped on board SS. *Barenfels* and the second on SS. *Kybfels* on the 25th from a German port. The plaintiff drew against the defendants for the first shipment ; the bill of exchange was presented to the defendants along with the shipping documents and on July 31, 1914, was accepted by the defendants. The plaintiff on August 9, 1914, drew a bill of exchange as regards the second shipment ; it was presented to the defendants who accepted it on November 10, 1914. Both bills were not honoured on due dates of payment. Owing to the outbreak of war SS. *Barenfels* was seized as a prize but she was allowed to finish her voyage, when on June 8, 1915, she delivered the defendants shipment at Madras. The defendants accepted the cargo and paid the amount of the first bill. The plaintiff sued to recover interest from the defendants on the amount of the first bill from its maturity to the date of payment and for the amount due on the second bill with interest. *Held*, (1) that as regards the first bill the defendants obtained all that they could obtain under the C. I. F. contract when the bill was presented to them for acceptance, that is good shipping documents ; that on their acceptance the risk thereafter was entirely their own and they were not entitled to refuse payment on maturity and that having refused payment on maturity they were liable for over due interest after that date, (2) that, as regards the second bill as the bill of lading had become a void contract before it was tendered to the defendants on November 10, 1914, there was at the time a failure of consideration for the acceptance of the bill of exchange ; and the defendants were therefore, not bound to pay at maturity. (*Beaman, J.*) MARSHALL & CO. *v.* NAGINCHAND PHULCHAND. **42 Bom. 473 : 37 I. C. 644 : 18 Bom. L. R. 915.**

CONTRACT—C. I. F. Terms.

———*C. I. F. Terms—Meaning of—Bill of lading—Effect of Royal Proclamation forbidding trading with enemy.*

A C.I.F. contract is one under which the purchaser is bound to pay the stated price for the goods on tender of the documents showing that the goods have been shipped for transit to the port of destination, duly insured according to the terms of the contract and that freight has been paid. A bill of lading as known to merchants is a receipt for goods actually delivered over and shipped on board the ship named therein signed by the captain of the steamer or representative and no document which does not conform to these conditions can strictly be called a bill of lading. A C.I.F. purchaser is entitled to ask for a bill of lading for he is not bound to pay upon proof merely that the goods have arrived at the port of departure. A contract with an enemy subject, made before the war, becomes impossible of performance by the Royal Proclamation and the defendant is not liable to pay damages. (*Macleod, J.*) NASSIM ISAAL BEKHUR *v.* SULTAN ALI SHURTARY. **40 Bom. 11 : 28 I. C. 433 : 17 Bom. L. R. 249.**

———*C. I. F. Terms—Title to goods when passes.*

Certain jute was shipped under a C. I. F. contract on terms that the contract should be held cancelled for goods not arriving. The bills of lading were made to the order of the consignees, but ultimately remained still with the vendors. *Held*, that the goods still remained the property of the sellers. (*Jenkins, C. J.*) CARGO EX SS. 'RAPPENFELS,' *In re.* **30 I.C. 174 : 42 Cal. 334.**

———*C.I.F. Terms—Bills of lading to be delivered on payment of price—Property when passes.*

When a seller deals with, or claims to retain, the bill of lading in order to secure the price, as when he sends forward the bill of lading with a bill of exchange attached, with directions that the former is not to be delivered to the buyer till acceptance or payment of the bill of exchange the appropriation is not absolute, but until acceptance of the draft, or payment or tender of the price, is conditional only and until then the property in the goods does not pass to the buyer. (*Martineau and Moti Sagar, JJ.*) GULAB RAI-SAGAR MAL *v.* MIRBHE RAM-NAGAR MAL. **4 Lah. 423 : 79 I. C. 194 : 1924 Lah. 239.**

———*C. I. F. Terms—Mercantile custom—Payment.*

When goods have been sold upon C.I.F. terms the contract of the seller is performed by tendering to the buyer the documents which would enable the latter to obtain on the ship's arrival the delivery of the goods contracted for. These documents must of course be tendered within a reasonable time from the date agreed upon for shipment of the goods which they represent. If the contract of sale provides that payment is to be drawn on the buyer, the latter is bound to accept the draft upon tender of the proper documents. This he must do even though the goods be lost or destroyed at the time the draft is presented. The delivery he is entitled to as against payment of the contract price is not the goods contracted for but their symbol represented usually by the bill of lading, charter-party, invoice and policy of insurance. Upon payment he can upon arrival of the ship, demand the goods themselves and should these not be forthcoming, or, when forthcoming, not be of nature contracted for all his remedies at law are then open to him. (*Shadi Lal, C.J. and Fforde, J.*) BUBLEY HURRY AND CO. *v.* HERTZ AND CO. **4 Lah. 215 : 72 I. C. 421 : 1923 Lah. 541.**

CONTRACT—C. I. F. Terms.

———*C.I.F. Terms—Accepting shipping documents and drafts—Refusal to take delivery.*

Where the purchaser of goods under a C. I. F. contract accepted shipping documents and drafts but refused to take delivery on the ground that the goods were not in accordance with the description, they could not, in answer to the claim upon the draft, plead failure of consideration because, what they contracted for, were the shipping documents and not the actual goods. (*Scott-Smith and Martineau JJ.*) STIRLING MASON & CO. *v.* JWALA NATH BHAGWAN DAS. **1 Lah. 22 : 62 P. L. R. 1920 : 1 Lah L.J. 51: 55 I. C. 975 : 39 P. W. R. 1920.**

———*C. I. F. Terms—Incidents of.*

A C. I. F. contract is a contract for the sale of goods to be performed by delivery of the shipping documents. (1908) 2 K.B. 161 ; (1912) A.C. 18; (1915) 2 K.B. 379; (1916) 1 K.B. 495 ; (1919) 1 K.B. 198; (1911) 1 K.B. 934, Ref. (*Seshagiri Aiyar and Moore, JJ.*) MYLAPPA CHETTIAR *v.* AGAMIRZA MAHOMED. **37 M. L. J. 712 : 54 I.C. 550 : 26 M. L. T. 504.**

———*C.I.F. Terms—Incidents of.*

In a C. I. F. contract for purchase of goods tender by the vendor after the goods had been shipped, of shipping documents including the bills of lading which represent the goods is a good tender and performance by the vendor. The tender of the shipping documents including bills of lading which have been dissolved as contracts of affreightment is not such a tender as the vendors are bound to accept under the contract and the goods are thrown on the vendor's hands. It makes no difference in the application of this rule if the bills of lading were endorsed over to the vendees before the outbreak of the war. (*Wallis, C.J. and Spencer, J.*) H. ELLIOT & CO. *v.* ABDUL SAHEB. **41 Mad. 1060 : 35 M.L.J. 184 : 49 I. C. 196 : 8 L.W. 565.**

———*C.I.F. Terms—Incidents of—Outbreak of war.*

Under a C.I.F. contract for the sale of goods, there is a sale of goods by the delivery to the ultimate owner of the documents of title to the goods. Where the seller tenders to the buyer documents under a C.I.F. contract which include a bill of lading in an enemy ship, the tender is bad, because the contract was rendered illegal as it involved a contract of affrightment with an alien enemy and similarly the buyer cannot enforce the contract against the seller. (1915) 2 K. B. 379 ; (1916) 1 K.B. 495 Foll. 21 C.W.N. 670 Ref. (*Coutts Trotter, J.*) THIRUVARANGIAH *v.* PANIA & CO. **43 I.C. 673 : 33 M.L.J. 410.**

CONTRACT—C. I. F. Terms.

——— *C. I. F. Terms—Meaning and scope—Effect of S. 78, Contract Act.*

The effect of a C.I.F. contract is that the buyer under it gets title to documents of title only, on payment of money due on those documents. The contract is not overridden by S. 78 of the Contract Act which expressly reserves contracting with special terms and impliedly accepts mercantile usages. (*Abdur Rahim, O C. J. and Burn, J.*) SOORTHINGJEE SAKAL CHAND *v.* MAHOMED NASURUDDIN. **40 I. C. 526 : 32 M L. J. 146.**

———*C.I.F. Terms—Terms and incidents of.*

Under a C.I.F. contract for the sale of goods the seller undertakes to sell the specified goods, to ship them to the place agreed upon, to obtain a contract of affreightment and policies of insurance and to hand over the bill of lading and the policies to the buyer. Such a contract provides for the delivery of the goods to be made by handing over the documents to the buyer and when this is done, the seller has performed the contract in full and is relieved of further liability. English cases reviewed. (*Robinson, C. J. and Duckworth, J.*) S. K. R. S. L. CHETTY FIRM *v.* AMARCHAND MADHOWJEE & CO.

66 I. C. 579 : 11 L. B. R. 141.

———*C.I.F. Terms—Right to reject goods.*

Under a C.I.F. contract property in the goods sold passes at the time of shipment but such passing is subject to the buyer's option to reject the goods if after inspection he finds them to be not goods in accordance with the contract ; this, however, refers to the goods at the time of shipment and not to any shortage or deterioration caused on the voyage for which the buyer's remedy is only on the policy of insurance. (*Twomey, C. J. and Robinson, J.*) AHCHOY *v.* TRADING CO.

56 I. C. 978.

Consideration.

———*Consideration--Promise to pay decree debt—If can be enforced after decree is based.*

Where in consideration of the decree-holder not executing his decree, the judgment-debtor promised to pay the decree amount with interest by a certain time, the same is enforcible as a valid contract, even though at the time of suit the original decree is time barred. (*Newbould and Rankin, JJ.*) IBRAHIM MULLICK *v.* LALIT MOHAN ROY. **50 Cal. 974 : 28 C. W. N. 322 . 1924 Cal. 388.**

———*Consideration—Stranger—Not to question.*

In a suit by the vendee to recover possession if the vendor admits the conveyance, it is not open to his co-owners to question it on the ground of want of consideration or for any other ground, not affecting the title of the vendor. 27 A. 271 P. C. Foll.: 35 A. 273 Dist. (*Mookerjee and Beachcroft, JJ.*) CHINTAMANI PRAMANIK *v.* HRIDAY NATH NATH KAMILA.

51 I. C. 123 : 29 C. L. J. 241.

———*Consideration—If can be questioned by third party.*

Where the vendor does not question the consideration for the sale, it is not open to a third party to do so. (*Sadasiva Aiyar and Tyabji, JJ.*)

CONTRACT—Construction.

ARTHO RAMA *v.* ARTHO PADHI. **14 M. L. T 177: (1913) M. W. N. 687: 20 I, C. 952: 25 M. L. J. 248.**

Construction.

———*Construction.*

Where the contract provided that goods are to be delivered as and when same may be delivered from the mills. *Held*, this should not be construed to mean " if and when the same may be received from the mills." To construe in this way is to convert words, which fix the quantities and times for deliveries by instalments into a condition precedent to the obligation to deliver at all, and virtually make a new contract. The words certainly regulate the manner of performance, but they do not reduce the fixed quantity sold to a mere maximum, or limit the sale to such goods, not exceeding the agreed bales as the Mills might deliver to the defendants during the agreed period. (*Lord Sumner*). HARNANDRAI FATCHAND *v.* PRAGRAJ. **44 M. L. J. 498 : 47 Bom. 344: L. R 4 P. C. 61 : 32 M. L. T. (P. C.) 171 : 72 I. C. 485 : 25 Bom. L. R. 537 : 27 C. W. N. 879 : (1923) M. W. N. 547:18 L. W. 441: 38 C. L. J. 248: 50 I. A. 9: 1923 P. C. 54 (2) (P.C.).**

———*Construction—Condition.*

The term 'conditions of sale' in connection with the preparation of bargain paper means 'terms of sale' and not conditions to which the bargain is subject.

Whether an agreement is a completed bargain or merely a provisional arrangement depends on the intention of the parties as deducible from the language used by the parties on the occasion when the negotiations take a concrete shape. As observed by the Lord Chancellor (Lord Cranworth) in *Ridgway* v. *Wallon*, 6 H.L. Cas. 289, the fact of a subsequent agreement being prepared may evidence that the previous negotiation did not amount to an agreement, but the mere fact that persons wish to have a formal agreement drawn up does not establish the proposition that they cannot be bound by a previous agreement. (*Mr. Ameer Ali*). HARICHAND MANCHARAM *v.* GOVIND LUXMAN GOKHALE.

44 M. L. J. 608: 47 Bom 335 : 28 C. W. N. 73: 17 L. W. 572: 32 M.L.T. (P.C.) 175: L.R. 4 P. C. 84: 37 C. L. J. 440: 25 Bom. L. R. 531: 50 I. A. 25: 71 I. C. 763 : 1923 P. C. 47 (P. C.).

———*Construction—Contract for conveyance—Duty to make out marketable title—Execution of conveyance—Delay.*

According to the terms of an agreement for sale the purchaser bound himself to complete the purchase within one month from the date of agreement and in case of default was to bear the burden of certains charges. He tendered the draft conveyance three days after the fixed period but the vendor refused to execute it on the ground of its bilated tenders. *Held*, that the provision relating to the purchaser's default being in the nature of a penalty and no loss from delay in the tender having been proved by the vendor the latter was bound to execute the conveyance. (*Mr. Ameer Ali*). BANKU BEHARI DHUR *v.* GALSTAUN. **21 A. L. J. 9: 9 O. & A. L. R. 237 : 69 I. C. 162 : 31 M. L. T. 159 : 27 C. W. N. 77 : 1922 P. C. 339 (P. C).**

CONTRACT—Construction.

——*Construction — Performance, condition for avoiding—Breach of contract.*

A contract for the purchase of Alizarine provided that if there was any fluctuation in the Syndicate rates the conditions of the contract regarding price would become void. The syndicate was composed of a German firm and English members and after the Great War broke out, the syndicate ceased to the operative. In a suit by the purchasers against the sellers for damages for breach of contract to continue the deliveries, *Held*, that the obligation of sellers did not depend upon the continuance of the syndicate and that as the condition avoiding the contract, namely, fluctuation of rates, never came into operation the contract continued on the footing of the rates specified and that the buyers were entitled to recover damages, (*Viscount Haldane*). TOOLSIDAS TEJPAL *v.* VENKATACHALAPATHY IYER.

(1920) M.W.N. 557: 25 C. W. N. 26: 28 M. L. T. 410 : 59 I. C. 27: 13 L. W. 1 (P. C.).

——*Construction —Agency—Under brokers—Dependent contract.*

In the case of an employment of an underbroker by broker for a fixed term, if the services of the broker are dispensed with in the interval, the dependent contract of underbrokerage is also disallowed and the under-broker is not entitled to sue the broker for damages for wrongful dismissal unless the broker had brought about the termination of the head agency purposely. (*Lord Buckmaster.*) LACHMAN DAS *v.* RAGHUMULL.

47 Cal. 290: 46 I. A. 314: 24 C. W. N. 577: 2 U.P.L.R.(PC.) 68: 58 I. C. 851: 11 L. W. 551 (P.C.)
[On appeal from 38 I. C. 278.]

——*Construction—Sale of goods—Forms of indent from England, if incorporated in the contract.*

Appellants contracted to deliver to respondents certain articles which both parties knew were to be shipped from England. The question was whether a stipulation in the following words 'Terms cash, less three months discount equal to 1 per cent. Per indent Nos. 906, 907, 908, 909 (the numbers referring to indents under these numbers where the contracts made by the appellants with English manufacturers for the supply of the goods), was meant to incorporate the terms of the indents as terms of the contract. *Held*, that the indents, were not made part of the contract in suit, and the date of shipment in the indent was not included in the contract as the date of shipment under the contract. (*Lord Dunedin,*) WILLIAM ALEXANDER *v.* GOKUL DAS.

23 C. W. N. 1091 (P. C.).

——*Construction—Implied term of contract —Compensation—Assessment of.*

Plaintiff contracted to supply labour for reclamation work undertaken by the defendant trust. The plaintiffs were to find the necessary labour for filling and emptying the wagons of sand and were to be paid by the measurement of the area reclaimed, having before commencing work, satisfied themselves as to the correctness of the depths shown on the sections of the ground. The defendant Trust were at the time engaged in puttting rubble protection to enclose the area

CONTRACT—Construction.

to be reclaimed and this would be in progress probably when the works would be commenced and it was stipulated that the plaintiff were not to make any claim for alleged or actual loss of material being washed away during the progress of the work. The plaintiffs were to be paid strictly in accordance with the work when actually done on the sections of the ground, at the completion of the work and no allowance whatever for loss would be entertained for sinking, washing away, etc. The trial judge held that the plans and sections added an implied term to this contract that the defendant, Trust was to supply the protection actually shown on the plans and sections, whilst the Appeal Court was of opinion that the implied covenant was to supply 'adequate protection' the inadequacy being proved by the mere fact of the discrepancy between what they considered the proved wagon loads deposited and the amount measured, *Held*, that assuming without deciding that the contract had an implied condition, that condition was only to execute the protection as shown on the plans. (*Lord Dunedin,*) THE KARACH PORT TRUST *v.* J. MACKENZIE DAVIDSON.

8 L. W. 324: 22 C. W. N. 961: 48 I. C. 319: (1918) M. W. N 611 (P. C.)

——*Construction—Vendor and purchaser—Delay in completion of transfer—Interest—Right to.*

In 1906 a mortgagor contracted to pay interest on the mortgage money in three months, on default of which he agreed to sell the land to the mortgagee for a lakh of rupees from which the mortgage money and interest, etc., should be deducted. The mortgagor failed to pay as above and refused to convey the land. The mortgagee sued for specific performance and got possession in 1911. On a question arising as to the rights of the mortgagee, *Held*, on the construction of the agreement that the mortgagee was entitled to deduct from the purchase price the interest on the mortgage amount down to the date when he obtained possession ; and there being an express provision in the agreement the general rules as to interest between vendor and purchaser did not apply. (*Lord Buckmaster.*) MAUNG SHWE GOT *v.* MAUNG INN. **44 Cal. 542 : 21 M. L. T. 18: 15 A. L. J. 82 (1917) M. W. N. 117 : 32 M. L. J. 6 : 25 C. L. J. 108 : 19 Bom. L. R. 179: 21 C. W. N. 500 : 5 L. W. 532 : 10 Bur. L. T. 69 : 33 I. C. 938 : 44 I. A. 15 (P. C.).**

——*Construction—Admissibility of extrinsic evidence—Rate of payment for work done under a contract—Over-all-rate, effect of.*

The rate of payment for work done under a written contract is determined by the terms of the contract, and hence extrinsic evidence as to the rate of payment allowed for such work to another contractor or to same contractor under another contract is irrelevant and inadmissible. Under the terms of the contract in this case the schedule of rates of payment specified under one head a certain rate for carting permanent way material and under another head the rate for carting explosives, and the note referred to in the schedule fixed conditions of carriage of cement

and explosives. The question in dispute was as to the rate of payments, for carting cement. *Held*, that cement was permanent way material and the rate of payment for carting cement was that specified in the schedule for carting the permanent way material. (*Lord Parmoor.*) SETH JASWANT RAI *v.* THE SECRETARY OF STATE.

23 C. L. J. 177 : 18 B. L R. 355 : 33 I. C. 924 : (1916) 1 M. W. N. 201 : 3 L. W. 297 : 19 M. L. T. 103. (P. C.).

——*Construction—Letter of offer—All terms of letter not embodied in contract—Effect.*

Where all the terms of a letter of offer were not incorporated in the document embodying the contract, it is the latter document that governs the rights of the parties and a clause in the former not embodied in the latter is of no effect. (*Lord Parker.*) PERFECT POTTERY CO., LTD *v.* MRS. IDA L. ROSE. **27 M. L. J. 74 : 18 C. W. N. 1185 : 1. L. W. 610, 24 I. C. 506 : 10 N. L R. 108 (P. C.).**

——*Construction—Guarantee.*

Respondent agreed with appellants that if the latter advanced to a particular Cotton Mills Co, a lakh and a half rupees he would within to weeks procure a loan of eleven lakhs as the first mortgage of the Mills property and repay the advance out of the said mortgage money. Appellant sued for damages for breach of the agreement of guarantee by the respondent and the respondent contended that his liability was contingent on a first mortgage being given. *Held*, that the deed amounted to a substantial undertaking that a loan should be procured by the respondent and that out of that loan the sum of one and a half lakhs should be repaid. The respondent was therefore liable in damages. (*Lord Macnaughten*). VISSANNJI *v.* SHAPURJI. **36 Bom. 387 : 16 C. W. N. 769 : 14 Bom. L. R. 493 : 9 A. L. J. 811 : (1912) M. W. N. 691 : 16 C. L. J. 53 : 23 M. L. J. 77 : 16 I. C. 98 : 12 M. L. T. 90 (P. C.).**

——*Construction—Sale of railway sleepers—'Passing' of seller's agent, final sleepers supplied unfit for use as such—Right of buyer to damages.*

Plaintiff entered into a contract with the defendant for the supply of sleepers for railway and the contract contained the following clause. The passing of sleepers by the B. B. T. Co,. L'd, is as usual final as regards measurement and quality. In an action for damages for breach of warranty, *Held*, on the true construction of the contract, the contractors could not supply anything they chose, but the supply should be according to the standard set up expressly or impliedly under the contract or at least must be reasonably fit as sleepers of the dimensions prescribed for use by the railway company. The right conferred by the clause amounted merely to the right to determine by and through the skill and experienced persons whom they should necessarily employ for the purpose; acting honestly and impartially according to the best of their judgments whether the goods supplied were in conformity with the requirements of the contract under which they were so supplied. (*Lord Atkinson.*) BOMBAY BURMA TRADING CORPORATION CO, LTD. *v.* AGA MAHOMED. **34 Mad. 453 : 38 I. A. 169 : 15 C. W. N. 981: (1911) 2 M. W. N. 111 : 10 M. L. T. 150: 13 Bom. L. R. 813 : 14 C. L. J. 326 : 8 A. L. J. 1208 : 12 I. C. 44 : 21 M. L. J. 1110 (P. C.).**

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——*Construction—Sale of goods—Delivery to be taken within a specified period.*

Where no delivery was taken or given within the specified period, delivery of part of goods after the fixed period is a separate transaction and is no part of the original contract and therefore refusal to take delivery does not give rise to liability in damages: (*Macleod, J.*) THE PHOENIX MILLS LTD. *v.* MADHAV DAS RUPCHAND. **69 I. C. 9 : 24 Bom L. R. 142.**

——*Construction—Sale of goods—Damages—Right to.*

Held, on the construction of the contract, that the terms of the contract indicated that it was the intention of the parties that the bales should be as near the description stated in the contract as possible, that if the plaintiffs were dissatisfied with a tender of goods on the ground that the goods were no where near the description contained in the contract then they might repudiate the bargain altogether, and that neither of the parties ever contemplated that there should follow, on a repudiation of that kind, any right on the part of the plaintiffs to recover damages. *Marten, J.*:—The arrival of goods contracted for, namely, ginned goods was a condition precedent which was never fulfilled and therefore the contract was at an end. (*Heaton and Marten, JJ.*) TRIBHOVANDAS *v.* NAGINDAS. **54 I. C. 233 : 21 Bom. L. R 1137.**

——*Construction—Agreement in writing to sell immoveable property—Condition — Term—agreement amounts to contract.*

Held, on the construction of an agreement to sell that the word 'conditions' in the expression the conditions are as follows' meant terms. The mere fact that bargain paper was to be made through a vakil could not of itself prove that there was a condition precedent to the agreement becoming effectual as a contract. The writing amounted to a binding agreement of which the plaintiff was entitled to specific performance. (*Macleod, C. J. and Heaton, J.*) GOVIND LAXMAN GOKHAL *v.* HIRACHAND MANCHARAM. **53 I. C. 805 : 21 Bom. L. R. 1047.**

——*Construction— Formal document not drawn up—Completion.*

A document stating that one party would execute a sale deed of his immoveable property drawn up by a vakil, would receive earnest and whole money in two lots and that the bargain would be cancelled if some events happen in a particular way, is a mere agreement to enter into a contract of sale and not a contract of sale. The condition as to the execution of the bargain paper prevented the agreement from operating as a concluded contract when only its specific performance could be enforced. (*Marten, J.*) GOVIND *v.* HARI CHAND. **50 I. C. 403 : 21 Bom. L. R 302.**

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———*Construction—Parties can agree to creation of rights and liabilities according to a particular law.*

A party to a contract can agree that it shall be applied for the purpose of imposing rights and liabilities according to a particular law which would not ordinarily be applicable. (*Scott, C. J. and Beaman, J.*) SITARAM *v.* SIRAJUL KHAN.

41 Bom. 636 : 42 I. C. 32 : 19 Bom. L. R. 549.

———*Construction—Building contract—Payment on architect's certificate—Fraud of architect.*

Where under the terms of the contract the employer has agreed to pay the contractor of his building, according to the final certificate of the architect, the employer cannot impeach the certificate except on the ground of fraud. If owing to the incompetency or mistakes of the architect the employer has to face losses his remedies lie only against the architect. (*Macleod, J.*) ALIMAHOMED RAHUNI TULLAH *v.* PANDURANG LAXMAN.

33 I. C. 701 : 18 Bom. L. R. 156.

———*Construction—Arbitration — Award — Successive awards—Several and separate contracts.*

Where a commercial contract provides for reference to arbitration and one party to the contract obtains an award as regards a part of his claim, he can proceed with the arbitration as regards subsequent breaches of contract. There may be successive awards even in the same matter. Where there are several and separate contracts each containing provision for arbitration the right conferred by the arbitration clause is not exhausted when a complete award is made upon the first reference. (*Mookerjee and Fletcher, JJ.*) BALMUKUND RINA *v.* GOPIRAM BOHTICA.

31 C. L. J. 391 : 56 I. C. 828 : 24 C. W. N. 776.

———*Construction—Arbitration — Dispute — Arbitrator's award of interest—Legality of.*

The petitioner entered into a contract with the respondent for the sale of one lakh yards of Hessain cloth at Rs. 30 per yard delivery to be made in two instalments. There was a clause that any dispute whatsoever arising on or out of the contract shall be referred to the arbitration of the Bengal Chamber of Commerce. On the due dates the respondents presented their bills for payment without claiming any interest. The petitioner admitted the respondent's claim but claimed to withhold payment by setting it off against a claim that would be due from the respondent to the petitioner. *Held*, that inasmuch as the petitioner was withholding payment under a claim of right, there was a dispute between the parties, the award of arbitrator as to interest on the money was not invalid. (*Rankin, J.*) UTTAM CHAND *v.* MAMOOD JEWA MAMOOJI.

46 Cal. 534 : 54 I. C. 285 : 23 C. W. N. 704.

———*Construction—Draft — Execution of regular deed—Contract, when complete.*

There may be a completed agreement though a document has to be executed embodying its terms. It depends on the question whether the parties intended that there should be no binding contract with the execution of a document or whether they intended the document to be merely commemorative of the terms of a bargain already completed, even though its execution is in a manner required by law. 20 C. W. N. 66 Ref. (*Richardson and Huda, JJ.*) BIJEYA KANTA LAHIRY CHOWDHURY *v.* KAILASH CHANDRA BHOWMIK.

46 Cal. 771 : 52 I. C. 575 : 23 C. W. N. 563.

———*Construction—Home guarantee—Sale by purchaser—London buyer—Arbitration in England as to goods—Not binding on original seller.*

The plaintiffs who carried on business as dealers of jute in Calcutta, sold some of the bales under what is called 'Home guarantee' to defendants who sold them to merchants in England. 'The Home guarantee' consisted in Calcutta seller guaranteeing the condition weight and the quality of goods at the ports of destination. The London buyer claimed certain allowance on account of inferiority in quality of the goods. *Held*, that the plaintiffs, who were strangers to the arbitration were not bound by the award and there should be a clear and unambiguous agreement to that effect to make it binding on them. Though it is possible to have the differences between the Calcutta buyer and the seller referred to arbitration in London, the meaning of this clause as to 'Home guarantee' cannot be extended to make an award between a Calcutta and a London purchaser binding on the Calcutta seller. (*Chaudhuri, J.*) RAM DUTT RAMKISSAN *v.* E. D. SASSOON & CO.

33 I. C. 938 : 43 Cal. 77.

———*Construction—'Late shipment'—Meaning of.*

Where a vendor contracted to deliver rice in two instalments in June and July 1909 with a reservation that he should not be responsible for delay in case of 'late shipment,' etc., and the vendor was not able to so deliver, *Held*, that the 'term shipment in the agreement included not merely the loading of goods on board the ship but also the starting of the ship. (*Mookerji and Beachcroft, JJ.*) KALI KANTA SHA *v.* ISMAIL.

20 C. L. J. 133 : 27 I. C. 7 : 20 C. W. N. 159.

———*Construction—Condition that it should operate "hereafter" is not vague.*

Where a contract to grant a lease stated that the lease should be executed "hereafter" *held* the contract was not vague and uncertain, "hereafter" only meant after the date of the contract. (*Fletcher and Chatterje, JJ.*) KALIDAS BHANGA *v.* GIRIBALA DASI.

23 I. C. 360.

———*Construction—Similar contracts.*

It is very unsafe to attempt to interpret a contract with the aid of decisions on other contracts more or less dissimilar. (*Chitty and Chatterjea, JJ.*) BENOY KRISHNA DEB *v.* DEBENDRA KRISHNA.

9 I. C. 660 : 15 C. W. N. 722.

———*Construction—Arbitration—Indent.*

Where in the case of a commercial contract the indent provides for the reference of all disputes arising out of the indent to arbitration a total non-delivery of the goods indented for, is not a dispute within the meaning of the indent. 9 I. C. 655 Dist. 18 I. C. 316 Foll. (*Broadway, J.*) CHAJJU MAL & CO. *v.* GURMUKH SINGH.

72 P. L. R. 1917 : 42 I. C. 95 : 139 P. W. R. 1917.

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———*Construction—Subsequent Conduct.*

The Courts are not at liberty to adopt a view inconsistent with the terms of the written contract, though they can refer to the subsequent conduct of the parties, to find what the document was intended to mean. (*Kensington and Johnstone, JJ.*) BEGARI RAM *v.* BAJA RAM.

163 P.L.R. 1911 : 10 I. C. 250 : 214 P. W.R. 1911.

———*Construction—Completion of—Writing—Intention.*

Where a contract though arranged orally is intended to be embodied in a document, it is not completed until the document is formally executed. (*Johnstone, J.*) BHUP SINGH *v.* JIVAN SINGH.

2 P. L. R 1911 : 9 I. C. 385 : 28 P. W. R. 1911.

———*Construction—Clause for arbitration—Breach of Contract.*

A contract of sale between the vendors and purchasers of certain goods contained the following arbitration clause : " should any dispute arise as to the interpretation of this contract or any matter in connection therewith or with the carrying out thereof the same shall be submitted to arbitration. *Held* on a construction of the contract that a claim for damages for breach fell within the clause requiring a submission to arbitration. (*Schwabe, C. J. and Ramesam, J.*) SUBBIAH & CO *v.* TETLY AND WHITELY. **75 I C. 673 : 45 M. L. J. 39 : 32 M. L. J. 380 (H. C.) : 18 L. W. 77 : (1923) M. W. N, 445 : 1923 Mad. 693.**

———*Construction— Commercial contracts — Mode of delivery—Stipulation as to.*

In construing mercantile contracts courts will assume that every clause inserted therein was inserted by the parties to some good purpose and with some definite meaning as merchants are not in the habit of inserting in their contracts stipulations to which they do not attach some value and importance. A party to the contract is entitled to delivery of goods in the manner stipulated and he cannot be compelled to take something else in substituion for it however effective a substitute it might be. (*Schwabe, C J. and Krishnan, J.*) ADAM HAJI PEERA MAHOMED ISHAIK *v.* HUSSAIN AKBARI. **43 M. L. J, 199 : (1922) M. W. N. 434 : 31 M. L. T. 40 (H. C.) : 70 I. C. 736: 1923 M. 103.**

———*Construction—Sale of goods—Contract to purchase from plaintiffs goods which plaintiff had previously thereto purchased from another—Tender by plff. of similar goods relating to other contracts—Repudiation.*

Plaintiff had agreed to purchase from B and Co. certain bales of yarn of specified shipments. The contract between plaintiff and B and Co., provided as follows: "B and Co., are relieved from liability for non-shipment owing to causes specified herein and buyers are not entitled to cancel the contract owing to delay caused by any of the specified causes provided that such delay in shipment shall not exceed three months. The buyers are also debarred from objecting to goods being shipped prior to the contract." The defendants in their turn agreed to purchase these very goods from plaintiffs and the contract while incorporating by reference the terms of plaintiffs' contract with B and Co., went on to provide "Please note that you have to take delivery of goods as received by us and we are not responsible for the late shipment or non-shipment of the goods or part of the goods." The plaintiffs tendered other goods of similar quality but forming part of some other contract of plaintiffs with B and the defendants wanted better particulars about shipment, etc , before they would accept the goods. *Held*, that the defendants were bound to take the goods as and when they were received by the plaintiffs without reference to the date of shipment but the defendants were not bound to accept goods relating to other contracts of plaintiffs' with B and Co, even though they are of the same quality mark and quantity. *Held*, further, that the defendants' letter asking for fuller particulars in the absence of which they declined to accept the goods was not a repudiation of the contract which disentitled them from raising in defence in the suit that the goods were not such as they were bound to accept under their contract. *Braithwaite* v *Foreign Hardwood Co.* 2 K.B. 543 *Consorozio v. Northumberland* 88 L. J. K. B. 1194 *Bowes* v *Shand* L. R. 2 A C. 455 : Referred to (*Wallis, C J. and Ramesam, J.*) S. A. SIVARAMA AIYAR *v.* K. M. SUBBIA & SONS.

70 I. C. 346 : 15 L. W. 9 : 1922 Mad. 28.

———*Construction—Railway demanding excess and demurrage.*

Plff. consigned timber at Quilon to Negapatam and charges were levied at Quilon according to weight. On arrival of timber at Negapatam, the Railway authorities purporting to act under R. 22, authorizing re-classification and re-calculation of rates, charged at wagon rate and refused delivery till the excess was paid. They also claimed demurrage and wharfage. The plff paid under protest and sued to recover. *Held*, that the rules as to re-calculation related to errors in calculation and not to a change in the fundamental basis of calculation. *Quære* : whether the Company could claim demurrage. (*Seshagiri Aiyar, J.*) VENUGOPALA AIYANGAR *v.* S. I. RAILWAY CO. **62 I. C. 602 : 13 L. W 309.**

———*Construction—Exemption from liability—Exception clause to be clear.*

A party to a contract relying upon a clause as affording him protection from liability cannot succeed unless the clause is clearly and unambiguously expressed. In mercantile documents a stipulation derogating from the ordinary law governing the rights of the parties cannot be given effect to, unless it is clearly expressed. (*Wallis, J.*) VENKATESA PERUMAL CHETTY *v.* S. PARTHASARADHY IYENGAR.

13 M. L. T. 220 : 18 I.C. 986 : (1913) M. W. N. 772.

———*Construction.*

A mere Ruzu Khata unsupported by oral agreement or consideration does not form a fresh contract. (*Mittra, A. J. C.*) JETHAMAL *v.* SAROO. **58 I. C. 30.**

———*Construction—Effect of subsequent negotiations on completed contract.*

The terms of a contract by correspondence should be constructed with reference to the

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whole correspondence. If once the contract is completed subsequent negotiations do not affect it. (*Mitra, A. J. C.*) MILL STONES TRADING Co. *v.* MATHURADAS. **57 I. C. 636: 17 N. L. R. 1.**

———*Construction—Complaints and executory contract—Condition that a document should be executing—Documents not executed—Waiver of condition.*

If the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a more expression of the desire of the parties as to the manner in which the transaction already agreed to, will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognize a contract to enter into a contract. In the latter there is a binding contract and the reference to the more formal document may be ignored. (*Miller, C. J. and Mullick, J.*) HUKUMCHAND *v.* RAJARAM BAHADUR SINGH. **4 Pat. L. J. 580 : 53 I. C. 833 : 1919 Pat. 305.**

———*Construction—Simultaneous execution of —Presumption.*

When two contracts or made on the same day between the same parties, a presumption may be drawn that there is some connection between the two. (*Roe and Jwala Prasad, JJ.*) BAPU LAL BARIK GAYAWAL *v.* HARIHAR PANDIT. **1 Pat. L. J. 539: 38 I C. 116 : 3 Pat. L W. 161.**

———*Construction—Agreement to give passage to England on completion of service—Money is claimable.*

If this contract of service contained a term to provide for passage-money after the service period, the passage-money must be given whether the man sailed or not. (*Carr, J.*) OPPENHEIMER & Co. *v.* LONG. **2 Bur. L. J. 291: 1924 Rang. 112**

———*Construction—Delivery of goods.*

A contract for the sale of goods "delivery to be taken *ex* scale in all October" means that the goods are to be taken whenever in all that month sellers call upon buyers to do so. Consequently 31st October is the last day for the performance of the contract and a breach of the contract takes place only on that date. (*Maung Kin und Pratt, JJ.*(HUNT HUAT & Co. *v.* SIN GEE MOH & Co **66 I. C. 510 : 11 L, B. R. 182.**

———*Construction—Sale of rice Milled by certain firms—Breach.*

A contract for sale of rice milled by one of certain firms gives the seller a right to select. Once the selection is made and has been accepted by the buyer, the seller is bound to supply rice of the same milling. When the contract provided that the seller is to be absolved in case of accidents to machinery and the mill is destroyed by fire, the seller is not bound to supply rice of another of the mills named in the contract. (*Twomey, C. J. and Ormond, J.*) ARRACAN COMPANY *v.* H. HAMADANNE. **47 I. C. 541 : 11 Bur. L. T. 63.**

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———*Construction—Sale of goods—'Early in January.*

The word "early" means at or near the beginning of a period of time. It implies in its ordinary acceptation that there is not merely a time which is early and a time which is late but also an intermediate time which is neither early nor late. (*Twomey, J.*) FINDLAY & SONS LTD. *v.* NURSEE TAJEE. **9 I. C. 460 : 4 Bur. L. T. 16**

———*Construction—Contract on usual terms —Delivery of goods—Late Shipment—'Force majeure'—When advantage can be taken of—Office contracts—Meaning of.*

Defendants entered into a contract on usual terms to supply Java sugar to plaintiff between July and September. Owing to war and Government requisitioning, shipments of goods could not arrive before September. In October, before the steamer arrived, plaintiff sued for damages. Defendants pleaded that the contracts were office contracts and claimed the benefit of *force majeure*. It was held that the contracts were usual office contracts and the parties were bound by its terms as to whether the goods tendered were such as could be tendered as July shipment goods and that the defendants were entitled to wait till the arrival of the last steamer and could take advantage of *force majeure* clause and that the plaintiff's suit brought before the arrival of last steamer was premature. (*Kemp, A. J. C.*) GOBINDARAM *v.* KHUSHALDAS. **13 S L. R. 100; 56 I. C. 885.**

———*Construction—Bill of lading—Delivery at a certain 'port or so near thereunto as a ship may go'—Meaning of.*

In bills of lading, the above words would refer only to the unloading or delivery of the goods, and mean that the ship should get within the ambit of the port; the clause would not justify a delivery at a different place by reason of natural causes of war. (*Pratt, J. C.*) SANDAY PATRICK & Co. *v.* BRITISH INDIA STEAM NAVIGATION COMPANY. **37 I. C. 285 : 10 S. L R. 100.**

———*Construction—Sale of goods—Contract to sell and delivery according to office terms—Practice of European merchants—Due date Sunday—Delivery to be completed by Saturday.*

Where there is a contract to sell and deliver according to office terms and where the due date is Sunday, a non-working day for Europeans, delivery should be completed by Saturday. A person contracting to sell and deliver according to office terms must make arrangements, as is the practice with European merchants, for the drawing of samples, etc., a few days before the due date, so that delivery might be effected within the due date. (*Hayward, A. J. C.*) FIRM OF MATUMAL *v.* FIRM OF RUTTANJI. **24 I. C. 888 : 7 S. L. R. 141.**

———*Construction — Arbitration — Provision for reference—'Dispute arising under the indent.'*

(*Obiter*)—The question whether a dealer should pay a claim which is not recoverable at law is not a dispute arising under the indent. (*Crouch, A. J. C.*) EWART RYRIE & Co. *v.* TARACHAND, **9 I. C. 896.**

CONTRACT—Hire Purchase.

Hire Purchase.

See ALSO CONTRACT ACT, S. 78.

———*Hire Purchase—Transfer of ownership Default in payment of instalments—Effect.*

The ownership in goods obtained on the hire purchase system does not pass till the last instalment agreed upon has been paid. When a hire purchase agreement contains no provision for forfeiture of previous payments in case of default in paying an instalment the parties regain their original position, but the owner however on receiving back the goods can claim reasonable compensation subject to the liability to refund the balance of the amount received by him. (*Oldfield and Seshagiri Aiyar, JJ.*) SRINIVASA AIYANGAR *v.* DOUGLAS AND GRANT, LTD. **57 I. C. 62**

Implied Terms.

———*Implied Contract—Meaning of.*

The expression 'implied contract' is an English term of art and must be so construed. It involves the legal incident of some consideration moving from the landlord as in England. (*Lord Summer.*) JAGAVEERA RAMA *v.* ALWARASA ASARI.

(1918) M. W. N. 732: 23 C. W. N. 225: 36 M. L. J. 49 : 48 I. C. 907 : 17 A. L. J. 129 (P. C.).

———*Implied terms—Deposit by purchaser with seller—Repudiation of contract by purchaser—Whether entitled to return of deposit.*

There is nothing either in the Specific Relief Act or in the Contract Act which touches the question of deposit. But it is clear that, even when there is no clause in the contract as to the forfeiture of deposit if the purchaser repudiates the contract, he cannot get back the money as the contract has gone off through his default. This will equally be so even though the buyer is not put to any loss by the repudiation. L. R. 10 Ch. App. 512 and 24 Cal. 897 Referred to. (*Chatterjee and Pearson, JJ.*) MANGOBINDA DUTTA *v.* BAISOGOMAFF. **67 I. C. 714 : 1922 Cal. 104.**

———*Implied terms- Trade usage—Date of performance falling on sunday—May be performed on Monday.*

Where the date of performance of a contract falls on a Sunday, there is a well-known trade usage that it can be performed on the next day, espicially where an European importer, is concerned. The usage of which evidence is allowed must be such as not to render the written contract insensible, inconsistent or unreasonable. (*Mookerjee, A. J. C. and Fletcher, J.*) KASIRAM PANIA *v.* HURNUNDROY PULCHAND. **26 C. W. N. 354**

———*Implied terms—Course of business—Usage [of] trade—How ascertained—Contract partly expressed, partly unwritten—Covenants which can be implied by court.*

The usage implied in a contract must be shown to be certain and reasonable and so universally acquiesced in that every body in the particular trade knows it or might know if it he took the pains to enquire.

A Court has no right to imply in a written contract any stipulation between the parties unless

CONTRACT—Interpretation of.

on considering the terms of the contract in a reasonable and business like manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist. The principle on which a stipulation is to be implied in a written contract is to give such business efficacy to the transactions as both parties must have intended. (*Sanderson, C. J. and Woodroffe and Mookerjee, JJ.*) LAKURKA COAL, LTD. *v.* JAMNADAS BHAGWANDAS. **33 I. C. 838.**

———*Implied terms—loan—Promise] to pay.*

Every loan implies a promise to repay and an unqualified admission of indebtedness is equivalent to an express covenants and creates a personal obligation. (*Mookerjee and Carnduff, JJ.*) RAMNARAIN SINGH *v.* ODINDRA NATH MOOKERJEE. **15 C. L. J. 17: 13 I. C. 440 : 17 C. W. N. 369.**

———*Implied term—Agreement between two temples regulating processions—Construction.*

Per-Chief Justice :—The law on the subject of the implication of terms in a contract has frequently been misunderstood and misapplied. The Court ought not to imply terms in a contract unless there arises from the language of the contract itself and the circumstances under which it is entered into, such an inference that the parties must have intended the stipulation in question, that the Court is necessarily driven to the conclusion that it must be implied. *Held*, on a construction of an agreement between two temples regulating the processions of idols on particular days that there was no implied term that one of them would limit its procession to those particular days. (*Schwabe, C. J. and Wallace, J.*) GOVINDA CHARIAR *v.* NATU KESAVA MUDALIAR.

17 L. W. 79: (1923) M. W. N. 186 : 72 I. C. 243: 1923 Mad 344.

———*Implied terms--Agreement for re purchase—Time is essence.*

In an agreement for re-purchase time is of the essence of the contract. (*May Oung and Duckworth, JJ.*) MAUNG WALLA *v.* MG SHWE GUN.

1 R. 472 : 2 Bur. L. J. 188 : 1924 Rang 57.

Interpretation of.

———*Interpretation of—Amending and consolidating Act—English law—Adoption of.*

The Contract Act is an amending as well as a consoldating Act and beyond the reasonable interpretation of its provisions there is no means of determining whether any particular section is intended to reproduce or amend the pre existing law. There is no improbability in the Indian legislature having taken the lead of the English in a matter of legal form. (*Lord Parker*) RAMDAS VITHALDAS DARBAR *v.* AMERCHAND & CO.

40 Bom. 630 : 20 C. W. N. 1182 : 18 Bom L R. 670 : 20 M. L. T. 194 : 31 M. L. J. 541 : 4 L. W. 342 : 14 A. L. J. 1045 : 85 L. J. P. C. 214 : 24 C. L. J. 320 : 43 I. A. 164 : 21 I. C. 343 : 32 T. L. R. 594 : 35 I. C. 954 : (1916) 2 M. W. N. 110 (P. C.)

On appeal from **21 I. C. 343 : 38 B. 255.**

———*Interpretation of—English decisions.*

Indian Courts are bound by the Indian Contract Act and should not be guided by English decisions which have overruled cases on which the

CONTRACT—Liability.

Indian Act is based. (*White, C. J. Sankaran Nair, and Sadasiva Aiyar, JJ.*) MANNAVA ANNAPURNAMA *v.* UPPALA AKKAYYA. **36 M. 544 : 13 M. L. T. 268 : (1913) M. W. N. 328 : 19 I. C 12 (F.B.) : 24 M. L. J. 333.**

Liability.

——*Liability—Sale of goods--German steamers carrying goods seized during war—Arrival in a different ship long after—Doctrine of frustration.*

In pursuance of a contract for sale of goods headed "contract shipment and arrival" goods were sent in a German steamer, which on the out break of war was seized and condemned as prize. Two years later the goods arrived in a different steamer, but were not given to the buyer. In a suit for damages for non-delivery *held* plaintiff was not entitled to delivery of the goods,

Per *Sanderson, C. J.* The arrival of the goods under the particular circumstances was not such an arrival as was thought by the parties to the contract. The purpose of the contract and the intention of the parties had been upset by the capture and the prolonged delay.

Per *Richardson, J* : According to the doctrine of "frustration" a subsequent event or contingency beyond the ken of the parties at the time of the transaction, for the occurrence of which neither of them is responsible and for which they have not provided may sometimes operate to undermine and avoid the contract—English case law referred to. (*Sanderson, C, J. and Richardson, J.*) GOURI SHANKAR AGARWALLA *v.* H. P. MOITRA.
70 I. C. 379 : 26 C. W. N. 573.

——*Liability—Date of operation of.*

An agreement when confirmed becomes operative with effect from the date when originally made. (*Mookerjee and Fletcher, JJ.*) DINA NATH *v.* METHARAM. **64 I. C. 785 : 33 C. L. J. 577.**

——*Liability—Failure to complete contract—Earnest money when forfeited.*

Where a purchaser was under, the contract of sale, bound to pay up the balance of consideration within a certain time in default of which he was to forfeit the earnest money, and it is found that not only was he not in a position to pay that money but he never offered to pay it, he is not entitled to recover the earnest money paid by him. (*N. R. Chatterjea and Panton, JJ.*) ATUL CHANDRA KUNDU *v.* SARAT CHANDRA LAHA.
59 I. C. 215 : 24 C. W. N. 967.

——*Liability—Contracting parties.*

Parties must adhere to contracts made by them with the full understanding of all the terms and must not be allowed to resile from the agreements. *Rattigan, J.*) DREYFUS & CO *v.* GURDITTA MALL
70 P. W. R. 1911 ; 85 P. L. R. 1911 : 9 I. C. 655 : 35 P. R. 1911.

——*Liability—Negotiable instrument.*

There is a difference between the law relating to liability on ordinary contracts and that on negotiable instrument. (*Wazir Hassan, A. J. C.*) JAGRUP SINGH *v.* RAMA KISHAN DAS.
59 I. C. 596 : 7 O. L. J. 705 : 23 O. C. 353.

CONTRACT—Right to enforce.

Right to Enforce.

——*Right to enforce—Stranger,*

On a sale of property by the mortgagor directing the vendee to pay off the mortgage, the mortgagee is not entitled to a personal decree against the vendee. There is no privity of contract between the mortgagee and the vendee, (*Lord Macnaghten*) JAMNA DAS *v.* RAM AUTAR.
34 All. 63 : 39 I. A. 7 : 16 C. W. N. 97 : 11 M. L. T. 6 : 9 A. L. J. 37 : (1912) M. W. N. 32 : 15 C. L. J. 68 : 14 Bom, L. R. 1 : 13 I. C, 304 : 21 M. L. J. 1158 (P. C).
[On appeal from 31 All. 352]

——*Right to enforce—Agreement to abide by oath.*

If the parties have made a binding agreement it does not matter to a Court how foolish it is, and after all the parties probably know their business better than the Court and it may not be so foolish in the eyes of the parties as in the eyes of the Court. Consequently where the parties contracted to abide by the statement of the defendant on oath, there is nothing illegal in such contract and the parties are bound to abide thereby. (*Walsh, J.*) KESHO RAM *v.* PEARE LAL.
21 A. L. J. 209 : L. R. 4 A. 368 : 71 I. C. 761 : 1923 A. 443 (2).

——*Right to enforce—Stranger.*

A defendant is not liable to answer the claim of a third party to a contract when he is not party thereto, except in cases where a Court of equity would hold him liable. (*Richards and Banerjee, JJ.*) MANGALSEN *v.* MUHAMMAD HUSSAIN.
37 All 115 : 27 I. C. 737 : 13 A. L. J. 73.

——*Right to enforce—Stranger,*

There is nothing in the Contract Act to show that a person not a party to the contract can sue on it. Section 2 (1) indicates to the contrary. (*Scott, C. J. and Chandavarkar, J.*) SANKAR VISVANATH WABH *v.* UMABAI SADASIV WAGLE.
37 Bom. 471 : 19 I. C. 736 : 15 Bom : L. R. 320.

——*Right to enforce—Stranger.*

A contract can create no right or liability in a person who is not a party to it unless he claims or can be charged through a party as in the case of a *cestui que trust*, claiming through the trustee. A person for whom a benefit is secured under a contract entered in the name of a third person can sue in his own right to enforce that contract. (*Sanderson, C. J.*) KHERODE BEHARI GOSSAMI *v.* NARENDRA LALKHAN. **55 I. C. 810 : 23 C. W. N. 453.**

——*Right to enforce— Stranger to—When can claim benefit of.*

The doctrine that a stranger to a contract may claim the benefit of the performance thereof cannot be allowed to be invoked to defeat the ends of justice. (*Mookerji and Richardson, JJ.*) HAR SHYAM CHOUDHARI *v.* SHYAMLAL SAHU.
43 Cal. 69 : 22 C. L. J. 227 : 31 I. C. 22 : 20 C. W. N. 601.

——*Right to enforce—Stranger—If can sue for benefit of contract.*

CONTRACT—Right to enforce.

Whether a person deriving a benefit under a contract to which he is no party is entitled to enforce his claim under the contract must in India, be decided according to justice, equity and good conscience. A suit by a creditor against an alienee from his debtor directed to pay off the debt is maintainable if the alienee had been recognized as liable to pay the debt 32 A. 410 (P.C.) rel on. *Tweedle v. Atkinson*, 30 L J 2 B 265 not foll. (*Jenkins, C. J. and Mookerjee, J.*) DEB NARAIN DUTT *v.* RAM SADHAN MANDAL.
41 Cal. 137 : 17 C. W. N. 1143 : 20 I. C. 630 : 18 C. L. J. 603.

——*Right to enforce—Death of contractor—Work carried on by Contractor's minor sons under guardianship of mother—Suit for work done.*

After the death of the original contractor, rope and labour continued to be supplied to the defendants at the expense of the minors not under any new contract made either with them or their mother but under the old contract made with their father for services thus rendered the right to be remunerated would seem to have been their right and the right to sue consequently accrued to them. (*Brett and Carnduff, JJ.*) SARAT CHANDRA SINGH BAHADUR *v.* SUDHAN HARI MUKERJEA
14 I. C. 694.

——*Right to enforce—Stranger to contract.*

A stranger merely because he receives a benefit under a contract has no right of suit on the contract (32 A. 410 dis). So if the executants of a bond the plff and the vendee of certain lands from the executants come to an agreement by which the plff is to be paid out of the purchase money and was to regard the vendee as sold debtor still the plff. being no party to the conveyance his suit cannot be regarded as one on the conveyance and Art. 116 of Limitation Act will not apply. (*Koxe, J.*) DEB NARAIN *v.* RAM SADH. **9 I. C. 988.**

——*Right to enforce—Stranger.*

A stranger cannot enforce a provision in his or her favour in the award. (*Broadway, J.*) DIWAN CHAND *v.* BISHEN DAS. **2 Lah. L. J. 255.**

——*Right to enforce—Stranger to contract.*

A mere benefit secured by a document would not give the party to whom the benefit is given, a cause of action to sue on the instrument if he is a stranger to it. But where a person agrees to indemnify another under a contract, all those representing the latter can enforce the indemnity, 14 M. 488, 34 A. 429 ; 22 M L J 207 Ref. (*Seshagiri Aiyar and Moore, JJ.*) SEETAMMA *v* NARAYANAMURTHI. **57 I. C. 982 : 38 M. L. J. 470.**

——*Right to enforce—Stranger—Interest in favour of third person—Whether enforceable.*

A provision in a family partition-deed for the performance of the marriage of a daughter creates a trust in favour of the daughter and hence is enforceable by her, though she was no party to it. 26 M. L J. 127 : 13 I. C. 205 : 22 M. L. J. 159 : 11 M. L. T. 14 : 1912 M. W. N. 39. Dist. (*Oldfield, J.*) SUNDARARAJA AIYANGAR *v.* LAKSHMI AMMAL.
24 I. C. 943 : 38 Mad. 788.

——*Right to enforce—Stranger—Family arrangement—Benefit to daughter.*

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A third party in whose favour a provision is made in a family settlement in the nature of a partition can claim the benefit of provision made in her favour. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) SUDALAI AMMAL *v.* GOMATI AMMAL.
23 M. L. J. 355 : (1912) M. W. N. 908 : 16 I. C. 428 : 12 M. L. T. 288.

——*Right to enforce—Stranger.*

A person though not a party to a document must put up with the burden placed by it if he takes a benefit under the document. (*Sundara Aiyar, J.*) KULANDAVELU PADAYACHI *v.* KAMALACHI AIYANGAR. **11 M. L. T. 216 : (1912) M. W. N. 409 : 15 I. C. 388 : 22 M. L. J. 456.**

——*Right to enforce— Stranger—Provision for benefit of third parties.*

Where at a partition, provision is made for the benefit of the daughters after their mother's death. *Held*, that the daughters could enforce the provision after the mother's death (*Sundara Aiyar and Spencer, JJ.*) KOSURI RAJA GOPALRAJA *v.* DATLA RADHAYYA. **11 M. L .T. 14 : (1912) M. W. N. 39 : 13 I. C. 205 : 22 M. L. J. 159.**

——*Right to enforce—Stranger, right of.*

A person not a party to the contract cannot sue on it, is a rule which would require great modification in this country, and the proper exception is where co-parceners agree that payments should be made to certain female members for maintenance. The exception need not be confined to cases where a person has a legal right to it. (*Sundara Aiyar, J.*) ARUMUGA GOUNDAN *v.* CHINNAMMAL. **21 M. L. J. 918 : 10 M. L. T 214 : 12 I. C. 185 : (1911) 2 M. W. N. 524.**

——*Right to enforce—Trust—Enforcement of.*

A person who is not a party to a contract and with whom there is no privity, cannot gain any advantage by it he is put in the position of a *cestui que trust.* (*Batten. A. J. C.*) SOGAI *v.* WARLOO. **48 I. C. 549.**

——*Right to enforce—Mahabrahmans—Offerings to—Contract to devide.*

A contract to divide offerings to Mahabrahmans is not enforceable except as between the immediate parties to it. (*Lindsay, J. C.*) MAHESH PRASAD *v.* BHARATH. **59 I. C. 677 : 23 O. C. 252.**

——*Right to enforce—Third party—When can take benefit.*

In contracts relating to land, a third party may take the benefit of the contract if he has a beneficiary interest in its purpose. (*Chapman and Roe, JJ.*) MANMATH NATH ROY *v* AMEER KHAN.
46 I. C. 98 : 3 Pat. L. J. 394.

Right to sue.

——*Right to sue—Stranger.*

Where there is an assignment of his lease rights by a person directing the assignee to pay a sum of money to the lessor plaintiff. *Held* (*Chief Justice, Bakewell and Kumaraswami Sastri, JJ.*) contra. The plaintiff could not sue on the contract between the assignor and the assignee as he

CONTRACT—Right to sue.

was no party to it. The rule in Tweedle *v.* Atkinson (1861) 1.B. and S. 393 is generally applicable to India.

Per the Chief Justice and Kumaraswami Sastri, J. (*Bakewell, J.* contra). By reason of the assignment, the assignee became bound to hold the demised lands for a further term and the plaintiff became entitled to treat the arrears as money had and received by the assignee to the plaintiff. *Per Kumaraswami Sastri, J.*—The rule in Tweedle *v.* Atkinson is not of universal application and is subject to exceptions in India, *e.g.*, persons in whose favour a charge on property is created by contract between third parties, female members of a family who are entitled for maintenance under agreements between other members, etc. Similarly persons who take a benefit under a contract to which they are parties are also subject to the burdens imposed thereby. A *jenmi* situated as the plaintiff, is in this case entitled to sue on the contract between the assignor and assignee *Kanomdar and Melcharathar.* (*Wallis, C. J. Bakewell and Kumaraswami Sastri, JJ.*) PANKU MENON *v.* DHARMAN ACHAN.

41 Mad. 488 : 22 M. L. T, 543 : (1918) M. W. N. 98 : 34 M. L. J. 193 : 43 I. C. 625 : 8 L. W. 118.

———*Right to sue—Stranger— Rule— Exception.*

A mortgaged his lands to *B*, part of the consideration therefor, being *B*'s promise to discharge a debt of *A* to *C*. *Held*, that *C* who was a stranger to the contract cannot sue *B* for the payment of his debt without joining *A* as a party. *Per curium.* The following are some of the circumstances under which a stranger to a contract can sue the promisor : (*a*) the creation of a trust in favour of the plaintiff in respect of the amount sued for (but a direction to pay, as in the present case, does not of itself create an express or constructive trust, owing to the absence of the elements necessary to constitute a trust); (*b*) the creation of a change of an immoveable property by the promisor or allocation by the promisor of the specific money in suit in favour of the plaintiff; (*c*) the creation of a settlement on marriage, in which the plaintiff may de beneficially entitled as provided by Section 23 of the Specific Relief Act; and (*d*) estoppel as against the promisor, owing to transactions between the plaintiff and the promisor. 3½ All. 410 and 17 C. W. N. 1143 Dist. (*Ayling and Tyabji, JJ.*) ISWARAM PILLAI *v.* SONNIVARERU TARAGAN. **38 Mad. 753 : 23 I.C. 951 : 26 M. L. J. 127.**

———*Right to sue—Securing a girl for marriage—Money paid to be given to girl's guardian—Girl not secured—Money recoverable.*

Defendant asked for Rs. 200—for the purpose of settling the plaintiff's marriage. The plaintiff however sent only Rs. 175 by money order. Defendant did not spend that sum in connection with the plaintiff's marriage in accordance with the agreement come to and therefore plaintiff sued to get the money back. Plaintiff's pleader stated that girls were scarce and plaintiff wanted the defendant to secure a girl for him and the money was given him to be paid to the guardian of the girl selected, should money be demanded,

CONTRACT—Stranger.

Held : that plaintiff can recover. 41 M. 197 and 33 B. 411, Foll. (*Prideaux, A. J. C.*) GANGADHAR DAJI *v.* GOVIND NARAIN. **74 I. C. 107 : 1923 Nag. 296.**

Shipping.

———*Shipping—Carriage by sea—Sweepings.*

Where under the terms of the charter party all the sweepings are to be delivered to the charterer, the shipowner cannot apportion them between the charterer and other shippers where the charter party provides that the charterer shall be entitled to all sweepings and shortage occasioned by escape from the bags at the port of discharge. The shipowner cannot evade liability behind a condition in the bill of lading which renders the shipowner immune against loss or damage caused by insufficient packing and torn of fragile bags and say in defence that the shortage was caused by charterer's negligence. (*Scott, C. J. and Heaton, J.*) BOMBAY AND AFRICA STEAM NAVIGATION CO., LTD. *v.* AJUM GOOLAM HUSSAIN. **41 Bom. 119 : 34 I. C. 525 : 18 Bom. L. R. 230.**

———*Shipping—Date of Shipment—Bill of lading.*

The ordinary practice is that a bill of lading is not prepared till after the goods have been received on board a ship and bears the same date as that of the mate's receipt. Where the contract is for shipment of the whole lot in February and the bill of lading was dated 28th February, the goods must be presumed to have been actually shipped in February though the ship actually sailed sometime later, and therefore there was no late or improper shipment 'Shipment' is equivalent to 'putting on board.' (*Fawcett, A. J. C.*) GIBBON & Co. *v.* KUNDAMMAL RAMNATH. **28 I. C. 196.**

Stranger.

———*Stranger.*

See also (1) CONTRACT—RIGHT TO ENFORCE.
(2) CONTRACT ACT, S. 2 (d).

———*Stranger—Right to enforce—Privity—Subsequent dealings.*

Though at the outset a person was a stranger to a contract, still if subsequent dealings have brought him into privity with the parties it is open to the courts to grant relief to him on the contract 41 Cal. 137 Ref. (*Lindsay and Kanhaiya Lal, JJ.*) NEHAL SINGH *v.* FATEH CHAND. **20 A. L. J. 708 : 44 A. 702 : 68 I. C. 778 : 1922 All. 426.**

———*Stranger—Right to take benefit.*

There is no universal rule that a stranger to a contract can in no circumstances claim a benefit thereunder 32 A 410 ; 41 C. 737 ; 46 Cal. 160 Rel. It is competent to a tenant to invoke the benefit of a contract between the Govt. and the settlement holder even though he may not be a party thereto. 11 C.L.J.68 : 37 C. 449 : 3 Pat L J. 394 : 17 C.L.J. 70 Ref. (*Mookerjee and Cuming, JJ.*) RANI HEMANTA KUMARI DEBI *v.* THE MIDNAPORE ZEMINDARI CO. **35 C. L. J. 493 : 77 I. C. 261: 1923 C. 25.**

CONTRACT—Stranger.

——*Stranger—Liability of—Landlord and Tenant—Rent suit—Plea of payment against third party—Decree against third party.*

Where in a rent suit the tenant defendant pleads payment to a third party who on being impleaded in the suit admits it. *Held*, that the plaintiff cannot get a decree against the third party defendant for the money received by him as it was not received for the use of the plaintiff. (*Richardson and Newbould, JJ.*) KAMPTA PRASAD RAI *v.* KULDIP RAI. 20 I. C. 70.

——*Stranger—Right to enforce—Assignment of all the property of the transferor—Credit of transferor—Suit for recovery of debt from transferee—Maintainability.*

Where a person gets a transfer of all the assets of his transferor and subjects himself to the payment of his debts, a creditor of the transferor to whom such a transfer is communicated has a right to proceed against the transferee. A suit by the creditor against the transferee is in such a case not open to the objection that there is not privity of contract between the parties. 41 Cal. 157 : 41 Mad 488 ; 26 Mad. 686 ref. 4 Cal. 897; 8 Cal 79 foll. (*Kumaraswami Sastri, J.*) G. RAMASWAMI AIYAR *v.* DEIVASIGAMANI PIILLAI.

43 M. L. J. 129: (1922) M. W. N. 442 : 16 L. W. 282 : 69 I. C. 957 (2): 31 M. L. T. 156 (H.C.) : 1922 Mad. 397.

——*Stranger—Not affected.*

The arrangement between the mortgagee and the purchaser of portion of equity of redemption with regard to consideration money left with him is not binding on the mortgagor. (*Kanhaiya Lal, A. J. C.*) ABDUL HASAN KHAN *v.* JAGWANTA.

32 I. C. 729: 2 O. L. J. 620.

——*Stranger—Not liable.*

No one who is not a party to a contract is liable thereon. (*Das*, J.) HAMID HASAN *v.* SHAHZAD KHAN. 52 I. C. 177.

Teji Mundi Contracts.

——*Teji Mundi contracts—Nature explained.*

In a *teji* contract, all the formalities of an ordinary contract are observed except that the seller only signs his note and gets an extra amount as consideration for his promise not to offer delivery unless called upon. It is the purchase of an option or right to call for delivery. (*Young, J.*) DHUNJIDEOSI *v.* POKERMMALL ANANDROY. 24 I. C. 441 : 7 Bur. L. T. 54.

CONTRACT—Variation.

Variation.

——*Variation—Provisions of not to be varied on grounds of inconvenience.*

No variation of the contract of parties and the statutory provisions applicable thereto is possible by reason of general considerations or administrative rules which have not the force of an Indian statute. (*Lord Shaw.*) HAJI BUKSH ILAHI *v.* DURLAV CHANDRA KAR. 39 Cal. 981: 39 I. A. 177: 16 C. W. N. 842: 23 M. L. J. 206: 12 M. L. T. 385: (1912) M. W. N. 1005 : 16 I. C. 821 (P. C.) : 14 Bom. L. R. 1063 : 10 A. L. J. 452 : 16 C. L. J. 620 : [On appeal from : 13 C. W. N. 633 : 3 I. C. 986: 9 C. L. J. 341.]

——*Variation is not extinguished by merely one party alleging that new contract had been substituted in place of old one.*

The mere fact that one party alleges that a new contract had been substituted in the place of an old one is not sufficient to put an end to the old contract even as against the party making the allegation. But if the allegation is proved true, the consequence will be different. (*Fletcher and Chatterjee, JJ.*) KALIDAS BHANGA *v.* GIRIBALA DASI. 23 I. C. 360.

——*Variation—Power to vary terms.*

Where one party to a contract is authorized to vary terms, the power should be strictly construed and the indulgent party should not be allowed to travel beyond the plain words of the power. (*Seshagiri Aiyar, J.*) VENUGOPALA AIYANGAR *v.* S. I. RAILWAY CO. 62 I. C. 602 : 13 L. W. 309.

——*Variation—Novation—Essentials.*

The main element in a novation of a contract is that the right against original contractor is relinquished and the liability of the new contracting party accepted, provided that the new contract is legally enforceable. (*Das and Admi, JJ.*) BARKUARIN ALAK *v.* SIRCAR BARNARD & CO.

2 Pat. L. T, 761 : 62 I. C. 668. 6 P. L J. 473:

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———*Scope.*

See also CONTRACT—CONSTRUCTION.

———*Scope of—Not exhaustive.*

The Indian Contract Act does not purport to be a complete code dealing with the law relating to contracts, but defines and amends certain parts of that law. (*Macleod, J.*) SHIVLAL MOTILAL *v.* BIRDICHAND JIVRAJ.

40 I. C. 194 : 19 Bom. L. R. 370.

———*Scope.*

The Contract Act is not exhaustive so far as the law relating to common carriers is concerned, but its other provisions dealing with particular branches of law are exhaustive. 30 C. 530 : 18 C. 623 Ref. (*Johnstone and Ratligan, JJ.*) KANHAIYA LAL *v.* NATIONAL BANK OF INDIA, LTD., DELHI. **9 I. C. 966 : 32 P. W. R. 1911.**

———*Scope—Not exhaustive.*

The Contract Act is not exhaustive Code. 15 B. 48; 4 C.L.J. 555. (*Benson and Sundara Aiyar, JJ.*) ACHA RANGANAIKAMMAL *v.* ACHA RAMANUJA AIYANGAR. **35 M. 728 : 21 M. L. J. 600 : 10 M. L. T. 57 : 11 I. C. 570: (1911) 2 M. W. N. 285.**

———*Scope of.*

Although the Contract Act purports to deal only 'with certain parts of the law relating to contracts' yet it should be regarded as exhaustive and binding on the Courts in India when it treats a subject in a way at variance with the English Law. (*Batten and Stanyon, A. J. C.*) BALLABHDAS *v.* PAIKAJEE.

38 I. C. 915 : 12 N. L. R. 177.

———Ss. 1 and 118—*Opposition between custom and contract—Evidence Act, S. 92 Proviso (5).*

A mercantile custom obliging the purchaser in contravention of the written terms of a contract to accept goods not of the stipulated kind can be of no avail in a suit for the recovery of goods under the contract, but evidence of custom not in consistent with the contract can be admitted. Per *Heaton, J.* Where there is reliance on custom there is necessarily a variation from the written contract, but the variation need not be in contradiction of or repugnant to it. (*Scott, C. J. and Heaton, J.*) RUTTONSEY *v.* BOMBAY U. S. AND MANUFACTURING CO., LTD.

41 Bom. 518 : 37 I.C. 271 : 18 Bom. L. R. 532

———S. 2—*Stranger to—Right to take benefit.*

There is no universal rule that a stranger to a contract can in no circumstance claim a benefit thereunder. 32 A. 410 : 41 C. 737 : 46 Cal. 160 Rel. It is competent to a tenant to invoke the benefit of a contract between the Govt. and the settlement holder even though he may not be a party thereto 11 C. L. J. 68 ; 37 C. 449 : 3 Pat. L. J. 394 : 17 C. L. J. 70 Ref. (*Mookerjee and Cuming, JJ.*) RANI HEMANTA KUMARI DEBI *v.* THE MIDNAPORE ZEMINDARY CO.

77 I. C. 261 : 35 C. L. J. 493 : 1923 Cal. 25.

———S. 2—*Consideration—Omission to sue—Effect of.*

Where a person in consideration of a promise desists from enforcing by suit a claim for an alleged infringement of his right the promise is one supported by consideration and can be enforced as a contract (*Abdul Raoof and Campbell, JJ.*) PARSHOTTAM SINGH *v.* RALLIA SINGH.

65 I. C. 52 : 4 U. P. L. R. (L.) 36 : 1922 Lah. 269.

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———S. 2—*Offer—Invitation to offer—Quotation of prices.*

An offer must be distinguished from an invitation for an offer. A letter from a prospective buyer asking for quotations from a merchant is an invitation for an offer. If the merchant sent his quotations and the buyer accepts them and orders goods that constitutes the proposal, which the seller may or may not accept. (*Wilberforce, J.*) FIRM OF DURGA PARSHAD MUTSADDI LAL *v.* FIRM OF RULIA MAL DOGAR MAL.

4 Lah. L. J. 176 : 29 P. L. R. 1922 : 65 I. C. 282 : 1922 Lah. 100.

———S. 2—*Auction bid—Withdrawal before fall of hammer.*

A bid at an auction is nothing more than an offer and can be withdrawn like all other offers before it is accepted by the other party which in the case of an auction is signified by the fall of the hammer. (*Coutts-Trotter and Ramesam, JJ.*) CHAMPALAL *v.* JEYGOPAL DAS.

16 L. W. 816 : 43 M. L. J. 132 : (1922) M.W.N. 564 : 45 M. 799 : 31 M. L. T. 401 : 70 I. C. 977 : 1922 M. 485.

———S. 2 (a) and (b)—*Acceptance—Bid—Whether bid may be withdrawn.*

Every bid is an offer on the one side which is not binding on the other side till it is assented to. Therefore a bidder may withdraw his bid before the sale has been completed, *i.e.*, before the acceptance of the bid. (*Mookerjee and Beachcroft, JJ.*) KENARAN *v.* KAILASH CHANDRA.

19 I. C. 904 : 18 C. L. J. 53.

———S. 2 (a)—*Auction bids are mere offers until accepted.*

The Tahsildar of Madura acting on behalf of Government held an auction of certain lands in July 1915. The 1st defendant purchased the property at the auction and depositd 15 per cent of the purchase money on the day of sale. There was a stipulation in the conditions of sale that the sale was to be subject to confirmation by the Collector. In spite of several applications by the 1st defendant the sale was not confirmed and the Government cancelled the sale in 1917. *Held*, that the effect of the 1st defendant's bid at the auction was a mere offer by him which was to be accepted by confirmation of the Collector and that in the absence of such confirmation, there was not a completed contract of sale in favour of the 1st defendant. (*Phillips and Devadoss, JJ.*) MUTHU PILLAI *v.* SECY. OF STATE FOR INDIA

45 M. L. J. 67: 17 L. W. 531 : (1923) M. W. N. 317: 32 M.L.T. (H.C.) 309: 72 I. C. 436 :1923 Mad. 582.

———S. 2 (a)—*Offer and quotation—Distinction.*

A quotation submitted by a trader as the basis of a possible order from customers is distinct from an offer to sell which if accepted creates a contract for the breach of which damages may be recovered. (*Seshagiri Aiyar and Moore, JJ.*) MYLAPPA *v.* AGA MIRZA.

37 M. L. J. 712: 54 I. C. 550: 26 M. L. T. 504.

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——S. 2 (a) and (b)—*Offer and acceptance.*

A by letter offered to purchase certain goods from *B* on condition of taking delivery on certain dates and payment of advance. *B* replied "I shall reduce all the terms to writing and receive the advance." The same day *A* gave the advance to *B* who gave a receipt crediting it towards the advance stipulated by *A* 'to be paid by *A*.' *Held*, there was a completed contract and the reduction to writing was merely incidental to the completion of the contract. (*White, C. J., Wallis and Ayling, JJ.*) KROSHNA JUTE AND COTTON MILLS CO, LTD. *v.* INNES. **9 M. L. T. 174: 21 M. L. J. 182: 9 I. C. 104 : (1911) 1 M. W. N. 17.**

——S. 2 (a) and (b)—*Letter of request for a loan is only a proposal.*

Where a person writes a letter requesting a loan from another and promising repayment with interest the letter is not a contract but a mere proposal. Consequently it cannot be sued on as a promissory note. (*Pipon, J. C.*) SAYAD SIKANDAR SHAH *v.* BHAI RAMCHAND. **71 I. C. 968.**

——S. 2 (a)—*Offer to sell kept open till certain date—Effect.*

An offer to sell and to keep the offer open till a certain time is *nudam pactum* and can, at any time before acceptance, be recalled. (*Parlett, J.*) MA THIN *v.* H. M. YASSIM. **31 I. C. 890.**

——S 2 (a) and (b)—*Offer and acceptance—Lowest price telegraphed at request—Broker accepted earnest money on behalf of vendor.*

Where a broker negotiating a sale of three properties, telegraphed to the vendor for the lowest price, which was intimated and the broker accepted earnest money in respect of one of them and the vendor repudiated the broker's acceptance. *Held*, telegraphing lowest price is not tantamount to an offer but a mere intimation for offer. (*Hartnoll, C. J. and Twomey, J.*) HARDANDASS *v.* RANI MOHORI BIBI. **7 Bur. L. T. 136 : 23 I. C. 322 : 7 L. B. R. 343.**

——S. 2 (b)—*Offer by letter—Acceptance in minute—Terms of, partly incorporated therein—Variance between letter and minute.*

Where an offer made by R. to the provisional Directors of a company, was, after the company was formed, accepted by it by its minute. *Held*, that the only binding contract was that contained in the minute, notwithstanding that the latter was defective, inasmuch as it did not incorporate certain material terms set forth in the letter containing the offer. (*Lord Parker.*) PERFECT POTTERY CO. *v.* ROSE. **27 M. L J. 74 : 18 C. W. N. 1185 : 1 L. W. 610: 24 I. C. 506 : 10 N.L.R. 108 (P. C.).**

——S. 2 (b)—*Acceptance without knowledge.*

Reward, offered for the search of a missing boy, for whose search a servant was already sent, cannot be claimed by the servant though he found the boy out; the servant did not undertake the search after the offer nor on its strength and hence the finding out by him does not amount to acceptance by conduct. (*Banerji, J.*) LALMAN SHUKUL *v.* GAULI DAT. **19 I. C. 576 : 11 A. L. J. 499.**

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——Ss. 2 (b), 3 and 10—*Company—Shareholder—Inducement by agent to take shares—Entry in register.*

Where the agent of a company induces a person to sign an application for the shares of a company and that person's name is accordingly entered in the register of members as a shareholder, there is a complete contract between that person and the company's agent. (*Scott, C. J. and Russel, J.*) MOTILAL CHUNILAL *v.* THAKORLAL. **36 Bom. 557 : 16 I. C. 696 : 14 Bom. L. R. 648.**

——S. 2 (b)—*Contract—Offer and acceptance.*

Where a letter of offer to sell certain properties taken as a whole, shows that the intention of the offerer was to sell all the properties together at a uniform rate of price, the offeree cannot accept only a portion of it and claim specific performance of that portion of the contract. (1893) A. C. 552 Foll. (*Ratligan and Shadi Lal, JJ.*) BHAWAN RAM *v.* SADULA KHAN. **169 P. W. R. 1913 : 20 I. C. 282 : 277 P. L. R. 1913.**

——S. 2 (d)—*See also* CONTRACT—STRANGER.

——S. 2 (d)—*Old debts—Consideration—Validity.*

Old debts form good consideration for a mortgage or transfer of property. (*Piggott and Walsh, JJ.*) KUNJ BEHARI LAL *v.* MADHSODHAN LAL. **50 I. C. 117.**

——S. 2 (d)—*Consideration—Failure of.*

Where the plaintiff sold his share to defendant but never undertook to get the transfer recognized by the company, and where the manager of the company refused to recognize the transfer, there has been no failure of consideration and the plaintiff can recover the purchase money. (*Richards, C. J. and Banerji, J.*) BAHADUR SINGH *v.* SYAM SUNDER TAQ. **12 A. L. J. 629 : 23 I. C. 900: 36 A. 365.**

——S. 2 (d)—*Subscription gratuitously promised by treasurer—If recoverable.*

A subscription gratuitously promised to an institution cannot be recovered even if the promisor is the treasurer thereof. (*Richards, C. J. and Banerji, J.*) ABDUL AZIZ *v.* MASUM ALI. **36 A. 268 : 23 I. C. 600 : 12 A. L. J. 351.**

——S. 2 (d)—*Consideration, valuable—Gift for performance of temple services.*

A gift in consideration of the donee performing certain religious services at a temple is a transfer for valuable consideration. (*Batchelor, C. J. and Kemp, J.*) RAMACHARYA VENKATARAMANACHARYA *v.* SHRINIVASACHARYA VENKATARAMANACHARYA. **46 I. C, 19 : 20 Bom. L. R. 441**

——S. 2 (d)—*Consideration—Benefit to third person whether sufficient.*

If the promisee does some act from which a third person is benefitted which he would not have done but for the promise, the consideration is sufficient. (*Mookerjee and Walmsley, JJ.*) FANINDRA NARAIN ROY *v.* KACHHEMAN BIBI. **45 C. 774 : 22 C. W. N. 188 : 41 I. C. 673 : 28 C. L. J. 152.**

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——S. 2 (d)—*Consideration—Compromise.*

A compromise is an agreement to put an end to disputes and to terminate or avoid litigation. The real consideration is not the sacrifice of a right but the abandonment of a claim. (*Mookerji, J.*) UPENDRA NATH *v.* BINDESHRI PRASAD.
20 C. W. N. 210 : 32 I. C. 468 : 22 C. L. J. 452.

——S. 2 (d)—*Agreement to accept lower rent.*

Whether an agreement by a landlord on the expiry of the term of a *kabuliyat* to accept rent at a lower rate than that reserved in the *kabuliyat* is unenforceable for want of consideration is doubtful. Payment and acceptance of rent at a reduced rate ever since the expiry of a lease (which reserved a higher rent) may be adduced as evidence to show that the parties never intended that the stipulation to pay the full rent was to be acted upon or in the alternative that there had been a waiver. (*N. R. Chatterjee and Newbould, JJ.*) MANINDRA CHANDRA NANDI *v.* DURGA SUNDARI DASIA. 32 I. C 185 : 20 C. W. N. 680.

——S. 2 (d)—*Release of original debtor a consideration for liability of another.*

The release of the original debtor is a good consideration for the undertaking by another to be liable in his place. (*Mookerjee and Roe, JJ.*) MOHES CHANDRA *v.* RAJANI KANTA.
31 I. C. 29 : 22 C. L. J. 235.

——S. 2 (d)—*Compromise—Consideration—Prior sale.*

Held, that as the prior sale was without consideration, forbearance by the vendee to enforce its terms could not be consideration for the subsequent compromise, which was consequently not binding on the plaintiff and the latter was therefore entitled to recover his property. (*Scott-Smith, J.*) RALU *v.* PHALLA. 53 I. C. 497 : 137 P. R 1919.

——S. 2 (d)—*Consideration.*

Where the members of a community, who had rendered some help to the defendant, stipulated for payment by him of a certain sum of money to the community as a whole, and he promised to do so, *Held* that the promise was for consideration and was enforceable. (*Krishnan, J.*) BUDAVARAM NARASIMHULU CHETTY *v.* NOOTA IBBUNDRUM NAGASAM VARU. 44 M. L. J. 240 : (1923) M. W. N. 237 : 72 I. C 95 : 1923 Mad. 434.

——S. 2 (d)—*Consideration—Execution of security bond for pre-existing simple debt—Implied forbearance to sue.*

A forbearance to sue a debtor on his pro-note is a good consideration for the latter executing a security bond for payment of the debt, and the creditor can enforce the security. An agreement for forbearance need not be for any definite or particular time. It is enough if an implied request for forbearance be inferred. (*Sadasiva Aiyar and Spencer, JJ.*) SRINIVASA RAGHAVA *v.* RENGANATHA. 25 M. L. T. 347 : 51 I. C. 963 : 36 M. L. J. 618.

——S. 2 (d)—*'Consideration'—Detriment to party.*

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Any detriment suffered by defendant on the faith of the promise of the plaintiff will be sufficient consideration to make the plaintiff's promise enforceable. 14 Cal. 64 and 36 All. 268 Foll. (*Seshagiri Aiyar and Napier, JJ.*) PERUMAL MUDALIAR *v.* SENDANATHA MUDALIAR.
44 I. C. 479 : (1918) M. W. N. 173.

——S. 2 (d)—*Consideration—Abstention from—Taking legal proceedings.*

Where a creditor abstains at the instance of a debtor from taking legal proceedings against an estate which is likely to come into the hands of the former on a future date, that is sufficient consideration for a promisee to pay a debt due to the latter under S. 2 (*d*). (*Wallis, C. J. and Seshagiri Aiyar, J.*) LAKSHMANAN CHETTIAR *v.* BOMMACHI NAICKER. 32 I. C. 416.

——S. 2 (d)—*Consideration--Release of claim, when good consideration.*

The release of a claim by one person is a consideration for guarantee of payment by another only when that claim is given up and not when there is a mere promise. (*Sankaran Nair and Oldfield, JJ.*) NAGAPPA *v.* RAMANATHAN.
(1916) 2 M. W. N. 264 : 29 I. C. 422 : 4 L. W. 553.

——S. 2 (d)—*Consideration—Agreement not to appeal if binding.*

An agreement not to appeal, the consideration for which is the mutual consent of the parties to refer the matter in dispute to the Court itself is binding on the parties. (*Sadasiva Aiyar, J.*) *In re* NIMAGADDU PEDA NAGAMMA. 29 I. C. 355.

——S. 2 (d)—*Consideration.*

A consideration in law must be 'good' and 'valuable'. 1 A. 309 Fol. (*Sadasiva Aiyar and Napier, JJ.*) MUTHU KARUPPA MUDALI *v.* P. C. MU. KATHAPPUDAYAN. 16 M.L.T. 194 : 27 M. L. J. 249 : 25 I. C. 726 : (1914) M. W. N. 706.

——S. 2 (d)—*Consideration—Third party—If can enforce.*

A hypothecation bond executed by *A* to *B* for a consideration including the amount due by *A* to *C* a third party, cannot be enforced by *C*, he being no party to the bond. (*Ayling and Tyabji, JJ.*) ISWARAM *v.* TAREGAN. 26 M. L. J. 127 : 23 I. C. 951 : 38 M. 753.

——S. 2 (d)—*Joint promise—Consideration—Paid to one promisor—Effect—If good as against others.*

A consideration paid to one joint promisor is legally sufficient to support a promise made by others. (*Sadasiva Aiyar and Spencer, JJ.*) SORNALINGA MUDALI *v.* PACHI NAICKEN.
38 M. 680 : 14 M. L. T. 559 : (1914) M. W. N. 27 : 22 I. C. 1 : 26 M. L. J. 113.

——S. 2 (d)—*Consideration—Passed.*

Where the plaintiff company agreed to undertake the management and development of a mining concern of the defendant and another and finance it on being admitted to a share of the profits. *Held*, that advances made were not made at the personal request of the defendant but

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on account of the agreement and could not be treated as consideration for a pro-note executed by the defendant subsequently. (*Benson, O. C. J. and Sankaran Nair, J.*) ANGLO-INDIAN TRADING CO., LTD. *v.* GERALD FRANK BRIERLY.
17 I. C. 256 : (1912) M. W. N. 930

——S. 2 (d)—*Contract for benefit of third person—Enforcement of, by third person.*

An agreement in pursuance of which a member of a Hindu family declines to take share in the family property at a partition on the consideration that the others shall maintain their sister forms a good consideration for the sister to enforce her rights of maintenance against her brothers. 4 M. 137 rel on. (*Ayling, J.*) PERURI SOMANNA *v.* GRANDHI MANICKAM. 14 I.C. 517.

——S. 2 (d)—*Consideration.*

Where one of the terms of a *Karar* for partition was that the other co-parceners should pay a certain sum for the costs of the marriage of the daughter of one of them and in pursuance thereof pro-notes were executed, the pro-note and the agreement to pay are supported by consideration since it forms one of the terms of the contract. (*Sundara Aiyar and Spencer, JJ.*) ANANTANARAYANA AIYAR *v.* SAVITRI AMMAL. 36 M. 151 : (1912) M. W. N. 59 : 11 M. L. T. 63 : 13 I. C. 458 : 22 M. L. J. 231.

——S. 2 (d)—*Acknowledgment—Consideration.*

A mere Ruzu Khata unsupported by oral agreement or consideration does not form a fresh contract. (*Mitra, A. J. C.*) JETHAMAL *v.* SAROO.
58 I. C. 30.

——S. 2 (d)—*Consideration—Pro-note executed in lieu of a previous pro-note.*

A pro-note was executed by the defendant in favour of *S*, wife of the second plaintiff *R*, on 8th December 1917. It was in renewal of a pro note previously executed by the deft. in favour of *R's* uncle *K*, on 16th December 1914. It was executed just before limitation on the earlier pro-note expired. *K* died childless and made a will in favour of *S*. It was found that it was at the request of the second plaintiff that the pro-note was renewed in favour of *S*. *Held* that the second plaintiff's forbearance to sue on the original instrument is sufficient consideration for the renewal. (*Daniels, A. J. C.*) SYED MUHOMMAD *v.* RAMCHARAN.
74 I. C. 316 : 10 O. L. J 43 : 26 O. C. 204 : 9 O. & A. L. R. 155 : 1923 Oudh 176.

——S. 2 (d)—*Consideration.*

Forbearance to continue an appeal against a person on that person's brother agreeing to pay the amount claimed is a good consideration. (*Stuart, C. J.*) ZAKER ALI *v.* GULAB RAI.
17 I. C. 466 : 15 O. C 314.

——Ss. 2 (d) and 40—*Failure of consideration.*

Defendant agreed to pay Rs. 5 per mensem for life to plaintiff for the latter having the defendant trained in singing. The contract was one for personal service said to be rendered by plaintiff and the contract cannot be enforced as there

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was failure of consideration on the finding that plaintiff's sister and not the plaintiff engaged teacher for the defendant. (*Jwala Prasad, J.*) BACHHU RAM *v.* CHANDER TAWAIJ. 38 I. C. 230.

——S. 2 (d)—*Forbearance to sue.*

A pro-note was executed by five persons in consideration of old debts incurred by only three of them. On a suit on the pro-note the other two signatories pleaded denial of receipt of any consideration. *Held*, that the two contesting defendants being closely related to the actual debtors, creditor's forbearance to sue the latter was sufficient consideration for their promise. (*Twomey, J.*) MG. KYA YEIT *v.* KARUPAN CHETTY.
11 I. C. 773 : 4 Bur. L. T. 156.

——S. 2 (h)—*Representation in contracts of fact and future intention.*

A representation of fact is a contract and the party misrepresenting is bound to make good the representation. A representation of future intention at best is only a contract and can only be proved as a contract. (*Beaman, J.*) LADKABAI *v.* NAVIVAHU. 31 I. C. 708 : 17 Bom. L. R. 783.

——S. 3—*Contract—Completion of—Evidence.*

In a suit by *A* for damages for non-delivery of goods by *B* the latter pleaded that there was no completed contract. *B* had accepted a deposit of earnest money from *A* and did not reply to a letter from *A's* pleader demanding specific performance. *Held*, there was evidence of a completed contract. (*Sir John Edge*) BANARSI DAS *v.* BANSI LAL. 16 I. C. 75 (P.C.).

——S. 3—*Formation of contract—Signature.*

Though a contract implies two parties, a contract in writing does not require the signature of both parties, hence a bond executed and delivered by one party which is accepted by another is a contract in writing. (*Mookerjee and Chatterjee, JJ.*) CHALIAPHROO *v.* BANGA BEHARI SEN.
22 C. L. J. 311 : 31 I. C. 394 : 20 C. W. N. 403.

——Ss. 3 and 7—*Acceptance, place of.*

When the proposal and acceptance are made by means of letters the contract must be deemed to have been made at the place where the letter of acceptance is posted. Where the customers could have no control over the goods until they had paid the price at Amritsar and had thus obtained the railway receipt, and endorsement in their favour and though the railway would be deemed to take delivery at Calcutta on behalf of the customers of goods despatched from there and consigned to the customers ; it is not easy to see how the railway could take delivery on behalf of the customers of goods which were not consigned to the latter and not in any way under their control. But where it must have been understood between the parties that the goods should be delivered and paid for at Amritsar, the cause of action arose at Amritsar. (*Moti Sagar, J.*) FIRM OF HIRA NAND MURLIDHAR *v.* FIRM OF GURMUKH RAI. 73 I. C. 205 : 1923 Lah. 427.

——Ss. 3, 7 (2)—*Qualified acceptance of proposal and omission to reply to counter-proposal.*

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A qualified acceptance of a proposal is but a counter-proposal, omission to reply to which would not be an acceptance of it. *Quaere*: would such an omission be an acceptance of the counter proposal when the latter is accompanied with intimation that silence would amount to acceptance? 24 B. 510. (*Seshagiri Aiyar and Phillips, JJ.*) PERALAL KRISHNAYYAN *v.* PADMANABHAN CHETTIAR. **5 L. W. 149 : 37 I. C. 792 : (1917) M, W. N. 91.**

——S. 4—*Acceptance when complete.*

The defendant offered to let his premises for ten years at Rs. 175 per month. The plaintiff accepted the offer but in the letter of acceptance desired the defendant to insert an optional clause in the lease giving the plaintiff the option to renew the lease for another five years. *Held*, that the optional clause was a counter-offer and unless in its turn it was accepted by the defendant it would have no effect on the acceptance. (*Macleod, C. J. and Heaton, J.*) SIR MAHOMED YOOSUF ISMAIL BATH *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL. **45 Bom. 8 : 57 I. C. 971 : 22 Bom. L. R. 872.**

——S. 4—*Contract where complete—Offer.*

An offer is made not at the place from which it is sent but at the place where it reaches the acceptor. (*Seshagiri Iyer and Moore, JJ.*) MYLAPPA CHETTYAR *v.* AGA MIRZA MAHOMED SHERAZEE. **37 M.L. J. 712 : 54 I. C. 550 : 26 M. L. T. 504.**

——Ss. 5, 6 and 7—*Proposal—Acceptance—Revocation.*

Where there is no unqualified acceptance before revocation does not reach the person owing to his own misrepresentation about his address, the offeror must be deemed to have validly revoked his proposal. (*Martineau, J.*) THE RAMPUR SUGAR STATE FACTORY *v.* DIWAN CHAND ISHAR DAS. **51 I.C. 860.**

——Ss. 5, 23, 70 and 156—*Suit for wages.*

A suit for salary or wages from a company lies against the company and not against its Secretary or the Managing Director (*Johnstone, J.*) ABDUL HAQ *v.* DAS MAL. **43 P. W. R. 1913 : 19 I. C. 595 : 190 P. L. R. 1913.**

——Ss. 5 and 167—*Court's duty to exclude irrelevant evidence.*

It is the duty of Court to exclude an irrelevant document from evidence even if no objection is taken to its admissibility by the parties, omission to object would not render it admissible. (*Miller C.J. and Mullick, J.*) SUMIRA KUAR *v.* RAM KAIR CHOWBEY. **5 Pat. L J. 410 : 1 Pat. L. T. 702 : 57 I. C 561 : 1921 Pat. 17.**

——Ss. 7, 8 and 9—*Offer and acceptance—Proposal to purchase goods at a specified price—Price credited by seller to account—Acceptance.*

The acceptance of a proposal must be unqualified and a person making a proposal cannot impose on the party to whom it is addressed the obligation to refuse it under the penalty of imputed assent or attach to his silence the legal result that he must be deemed to have accepted it. Acceptance of a proposal may be made without express communication, by the conduct of the

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acceptor. A written offer to take goods accompanied by a sum of money representing the price is acceptance, if the purchaser credits the money received to his account. (*Lindsay, J.*) BISHUN PADU HALDAR *v.* CHANDI PRASAD & CO. **1 U. P. L. R. (H. C.) 183: 54 I. C. 437: 18 A. L. J. 73.**

——S. 7—*Qualified acceptance, if an acceptance when results in a contract—Writing if necessary.*

Acceptance of an offer with a variation is no acceptance at all; it is simply a counter-proposal which should be accepted by the original promisor before a contract can be made and such an acceptance need not be in writing. (*Ratligan and Scott-Smith, JJ.*) BHAGWAN DAS *v.* SHIV DIAL. **92 P. R. 1913: 22 I. C. 811: 109 P L. R. 1914.**

——Ss. 7 and 8—*Contract—Correspondence.*

A contract is concluded as soon as all the essential terms are settled though the formal documents have yet to be executed. If a contract has to be made out from the correspondence between the parties, the whole of the correspondence muat be taken into consideration in determining whether there was a completed contract. (1916) 2 Ch. 187 Ref. (1879) L. R. 4 A. C. 311 Dist. (*Seshagiri Aiyar and Moore, JJ.*) MYLAPPA CHETTIAR *v.* AGA MIRZA MAHOMED SHIRAZEE. **54 I. C. 550: 37 M. L. J. 712: 26 M. L. T. 504.**

——S. 7—*Offer refused—Subsequent acceptance no effect.*

To convert a proposal into a promise, the acceptance must be unqualified and without condition. When once a proposal is practically refused it does not hold good and no acceptance after the refusal could convert the proposal into a promise so as to create a contract. (*Jwala Prasad and Adami, JJ.*) NIROD CHANDRA ROY *v.* RAJA KIRTYA NANDA SINGH. **1922 P. 24.**

——S. 8—*Contract—Conditional proposal—Agreement to bequeath village—Performance of condition.*

The plaintiff was brought up since her childhood by her widowed aunt, who got her married in 1886 to a suitable zemindar at her own expense. At the time of the marriage the aunt promised that, if the plaintiff and her husband would reside with her, she (the aunt) would purchase and settle property on the plaintiff. The plaintiff and her husband accordingly resided with the aunt. In 1893 the aunt purchased a village, *Repudi*, in her own name, but ultimately to be for the benefit of plaintiff. Owing to the dissatisfaction arising from the aunt's omission to transfer the property to plaintiff, her husband ceased to reside with the aunt. The aunt thereupon in October 1893 wrote to the plaintiff stating that the village had been purchased only for the plaintiff and would be duly transferred to her on the death of the aunt. The plaintiff and her husband thereupon resided with the aunt till her death in 1899.

Held, that the letter of 1893, coupled with the conduct of the plaintiff constituted a binding contract by the aunt to give the village to the plaintiff. The letter was a proposal with a condition

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which being accepted, was equivalent to a contract which the aunt could not resile and which was specifically enforceable. 8 A. C. 467: 5 H. L. C. 217 Ref. (*Lord Shaw.*) LAKSHMIVENKAYYAMMA *v.* VENKATANARASIMHA. **39 Mad. 509: 20 C. W. N. 1054: 14 A. L. J. 797: 31 M. L. J. 58: (1916) 2 M. W.N. 23: 20 M. L. T. 137: 4 L. W. 58: 18 Bom. L.R. 651: 34 I.C. 921: 24 C.L.J. 279. (P.C.).**

——S. 8—*Auction sale—Bid—Acceptance of bid by Amin subject to approval by his principal—Rights of bidder to enforce the sale.*

When an *Amin* holding an auction sale accepts the highest bid on behalf of his principal subject to the principal's giving his assent to it, there is a valid and enforceable contract when that assent has been given. In the absence of any restriction to the contrary in the conditions of sale, a person may bid as *benamidar* for another and the fact that the bidder did not disclose his character of *benamidar* does not entitle the principal to revoke the auction sale. (*White, C. J. and Sankaran Nair, J.*) CHITIBABU ADENA *v.* GARIMALLA JAGGARRAYADU. **29 I. C. 12: 28 M. L. J. 617.**

——S. 9—*Implied contract—Compound interest—Agreement to pay, inferred from course of business for a long period.*

An implied contract to pay compound interest on sums due under dealings between a debtor and creditor may be implied from a long course of dealing between the parties. S. 92 of the Evidence Act does not bar the proof of such an agreement. (*Sir John Edge.*) HARIDAS *v.* MERCANTILE BANK. **38 M. L. J. 387: (1920) M. W. N. 312: 18 A. L. J. 359: 22 Bom. L. R. 545: 2 U. P. L. R. (P. C.) 78: 55 I C. 522: 44 Bom. 474: 27 M. L. T. 255: 47 I. A. 17: 12 L. W. 356. (P. C.)**

——S. 9—*Principal and agent—Agent's claim for extra remuneration on implied contract—Enforceability.*

An agent, who is charged with the business of collecting old debts left as outstandings by the agent's predecessor can enforce against his principal an implied undertaking for an extra remuneration for such business having regard to the known facts of the business of Nattukottai Chetties and he is entitled to a reasonable remuneration even if it is not fixed (*Coutts-Trotter and Srinivasa Aiyangar, JJ.*) VELLAYAN CHETTY v. KULENDAVELLAPPA CHETTY. **31 I. C.783: 29 M. L.J. 749.**

——S. 9—*Implied contracts.*

Implied contracts are as much binding as express contracts on the parties. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) SITARAM AIYAR *v.* EDWARDS SNEADE BOYAD STEVENSON. **16 I. C. 609.**

——S. 10—*Unilateral declaration, binding nature.*

A declaration or statement marking a stage in the negotiations as to the proposed amicable settlement between the parties, while admitedly a document giving effect to the declaration or statement was to be executed later on, is an undertaking, which, unless there is a correlative undertaking, may be broken off at any time by either side. (*Heaton and Shah, JJ.*) DALPATSINGJI *v.* RAISINGJI NAHARSINGJI. **39 B. 528: 29 I. C. 943: 17 Bom. L. R. 566.**

CONTRACT ACT (IX OF 1872), S. 11—Fraud by Minor.

——S. 10—*Agreement to give time to judgment-debtor—No consideration—Effect.*

An agreement to give time to judgment debtor like all other agreements must be supported by consideration. (*Mookerjee and Beachcroft, JJ.*) DEBENDRA NARAIN SINHA *v.* SOURINDRA MOHAN SINHA. **24 I. C. 391.**

——S. 10—*Mortgage—Without consideration*

Per Spencer, J.—A mortgage without consideration is a nullity and so inoperative and that it creates no charge on the property as against subsequent purchaser. 23 I. C. 805 Foll. 15 M. 54 Dist. (*Spencer and Kumaraswami Sastri, JJ.*) KUMARAPPAN CHETTIAR *v.* NARAYANAN CHETTIAR. **35 I. C. 455.**

——S. 10—*Minor—Suit on pro-note.*

A minor can sue on a promissory note for its enforcement. (*Po Han, J.*) SHARFATH ALI *v.* NOOR MAHOMED. **2 Bur. L. J. 227: 76 I. C. 810 : 2. 1 : 1924 R. 136.**

——S. 10—*Noond—Entry by broker without signature.*

An entry by a broker in the noond of each contracting party embodying the terms of the contract signed by the broker is a written intimation by the broker to each party that a contract has been effected. (*Crouch, J.*) LENZ *v.* LAL CHAND. **19 I. C. 925: 6 S. L. R. 278.**

——S. 11.

Fraud by Minor.
Incompetency.
Minor Beneficiary.
Minor Coparcener.
Minor Partner.
Minor Promisee.
Minor Promissor.
Mutuality.
Ratification.
Scope.

Fraud by Minor.

——S. 11—*Fraud by minor—Contract—Misrepresentation as to age—No estoppel.*

A minor is not estopped from pleading his minority at the time of a contract and the minor is not liable on the contract. (*Lord Shaw.*) MAHOMED SYEDOL ARIFFIN *v.* YEOHOOL GARK. **21 C. W. N. 257 : (1917) M. W. N. 162: 19 Bom. L. R. 157: (1916) 2 A. C. 575: 86 L. J. P. C. 15: 115 L. T. 564: 32 T. L. R. 678: 39 I. C. 401: 43 I. A. 256 (P. C.).**

——Ss. 11 and 17—*Fraud by minor—Misrepresentation as to age, effect of—Estoppel.*

A mortgage made by a minor is wholly void. 30 Cal. 539, Foll. A minor who makes a false representation made to a person who knows it to be false is not estopped from taking away the privilege of infancy. (*Abdul Raoof, J.*) HARNAM SINGH *v.* NARAINA. **66 P. W. R. 1921.**

——S. 11—*Fraud by Minor—False representation as to age—Mortgage.*

A mortgage made by a minor is wholly void and the mortgagee is not entitled to enforce his security created under the mortgage. The

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false representation by the minor as being of full age made to the mortgagee, who knew it to be false was not such a fraud as to take away the privilege of infancy. 30 Cal. 539 (P. C.) Foll. 2 Cal. W. N. 18 Disappear. (*Broadway and Abdull Raoof. JJ.*) HARNAM SINGH *v.* NARAINA.
162 P.R 1919 : 54 I C. 876 : 2 U.P.L R (Lah.) 40.

——— **S. 11**—*Fraud by minor — Promissory note by—Enforceability—Person more than eighteen years old—Guardian appointed by Court—Majority Act, S. 3.*

A promissory note executed by a person for whom a guardian of person has been appointed by the Court before he attained eighteen years is a void contract if it was executed by him before he attained twenty-one years. 30 C. 539 ref. The fact that a person has attained eighteen years and would be a major but for the Court's order appointing a guardian will not relieve a plaintiff suing upon a document executed by him before he completed his age of twenty-one years from the necessity of proving fraud or misrepresentation said to have been committed by that person. 25 Cal. 616 Foll. Estoppel cannot overrule a plain provision of law or form the basis of a cause of action for a suit upon a contract when the contract itself is void. 38 Mad 1071 Foll. (*Spencer and Bakewell, JJ.*) JAMBAGATHACHI *v.* RAJAMANNARSWAMY NADALWAR. **57 I. C. 678 : 11 L. W. 596.**

——— **S. 11**—*Fraud by minor—Contract void.*

Contracts by minors are void ; and the only ground on which equity would interfere and make them return, money or property is fraud. When a minor obtains money by misrepresenting his age, that amounts to fraud and he may be made to refund it. (*Wallis and Sadasiva Aiyar, JJ.*) VAIKUNTARAMU PILLAI *v* ATHIMOOLAM CHETTIAR.
38 Mad. 1071 : 23 I. C. 799 : 26 M. L. J. 612.

——— **S. 11** — *Fraud by minor—Misrepresentation by minor as to age.*

Where a minor on making a contract represents himself to be a major, no question of estoppel rises, as the plaintiff has to prove the contract and consequently the competency of the contracting parties, the defendant consequently not being called upon to prove anything. (*Leggatt, A. J. C.*) MANILAL *v.* KAVASJI. **9 I. C. 124 : 4 S. L. R. 250.**

Incompetency.

——— **Ss. 11, 23 and 25 Expl. (2)**—*Incompetency—Person under Court of Wards executing bond—Subsequent bond by his son—Consideration.*

Where a person under the Court of Wards borrows money, debts come into existence though the person is not liable and a subsequent bond by his son for that debt, is not merely ratification of a former void contract but is a fresh contract. (*Chevis and Leslie Jones, JJ.*) RAJMAL SHAH *v.* COURT OF WARDS OF TIKA BALDEO SINGH.
46 I. C. 974 : 142 P. W. R 1918.

——— **S. 11**—*Incompetency of judgment-debtor C. P. C, Sch. III, para 11—Judgment-debtor—Disqualified—Transfer by him—Effect.*

A judgment-debter to whom Sch. III, para, 11, C.P.C., applies is a person disqualified within the meaning of S. 11 to the extent stated in the paragraph and any transaction entered with by him

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in contravention thereof is a mere nullity incapable of subsequent ratification or of enforcement in equity. (*Drake-Brockman, J. C., Stanyon and Mitra, A. J Cs.*) SALU BAI *v.* BAJAT KHAN.
42 I. C. 200 : 13 N. L. R. 130 (F. B.)

Minor Beneficiary.

——— **S. 11**—*Minor beneficiary—Validity of contract—Trust—Purchase in the name of minor.*

A person competent to contract may validly create a trust by purchasing property in the name of a minor. If a minor is not a contracting party himself but is the beneficiary under a sale, the transaction will be upheld.

When a contract by the minor is not a necessary condition for upholding the rights of the minor in the property, his rights should be maintained ; when it is a necessary condition preliminary to the transaction or contractual obligations flow from the transaction, the transaction is void. (*Sundara Aiyar and Spencer, JJ.*) MUNIYA *v.* PERUMAL. **13 M. L. T. 311 : 18 I. C. 963 : 24 M. L. J. 352.**

Minor Coparcener.

——— **S. 11**—*Minor coparcener.*

Minor member of a joint Hindu family of whose person a guardian is appointed cannot contract. (*Spencer and Bakewell, JJ.*) JAMBAGATHACHI *v.* RAJAMANNARSWAMY NADALWAR.
57 I. C. 678 : 11 L. W. 596.

——— **S. 11**—MINOR—ESTOPPEL—
See also EVIDENCE ACT, S. 115.

Minor Partner.

——— **Ss. 11 and 254**—*Minor partner.*

A minor coparcener cannot sue as partner for dissolution of a partnership. A minor in India cannot become a partner in his own rights, as he is incapable of contracting under S. 11. (*Phillips. J.*) *Per contra* (*Spencer and Phillips, JJ.*) GANGAYYA *v.* VENKAT RAMAYYA. **38 I. C. 111.**

Minor Promisee.

——— **S. 11**—*Minor promisee—Validity.*

A contract of sale negotiated by a minor who settled the terms paid consideration and got a sale-deed executed in his name is altogether void *ab initio* and no title passes thereby to the minor. There is a fundamental difference between a contract of sale and a completed conveyance. 39 C. 232: 33 M 12 : 33 A. 657 : 31 A. 68 Ref. (*Piggott, J.*) MUSAMMAT MUNNI *v.* MADAN GOPAL.
27 I. C. 733 : 13 A. L. J. 185.

Also (*Knox and Piggott, JJ.*) MAHOMED *v.* MAHOMED. **10 I. C. 906.**

——— **S. 11**—*Minor promisee—T. P. Act. S. 54—Sale in favour of minor, validity of—Sale by certificated guardian in favour of minor.*

A sale in favour of a minor is valid there being nothing in the incapacitating a minor from being a transferee of property. Where a certificated guardian sells his property to his ward there is a presumption that the guardian accepts the sale on behalf of his ward. (*Richards, C. J. and Banerjee, J.*) ULFAT RAI *v.* GOURI SHANKER.
33 All. 657 : 11 I. C. 20 : 8 A.L.J. 670.

Also (*Lindsay, J. C. and Kanhaiyalal, A. J. C.*) RAGHUNATH *v.* HAJI, **18 O. C. 115 : 30 I. C. 200 : 2 O. L. J. 200.**

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——S. 11—*Minor promisee — Mortgage in favour of, if void—Transfer of Property Act.*

A mortgage bond executed by a person of full age in favour of minors as a security for a loan is not void and is enforceable at their instance. There is nothing in the T. P. Act to nullify a transfer made by a person of full age in favour of a minor. 39 C. 232, P. C. : 30 C. 539 P. C. Dist. (*Mookerjee and Teunon, JJ.*) BHAGGABHOR MONDAL *v.* MOHINI MOHAN BANERJI. **33 I. C. 994 : 22 C. W. N. 130.**

——S. 11—*Minor promisee—Conveyance to—Validity of.*

A conveyance to a minor may validily be made (*Chitty and Teunon, JJ.*) BAHAL-UD-DIN *v.* RAFAQUAT HUSAIN. **18 I. C. 451.**

——S. 11—*Minor promisee—Competency to purchase property.*

An infant can purchase property. 33 A. 657 ; 38 A. 62 : 38 A. 154 : 18 I. C. 451 : 30 I. C. 200 · 24 M. L. J. 352 Ref. 33 M. 312 disappr. (*Shadi Lal, J.*) AHMED *v.* RAJA. **39 I. C. 44 : 50 P.W.R. 1917.**

——Ss. 11, 16, 64 and 65—*Minor promisee—Contracts—Incidents whether void.*

There is nothing in the Contract Act that prevents an infant from being a promisee. When consideration passes from a minor, he can enforce the contract. (*Wallis, C. J., Abdur Rahim and Srinivasa Aiyangar, JJ.*) RAGHAVA CHARIAR *v.* SRINIVASA RAGHAVA CHARIAR. **40 Mad 308 : 31 M. L. J. 575 : 20 M. L. T. 407 : 36 I. C. 921 : (1916) 2 M. W. N. 363 (F. B.)**

——S. 11—*Minor promisee.*

Where a contract by a minor is a necessary preliminary to the transaction, it must be regarded as void but where it is not a necessary preliminary his rights should be maintained. 30 C. 539 P. C. ; 33 M. 312 Ref. A purchase of property for the benefit of a minor by his maternal uncle is valid and if the property is alienated by the minor's father the minor can recover. (*Sundara Aiyar and Spencer, JJ.*) MUNIA KONAN *v.* PERUMAL KONAN. **26 I. C. 195 : 37 Mad. 390.**

——S. 11—*Minor promisee—Purchase of immoveable property by Hindu mother with son's money—Validity of the sale.*

A Hindu mother purchased certain immoveable property in her name with money belonging to her major and two minor sons. *Held*, the sale was not void as being in favour of minors. 30 C. 539 and 4 I. C. 383. Dist. (*White, C. J. and Oldfield, J.*) ANDALAMMAL *v.* NARASIMHA. **24 I. C. 927 : 1 L. W. 379.**

——S. 11—*Minor promisee —Contract in favour of—When not void.*

A contract creating only rights in favour of a minor and not involving any contractual obligation on his part is valid.. A pro-note executed in favour of a minor is valid though he does not incur liability by endorsing it. (*Benson and Sundara Aiyar, JJ.*) RANGARAZU *v.* M. BASAPPA. **1913 M. W. N. 415 : 13 M. L. T. 325 : 18 I. C. 968 : 24 M. L J. 363.**

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——S. 11—*Minor promisee—Sale in favour of minor is enforceable.*

There is nothing in law to prevent a sale of immoveable property in favour of a minor and the minor can sue for possession of the property as such vendee. 33 M. 312 not foll ; 40 M. 308; 38 A. 62 ; 38 A. 154 Ref. (*Prideaux, A. J. C.*) BALKRISHNA *v.* LAKHU. **68 I. C. 191 : 1922 Nag. 239.**

——S. 11—*Minor promisee—Sale to, validity of transfer by sale.*

There is no good reason for the proposition that a minor, because he is not competent to contract, is debarred from taking property under a transfer by sale and therefore such transfer is not void. (*Lindsay, J. C. and Kanhaiya Lal, A. J. C.*) RAGHUNATH BAKHSH *v.* MUHAMMAD BAKHSH. **2 O. L. J. 200 : 30 I. C. 200 : 18 O. C. 115.**

——S. 11—*Minor promisee—Mortgage—Enforceability of.*

A mortgage in favour of a minor is valid and enforceable by him for there is no contract by the minor which still remains to be performed. 30 Cal. 539 : 40 M. 308 ; 39 Cal. 232 and 46 I. C. 670 Foll. If a mortgage decree cannot be obtained in the case for some reason or other, the minor is entitled to get a money decree. 24 C. L. J. 363 Foll. (*Miller, C. J. and Jwala Prasad, J.*) MADHAB KOERI *v.* BAIKUNTHA KARMAKAR. **4 Pat. L. J. 682 : 52 I. C. 338 : 1919 Pat. 343.**

——S. 11—*Minor promisee—Lease in favour of.*

A lease in a minor's favour imposing a liability on him is null and void. 30 C. 539 P. C., Foll. (*Jwala Prasad and Coutts, JJ.*) PRAMILA BADILDAS *v.* JOGESHER MANDAL. **5 Pat. L. W. 147 : 3 Pat. L. J. 518 : 46 I. C. 670 : 1918 Pat. 241.**

——S. 11—*Minor promisee.*

Transfer by a major to a minor cannot be void when the minor has paid the price as the act of transfer is of vendor though the mere contract to purchase would have been void. 30 C. 539 P. C., Dist. (*Maung Kin, J.*) MAUNG AUNG NYUN *v.* MAUNG GYI. **32 I. C. 638.**

Minor Promisor.

——S. 11—*Minor promisor—Contract by.*

Under the Contract Act, where a minor purports to contract, his alleged contract is void and not merely voidable ; he is a person who is not competent to contract. 30 Cal. 539 Rel. (*Sir John Edge*) MA HNIT *v.* HASHIM EBRAHIM METER. **32 C. L. J. 214 : 18 A. L. J. 335 : 22 Bom. L. R. 531 : 38 M. L. J. 353 : (1920) M. W. N. 319 ; 27 M. L. T. 190 : 55 I. C. 793 : 2 U. P. L. R. (P. C.) 58 (P. C.).**

——S. 11—*Minor promisor— Sale—Setting aside—Decree for repayment of money*

Setting aside of a sale deed executed by a minor or refund of the consideration money is within the power and competence of a court, but this

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power should not be used if the vendee has been unscrupulous in his dealings with the minor. *Mears, C. J. and Piggott, J.)* MAHOMED SAID *v.* BISHAMBAR NATH.
21 A. L. J. 596 : 45 All. 644 : 1924 All. 156.

——S. 11—*Minor promisor—Competency to contract—Minor.*

A minor cannot make a valid contract of sale of land. He can sue for recovery of the property on attaining majority. 30 C. 539 (P. C.) followed. (*Chatterjee and Beachcroft, JJ.*) PURNA CHANDRA *v.* RASSORAJ. 33 I. C. 133.

——S. 11—*Minor promisor—Mis-representation as to age—Avoidance of contract—Duty to refund benefit.*

Where a minor enters into a contract on an erroneous representation as to his age, the contract is none the less void and he is not under any obligation legal or equitable to pay any money before avoiding the contract. If he seeks to recover property transferred by him as a minor, he cannot be compelled to refund to the transferee any money which has been paid to the minor as consideration for the transfer, 1 L. L J. 122 ; 30 C. 539 followed. 38 P. R. 1919 referred to. (*Broadway, J.*) BISHEN SINGH *v.* BISHNA.
9 I. C. 543 : 1924 Lah. 294.

——S. 11—*Minor promisor.*

A contract by a minor is void not merely voidable. Case law discussed. (*Sundara Aiyar and Spencer, JJ.*) MUNIA KONAN *v.* PERUMAL KONAN.
26 I. C. 1 95 : 37 Mad. 390.

——Ss. 11 and 65—*Minor promisor—Execution of bond—Consideration paid—No misrepresentation—Suit for cancellation o bond—Duty to restore benefit.*

A person of the age of 19 for whom a certificated guardian had been appointed under the Guardians and Wards Act executed a bond on obtaining in cash the consideration therefor. There was no fraud or misrepresentation on the part of the minor and the creditor *bona fide* believed that the executent of the bond was a major. In a suit by the minor for cancellation of the bond. *Held* that the plff. was entitled to a decree only on his returning the money he got from the defendant but without interest and cost. (*Simpson, A. J. C.*) MUHAMMAD ANWAR KHAN *v.* JHANDA SINGH. 9 O. L. J. 404 : 69 I. C. 888 : 25 O. C. 237 : 1922 Oudh 271.

——S. 11—*Minor promisor—Minor, capacity to contract.*

A minor cannot make a valid contract. (*Maung Kin, J.*) MAUNG PO DAWK *v.* MAUNG BA GYAW.
33 I. C. 132.

Mutuality.

——S. 11—*Mutuality—Minor—Guardian's contract for purchase of immoveable property—Not enforceable by minor.*

It is not within the competence of the guardian of a minor or the manager of his estate, to bind the minor or his estate by a contract for the purchase of immoveable property. If the guardian or manager of the minor's estate enters into

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such a contract for the minor, there is no mutuality in the contract as the minor is not bound by it ; and the minor cannot, on attaining majority, obtain specific performance of the contract. (*Lord Macnaughton.*) MIR SARWAR JAN *v.* FAKRUDDIN MAHOMED. 39 Cal. 232 : 39 I. A. 1 : 16 C. W. N. 74 : (1912) M. W. N. 22 : 9 A. L. J. 33 : 15 C. L. J. 69 : 14 Bom. L. R. 5 : 21 M. L. J. 1156 : 13 I. C. 331 : 11 M. L. T. 8 (P. C.).

——S. 11—*Mutuality—Evidence.*

The mutuality of a contract does not depend upon the evidence for it and if a mutual contract exists, its validity is not affected by the fact that it is difficult to prove it. A contract for the minor's benefit may be specifically enforced against him. (*Coxe and Teunon, JJ.*) LAL GOPAL DUTTA *v.* KHOROORIAH MAJOZILLA ZEMINDARY SYNDICATE, LTD. 13 I. C. 673 : 16 C. W. N. 297.

——S. 11—*Mutuality—Minor—Contract by guardian for purchase of land—Specific performance.*

It is not within the competence of a guardian of a minor to bind the minor or his estate by a contract for the purchase of immoveable property. The minor in such a case is not bound by the contract. The minor, on attaining majority cannot enforce specific performance of the contract. 39 C. 232 (P. C.) Foll. 40 M. 308 (F. B.) and 42 M. 185 Ref. 23 M. L. J. 610 not foll. (*Spencer and Bakewell, JJ.*) CHODAVARAPU NARAYANA *v.* VENKATASUBBA. 27 M. L. T. 264 : 38 M. L. J. 77 : 55 I. C. 377 : (1920) M. W. N. 129.

——S. 11—*Mutuality—Minor—Contract by guardian—Specific performance.*

A guardian of a minor cannot bind the minor or his estate by a contract for the purchase of immoveable property and specific performance of such a contract cannot be enforced by the minor, (*Mitra, A. J. C.*) SAKHARAM *v.* BHIVRABAI. 44 I. C. 164.

——S. 11—*Mutuality—Suit for specific performance.*

Specific performance cannot be obtained of a contract made on behalf of a minor by his guardian or the manager of his property, where such contract could not be enforced against the minor or his property, 39 Cal. 233 (P. C.) foll. (*Stanyon, A. J. C.*) SURAJMAL *v.* PANDHARI.
41 I. C. 45 : 13 N. L. R. 98.

Ratification.

——S. 11—*Ratification— Minor —Contract by.*

A contract by a minor is void and cannot be ratified by him after attaining majority. (*Chatterjee and Walmsley, JJ.*) NARENDRA LAL KHAN *v.* HRISHIKESH MUKERJEE. 46 I. C 765.

——S. 11—*Ratification—Contract by minor.*

A contract by a minor is void and not voidable and cannot, therefore, be ratified by any subsequent act of the minor. (*Shadi Lal and Beavan Petman, JJ.*) AMAR NATH *v.* KHUDU MAL.
53 I. C. 123.

CONTRACT ACT (IX OF 1872), S. 11—Ratification.

——S. 11—*Ratification—Minor's contract—Effect.*

A contract of exchange made by a minor is void and as such cannot be ratified by him after attaining majority or by his mother. 30 Cal. 539 ref. (*Rattigan, C. J.*) BHANA *v.* BELA SINGH.
51 I. C. 410 : 38 P. R. 1919.

Scope.

——S. 11—*Scope.*

A minor has no right to enforce a fraudulent contract of his guardian. (*Robinson, C. J. and Heald, J.*) MAUNG TIN *v.* MAMAI MYINT.
65 I. C. 459 : 11 L. B. R. 83.

——S. 12—*Soundness of mind—Contractual capacity—Presumption in favour of sanity—Mere weakness of mind—Effect on contract.*

The test of soundness of mind under S. 12 of the Contract Act is that the contractor or donor is capable of understanding the business and of forming a rational judgment as to its effect upon his interest. There being a presumption in favour of sanity, the person who relies on the unsoundness of mind must prove it sufficiently to satisfy this test. Mere weakness of mind is not sufficient as laid down in 27 A. 1 (P. C.) Although it is not necessary to prove utter mental darkness or congenital idiocy, there must be proof that the donor or contractor was incapable of understanding business, and forming rational judgment as to its effect. Even if occasional aberrations are proved, they would not vitiate transactions not entered into under their influence. (*Jwala Prasad and Adami, JJ.*) MAHOMED YAKUB *v.* ABDUL QUDDUS.
68 I. C. 372 : 4 P. L. T. 7.

——Ss. 14, 15, 16 and 17—*Fraud—Undue influence—Coercion—Distinction between.*

Fraud, undue influence and coercion are separate and separable categories in law. Specific allegations and particulars must be given in respect of each. (*Lord Shaw.*) BAL GANGADHAR TILAK *v.* SHRI SHRINIVASA PANDIT.
39 Bom. 441 : 13 A. L. J. 570 :
19 C. W. N. 729 : 17 Bom. L. R. 527 :
22 C. L. J. 1 : 29 M. L J. 34 :
18 M. L. T. 1 : (1915) M. W. N. 484 :
2 L. W. 611 : 29 I. C. 639 : 42 I. A. 135 (P.C.).

——Ss. 15 and 72—*'Coercion'—Definition of.*

S. 15 does not control S. 72 and coercion in S. 72 is not the same as defined in S. 15. (*Lord Moulton.*) KANHAIYA LAL *v.* NATIONAL BANK OF INDIA, LTD.
40 Cal. 598 :
40 I. A. 56 : 17 C. W. N. 541 :
(1913) M. W. N. 406 : 13 M. L. T. 406 :
11 A L. J. 413 : 17 C. L. J. 478 :
15 Bom. L. R. 472 : 184 P L. R. 1913 :
18 I. C. 949 : 25 M. L. J. 104 (P. C.).

——S. 15—*Coercion—Plea of—Proof.*

A suspicion or mere probability is not sufficient to support a plea of coercion quite apart from the consideration that it is not *secundum allegata et probata*, but depends upon other circumstances coupled with doubts entertained as to the veracity

CONTRACT ACT (IX OF 1872), S. 15.

of the defendant. (*Beaman and Hayward, JJ.*) PURUSHOTTAM DAJEE MANDLICK *v.* PANDHURANG CHINTAMAN.
39 Bom. 149 :
28 I. C. 921 : 17 Bom. L. R. 157.

——S. 15—*Coercion—Refusal to convey equity of redemption.*

A mortgagee who refuses to reconvey the mortgaged properties to the mortgagor except on certain terms is not guilty of coercion by unlawfully detaining property under S. 15. (*Sanderson and Mookerjee, JJ.*) BENGAL STONE COMPANY, LTD, *v.* JOSEPH ISAAC JOSEPH HYAM.
45 I. C. 738 : 27 C. L. J. 78.

——S. 15—*Threat to commit suicide.*

Per Wallis. C. J. and Seshagiri Aiyar, J. —Oldfield, J. dissenting. A threat to commit suicide to induce a document to be executed by a person is a threat to commit an act forbidden by the Indian Penal Code and amounts to 'coercion' within the meaning of S. 15, and the document executed in pursuance of that threat is invalid and inoperative. *Per Oldfield, J* :—Suicide itself is not punishable though its attempt is. (*Wallis, C. J., Oldfield and Seshagiri Aiyar, JJ.*) CHIKKAM AMMIRAJU *v.* CHIKKAM SESHAMMA.
41 Mad. 33 :
32 M. L. J. 494 : 5 L. W. 735 :
40 I. C. 352 : (1917) M. W. N. 423 (F. B.).

——S. 15—*Coercion, against whom directed.*

The 'Coercion' need not proceed from a party to the contract or be immediately directed against the party whom, it is intended to coerce, to enter into the contract or specifically prejudice him or his property. (*Sadasiva Aiyar and Moore, JJ.*) AMMIRAJU *v.* SESHAMMA.
3 L. W. 490 : 34 I. C. 578 :
(1916) 1 M. W. N. 368.

——S. 15—*Coercion—Duress—Distinction.*

A threat even from a third person amounts to coercion under S. 15 of the Act. The law of Duress of English Common Law is not applicable in India, as the law laid down in S. 15 is other than that contained in English Law texts ; in order to establish coercion, a person must prove (1) the utterance of threat ; (2) of an act forbidden by Penal Code, (3) with the intention of compelling the plaintiff to make the agreement complained of. Mere threat of bringing a criminal charge does not amount to coercion as defined in the Act, as it is not *per se* forbidden by Penal Code. But the case is different when the threat is bringing false charge (*Lindsay and Rafique, JJ.*) ASKARI MIRZA *v.* JAI KISHORI.
16 I. C. 344 : 15 O. C. 192.

——S. 15—*Coercion—Unlawful detaining or threatening to detain property.*

Detaining property is unlawful within S. 15, though the person detaining may have some right to the property if the detention is not authorized by law. (*Twomey, C. J. and Maung Kin, J.*) HA MAUNG *v.* MA TOKE.
55 I. C. 741 :
12 Bur. L. T. 195.

CONTRACT ACT (IX OF 1872), S. 16.

——— S. 16.
Blindness.
Burden of Proof.
Coercion.
Essentials.
Fear of Punishment.
Fraud.
Gift to Children.
Hard Terms.
High rate of Interest.
Illiteracy.
Long Indebtedness.
Mental Distress.
Position.
Proof.
Unconscionable Bargain.
Urgency and Inadequacy.
Who can plead.
Youth or Sex.

Blindness.

——— S. 16—*Blindness — Undue influence — Burden of Proof—High rate of interest.*

When it appeared in a suit on a mortgage that the mortgagor was a very nearly blind man, indebted already to the plaintiffs who were the village Sahukars and was entirely under their thumb, and the mortgage deed stipulated for an unconscionable rate of interest and there were other penal conditions. *Held*, that these facts were sufficient to show that the plaintiffs were in a position to dominate the will of the defendants and to throw the burden on them of proving that the mortgage in suit was not induced by undue influence. (*Kensington and Shahdin, JJ.*) BHOLA SINGH *v.* KISHORE CHAND.
147 P. L. R. 1913 : 20 I. C. 8 : 157 P. W. R. 1913.

———S. 16—*Blindness—Alienation by manager—If binding.*

A person who was manager of the affairs for his mother who was blind, mortgaged certain land. She authorized the writing of her name at the foot of the document and accompanied the mortgagor to the mortgagee for the money. *Held*, that she and her heirs were bound by the mortgage. (*Twomey, J.*) MA NGWE *v.* MAUNG PO SAN.
11 I. C. 775 : 4 Bur. L. T. 157.

Burden of Proof.

——— S. 16—*Burden of proof—Undue influence exercised by mortgagee over mortgagor—Weakman of bad habits.*

B, a very young man leading a most immoral life mortgaged his ancestral property to *N* and gave *N* possession of practically all his property which included other villages not mortgaged. *N* sold a considerable part of the property including some of the mortgaged villages and some of the mortgaged villages were purchased by *N*. Neither *N* nor the plaintiffs who claimed through *N* rendered accounts of what had been received by him from and in respect of any of the properties not even of the mortgaged properties. *B* was completely under the influence of *N*, an unscrupulous man who exercised that influence regardless of the interest of *B* and his infant son who was born subsequently to the two mortgages on which plaintiff sued. *Held*, that this was not an ordinary case of suit for sale on a mortgage in which it would be for the defendant the mortgagor to prove that nothing remained due under the mortgage.

CONTRACT ACT (IX OF 1872), S. 16.—Coercion.

The onus lay on the plaintiffs to prove that the mortgages had not been satisfied and what if any was due under each mortgage before they could get a decree for sale The plaintiffs having failed to prove that anything was due the suit should be dismissed. (*Sir John Edge*). B. L. RAI *v.* BHAIYA LAL.
58 I. C. 13 : 28 M. L. T. 345 : 1920 M. W. N. 685 : 24 C. W. N. 769 : 16 N. L. R. 94 (P. C.).

——— S. 16—*Burden of proof—Bequest under undue influence.*

Where a legacy under a will is sought to be set aside on the ground of undue influence it must be proved not only that the legatee was in a position to exercise influence but that the influence was unduly exercised, the burden of proving both being on the party attaching the legacy. Courts do not look with favour on attempts to attack bequests on the ground of undue influence. (*Sadasiva Iyer and Spencer, JJ*). RAJARAJESWARA SETHUPATHI *v.* KUPPUSAMI IYER.
68 I. C. 352 : 41 M. L. J. 474: (1921) M. W. N. 722.

——— S. 16—*Burden of proof—Active confidence.*

The plff. setting up a plea of undue influence in a suit to avoid an instrument, must prove that there was active confidence between the person executing the document and the person under whose influence the document is said to have been executed. (*Abdul Rahim, O. C. J. and Odgers, J.*) RAMA KRISHNA PRABHU *v.* NARAINA.
62 I. C. 215 : 11 L. W. 112.

——— Ss. 16 and 19—*Burden of proof—Pardanashin lady—Deed of gift.*

Where undue influence is alleged it is necessary to examine very closely all the circumstances of the case. Where a deed of gift by a pardanashin lady is impeached on the ground of undue influence the questions that arise are (1) was the transaction a righteous transaction, *i.e.*, was it a thing which a right minded person might be required to do ? (2) was it an improvident Act, (3) was it a matter requiring advise ? (4) did the intention of making the fact originate with the donor ? Where the relation between the parties is such that one of them is in a position to influence the other and the bargain is with the influencer and in itself unconscionable then, the person in a position to use his dominating power has the burden thrown on him of establishing affirmatively that no domination was practiced so as to bring about the transaction, but that the grantor of the deed was scrupulously kept separately advised in the independence of a free agent. 43 Mad. 546 ; 18 Cal. 545 ref. (*Dalal and Wazir Hasan, A. J. Cs.*) CHAURAS KUAR *v.* ABHAIRAJ KUAR.
65 I. C. 380 : 8 O. L. J. 681 : 1922 Oudh 59.

Coercion.

———S. 16—*Coercion.*

In dealing with a case of, 'coercion' as invalidating a contract, the Court should decide whether the alleged act of coercion amounts to an offence under the I. P. C. (*Sadasiva Aiyar and Moore, JJ.*) AMMIRAJU *v.* SESHANNA.
34 I. C. 578 : 3 L. W. 490 : (1916) 1 M. W. N. 368.

CONTRACT ACT (IX OF 1872), S. 16—Essentials.

Essentials.

——Ss. 16 (1) and (3) and 19-A—*Essentials—Avoidance of contract—Undue influence—Onus—Conspiracy.*

To avoid a contract under S. 16 of the Contract Act a party has to establish not only that the other party was in a position to dominate his will but he must also prove that the other party has used that position to obtain an unfair advantage over him. Under S. 16 sub-section (3) if the transaction is unconscionable, the burden of proving that the contract was not induced by undue influence is thrown on the person who was in a dominating position. He must establish affirmatively that no domination was practised so as to bring about the transaction, but that the granter of the deed was scrupulously kept separately advised in the independence of a free agent. In the category of cases of undue influence might be covered cases where the party to a transaction exercised that influence in conspiracy with or through the agency of others. (*Lord Shaw*). POOSATHURAI *v.* KANNAPPA.

38 M. L. J. 349 : 18 A. L. J. 344 : 11 L. W. 455 : (1920) M. W. N. 317 : 2 U. P. L. R. (P. C). 62 : 22 Bom. L. R. 538 : 43 Mad. 546 : 13 Bur. L. T 28: 27 M. L. T. 316 : 55 I. C. 447 : 47 I. A. 1 (P. C.)

——S. 16—*Essentials— Undue influence—Interest—High rate of—Hard bargain—Court's power to reduce rate.*

Where it is not proved that undue advantage was taken of mortgagor or that his will was dominated, the mortgagee is entitled to interest at contract rate and the bargain is not hard and unconscionable. (*Chaudhuri and Cuming, JJ.*) BIJOY KUMAR *v.* SATISH CHANDRA.

56 I. C. 1007 : 24 C. W. N. 444.

——S. 16—*Essentials—Plea of—Proof—Need of money—High rate of interest.*

To establish a plea of undue influence it must be shown that plff. (mortgagee) was in a position to dominate the will of the defendants (mortgagors) and secondly that he used that position to obtain an unfair advantage. If the terms of the contract appear on the face of them to be unconscionable or are shown to be so, the second point may be presumed. Urge it need of money on the part of the borrower is not in itself sufficient to place the lender in a position to dominate his will. (*Daniels, J. C. and Dalal, A. J. C.*) SHEIK MAHOMED MUZAFFAR ALI KHAN *v.* BHAWATI PRASAD SINGH. **66 I. C. 642 : 8 O. L. J. 358.**

——S. 16—*Essentials—Dominating positions—Unfair advantage.*

In order to avoid contract for undue influence the promisee must have used his dominating position to obtain an unfair advantage. (*Twomey, J.*) MG MYA *v.* MOOSAJI AHMED & Co. **24 I. C. 67: 7 Bur. L. T. 90.**

Fear of Punishment.

——S. 16—*Fear of punishment—Undue influence— Inference—Burden of proof—Circumstances dominating will.*

Where a *kabuliyat* registered three days after execution contained nothing in itself to show that it was a hard bargain or otherwise of an exacting nature, executant must prove that it was executed under undue influence. The fact that the prosecutor was ready to compound an offence of which the executant was charged with and to withdraw the charge if a *kabuliyat* was executed and the accused was ready to execute the *kabuliyat* on condition of the withdrawal of the charge would not necessarily lead to the inference that one of the party was in a position to dominate the will of the executant and that he used the position to obtain an unfair advantage over him. (*Knox, J.*) KALU *v.* PARBHU LAL. **28 I. C. 438.**

CONTRACT ACT (IX OF 1872), S. 16—Hard Terms.

——S. 16—*Fear of punishment—Undue influence.*

A mere fear of a punishment in a criminal case does not constitute undue influence and the money cannot be refunded unless the circumstances disclose pressure or undue influence. 42 C. 286 rel. on. (*Drake Brockman, J.C.*) WARISALI *v.* MAHOMED AZIMULLAH. **46 I. C 424.**

Fraud.

——S. 16—*Fraud 'very wide meaning.'*

The making of promises without the intention of keeping them is included under the head 'Fraud' in S. 16 though under the English rule it is not fraud merely to break promises or fail to perform obligations in future. (*Beaman, J.*) LAXMIBAI *v.* KESHAV ANNAJI. **33 I. C. 396 : 18 Bom. L. R. 134.**

Gift to Children.

——S. 16—*Gift to children.*

Where a father is old but capable of exercising independent and intelligent judgment, there is no presumption of undue influence which would invalidate a gift by him to his son. (*Jwala Prasad and Adami, JJ.*) MAHOMED YAKUB *v.* ABDUL KUDDUS. **68 I. C. 372 : 4 Pat. L. T. 17: 1923 P. 187.**

——S. 16—*Gift to children.*

There is no presumption of undue influence in India as well as in England in the case of a gift to a son, grandson or son-in-law during the donor's last illness. 33 C. 733 Foll. (*Ormond and Twomey, JJ.*) MAUNG PAI *v.* LUCY MOSS. **26 I. C. 39 : 8 Bur. L. T. 75 : 8 L. B. R. 235.**

Hard Terms.

——Ss. 16 and 74—*Hard terms—Interest—Compound interest—Court's power to give relief when money-lender not shown to have taken undue advantage of his position.*

It is difficult for a Court of justice to give relief on grounds of simple hardship in the absence of any evidence to show that the money-lender had unduly taken advantage of his position even when the transaction appeared to be undoubtedly improvident. The opinion of the Chief Court that the plaintiff in aredemption suit was bound by the mortgagor's contract to pay compound interest at 25 per cent. per annum was upheld. (*Mr. Ameer Ali,*) AZIZ KHAN *v.* DUNI CHAD.

101 P. R. 1918 : 23 C. W. N. 130 : 48 I. C. 933 : 165 P. W. R. 1918 (P. C.).

CONTRACT ACT (IX OF 1872), S. 16—Hard Terms.

———S. 16—*Hard terms—Undue influcnce—Proof—Excessive interest.*

In a case of a mortgage bond the Court should not infer undue influence from the mere fact that the rate of interest stipulated for is heavy and there is a proviso in the bond for capitalizing the interest in arrear. (*Fletcher and Smither, JJ.*) KACHHIRNNESSA CHOWDHURANI *v.* HEM CHARAN KASYA. 47 I. C. 11.

———Ss. 16 and 74—*Hard terms—Undue influence or fraud—Discretion of Court—Enforcement of contract.*

In the case of an agreement reduced to writing, a Court cannot, in the absence of fraud or undue influence, within the meaning of S. 16 refuse to enforce its terms however unreasonable they may be. Under such circumstances, the Court has no discretion. 28 A. 570. Ref. (*Benson and Miller, JJ.*) ABDUL KADIR BEARI *v.* BAGADE SHIV RAO. 15 I. C. 377 : (1912) M. W. N. 416.

High rate of interest.

———Ss. 16 and 19—*High rate of interest—Undue influence—Unconscionable contract.*

The power of the Court to interfere with contracts alleged to be unconscionable or brought about under undue influence is limited by Ss. 16 and 19 (*a*) and before any presumption can be drawn that the contract was such it must be shown that the lender was in a position to dominate the will of the borrower. Mere high rate of interest is not sufficient. (*Stanley, C. J. and Griffin, J.*) GANESA LAL *v.* MANDE LAL. 10 I. C. 249.

———Ss. 16 and 74—*High rate of interest—Unconscionable bargain.*

Where in a mortgage interest is stipulated at the rate of 24 per cent. in the absence of coercion or undue influence, there is no reason why the rate of interest stipulated should not be allowed. The law relating to hard and unconscionable transactions has been codified in the Contract Act. A Court cannot go outside the statutory provisions and follow some rules or supposed rules that have been applied in certain cases by the Courts of Equity in England. (*Fletcher and Cuming, JJ.*) HARICHANDRA NANDI *v.* KESHAB CHANDRA DAS. 54 I. C. 785.

———Ss. 16 and 74—*High rate of interest—Hardship—Mortgage.*

The fact that the borrower failed to realise what the rate of compound interest would work out in a few years or that he entered into an improvident bargain (unless it is an unconscionable one) would not entitle him to relief from a court of justice on the ground of hardship. It would be otherwise if the contract was brought about by undue influence. (*Chatterjee and Panton, JJ.*) HARENDRA KUMAR ROY *v.* DABENDRA KUMAR DAS. 54 I. C. 558.

———Ss. 16 and 74—*High rate of interest—Power of court to reduce.*

Though the rate of 25 per cent. compound interest on a mortgage is high, it is not within the power of the court to reduce the interest in the absence of proof of undue influence on the part of the mortgagee. 101 P. R. 1918 : 124 P.R. 1918 foll. (*Martineau and Campbell, JJ.*) KHOTA RAM *v.* NAWAZ. 6 Lah L. J. 238 : 4 Lah. 76 : 72 I. C. 765 : 1924 Lah. 21.

CONTRACT ACT (IX OF 1872), S. 16—High rate of interest.

———S. 16—*High rate of interest.*

There is nothing inherently wrong or oppressive in an agreement to pay compound interest. The rate of 1½ *per cent.* is not exhorbitant and the mere fact of its being high, would not be sufficient to raise a presumption of undue influence. 124 P. R. 1918 : 96 P. R. 1901, Ref. (*Martineau and Zafar Ali, JJ.*) CHIRANJI LAL *v.* DOST MAHOMED. 1923 Lah. 634.

———Ss. 16 and 74—*High rate of interest—Undue influence — Unconscionable bargain—Test.*

An agreement to pay interest at a stipulated rate does not become unconscionable though there is a stipulation to pay compound interest at the same rate on default in the payment of the simple interest. The lender may secure for himself compound interest after the borrower has for a considerable time neglected to pay the debt or the interest accruing due upon it which he has contracted to pay. (*Shadi Lal and Broadway, JJ.*) RAMDAS *v.* ABBAS. 56 I. C. 74 : 2 Lah. L. J. 393.

———S. 16—*High rate of interest--Interference by Courts.*

In a suit on contract expressly providing interest, the Court can interfere and reduce the rate of interest only if the exercise of undue influence is positively pleaded or proved or if the circumstances are such as to give rise to a presumption of undue influence. (*Johnstone and Chevis, JJ.*) JOTI PERSHAD *v.* HAKUM ALI. 73 P. L. R. 1914 : 22 I. C. 528 : 41 P. W. R. 1914.

———S. 16—*High rate of interest.*

A mere high rate of interest in a mortgage deed is not sufficient to show that undue influence was exercised. Compound interest at the rate of two per cent per month payable under a mortgage cannot therefore be reduced on this ground. (*Chevis, J.*) BIRJRAJ *v.* TIRKHA. 130 P. L. R. 1912 : 16 I. C. 119 : 100 P. W. R. 1912.

———Ss. 16 and 74—*High rate of interest—Mortgage—Onerous conditions in mortgage deed, if can be enforced against mortgagor.*

Inequitable and unconscionable conditions such as one providing for oppressive rate of interest, should not be enforced against the mortgagor or his successor in title. (*Rattigan and Shah Din, JJ.*) REHANA *v.* ZAMAN. 128 P. L. R. 1911 : 11. I. C. 519 : 246 P. W. R. 1911.

———S. 16—*High rate of interest — Relief against when can be given.*

Where a contract provides for a high rate of interest, courts cannot interfere to cut down the same unless there is satisfactory evidence that the stipulation as to high rate of interest was obtained by the exercise of undue influence. *Per White, C. J.*: The high rate of interest may be evidence not

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only of the unconscionable nature of the transaction but also of the fact that the will of the party who consented to pay the exorbitant rate of interest was dominated. (*White, C.J. and Sankaran Nair, J.*) KESAVULU NAIDU *v.* ARITHALAI AMMAL.
22 I. C. 769 : 36 Mad. 533.

——S. 16—*High rate of interest—Undue influence—Mortgage*

Neither prior indebtedness nor a high rate of interest would be sufficient to prove undue influence by the mortgagee on the mortgagor. There is undue influence if the debt constitutes a large amount and the money lender puts pressure on the debtor for its payment. (*Dalal, A. C. J.*) RAZA HUSAIN KHAN *v.* GANGAH PRASAD.
1C O. L. J. 390 : 77 I. C. 383 : 1924 Outh 118 (2).

——Ss. 16 and 74—*High rate of interest—Undue influence—Presumption—Mortgage.*

It is not a universal proposition of law that wherever there is a security for the debt a rate of interest over ten per cent. per annum is penal. Where a certain rate of interest is excessive or not is a question which must depend upon the particular circumstances of each case and a rate of interest at 15 per cent per annum compoundable every year is not sufficient to raise the presumption that undue influence was exerted by the mortgagee on the mortgagor in obtaining the mortgage, 42 C. 690; 18 A. L. J. 344 referred to. (*Simpson and Wazir Hasan, A. J. Cs.*) BABU BASANT RAI *v.* LALA KESHO RAM.
9 O. L. J. 612: 74 I C. 346 :1923 Oudh 139.

——Ss. 16—*High rate of interest—Power of court to reduce—Undue influence—Costs.*

In cases where there is no proof of undue influence a court has no power to reduce the contract rate of interest merely on the ground it is very high. 28 A. 570 P. C.; 20 O. C. 318 : 8 O. L. J. 418 ; 24 O. C. 313 foll. But the court disallowed costs on the ground that the interest decreed was high, (*Daniels, A. J. C.*) SHEIKH FAZAL AZIM *v.* LALA GIRDHARI LAL.
69 I. C. 657 : 9 O. L. J. 442 : 1923 Oudh 8 (1).

——Ss. 16 and 74—*High rate of interest—Penally—Relief against.*

The rate of interest, however exorbitant, cannot be abrogated unless the agreement was tainted by undue influence, fraud or misrepresentation such as are mentioned in the Contract Act. A solemn agreement duly and freely entered cannot be allowed to avoid the terms theroof which they agree to with their eyes open and with no restraint upon their freedom of will. Upon this principle, contracts for payments of exorbitant rates of interest, such as, 75 per cent. in some cases were upheld and were not allowed to be disturbed ; but in those cases the contracts were upheld against the party to the contract being allowed to trip up the terms of the contract when he agreed to them voluntarily and with his eyes open. (*Jwala Prasad and Ross, JJ.*) MAHADEO PRASAD *v.* BISSESSAR PRASAD.
2 Pat. 488 : 4 Pat. L. T. 707 : 74 I. C. 695 : 1924 P. 71.

——Ss. 16 and 74—*High rate of interest—Penally—Undue influence.*

CONTRACT ACT (IX OF 1872), S. 16—Long Indebtedness.

A high rate of interest cannot always be regarded objectionable as a penalty within S. 74. But when the contract provides a special condition for a change in the rate or mode of calculation of interest as a punishment for some default, that special condition is a penalty. A Court cannot attack a contract merely because the rate of interest is hard and unconscionable and a debtor cannot be relieved unless he shows that his case falls under S. 16. 44 C. 162 Dist. 29 C. 823 rel. on. (*Mullick and Jwala Prasad, JJ.*) NATHUNI SAHU *v.* BAIJNATH PRASAD 1 P. L. W. 300 : 39 I. C. 352 : 2 P. L J. 212.

Illiteracy.

——S. 16—*Illiteracy.*

Per Chatterjee, J :—If the contents of a written contract are not fully explained to or understood by a party who is an illiterate man, it is not binding on him. Reading audibly is not sufficient. (*D. Chatterjee and Walmsley, JJ.*) PARASULLA MALLICK *v.* CHANDRA KANTA DASS.
39 I. C. 177 : 21 C. W. N. 979.

Long Indebtedness.

——S. 16—*Long indebtedness—Undue influence—Creditor and debtor.*

A creditor cannot be said to be in a position to dominate the will of his debtor when he asks him to make some arrangement for the satisfaction of an existing debt. (*Stephen and Mullick, JJ.*) MOHENDRA LAL BISWAS *v.* AKHIL CHANDRA PAKRASHI. 20 I. C. 47 : 20 C. L. J. 424.

——S 16—*Long indebtedness—Agriculturist and money-lender—Balances struck from time to time—Compound interest charged—Undue influence if amounts to.*

In accounts between an agriculturist and a money-lender from the fact that accounts are taken and balance struck from time to time and bonds are taken for amounts found due each time, compound-interest being thus charged, no undue influence can be inferred. (*Johnstone and Chevis, JJ.*) RAMAR DIN *v.* HARABHAGAT.
48 P. L. R. 1914 : 22 I. C. 406 : 87 P. W. R. 1914.

——S. 16—*Long indebtedness — Mortgage deed—Consideration of previous interest and costs—Mortgagee, a money-lender—Presumption of undue influence.*

Undue influence may be presumed to be present where the consideration for a mortgage deed consists of previous interest and costs due to the mortgagee and the money lender was one with whom the mortgagor had a long course of dealing. (*Reid, C. J. and Kensington, J.*) MANSA RAM *v.* UMRA, 134 P. W. R. 1911 : 11 I. C. 198 : 213 P. L. R. 1911.

——S. 16—*Long indebtedness—Undue influence—Proof of exercise of.*

The mere fact that one of the parties to a contract was antecedently indebted to the other is not sufficient proof of undue influence. (*Prideaux, A. J. C.*) MAHADEO *v.* KISHANLAL.
68 I. C. 597 : 1922 Nag. 219.

CONTRACT ACT (IX OF 1872); S. 16—Mental Distress.

Mental Distress.

——S. 16—*Mental distress—Undue influence—Proof of.*

It is not enough to prove undue influence that a vendor of property was in a distressed state of mind and anxious to dispose of his property at the time of sale. (*Broadway and Harrison, JJ.*) INDER SINGH *v.* DYAL SINGH. **72 I. C. 1032 : 1924 Lah. 337.**

Position.

——S. 16—*Position—Undue influence.*

A creditor can ask his debtor to execute documents in a particular form and where a creditor writes to his debtor's servant to get his master's signature to such a form, no inference that undue influence was used can arise. (*Mears, C. J. and Banerjee, J.*) BHAGWAN BAKSH SINGH *v.* DAMODARJI JOSHI. **42 All. 230 : 59 I. C. 20 : 18 A. L. J. 100.**

——S. 16—*Position—Undue influence—Indebtedness—Effect of.*

The fact that one party to a contract stands in the relation of a debtor to the other is not by itself sufficient to prove undue influence. (*Prideaux, A, J. C.*) MAHADEO *v.* KISANLAL. **68 I C. 597 : 1922 Nag. 219.**

——Ss. 16 and 74—*Position—Karinda--Domination of will of his employer.*

A Karinda who a servant of very minor status cannot be presumed without very distinct evidence to be in a position to dominate the will of his employer. (*Lindsay, J. C. and Daniels, A. J. C.*) DALPAT SINGH *v.* AHMED SHAH. **48 I. C. 17 : 5 O. L. J. 579.**

——S. 16—*Position—Undue influence—Fiduciary relationship.*

When a Buddhist lady made a gift to her nephew who was also acting as her agent, *held*, that the relationship was not such a fiduciary one as would lead the Court to infer undue influence. (*Twomey and Ormond, JJ.*) KO SAN U *v.* MA THAUNG ME. **46 I. C. 738.**

Proof.

——S. 16—*Proof — Undue influence—Proof—Deed prejudicial to donor.*

A deed cannot be treated as void for undue influence merely because it is unreasonable or its terms are prejudicial to the donor. Undue influence is not a matter always capable of direct proof, and must depend in its very nature, on the conclusions to be drawn from the entire circumstances in which the transaction had its origin. Reference must be to the opportunities for and disposition to the exercise of influence on the one side and the result of its exercise as indicated by the merits of the transactions. (*Abdur Rahim and Oldfield, JJ.*) AMBA *v.* SHRINIVASA KAMATHI. **44 I. C. 483 : 7 L. W. 339.**

——Ss. 16 and 74—*Proof—Higher rate of interest on default—High rate of—Undue influence—Unconscionable bargain—Proof.*

To establish undue influence it must appear that there was something unconscionable either in the original dealing or in the subsequent stages of the transaction and as nothing unconscionable had been made to appear in this case and there was no plea of undue influence, the stipulated rate of interest could not be disallowed on the ground of undue influence. The stipulation to pay interest at the rate of 6 per cent. per month on default was in the nature of a penalty when the original rate was 3 per cent. (*Coutts and Das, JJ.*) HANUMAN BUX *v.* LAL NILMONI NATH SAHI DEO. **52 I. C. 335.**

CONTRACT ACT (IX OF 1872), S. 16—Unconscionable Bargain.

Unconscionable Bargain.

——S. 16—*Unconscionable bargain.*

Onus probandi lies on the person occupying a position to dominate the will of the other to show that he has not used it to obtain an unfair advantage over expectant heir with whom he deals. (*Lord Atkinson.*) LALA BALLA MAL *v.* AHAD SHAH. **35 M. L. J. 614 : 25 M. L T. 55 : 16 A, L. J, 905 : 23 C. W. N. 233 : 124 P. R. 1918 : 180 P. W. R, 1918 : 29 C. L, J. 165 : 1 U, P. L. R. (P.C) 25 : 48 I, C, 1 : 21 Bom. L. R. 558 (P. C.).**

——S. 16—*Unconscionable bargain.*

The mere fact that the rate of interest stipulated for in a mortgage-deed is high is not sufficient to justify the court in holding that the bargain was an unconscionable one. (*Banerji and Griffin, JJ.*) SRI CHAND *v.* NIADAR SINGH. **10 I. C. 14 : 8 A, L. J. 407.**

——Ss. 16 and 74—*Unconscionable bargain—Undue influence—Relief against penalty.*

Without any evidence of undue influence exercised or unfair means adopted by the lender, a rate of interest agreed to by the borrower cannot be disallowed as being penal unless it is so high as to shock the conscience of the Court. (*Fletcher and Huda, JJ.*) KASI NATH MITRA *v.* DHIKAM CHARAN MAITY. **45 I. C. 778.**

——Ss. 16 and 74—*Unconscionable bargain—Excessive interest, when penalty—Relief against.*

The Courts have ample power under the amended Contract Act to go behind hard and unconscionable bargains on the ground that where there is ample security, the exaction of excessive and usurious interests in itself raises a presumption of undue influence which it requires very little evidence to substantiate. Where there is no security, no rate of interest can be considered excessive. There can be no standard rate on personal loans. Under the amended S. 16, the question of hard and conscionable bargain can only be considered in reference to undue influence. Where the parties are reasonably on terms of equality, a judge cannot do better than adopt what they themselves have agreed upon. The *Dicta* of English Judges under the English Money Lenders' Act can safely be accepted in India since the Indians lean more in favour of the debtors. (*Holmwood and Chapman, JJ.*) ABDUL MAJID *v.* KSHERODE CHANDRA PAL. **42 Cal. 690 : 29 I. C. 843: 19 C. W. N, 809.**

——Ss. 16 and 74—*Unconscionable bargain—Extortionate and inequitable agreement not enforceable.*

Extortionate and inequitable agreements cannot be enforced. The actual value of the land in dispute at the time of agreement, determines if it is

CONTRACT ACT (IX OF 1872), S. 16—Unconscionable bargain

extortionate and inequitable. (*Smith and Martineau, JJ.*) INDAR SINGH v. MUNSHI LAL.
56 I. C. 272 : 1 Lah. 124.

——S. 16—*Unconscionable bargain.*

A Court of justice is not a blind and humble instrument of the creditor to plunder the debtor and a creditor who got securities at a very high rate of interest (30 per cent.) from an expectant heir, who was a very inefficient clerk in a Court, is guilty of undue influence and the bargain being unconscionable, the court cannot enforce it. 115 P R. 1908 F. (*Ried, C. J. and Kensington, J.*) NASIRDIN *v.* BALLA MUL.
64 P. W. R. 1914 : 25 I. C. 719 : 149 P. L. R. 1914.

——S. 16—*Unconscionable bargain—Champertous bargain—Relief against—Power of Court.*

Champertous bargains not having been held in the country contrary to public policy stand on the same footing as any other contract. The fact of a bargain being unconscionable is treated not in itself a sufficient ground for setting it aside but as one of the two elements which when combined will throw the burden of rebutting undue influence on the person seeking to profit by the contract (*Daniels, A. J. C.*) ABDUL KASIM BEG *v.* EHSANUL GHANI.
65 I. C. 129 : 24 O. C. 313.

——Ss. 16 and 74—*Unconscionable bargain—Relief against.*

Apart from the Usurious Loans Act, the mere fact that bargain is unconscionable in the sense that the rate of interest charged is excessive, is not in itself a sufficient ground for interference. (*Lindsay, J. C. and Daniels, A. J. C.*) DALPAT SINGH *v.* AHMAD SHAH.
48 I. C. 17 : 5 O. L. J. 579.

——S. 16—*Unconscionable bargain.*

The rate of interest entered in a deed of further charge was hard and unconscionable and the creditor was proved to have imposed his own terms and put pressure on the executants to impose a clog on redemption. *Held*, that the Court should allow a lower rate of interest on the deed of further charge. (*Kanhaiyalal. J.C.*) GAYADIN SINGH *v.* HAR KARAN SINGH.
22 I. C. 132 : 16 O. C. 267.

——S. 16—*Unconscionable bargain—Contract—Unconscionable—Undue influence.*

When the contract is *prima facie* unconscionable, the party seeking to enforce it must prove that the contract was not induced by undue influence. (*Chamier, C. J., Chapman and Jwala Prasad, JJ.*) BARA ESTATE, LTD. *v.* ANUP CHANDAR.
2 Pat. L. J. 663 : 2 Pat. L. W. 71 : 41 I. C. 337 : 1917 Pat. 342.

——S. 16—*Unconscionable terms—Landlord and tenant—Presumption of undue influence.*

When an unconscionable bargain is entered into by a tenant with the landlord, the Court may presume undue influence by the landlord, as he is in a position to exercise it. (*Roe and Jwala Prasad, JJ.*) KASHINATH RAY *v.* RAJA DURGA PRASAD SINGH.
1 Pat. L. J. 604 : 38 I. C. 235 : 2 Pat. L. W. 415.

CONTRACT ACT (IX OF 1872), S. 16—Urgency and Inadequacy.

Urgency and Inadequacy.

——S. 16—*Urgency and inadequacy of consideration.*

Urgent need of money on the part of the borrower does not of itself place the lender in a position to dominate his will within S. 16 *Held*, that the circumstances of the case whether taken singly or in combination were not by themselves sufficient to show that the consent of the borrowers was not freely given or to establish the defence that their consent was caused by undue influence (*Richardson and Huda, JJ.*) BEJOY SINGH DUDHIRIA *v.* KUMUDI KANTA TALUKDAR.
29 C. L. J. 488 : 49 I. C. 794 : 23 C. W. N. 690.

——S. 16—*Urgency—Undue influence—Position to dominate the will—Urgent need of money.*

The urgent need of money on the part of the borrower does not of itself place the lender in a position to dominate his will within the meaning of Section 16 of the Contract Act. But where the creditors are in a position to take advantage of the embarrasement of their debtors the bargain is unconscionable. (*Asutosh Mookerjee and Beachcroft, JJ.*) KHAGARAM DAS *v.* RAMASANKAR DAS.
42 Cal. 652 ; 21 C. L. J. 79 : 27 I. C. 815: 19 C. W. N. 775.

——Ss. 16 and 74—*Urgency—Unconscionable transaction.*

The mere fact that one party is in a position to dominate the will of another is not enough to avoid a contract between them in the absence of proof that the transaction is also unconscionable. Urgent need of the borrower does not place the lender in a position to dominate the will of the borrower within S. 16. Contract Act. 34 C. 150 Ref. A transaction may be unconscionable in many ways and a Court should see in each case whether according to its sense of justice it is really so. Excess of interest and charges may, if unexplained, of itself be evidence of a harsh and unconscionable bargain. (*Asutosh Mookerjee and Beachcroft, JJ.*) KALI PROSONNO BHATTACHARYYA *v.* PROTAP SINGH PATTAR.
18 I. C. 965 : 17 C. L. J. 221.

——S. 16—*Urgency.*

Urgent need of money on the part of the borrower does not of itself place the lender in a position to dominate his will. 34 Cal. 150, (P. C) (*Martineau and Zafar Ali, JJ.*) CHIRANJI LAL *v.* DOST MAHOMED.
1923 Lah. 634.

——S. 16—*Urgency—Undue influence.*

The mortgagor was in a condition of helplessness and he was compelled by circumstances to borrow money at Rs. 18-12 per cent. with a stipulation for compound interest on default of payment of the instalment. *Held*, that the mortgagee was in a position to dominate the will of the mortgagor and the stipulation for compound interest was unconscionable and that it should be relieved against. (*Shah Din, J.*) HARNAM *v.* RAJA RAM.
148 P. L. R. 1911 : 10 I. C. 37 : 226 P. W. R. 1911.

——S. 16—*Urgency and inadequacy—Undue influence—Unduly low price—Whether it alone points to.*

CONTRACT ACT (IX OF 1872), S. 16—Urgency and Inadequacy.

The mere fact that properties had to be parted for an unduly low price owing to pressure of necessity will not indicate undue influence. (*Sadasiva Ayar and Tyabji, JJ.*) SUNDERAMBAL AMMAL *v.* YOGAVANAGURUKKAL.

26 M. L. J. 315 : (1914) M. W. N. 286 : 23 I. C. 72 : 1 L. W. 276.

———S. 16— *Urgency — Undue influence— Evidence of.*

Urgent need of money on the part of the borrower is not by itself sufficient to prove undue influence or to show that the lender was in a position to dominate the will of the borrower. 34 C. 150 : 3 O. L: J. 418 Rel. (*Daniels, A. J. C.*) MT. BASHIRAM *v.* BISHAMBHAR NATH.

9 O L. J. 439 : 69 I. C. 667 : 1922 Oudh 268.

———S. 16—*Urgency—Necessity—Need of money.*

The mere fact of the existence of an urgent necessity on the part of the borrower is not sufficient to raise the presumption that undue influence was exercised. 34 C. 150: 8 O.C. 193 Rel. Nor does the existence of urgent need accompanied by a high rate of interest establish such a presumption. In ordinary circumstances, the more pressing the necessity, the higher the rate of interest, is likely to be, for, the borrowers have no time to make such inquiries as will ensure that they are borrowing at the cheapest rate obtainable. In order to establish undue influence, as defined by S. 16 of the Contract Act it must be shown that the lender took advantage of the necessity and of the position of the borrower and imposed unconscionable terms. (*Daniels and Lyle, A. J. C.*) MAHRAJ PRAG DIN *v.* BHAGWATI SAHAI.

66 I. C. 687 : 8 O. L. J. 418.

———S. 16—*Urgency—Undue influence—Position to dominate the will—Urgent need of money.*

Urgent need of money on the part of a borrower does not of itself place the lender in a position to dominate his will. (*Lindsay, J. C. and Kanhaiya Lal, A. J. C.*) MAHOMED SHERKHAN *v.* SWAMI DAYAL.

48 I. C 32 : 5 O. L. J. 572.

———S. 16—*Urgency and inadequacy—Undue influence—Low value of property—Litigation.*

The validity or otherwise of the sale of a claim under litigation should not be judged by the value of the property after it is decreed but by the circumstances at the date of sale. (*Kanhaiya Lal and Kendall, A. J. C.*) VISHNUNATHA KUAR *v.* LADLI PRASAD.

26 I. C. 26 : 1 O. L. J. 518.

———S. 16—*Urgency.*

Because the debtor was in need of money it does not follow that the creditor was in a position to dominate his will. (*Das and Adami, JJ.*) CHOTA NAGPUR BANKING ASSOCIATION LTD *v.* BHAGWAT BUX RAI.

69 I. C. 697 : 1 P. 263 : 1922 P. 491.

———Ss. 16 and 19 (a)—*Urgency.*

A reduction of the rate of interest agreed upon can only be obtained if the defendant proves undue influence. Mere urgent need of money by itself is no proof, that the obligee was in a position to dominate the will of the obliger under

CONTRACT ACT (IX OF 1872), S. 16—Youth or Sex.

S. 16, Contract Act. (*Pratt, J. C. and Hayward, A. J. C.*) NARAIN DAS *v.* H. W. D.' CRUZ.

10 I. C. 984 : 4 S. L. R. 276.

Who can plead.

———S. 16—*Who can plead.*

A man of mature age and of some intelligence and actively managing his affairs previous to a transaction, cannot resort to the plea of undue influence. (*Viscount Cave.*) LAL JAGDISH BAHADUR SINGH *v.* MAHABIR PRASAD SINGH.

42 All. 422 : 24 C. W. N. 529 : 47 I. A. 116 : 13 L. W. 19 : (1920) M. W. N. 342 : 7 O. L. J. 196 : 2 U P. L. R. (P. C.) 71 : 58 I. C. 845 : 23 O. C 54 (P. C.).

———S. 16—*Who can plead—Position of obligor's donee.*

It would not be open to a plaintiff to plead that a mortgage contract is bad for undue influence where he is only a donee from the mortgagor's widow. He is not entitled to the equities which existed in favour of the mortgagor. 20 I. C. 812, Ref (*Martineau and Zafar Ali, JJ*). CHIRANJI LAL *v.* DOST MAHOMED.

1923 Lah. 684.

———Ss. 16 and 74—*Who can plead — Undue influence—Unconscionable bargain—High rate of interest—Speculative purchaser.*

In the absence of proof of undue influence as defined in S. 19-A of the Act a contract cannot be avoided on the ground of its being an unconscionable bargain. A stipulation for 25 per cent. per annum compound interest in default of the payment of the principal, though high, is nothing unusual. A speculator who purchases the equity of redemption on the chance of getting redemption on easy terms cannot be allowed to set up the plea, as his vendor might have done, that the bargain was brought about by the exercise of undue influence. (*Agnew and Shadi Lal, JJ.*) AZIZ KHAN *v.* DUNICHAND.

305 P.L.R. 1913 : 20 I. C. 812 : 195 P. W. R. 1913.

———S. 16—*Who can plead—Undue influence—Petition writer.*

A petition writer could not be considered as a person not capable of understanding the legal consequences of his acts or the true import of a transaction or a person upon whom undue influence could be exercised. (*Kanhaiya Lal, and Kendall, A. J. C's.*) VISHNUNATH KUAR *v.* LADLI PRASAD.

26 I.C. 26 : 1 O.L.J. 518.

———S. 16—*Who can plead—Undue influence—Plea—Fair and reasonable bargain.*

Where the bargain is fair and reasonable the plea of undue influence collapses. (*Twomey, J.*) MG. MYA *v.* MOOSAJI AHMED & Co.

24 I. C. 67: 7 Bur. L. T. 90.

Youth or Sex.

———S. 16—*Youth or sex*—Pardhanashin *lady—Family settlement—Setting aside — Fraud — Absence of knowledge, effect of—Limitation.*

If a family settlement or the award of panchayat is impeached by a *pardanashin* lady on the ground that her consent was obtained by fraud, practiced by her kinsmen, whose interests conflicted with hers and who, therefore misled

CONTRACT ACT (IX OF 1872)—S. 16.
Youth or Sex.

her and the woman is shown to be illiterate and lacking in business capacity, the Court bas to consider not whether she knew what she was doing, had done or proposed to do but how her intention to act was produced, Fraud cannot be condoned unless there is full knowledge of the facts and the rights arising therefrom and the parties are at arm's length. (*Sir John Edge.*) SRI KRISHAN LAL *v.* KASHMIRO. **31 M. L. J. 362 : 20 C. W. N. 957 : (1916) 1 M. W. N. 433 : 34 I. C. 37 : 3 L. W. 528 : 14 A. L. J. 1236 (P. C.).**

——S. 16—*Youth or sex*—Pardanashin *lady*—*Mortgage of her house in favour of her husband's creditor—Undue influence—Onus on whom.*

A mortgage executed by a *pardanashin* lady in favour of her husband's creditor, wherein she derived no direct benefit herself, raises a strong presumption of undue influence in the absence of proof that she had been a free agent and duly informed of what she was about ; and the burden of this proof lies on him who claims against the lady. Undue influence might proceed from a third person. (*Jenkins, C. J and Chatterjee, J.*) BADIATANNESSA BIBI *v.* AMBICA CHARAN GHOSE, **23 I. C. 401: 18 C. W. N. 1133.**

——S. 16—*Youth or sex*—Pardanashin *lady—Gift in favour of priest.*

The donee, a priest, worked on the religious feelings of a lady when she was in mental distress and illness. The lady was not rich but made a substantial gift to the priest. *Held*, the transaction should be set aside. (*Chaudhuri, J.*) KAMINI DASSEE *v.* KRISHNA CHANDRA MUKHERJEE. **39 Cal. 933 : 16 I. C. 110 : 16 C. W. N. 649.**

——S. 16—*Youth or sex* — Pardanashin *lady—Mortgage deed—Procedure.*

When a deed is executed by a *pardanashin* lady or a boy of tender years, mere reading over is not sufficient. The language should be thoroughly explained especially when it is vague and ambiguous. (*Kanhaiya Lal and Kendall, A. J. C.*) MUHAMAD ALI *v.* RAMZAN ALI. **38 I. C. 454 : 3 O. L. J. 746.**

——S. 16—*Youth or sex—Undue influence—Old man—Gift of an agent.*

Undoubtedly, if a person of competent capacity signs a deed, it is to be presumed that he understood the instrument to which he has fixed his name. The principles of law applicable to a *pardanashin* woman will not be extended to a man on the ground that he happened to be old and not in robust health. But even in a case where an agent was the object of the bounty of his principal there is nothing to prevent this and if an agent can clearly show that a gift was made in his favour by a donor who was in a position to exercise a free and unfettered judgment with full knowledge of what he was doing, the gift will be upheld. (*Daniels and Dalal, A. J. C.*) MIRZA YAQUB BEG *v.* MIRZA RASUL BEG. **10 O. L. J. 86 : 74 I. C. 517 : 1923 Oudh 254.**

——S. 16—*Youth or sex*—Pardanashin *Lady—Deed of gift—Presumption of undue influence—Burden of proof of* bona fides.

CONTRACT ACT (IX OF 1872), S. 17.

In cases of gifts, undue influence will be presumed in transactions with *pardanashin* women and a knowledge of letters and of figures and a capacity of dealing at first hand to some extent with her tenants will not convert a *pardanashin* lady into a woman of the world so as to rebut the presumption. The burden of proving *bona fides* of the transaction lies on the party affirming it. (*Kanhaiya Lal and Kendall, A. J. C.*) NISAR HUSSAIN *v.* ASHRAF-UN-NISSA. **35 I. C. 395.**

——S. 17—*Fraud—Plea of—Allegation and proof—Particulars.*

To prove a case of fraud, it must be proved that representations were made which were false to the knowledge of the party making them or were such that the party making them could have no reasonable belief that they were true that they were made for the purpose of being acted upon and believes, that they were believed and acted upon and caused the actual damage for which relief is claimed. (*Mears, C. J. and Piggott, J.*) GAURI SHANKER *v.* MANKI KUNWAR. **45 A. 624 : 21 A. L. J. 571 : L. R 4 A 464 : 74 I. C. 466 : 1924 A. 17.**

——S. 17—*Fraud avoidance of—Contract—Performance—Effect.*

If a contract is obtained by fraud or cheating, it is voidable at the instance of the person defrauded or cheated. But where a performance has been obtained by fraud or cheating, the contract cannot be avoided. (*Kanga, J.*) FAZAL *v.* MANGALDAS. **23 Bom L. R. 1144 : 66 I. C. 726: 46 Bom. 489 : 1922 Bom. 303.**

——S. 17—*Fraud—Plea of.*

A plea of fraud is not sustainable when there is no misleading on any question of fact or law. (*Stephen and Mullick, JJ.*) MOHENDRA LAL BISWAS *v.* AKHIL CHANDRA PAKRASHI. **20 I. C. 47 (1) : 20 C. L. J. 424.**

——S. 17—*Fraud—Contract of service—Concealment of contract forbidding service elsewhere.*

One of the conditions of the plaintiff's employment under the deft. firm was that plff. was not to engage in any business of his own or join any other firm so long as he remained in the service of the deft. firm. Without the knowledge of the deft. firm plaintiff joined another in business transactions and induced the deft. firm to enter into contracts with that third person without disclosing his association with him. *Held* that the contracts were voidable at the instance of the deft. firm they having been procured as a result of the fraud practised by plff. and by his concealment of the fact that he was entering into contracts in contravention of the terms of his agreement with the deft. firm. (*Chevis and Campbell, JJ.*) SEDH MAL *v.* JOTI PRASAD. **66 I. C. 441**

——Ss. 17 and 74—*Excessive interest—Relief—Grounds for.*

The mere fact that the rate of interest stipulated in a mortgage deed is excessive is no ground for relief, unless it is shown that the lender was in a position to dominate the will of the borrower. (*Shadi Lal, J.*) ALLAH DIN *v.* FATEH DIN. **27 P. L. R. 1918 : 31 P. R. 1918 : 45 I. C. 101 : 54 P. W. R. 1918.**

CONTRACT ACT (IX OF 1872) S. 17.

——Ss. 17 and 178—*Fraud of purchaser—Vendor's lien—Nature of.*

Where a person orders and obtains possession of goods with the deliberate intention of not paying for them, he commits fraud. He must then be considered to be the agent of the vendor and his possession as that of the vendor. If vendee tries to dispose of the goods before payment by transfer of the invoices to a third party's name, the third party gets no title to the goods. (*Shah Din and Leslie Jones, JJ.*) ALLAHABAD BANK, DELHI *v.* FIRM OF MADAN MOHAN KISHAN LAL.
2 P. W. R. 1917 : 14 P. L. R. 1917 , 39 I. C. 169.

——S. 17—*Fraud—What is.*

Mere failure to fulfil a promise is not fraud unless from the outset the promisee did not intend to fulfil it. (*Maung Kin, J.*) MAUNG SHWE *v.* MAUNG CHET. 42 I. C. 113 (L. B.).

——S. 17—*Evidence Act, S.* 102.

A plaintiff who relies upon fraud must both plead and prove it, and must give the particulars of the alleged fraud and can succeed upon proof of the fraud as alleged and not of any other kind of fraud. (*Moore, J.*) MG LUGALE *v.* VENKATACHELLA CHETTY. 10 I. C. 922 : 4 Bur. L. T. 118.

——S. 17—*Wrong belief—Does not vitiate contract.*

That a party misreads, the acceptance memo. And believed it to besomething different from what it was, would not vitiate the contract. (*Kincaid, J. C. and Madgavkar, A. J. C.*) SODAWATER WALA *v.* VOLKART BROTHERS. 1923 Sind 25.

——S. 17—*Decree obtained by fraud—Avoidance of.*

A Court should not declare a decree a nullity on the ground of fraud unless it can define in clear terms the fraudulent acts by which the decree was obtained. But it will not take fraud in the narrow sense of S. 17 of the Contract Act. (*Hayward, J. C. and Crouch, A. J. C.*) SHIHOMAL *v.* MANAGER, ENCUMBERED ESTATES IN SIND. 25 I. C. 789 : 8 S. L. R. 3.

——S. 18—*Misrepresentation—Meaning.*

Where a vendor of lease-hold property is informed by the vendee of the object of his purchase and knows that the lease contains covenants which will defeat that object and yet remains silent, such silence will in equity be equivalent to misrepresentation. Flight *v.* Barton, 40 Eng. Rep. 108 Rel. on. (*Holmwood and Chapman, JJ.*) JOGENDRA NATH *v.* CHANDRA KUMAR. 24 I. C. 193 : 42 Cal. 28.

——Ss. 18 and 17—*Failure to make enquiry—Presumption.*

Failure to make such inquiries as an ordinary prudent man would make, may under certain circumstances be evidence that the person to whom misrepresentation was made was not actually deceived. (*Kennedy, J.C. Raymond and Kemp, A.J.C.*) MT. HURI *v.* ROSHEN KHUDABUX. 71 I. C. 161 : 16 S. L. R. 112 : 1923 Sind. 5 (F. B.)

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——S. 18 (2)—*Misrepresentation—How disproved—Distinction between Innkeeper and Boarding House Keeper—Principal test of tenancy.*

There is no misrepresentation, if there are means of discovering truth with ordinary diligence. A boarding house keeper receives boarders by special arrangement and makes such bargain as he chooses as to the price to be paid. Exclusive possession is the principal test of tenancy and in such case distraint is permissible. (*Jones, J.*) DONCA A. L. *v.* A. H. S. TEED. 112 P. L. R. 1916 : 36 I.C. 34 : 139 P. W. R. 1916.

——S. 19—*Fraud — Mistake—Transaction entered into by—Effect.*

A transaction entered into under a mistaken impression as to ownership of property or brought about by deceit, can be set aside. (*Piggott, J.*) LACHMI KUNWAR *v.* DURGA KUNWAR. 46 I. C, 566 : 40 All. 619 : 16 A, L. J. 646.

——S. 19—*Voidable contract—Right to avoid—Rights of representative.*

The right to avoid a transfer or a conveyance executed under undue influence or fraud is not a mere personal right but can be exercised by the heirs or legal representatives of the person unduly influenced or defrauded unless the person has indicated his election to stand by the transaction. (*Scott, C. J. and Hayward, J.*) GOVIND *v.* SAWITRI RAMA THOSAR. 43 Bom. 173 : 47 I. C. 883 : 20 B. L. R. 911.

——Ss. 19 and 19 A.—*Fraud—'Undue Influence.'*

Though 'Undue influence' and 'fraud' are separately dealt with in Contract Act. 'Undue influence' is a kind of 'fraud' in equity and invites the same relief as fraud, where a transaction is sought to be set aside on account of its presence therein. (*Scott, C.J. and Shah, J.*) NARAYANBHAT BHIMBHAT JOSHI *v.* AKKUBAI MANOHARBHAT JOSHI. 33 I. C. 576 : 18 Bom. L. R. 27.

——S. 19—*Misrepresentation—Contract when voidable.*

A misrepresentation should in fact materially induce the contract in order to give a right of avoidance. (*Sanderson, C.J., Mookerjee and Fletcher, JJ.*) G. M. BIBLA & CO. *v.* JOHUR MULL PREMSUKH. 55 I. C. 817 : 31 C. L. J. 158.

——S. 19—*Voidable contract—Stranger if can avoid—(Obiter).*

If a transaction which is voidable is admitted by the person who is entitled to avoid it, it cannot be questioned by a third party. (*Sharfuddin and Coxe, JJ.*) SAFAR ALI *v.* MOHESH LAL. 34 I. C. 956 : 23 C. L. J. 122.

——S. 19—*Parties in* pari delicto—*Effect.*

The section does not apply where the object of the agreement was illegal to the knowledge of both parties at the time it was made and both parties are in *pari delicto.* (*Woodroffe and Carnduff, JJ.*) NATHU KHAN *v.* SEWAK KOERI. 9 I C. 161: 15 C. W. N. 408.

——S. 19—*Partnership—Fraud of one partner—Rights of partner defrauded—Liability for loss.*

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If a person is induced by fraud to become a partner, the Court will rescind the contract and order the person defrauded to be reimbursed with the amount he might have paid owing to the fraudulent misrepresentation. (*Scott-Smith and Leslie Jones, JJ.*) GOLA SINGH *v.* HAKAM RAI.
3 Lah L. J. 306: 3 U. P. L. R. (Lah) 26: 60 I. C. 709 : 23 P. W. R. 1921.

——S. 19—*Suit on acknowledgment—Intimidation—Effect of.*

A person is not liable on an acknowledgment, where the money has been paid and his signature to the acknowledgment had been obtained by intimidation. (*Wilberforce, J.*) BISRAM *v.* KEWALRAM. 59 I. C. 781 : 24 P. W. R. 1921.

——S. 19—*Exception— Voidable contract—Ratification.*

A contract voidable on the ground of fraud or misrepresentation can be ratified by the person at whose option it is voidable. A contract cannot be avoided for fraud or misrepresentation if he had the means of discovering the truth about the matter. (*Shadi Lal, J.*) HAKIM RAI & SON *v.* KHARAK SINGH. 46 I. C. 21 : 42 P. R. 1918.

——S. 19—*Repudiation—When allowed.*

A person agreeing to lease a house after seeing a plan of it and finding that the house is not according to plan when he comes to occupy it, is justified in repudiating the contract. He can repudiate the contract as soon as misrepresentation is brought to knowledge. The exception to Sec. 19 applies when the contracting party might with due diligence have discovered the misrepresentation before he entered into the contract. (*Chevis, J.*) ALLAH BAKSH-KHAN *v.* R. E. BARROW. 38 I. C. 500 : 43 P. W. R. 1917.

——Ss. 19 and 23—*Fraud—Contract—Avoidance.*

The fraud referred to in Ss. 19 and 23 is fraud as defined in S. 17 and does not include the infringement of a condition in a contract to transfer a tenancy, requiring previous consent of the Financial Commissioner to the transfer of a tenancy. The Civil Court is not prevented from enforcing a contract *inter partes*, which is in itself in no way illegal or fraudulent *qua* those parties merely because a third person may have a right to refuse to give effect to that contract. (*Reid, C.J. and Robertson, J.*) HUSSAIN KHAN *v.* JAHAN KHAN. 48 P. L. R. 1913: 36 P. W. R. 1913 : 18 I. C. 5 : 58 P. R. 1913.

——S. 19—*Dishonest concealment of identity of contracting party—Agent secretly procuring a running contract with his principal—Contract voidable.*

When fraud has to be used in inducing a contract as to the contracting party and his identity, the contract is repudiable by the party defrauded. A contract is voidable where the agent dishonestly conceals the fact that he intends to cause wrongful gain to himself from the principal. (*Schwabe, C.J. and Wallace, J.*) ACHUTHA NAIDU *v.* MESSRS. OAKLEY BOWDEN. 16 L. W. 345: 43 M. L. J. 444 : 69 I. C. 927 : 1922 M. W. N. 576 : 45 M. 1005: 31 M. L. T. 487 : 1922 M. 497.

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——S. 19—*Finding as to—Misrepresentation—Inducing consent—Second Appeal.*

Illustration (*b*) of S. 19 is not exhaustive of the class of cases which could come under the explanation. A finding on the question whether a misrepresentation induced the consent of the party who relied on it, is one of fact and the High Court will not interfere with it in Second Appeal, though the finding may not be quite satisfactory. (*Sadasiva Aiyar and Spencer, JJ.*) PANNIKATTU RAGHAVA MANNIDIYAN *v.* PARAKKAL PATHAYAPURA VEETIL SIVASANKARA MENON. 13 L. W. 525 : 29 M. L. T. 230 : 62 I. C. 764: 1921 M. W. N. 340.

——S. 19—*Misrepresentation —Nature of—Fact—Opinion—When avoids contract.*

To decide whether a statement is a substantive part of a contract or a mere representation, it is essential that the statement should be descriptive of the contract in order to make it a term of the contract. Where one of the parties to a contract says: 'I am well known to the National Bank in your city' it is not a statement of fact but only his own opinion, as to the state of his credit though it may be false. Such a statement is not one of fact and even if false, does not avoid the contract under S. 19 (*Sadasiva Aiyar and Napier, JJ.*) HOPE PREDHOME & Co. *v.* EARNEST LOUIS. 29 I. C. 575.

——Ss. 19 and 14—*Fraud, when affects contract.*

S. 19 read with S. 14 deals with fraud so far as it affects the free will of parties at the time of entering the contracland theexplanation to the section must not be taken as meaning that and subsequent fraud will not affect the validity of the original contract. (*Sadasiva Aiyar and Spencer, JJ.*) CHITTURI SURAYYA *v.* BODURAMAYYA. 1915 M. W. N. 150 : 28 I. C. 57 : 17 M. L. T. 160.

——Ss. 19 and 65— *Mortgage brought about by fraud—Rescission.*

A contract brought about by fraud is voidable at the option of the party defrauded under S. 19. A rescinded contract becomes a void contract and the person who has received any advantage under it, is bound to restore it to the other party. (*Sadasiva Aiyar and Hannay, JJ.*) KIZHAKOT PARATHAT MARIZAMMA *v.* NANDANASSERI ILLATH GANAPATHI MUSSAD. 27 I. C. 130.

——S. 19 A.—*Nature of pleadings in the case of undue influence.*

Undue influence must be pleaded with precision and unless a case is made out in the pleadings, the Court will not investigate it. (*Das and Adami, JJ.*) INDARCHAND *v.* BUDIADHAR PANDE. 2 Pat. L. T. 111 : 5 Pat L. J. 744 : 60 I. C. 282 : 1921 Pat. 107.

——S. 19—*False personation—Suit for damages by buyer against identifier for fraudulent representation.*

A plaintiff in order to succeed in an action for damages for fraudulent representation against an attestor and identifying witness of a sale deed purporting to be executed by a person who was in fact personated by another, must prove that the attestor represented the person who actually

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executed the sale deed to be the owner of the property knowing such representation to be false or without belief in its truth or recklessly without caring whether it was true or false and that the plaintiff was induced to act and did in fact act, in reliance on the said representation. If any one of these matters is not found, no decree for damages can be given. (*Twomey, J.*) HAJI SADULLA *v.* JAVAHIR KARIM BUX. 22 I. C. 818.

———S. 20—*Caveat Emptor.*

The plaintiff, in a suit for rescission of a contract on the ground that the defendant by forging another's name and personating as the real owner induced the plaintiff to enter into the contract, cannot succeed on the principle of *Caveat Emptor* as the real owner of the property with whom plaintiff was believing himself to be contracting never joined him in the contract. The contract can be avoided under S. 20, Contract Act. (*Scott, C. J. and Heaton, J.*) ISMAIL ALLARAKHIA *v.* DATTATREYA R. GANDHI. 40 Bom. 638 : 34 I. C. 515 : 18 Bom. L. R. 201.

———S. 20—*Mistake.*

Where both the vendor and vendee of land did not know that the land had already become the subject of proceedings under the Calcutta Inprovement Act, and as such might any day come under the Act there is a mistake as to a matter of fact essential to the agreement and the agreement is void. (*Sanderson, C. J. and Richardson, J.*) NURSING DASS KOTHARI *v.* CHUTTOO LALL MISSER. 50 Cal. 615 : 74 I. C. 996 : 27 C. W. N. 639 : 1923 Cal. 641.

———S. 20—*Scope of—Doctrine of frustration.*

S. 20 deals with the question of common mistake; perhaps the general principle of frustration may govern such cases. (*Sanderson, C. J. and Richardson, J.*) GOURI SHANKAR AGARWALLA *v.* MOITRA. 70 I. C. 379 : 26 C. W. N. 573.

———S. 20—*Compromise under mistake of fact—Setting aside.*

Where a plaintiff and defendant compromised what both of them believed to be a pending litigation while it had been as a matter of fact decided in favour of the plaintiff. *Held*, that the plaintiff was entitled to a declaration that the puttah and the *Kabuliyat* executed in pursuance of the compromise were inoperative. 6 Cal. 687 Foll. (*Teunon and Walmsley, JJ.*) ANNADA CHANDRA DAS *v.* KALI DAS BEPARI. 51 I. C. 955 : 29 C. L. J. 526.

———Ss. 20 and 65—*Mutual mistake—Effect.*

Plaintiffs agreed to take a lease of the *Mogoli Brahmattor* rights of defendants for working the mines thereunder, both the parties believing at time of agreement that *Brahmattor* rights included mineral rights, and it was subsequently discovered that they carried no such rights ; *held*, that the agreement was void under S. 20 as soon as the mistake was discovered and that the plaintiffs were entitled to a refund of the money paid under the agreement. (*Teunon and Sheepshanks, JJ.*) RAMACHANDRA MISRA *v.* GANESH CHANDRA GOPADHYA. 25 C. L. J. 459 : 39 I. C. 78 : 21 C. W. N. 404.

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———Ss. 20, 21 and 22.

A mistaken assumption which has reference to the motive which induced the execution of a document is not 'a mistake as to his rights' which would justify a Court in passing a decree for its cancellation. (*Abdur Rahim and Oldfield, JJ.*) AIYER *v.* SUBRAMANIA AIYAR. 40 I. C. 205 : 32 M.L.J. 439 : 6 L.W. 22.

———Ss. 20 and 65—*Mistake—Effect on contract.*

When in an agreement of sale both parties are under a mistake as to an important fact, S. 20 would govern the case and render the agreement void and the seller would in such a case be liable under S 65 to make compensation. (*Lindsay, J. C.*) FATEH CHAND *v.* LACHMI NARAIN. 57 I. C. 481 : 7 O. L. J. 312.

———S. 20—*Arbitration—Reference—Mistake of fact—Effect of.*

Where both parties to a reference to arbitration are under a mistake of fact as to something which is not essential to the agreement, the agreement, of reference is not void and cannot bo set aside. (*Pratt, J. C. and Fawcett, A. J. C.*) GOVERDHANDAS *v.* RAMCHAND MANJIMAL. 47 I. C. 783 : 12 S. L. R. 41.

———Ss. 21 and 72—*Mistake of law—Effect of.*

As the agreements entered into by Liquidator with the defendants were contracts within the Contract Act. they could not be avoided under S. 21 of Act for any mistake of law; and accordingly, the payments made to the defendants were payments under a binding contract and could not, therefore, be recovered under S. 72; S. 65 of the Indian Contract Act did not apply to the payments in question as they were made to the defendants under valid agreements, *viz.*, those with the liquidator and not under void ones. (*Heaton and Marten, JJ.*) WOLF & SONS *v.* DADIBA KHIMJI & Co. 21 Bom. L. R. 986 : 58 I. C. 465 : 44 Bom. 631.

———S. 21—*Mistake of parties—Fact or law.*

The mistake of parties about the right of the defendant municipality to acquire land under S. 92. Bom. Dt. Municipal Act, is one of fact and not of law not falling under S. 21 of the Contract Act. (*Fawcett, J. C. and Raymond, A. J. C.*) HANUMAL HARPALMAL *v.* COMMITTEE OF MANAGMENT, HYDERABAD. 58 I. C. 591: 14 S. L. R. 22.

———S. 22—*Mistake of fact—Effect.*

A contract entered into under a mistake of fact is only voidable and is binding until it is avoided (*Banerji, J.*) KHUDA BUX *v.* FATEHCHAND. 10 I. C. 343.

———S. 23.

Acts defeating statute.
Acts prohibited by statute.
Agreement not to adopt.
Agreement to prevent bidding.
Bribe for perjury.
Bribe to public officers.
Champerty and maintenance.
Collateral Contract.
Excise contract.

CONTRACT ACT (IX OF 1872), S. 23.—Acts defeating statute.

Indemnifying surety.
Marriage contract.
Partial illegality.
Parties to illegal acts.
Prostitution.
Religious purposes.
Restraint of trade.
Slavery.
Stifling prosecution.
Unlawful object.
Miscellaneous.

Acts Defeating statute.

——S. 23—*Act defeating statute—Protection of courts—Exclusion from.*

No man can exclude himself from the protection of Courts by a contract entered into with another. (*Sir Lawrence Jenkins, J.*) REHMAT UN NISSA BEGUM *v.* PRICE.

42 Bom 380 : 22 C. W. N. 601 : 16 A. L. J. 513: 27 C. L. J 623 : 5 P. L. W. 25 : 23 M. L. T. 400: 8 L. W. 53 : 20 Bom. L. R. 714 : 35 M. L. J. 262 : 12 Bur. L. T. 91 : 45 I. C. 568 : 45 I. A. 61. (P. C.).

——Ss. 23 and 73—*Acts defeating statute—Contract—Sale of Mahal—Agreement to surrender Sir lands.*

An agreement to surrender *Sir* lands on a sale of a mahal is contrary to the policy of North-West Provinces Tenancy Act, and there is no rights to damages for breach of such contract. The arrangement cannot be enforced in Courts. (*Sir John Edge.*) MOTI CHAND *v.* IKRAM ULLAH KHAN.

15 A. L. J. 150 : 5 L. W. 388 : 21 M. L. T. 267 : 32 M. L. J. 383 : 21 C. W. N. 616 : 19 Bom. L. R. 433 : 26 C. L. J. 24 : (1917) M. W. N. 453 : 44 I. A. 54 : 39 I. C. 454 : 39 All. 173. (P. C.):

——S. 23—*Acts defeating statute—Clause tending to defeat the provisions of the Agra Tenancy Act—Enforceability.*

A sale deed which tends to defeat the provisions of the Agra Tenancy Act on the subject of the creation of exproprietary tenancies is void and unenforceable. Where the defendants, the executant of the deed, expressly stipulated that they would surrender actual possession and enjoyment of the *Sir* and *Khudkasht* lands in respect of which they became by statute exproprietary tenants from the date of the execution of the deed of sale, such a stipulation is void as being contrary to public policy. Any stipulation by way of penalty, inserted in a sale deed in order to enforce the fulfilment of such a covenant on the part of the vendor is also void and unenforceable. Where the entire clause stipulating for the surrender of the exproprietary tenure and for a penalty in the event of the failure of the vendor to make such a surrender can be wiped out of the document without interfering in any way with the other stipulations, the latter can be enforced. (*Piggott and Walsh, JJ.*) BITHAL DAS *v.* RAGHUNATH DAS. L. R. 3 A. 464 (Rev). 1922 All. 430.

——S. 23—*Act defeating statute — Exproprietory rights — Sale of sir—Agreement to relinquish—Validity of.*

CONTRACT ACT (IX OF 1872), S. 23—Acts defeating statute.

On a sale of Zemindari, the vendor agreed to relinquish ex-proprietory rights on the vendee paying a certain allowance which was to be a charge on the property sold. The allowance fell into arrears. *Held*, the arrangement was a mere device to get round the Rent Act, that the contract was void and consequently neither a personal decree nor a decree against the property in the hands of the transferee could be given. (*Tudball and Rafiquc, JJ.*) RATAN DEI *v.* DURGA SHANKAR. 39 All. 645 : 41 I. C. 892: 15 A. L. J. 656.

——S. 23—*Act defeating statute—Transfer—Effect.*

Contract though unenforceable will not vitiate a transfer merely because the contract is unenforceable. (*Richards, C. J. and Rafique, J.*) BAJRANGI LAL *v.* GHURA RAI.

38 All. 232 : 32 I. C. 913 : 14 A. L. J. 270.

——S. 23—*Act defeating statute—Agreement not to partition properties sold—Validity.*

A condition in a sale deed that the vendees would not partition the shares purchased without the consent of the vendors is not opposed to public policy as no right is absolutely given up. The vendor merely is entitled to recover damages for the breach of the contract. (*Tudball, JJ.*) KUER SEN *v.* SUKH KHO. 27 I. C. 503 : 13 A. L. J. 6.

——S. 23—*Act defeating statute—Mortgage—Prohibited by law—Mortgagee not entitled to possession or money.*

Transfer of occupancy holdings is prohibited by express provisions of the law and consequently neither possession nor his money can be recovered by the usufructuary mortgagee. 33 A. 779 Dist. (*Piggott, J.*) RAJWANTI KUNWARI *v.* DOMAN SINGH. 25 I. C. 182.

——S. 23—*Acts defeating statute—Landlord and tenant—Payment exceeding rent.*

A tenant agreed to pay to his Zemindar certain (*Rasum Zemindari*) dues over and above his usual rent. *Held* that the contract was against public policy and unenforceable as its intention was to defeat the object of the provisions of Ss. 56 and 86 of the U. P. Land Revenue Act and that the dues were not rent. (*Rafique and Piggott, JJ.*) SISRAM *v.* ASHGAR ALI. 35 All. 19 : 16 I. C. 422 : 10 A. L. J. 416.

——Ss. 23 and 24—*Act defeating statute—Mortgage of occupancy holding.*

A mortgagee of occupancy holding cannot recover money paid to mortgagor as an usufructuary mortgage of such a holding is illegal. (*Chamier, J.*) KANHAI *v.* TILAK. 16 I. C. 42.

——S. 23—*Acts defeating statute—Contract Act.*

If the contracts for reconveyance or pre-emption in respect of a land offered the rule against perpetuities by having no time or a remote time fixed for their performance they are against public policy and void. (*Macleod, C. J. and Kanga, J.*) DINKAR RAO *v.* NARAYAN. 24 Bom. L. R. 449 : 1922 B. 84.

——S. 23—*Act defeating statute.*

A contract to prepare by printing and to supply copies of a picture produced in England is not

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unlawful or against public policy. (*Macleod, C. J. and Crump, J.*) VASUDEO *v.* ANUPRAM.
44 Bom. 720 : 57 I. C. 592 : 22 Bom. L. R. 808.

——S 23—*Act defeating statute — Public policy—Speculation in Gold—Notification.*

Plaintiff contracted on behalf of the defendant to purchase sovereigns for Vaishakh and Jeth Vaidas of 1918. The defendant failed to make payment and the plaintiff sued the defendant for damage occasioned by breach of the contract. The defendant contended *inter alia* that the contracts were opposed to public policy and therefore void. *Held* that the contracts were not bad as contrary to public policy simply because they contravened the provisions of a subsequent notification of the Government of India under the Defence of India Act. Per *Hayward J. Dicta* of English judges on public policy should be disregarded by judges in India. Public policy should not be interpreted under S. 23 of the Contract Act as comprehending all the political policies from time to time of the Government of India. (*Scott, C J. and Hayward, J.*) SHRINIVASA DAS *v.* RAMACHANDRA.
44 Bom. 6 : 52 I. C. 546 : 21 Bom. L. R. 788.

——S. 23—*Act defeating statutes or rules—Breach of Government servants conduct rules—Effect of.*

Government servant's conduct rules are rules of conduct and not a statutory prohibition. Hence a disregard of these does not taint Government servant's transactions with immorality. or illegality. (*Scott, C. J. and Shaw, J.*) RAM KRISHNA TRIMBAK *v.* NARAIN SHIVRAO ARAS. **40 Bom. 126 : 31 I. C. 301 : 17 Bom. L. R. 955.**

——S. 23—*Acts defeating statute—Agreement with licensee to share profits is not void.*

Agreement to share profits with the forest licensee though not allowed by the terms of license, is not void. (*Scott, C. J. and Shah, J.*) NAZAR ALI SAYAD IMAM *v.* BABAMIYA DUREYATIMSHA.
40 Bom. 64 : 30 I. C. 913 : 17 Bom. L. R. 701.

——S. 23—*Act defeating statute—Sale with a condition.*

An option by purchaser to resell the property to the vendor or certain terms and conditions is valid. The purchaser is bound to fulfil if the conditions are complied with strictly. (*Fletcher and Tenuon, JJ.*) DHARANIDHAR MUKERJEE *v.* RAKHAL DAS BHATTACHARJEE. **35 I. C. 631.**

——S. 23—*Act defeating statute—T. P. Act, S. 6 (h)—Insolvent—Transfer to plaintiff of Hatchita in favour of the insolvent—Hatchita executed by insolvent debtor to plaintiff, suit upon—Consideration—Illegality—Transferability.*

A *Hatchita* in favour of certain insolvents by their debtors was transferred to plaintiff with the consent of the latter and the latter also executed a *Hatchita* in favour of the plaintiff. The adjudication and vesting order were subsequently discharged and the plaintiff brought a suit on the *Hatchita* executed by the debtors. *Held* that the consideration for the execution of the *Hatchita* by the debtors was that they were relieved from a debt which they believed to be due to the insolvents and the taker put it out of their power to sue on the debt and hence the contract was such that if permitted, it would defeat the provisions of the Insolvency Act and so was void under S. 23 of the Contract Act as the contract was made for an illegal purpose under S. 6 (*h*) of the Transfer of Property Act and that the defect could not be cured by the setting aside of the insolvency proceedings. (*Stephen and Chatterjee, JJ.*) CHINNIRAM BAKLA *v.* SHIBENDRA KUNWAR. **14 I. C. 519 : 16 C. L. J. 162.**

——S. 23—*Acts defeating statute—One of several judgment-debtors getting assignment of decree.*

One of several judgment-debtors got an assignment of the decree in the name of his agent who was to be paid commission for executing the same against the remaining judgment-debtors. The agent realized the moneys but refused to pay them to his principal. In a suit by principal for the money *held* that the suit is not barred by S. 23. (*Abdur Rahim and Oldfield, JJ.*) PALANIAPPA CHETTIAR *v.* CHOKKALINGA CHETTIAR.
44 Mad. 334: 12 L. W. 609 : (1920) M. W. N. 776 : 39 M. L. J. 692 : 60 I. C. 127 : 29 M. L. T. 59.

——S. 23—*Act defeating statute.*

A promise to abstain from raising the plea of limitation in a suit is void as it defeats the provisions of Law of Limitation. (*Kumaraswami Sastri and Phillips, JJ.*) BOLLAPRAGADA RAMAMURTHI *v.* TANAMANNA GOPPAYA. **40 Mad. 701 : 4 L. W. 48 : 20 M. L. T. 129 : 35 I. C 575 : 31 M. L. J. 231.**

——S. 23—*Act defeating statute—Contract to sell reversion when it falls in—Specific performance.*

A contract by a reversionary heir to sell his reversion if and when it falls to him is prohibited by S. 6 of the T. P. Act and is unenforceable. (*Wallis, C. J. and Tyabji, J.*) KAKARALAPUDI LAKSHMI NARAYANA *v.* KANDUKULI VEERA SAPABHA. **39 Mad. 554 : 28 M. L. J. 650 : 17 M. L. T. 419 : 29 I. C. 241 : (1915) M.W.N. 626.**

——S. 23—*Act defeating statute—Service Inam—Gadala or palanquin bearing service—Sale of—If opposed to public policy.*

The sale of palanquin bearing service Inam is not opposed to public policy. (*Benson and Sadasiva Aiyar, JJ.*) YUMAN SITARAM SATRISHU *v.* GORA RAMUDU. **13 I. C. 190 : (1911) 2 M. W. N. 588.**

——S. 23—*Acts defeating statute—Transfer of occupancy tenure.*

Transfers of occupancy and ordinary tenant right are voidable in the manner and to the extent provided for by the Tenancy Act. Such transfers are not unlawful within the meaning of S. 23. The transfers are not absolutely void even under the Tenancy Act. (*Miltra, A. J. C.*) SHALIGRAM *v.* NARAYAN. **4 N. L. J. 221.**

——S. 23—*Act defeating statute—Benami purchase.*

Benami purchase by police-officer while in service is not void as being opposed to public policy

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under S. 23 of the Indian Contract Act nor is it illegal being not prohibited by any statute. (*Findlay, A. J. C.*) BALKISSEN *v.* DEBI SINGH.
52 I. C. 153 : 16 N. L. R. 25.

——S. 23—*Act defeating statute—Contract—C. P. Tenancy Act*, 1898—*Ss.* 36 *and* 46—*Contravention of.*

A deed of surrender of an occupancy holding containing provisions contrary to Ss. 36 and 46 of the C. P. Tenancy Act will not be enforced by the Court. (*Batten, A.J.C*) JAIRAM *v.* GOPIKISHAN.
47 I. C. 32 : 14 N. L. R. 125.

——S. 23—*Act defeating statute—Voidable contract—Tenancy land sold as Khudkhast—C. P. Tenancy Act*, 1898, *S.* 70—*Suit for damages.*

Where land which is not transferable under a special statute is transferred in contravention thereof, a suit by the vendee for damages for breach of covenant for title is maintainable. (*Mitra, A. J. C.*) SHALIGRAM *v.* NARAIN.
45 I. C. 669.

——S. 23—*Act defeating statute—Public policy—Purchase by Government servant in contravention of rules*

A purchase made benami by a Government servant in contravention of executive orders and rules governing the conduct of public servant is void on the ground of public policy and the real purchaser does not get a title under the purchase. If he continues in possession for twelve years under the void sale he may acquire a title by prescription. (*Lindsay, J. C.*) MIRZA *v.* NAMBI KHANAM.
47 I. C. 694.

——S. 23—*Act defeating statute—Consideration—'Fobidden by law'—Contravention of the Paper Currency Act.*

A pronote payable to 'so and so or order or bearer' contravenes the provisions of S. 24 of the Paper Currency Acts and is therefore void. It is a contract forbidden by law and nothing can be recovered on the document. (*Shaw, J. C.*) HIDAYAT ALI BEG *v.* NGA KYAING.
24 I. C. 721 : (1914) II U. B. R. 13.

Acts Prohibited by Statute.

——S. 23—*Act prohibited by statute—Kanungo—Transfer of property to.*

A transfer of property to a Kanungo is not against public policy. (*Richards, C. J. Rafique, and Walsh, JJ.*) KAMALA DEVI *v.* GUR DIAL.
14 A. L. J. 969: 36 I. C. 319 : 39 All. 58.

——S. 23—*Act prohibited by statute—Opposed to public policy—Meaning.*

Assignment of mortgage in the name of a patwari's mother is not against public policy, though the Patwari cannot engage in trade or money lending according to rules framed by Revenue Board under S. 234, U. P. Land Revenue Act. The rules framed by Revenue Board under S. 234 in U. P. Land Revenue Act have not the force of law and it is doubtful whether the Board can frame the rule 10 thereunder. (*Richards, C. J. and Rafique and Walsh, JJ.*) BHAGWAN DEI *v.* MURARI LAL.
14 A. L. J. 962 : 36 I. C. 259 : 39 All. 51.

CONTRACT ACT (IX OF 1872), S 23—Agreement to prevent bidding.

——S. 23—*Acts prohibited by statute.*

Agreements which have been held to be void under this section include a sub lease of an excise contract, a transfer of a share in an excise contract, a transfer of occupancy rights, declared by statute to be non-transferable a d a transfer by a disqualified proprietor in contravention of S. 8 of Jhansi Encumbered Estates Act. It is impossible not to regard a transfer in contravention of S. 8 of the Punjab Tenants Act, 1893, as void on similar grounds. (*Fenton, F. C.*) VIR SINGH *v.* KALA SINGH.
3 P. R. 1915 (Rev.): 6 P.W.R. 1915 (Rev.) 31 I. C. 400.

——Ss. 23 and 11—*Act prohibited by statute—Madras Dt. Municipal Act, Ss.* 92 *and* 191—*Lease of right to collect slaughtering fees.*

A Municipal Council has no power to farm out the right to collect slaughtering fees. A lease of such a right is void under Ss 11 and 23 of the Contract Act. (*Ayling and Spencer, JJ.*) MUNICIPAL COUNCIL OF KUMBAKONAM *v.* ABBAH SAHIB.
36 Mad. 113 : 21 M. L. J. 790: 10 M. L. T. 168 : 11 I. C. 669 : (1911) 2 M. W. N. 95.

——S 23—*Act prohibited by statute—Opposed to public policy'—Agreement in contravention of S* 257-*A. old C. P. Code.*

An agreement in contravention of Section 25, 7 A (Old Code) is not opposed to public policy. (*Benson and Sundara Aiyar, JJ.*) KUMARA VENKATA PERUMAL *v.* THATHA RAMASWAMY CHETTY.
(1911) 1 M. W. N 290 : 9 M. L. T 487 : 21 M. L. J. 709: 9 I.C. 875 : 35 Mad. 75.

——S. 23—*Act prohibited by statute—Pleader advancing loan to a person not his client if opposed to public policy.*

A loan transaction between a pleader and a person who is not his client is not opposed to public policy and is legally enforceable. (*Stuart and Kanhaiya Lal, A. J. C.*) SUGHAR KUNWAR *v.* SITAPAT RAM.
4 O. L. J. 92 : 39 I. C. 135 : 20 O. C. 67.

Agreement not to adopt.

——S. 23—*Agreement not to adopt—Hindu widow.*

Where a Hindu widow having authority from her husband to adopt agrees in consideration of a pecuniary advantage to herself, not to adopt, the agreement is void as being opposed to public policy The authority is given not for her but for her husband's benefit. (*Wallis, C. J. and Seshagiri Aiyar, JJ.*) JAGANADHA GAJAPATI *v.* KUNJA BIHARI DEO.
25 M. L T. 204 : 9 L. W. 385: 49 I. C. 929: (1919) M. W. N. 52.

Agreement to prevent bidding.

——S. 23—*Agreement to prevent bidding—Illegal agreement.*

An agreement by a person promising to pay money to another if the latter would not compete for the purchase of certain property with the former is legal. (*Benson and Sundara Aiyar, JJ.*) RANGIAH GOUNDAN *v.* FAKIR MAHOMED.
10 I. C. 627 : 10 M. L. T. 338.

CONTRACT ACT (IX OF 1872), S. 23—Agreement to prevent bidding.

———**S. 23**—*Agreement to prevent bid at auction.*

An agreement to abstain from bidding at an excise auction is not void under S. 23 of the Contract Act as being against public policy. 18 Bom. 342, 16 Cal. 194. 6 C. L. J. 111 Rel. (*Batten, A. J C.*) MAHADEO *v.* KEWAL RAM **44 I. C. 223.**

———**S. 23**—*Agreement to prevent bidding at auction—Not contrary to public policy.*

Agreement between two or more persons not to bid against one another at a public auction is not unlawful or against public policy. (*Twomey, C. J. and Ormond, J.*) NAGAPPA CHETTY *v.* AH FOKE. **56 I. C. 963: 12 Bur. L. T. 241.**

——— **S. 23**—*Agreement to prevent bids—Contract if valid.*

An agreement not to bid against each other at an auction is not *necessarily* illegal or opposed to public policy. (23 M. 227) P. C. ref to. (*Young, J.*) AH. FOKE *v.* M. A. NAGAPPA CHETTY. **46 I. C. 755.**

———**S. 23**—*Agreement to prevent bid—Public policy.*

An agreement among the intending bidders at a public auction by the Government, for the purpose of keeping down the bids and dividing the profits as among themselves is opposed to public policy and unenforceable. (*Fawcett, J. C, and Crump, A. J. C.*) CHATTAMAI JETHMAL *v.* REWA CHAND. **28 I. C 40: 8 S. L. R 247.**

Bribe for perjury.

———**S. 23**—*Bribe for perjury.*

When a promissory note is executed in favour of a person in consideration of his inducing a third person to give evidence in favour of the person executing the note, the consideration being against public policy the pronote is unenforceable. (*Sadasiva Aiyar, J.*) ADIRAJA SHETTY *v.* VITTIL BHATTA. **1 L. W. 300: 23 I C. 540: (1914) M. W. N. 322.**

———**S. 23**—*Bribe for perjury—Illegal purpose.*

A person who pays money to another that the other should give false evidence against a certain accused, is debarred from recovering the amount so paid. The law refuses to lend its aid in enforcing agreements in which immorality is an ingredient. (*Lewis, J.*) MAUNG KYANK GIRI *v.* MAUNG LU NAGA. **10 I. C. 801: 4 Bur. L. T. 95.**

Bribe to public officers.

———**Ss. 23 and 65**—*Bribe to public officers—Public policy—Contract to appoint one to public office—Suit for recovery of maney paid thereunder—Recoverability.*

Contracts which have for their object the influencing of appointments to public offices and the restriction of the discretion vested in public officers in the selection of persons are illegal and void. A Court will not assist a party who has entered into a contract involving moral turpitude. Where a contract is illegal, an action cannot be maintained to recover money paid on it or to enforce it directly or to recover the value of services rendered under it. S. 65 relates to the obligation of a person who has received an advantage

CONTRACT ACT (IX OF 1872), S. 23—Champerty and Maintenance.

under an agreement which is discovered to be void or under a contract becomes void but not where the agreement is void *ab initio.* (*Asutosh Mookerjee and Richardson, JJ.*) LEDU COACHMAN *v.* HERA LAL BOSE. **43 Cal. 115 : 19 C W. N 919: 29 I. C. 625: 21 C. L. J. 537.**

Champerty and Maintenance.

——— **S. 23**—*Champerty and Maintenance.*

Where one *A*, the plaintiff, gave evidence that he was the legitimate son of one *M* but the defendants adduced evidence that he was the son of another man also named *M* and the High Court decreed in favour of the defendant on the ground that the defendant's case was quite possible and laid stress on the fact that *A* was supported in money by a co-plaintiff in whose favour *A* had executed a sale deed of a part of the property. *Held*, the decision was unsound. (*Sir John Edge.*) MAHOMED ABDUL AZIZ *v.* MIR TOSADDUQ HUSSAIN. **21 C. W. N. 873 : (1917) M. W. N. 529 : 42 I. C. 3: 7 L. W. 66. (P. C.)**

———**S. 23**—*Champerty—Public policy.*

An agreement to finance a litigation and to share the fruits thereof ought to be carefully watched and when found to be extortionate and unconscionable or made not with the *bona fide* object of assisting a claim believed to be just and of obtaining a reasonable recompense therefor, but for improper object so as to be contrary to public policy effect ought not be given to it. 2 Cal. 233, Foll. (*Knox, J.*) MANGAL PRASAD *v.* NABI BAKSH. **43 I. C. 74.**

——— **S. 23**—*Champerty—Validity of agreement to provide funds for litigation.*

An agreement to transfer property for financing a suit is valid provided that the agreement is fair and equitable and not extortionate and unconscionable and for an improper purpose. (*Stanley, C.J. and Banerjee, J.*) BALDEO SAHAI *v.* HARBANS. **33 All 626: 11 I. C. 932: 8 A. L. J. 652.**

———**S. 23**—*Champerty—When void in India—Fraudulent compromise.*

Champerty is not void in India unless the transaction is not a *bona fide* one for the acquisition of an interest in the subject of litigation, but an illegitimate transaction got up for the purpose merely of sroil or of litigation disturbing the peace of families and carried on from an improper and currupt motive. Where a compromise between the plff. and the deft. was to the effect that the deft. was to pay plff. half the plaint claim, and as regards the balance he was to bring a third party notice against a third party who had undertaken to indemnify the defendant against losses, that the plaintiff and the defendant were to share the balance equally and that defendant obtained this concession by agreeing to give evidence against the third party, *held*, that the agreement did not fall within the description of an illegitimate agreement and was therefore not invalid. (*Marten, J.*) WELD AND CO. *v.* SHER AHMED, EKBAL AHMED **59 I. C. 10.**

——— **S. 23**—*Champerty—English Law.*

The English Law of Champerty is not in force in India and fair agreements to share property in

CONTRACT ACT (IX OF 1872), S. 23—Champerty and Maintenance.

litigation with others in consideration of their supplying the funds for carrying on suits are not opposed to public policy and such agreements should receive effect except when extortionate or inequitable, 20 Cal. 145, (P. C.); 15 All. 35 (P. C.) Foll. (*Scott-Smith and Martineau, JJ.*) INDAR SINGH *v.* MUNSHI. **1 Lah. 124: 56 I. C. 272: 4 Lah. L. J. 301.**

——— **S. 23**—*Champerty—Right of reversioner to question alienation of widow, validity of transfer of.*

A transfer of a right of a reversioner is illegal and opposed to public policy as stimulating gambling in litigation. (*Le Rossignol, J.*) DIWAN CHAND *v.* IMAM DIN. **74 P. W. R. 1917: 41 I. C. 347: 135 P. L. R. 1917.**

——— **S. 23**—*Champerty — Agreement to sell property—If litigation is successful.*

There is nothing illegal in a plaintiff agreeing to sell the suit property to a third person if the suit prove successful. (*Robertson, J.*) DULLA *v.* FARID. **98 P. L. R. 1913: 18 I. C. 485: 115 P. W. R. 1913.**

——— **Ss. 23, 64 and 65**—*Champerty—Agreement to finance litigation*—*Suit for moneys advanced.*

Where the agreement is to finance a litigation against a person in possession of certain property in favour of persons unable to find funds and the financier is to get a share of the property in the event of success of the litigation and no provision is made in the event of failure for refund, the transaction is not a loan. Such a contract is Champertous, but the promisee is entitled to recover what he has advanced in the event of the litigation ending successfully in favour of the promisor. (*Ayling and Seshagiri Aiyar, JJ.*) PASUPATI VENKATAPATHIRAJU *v.* VENKATASUBHADRAYYAMMA. **47 I. C. 563.**

——— **S. 23**—*Champerty—English and Indian law.*

There is no law in India corresponding to the English law of Champerty and Maintenance so as to render an agreement which in England would be champertous void in India. (*Prideaux,, A. J. C.*) LATIF *v.* PANDHARI. **1923 Nag. 214.**

——— **S. 23**—*Champerty, validity of.*

An agreement, to obtain, for a nominal sum, the right to carry on a litigation with a very poor chance of success, is champertous and cannot be given effect to on principles of equity and good conscience. (*Macnair, A. J. C.*) HARI *v.* BALIRAM. **63 I. C. 356.**

——— **S. 23**—*Champerty—Public policy.*

Contract made for the purpose of gambling in litigation should not be given effect to as being champertous and against public policy. (*Macnair, A. J. C.*) ANANDA *v.* LAXMAN. **61 I. C. 884.**

——— **S. 23**—*Champerty and Maintenance.*

There is no law in India similar in effect to the English Law of Champerty and maintenance. Purchase of interest in the property for the purpose of litigation for its realization is unlawful. (*Prideaux, A. J. C.*) HIRALAL *v.* DAGDIO. **55 I. C. 635.**

CONTRACT ACT (IX OF 1872), S 23—Collateral Contract.

——— **S. 23**—*Champerty and Maintenance—Money advanced for purposes of litigation—Enforceability of contract.*

The specific law of maintenance and champerty has not been introduced into India and while fair agreements to supply funds to carry on litigation in consideration of having a share of the property if recovered, should not be regarded as *per se* opposed to public policy yet such agreements should be carefully watched and if, extortionate, and unconscionable or made not with the *bona fide* object of assisting for a reasonable recompense a claim believed to be just, but for the purpose of gambling in litigation, or of injuring and oppressing others by encouraging unrighteous suits, should be held contrary to public policy and not enforced. The question is one essentially between the vendor and the vendee. Reasonable compensation for the expenses incurred and the services rendered if substantial may, however, be awarded in such cases. (*Duckworth and Po Han, JJ.*) U PE GYI *v.* MAUNG THEIN SHIN. **1 R. 565: 2 Bur. L. J. 177: 77 I. C. 372: 1924 Rang. 48.**

——— **S. 23**—*Champerty and maintenance—Agreement to supply funds*

A fair agreement to supply funds to carry on a suit in consideration of having a share of the property if recovered, ought not to be regarded as being *per se* opposed to public policy. No doubt agreements of this character are to be carefully scrutinized and they are not to be tolerated if their motive is improper or if the immediate object is merely to promote gambling in litigation. (*Kennedy J. C. and Rymond, A. J. C.*) **16 S. L. R. 278 : 1923 Sind 50.**

Collateral Contract.

——— **Ss. 23 and 24**—*Collateral contract—Punjab Govt, Tenants Act, S. 8—T. P. Act, S. 43—Agreement by Govt. tenant to share whatever right may be acquired by him.*

An agreement by a Government tenant with plaintiff to the effect that if the plaintiff helped the former in bringing the land under cultivation the former would give to the plaintiff one half of whatever rights he might acquire in the land not opposed to public policy. (*Abdul Raoof and (Harrison, JJ.*) NATHU *v.* ALLAH DITTA. **3 Lah. 92 : 64 I. C. 18 : 3 Lah. L. J. 505 : 1922 L. 287.**

——— **S. 23**—*Collateral contracts—Turf Club Sweep Tickets—Sale of chance—Public policy.*

The sale of a share in a chance in the Turf Club Sweep is not a wager and is not opposed to public policy. (*Kensington, C. J. and Chevis, J.*) B. A. GOUGH *v.* H. S. LENEHAN. **25 I. C. 355 : 258 P. L. R. 1914.**

——— **S. 23**—*Collateral contract—Consideration—Loan for bribe.*

No suit lies for recovering money lent and used for an illegal object as bribe. 8 C. 24 Foll. (*Shadi, Lal, J.*) FIRM OF ATTAR SINGH *v.* HAKU. **84 P. W. R. 1914 : 24 I. C. 698 : 185 P. L. R. 1914.**

CONTRACT ACT (IX OF 1872), S. 23—Collateral Contract

——Ss. 23 and 223—*Collateral contracts—Principal and agent—Right of agent to recover gambling debt paid for principal—Pubiic policy.*

An agent can recover from his principal the amounts paid by him for the principal's gambling debt whether the payment was by way of adjustment of accounts or cash and a Hundi executed by the principal in favour of his agent for such payment is for consideraiion, 79 P. R. (1908) Foll. (*Robertson and Rattigan, JJ.*) GHASI RAM *v.* JAI LAL. **60 P. W. R. 1912 : 13 I C. 319 : 79 P. L. R. 1912.**

——S. 23—*Collateral contract—Bond in the name of the mother of creditor's concubine—Enforcement of.*

A bond for payment of a loan was taken by the creditor in the name of his concubine's mother. The debtor cannot plead that the consideration for the bond is tainted with immorality and that the bond therefore is unenforceable. The concubine's mother or her assignee can sue as *Benamidar* and it cannot be treated as involving the enforcement of an immoral contract. (*Spencer and Krishnan, JJ.*) PONNAMBALA MUDALI *v.* VASUDEVA PILLAI. **56 I C 616.**

——Ss. 23 and 30—*Collateral contract Gambling debts—Money lent for gambling—Recovery of.*

In a suit upon a pro-note defendant set up that the money was borrowed for gambling purposes. *Held*, in order to non-suit plaintiff it is not enough for the Court to find generally that the debt was contracted for gambling purposes but it must also find whether it was lent for future play or for past play and what portion of it was used for such a purpose. 7 M 301 F. (*Oldfield and Sadasiva Aiyar JJ.*) RAMALINGA REDDI *v.* MUTHU THEVAN. **29 I. C. 573**

——Ss. 23 and 65—*Collateral contract—Illegal contract—Void contract—Money paid if recoverable.*

If an agreement is void but not illegal, plaintiff can recover from a third party money which the latter has received on his behalf under the void agreement. If it is illegal, *i.e.*, probibited by law under a penalty, plaintiff cannot recover as his claim is founded on an illegal act and the receipt of money is itself illegal. (*Rigg, J.*) HORMASJI *v.* PO HMYIN. **51 I. C 330: 12 Bur. L. T. 9.**

Excise contract.

——S. 23—*Excise contract.*

An agreement to sub-lease salt pan in contravention of terms of license is not specifically enforceable. (*Macleod, C. J. and Shah, J.*) RABIABIBI *v.* GANGADHAR. **24 Bom. L. R. 111 : 46 B. 651 : 66 I. C. 393 : 1922 B. 78.**

——S. 23—*Excise contract—Contract opposed to public policy—Excise Act, S.43—Bombay Abkari Act (V of 1878), S. 43—Condition prohibiting sale or transfer.*

The contract of partnership by a licensee of liquor who is prevented only from selling, transferring or sub-letting his right to sell is not for bidden by law or opposed to policy of the Excise Act. (*Scott, C. J. and Chandavarkar, J.*) KARSAN *v.* GATLU. **37 Bom. 320 : 19 I. C. 442 : 15 Bom. L. R. 227.**

——S. 23—*Excise Contracts-Contract for partnership for sale of—Exoiseable articles—Legality.*

A partnership in any form for the sale of excisable articles is not necessarily illegal. The Court has to find out with reference to the provisions of the statute whether the terms of the partnership are such as to make it illegal. (*Walmsley, J.*) JNANENDRA NATH *v.* CHANDI CHABAN SAHA. **29 I. C. 480.**

——S. 23—*Excise contracts—Contract to evade excise rules.*

Contract to sublet or assign a license is one to evade the excise rules and is void and illegal under S. 23 of Contract Act. (31 C 798 F.) (*Coxe and Ryves, JJ.*) RAKHALACHANDRA SHAH *v.* DAMODAR SHAH. **12 Cr. L. J. 11 : 9 I. C. 115 : 15 C. W. N. 169.**

——S. 23—*Excise contract—Lease to unlicensed person for tapping toddy.*

A lease to a person not licensed under the Madras Abkari Act for tapping toddy, is not illegal and can be enforced. (*Odgers, J.*) SANTHANARAMA MUDALIAR *v.* SAMI KARUPPUNADAR. **61 I. C. 537 : 14 L. W. 226.**

——S. 23—*Excise contracts—Abkari license—Taking partner—Contrary to terms of license—Suit by creditor for recovery of moneys advanced to partnership—Knowledge of illegal character.*

The taking of a partner by an abkari licensee is in effect a sale to him of a portion of the business and making him an agent for the sale of liquor contrary to the terms of the license and that the partnarship is consequently illegal. 35 M. 582: 26 M. 430: 24 Mad 401 Foll. 27 Bom. 320 and (1910) M.W.N. 549 Dist. Where the carrying on of a business which is *prima facie* legal becomes *malum prohibitum* under certain circumstances, the burden of proving that the prohibition was known to a third party lies on the person asserting the existence of such knowledge 20 Q. B. D. 387 and L. R. 8 Q. B. cases 202 referred to. The illegality of the partnership is not an answer to a demand against it arising out of a transaction to which it is a party and which transaction is in itself illegal, unless the person making the demand is himself a *particeps criminis* and there is something in the transaction touching his conscience he is not affected. 32 Bom. 581, Dist. (*Seshagiri Aiyar and Moore, JJ.*) GANAPATHI BRAHMAYYA *v.* KURALLA RAMIAH. **43 Mad. 141 : 38 M. L. J. 123: 54 I C, 45 : 10 L. W. 476.**

——S. 23—*Excise contracts—Abkari license—Prohibiting transfer.*

An agreement sub-letting the right to vend *ganja* is illegal and unenforceable, where one of the conditions of an abkari license prohibits vending, transferring or sub-letting of the license. (*Sadasiva Aiyar, J.*) NAMASIVAYA GURUKAL *v.* SUBRAMANIA AIYAR. **34 I. C. 927.**

——S. 23—*Excise contract—Pro-note in consideration of transfer of license to sell toddy—Abkari Act, S. 22.*

CONTRACT ACT (IX OF 1872), S. 23.—Excise Contract.

A promissory note given in consideration of the transfer of a right to sell *toddy* prohibited under S. 22 of the Madras Abkari Act (I of 1886) is unenforceable, as being for an illegal consideration. (*Oldfield, J.*) SADINI KONDAYYA *v.* KOSAGANI PEDASWAMY.
27 I. C. 919 : (1915) M.W.N. 25.

———S. 23—*Excise contracts—Public policy.*
The provisions of the Abkari and Opium Acts are not merely intended to guard the Government revenue, but they are based upon public policy. No suit will lie to enforce rights that are inconsistent with the spirit of the Acts. (*Benson and Sundara Ayer, JJ.*) NATAN PADHMANABHAN *v.* BADRINATH.
35 Mad. 582 : 9 M L. T. 459 : 21 M. L. J. 425 : 10 I. C. 126 : (1911) 1. M. W N. 371.

———S. 23—*Excise contracts—Partnership in sale of drugs—Legality.*
An agreement in partnership to start a business for the sale of drugs the lease for which was obtained in the plaintiff's name is not illegal. (*Stuart, A. J, C. and Kanhaiya Lal, J*). MUSSAMMAT MERHA *v.* KUNDAN LAL.
25 I. C. 146 : 17 O. C. 193.

Indemnifying Surety.

———S. 23—*Indemnifying Surety — Illegal and opposed to public policy—Promise to indemnify surety who stands bail and executes bond.*
Where bail bond is forfeited owing to the failure of the accused to appear, the surety cannot sue a third person who had agreed to indemnify the surety for recovery of the amount forfeited, as such a contract is illegal. (*Walmsley, J.*) BHUPATI CH. NANDY *v.* GHULAM EHIBAR CHOWDHRY.
56 I. C. 539 : 24 C. W. N. 368.

———S. 23—*Indemnifying surety—Bail bond—Forfeiture—Suit by surety against third person upon promise to indemnify.*
A bail bond having been forfeited owing to failure of the accused to appear, the surety sued a third person who had agreed to indemnify the surety for recovery of the amount forfeited. *Held*, that the contract to indemnify was illegal and could not be enforced. (*Holmwood and Richardson, JJ.*) PROSONNO KUMAR CHUCKER BUTTY *v.* PROKASH CHANDRA DUTTA.
28 I. C. 560 : 19 C. W. N. 329.

———S. 23—*Indemnifying surety—Public policy—Surety—Bail—Deposit of money as consideration—Recovery of.*
Where a person stands surety or stands bail for another on receipt of cash consideration from the person for whom the surety or bail is offered, it is not open to the latter to recover the money paid as consideration for the suretyship of the bail: The contract is opposed to public policy and cannot be enforced. (*Le Rossignal and Campbell, JJ.*) KISHAN LAL *v.* DURGA PARSHAD.
65 I. C. 137.

Marriage contract.

———S. 23—*Marriage contract—Ante-nuptial agreement securing maintenance to wife.*

CONTRACT ACT (IX OF 1872), S. 23.—Marriage contract.

An ante nuptial agreement whereby a suitable maintenance is provided for the wife in case the husband ill treated or behaved improperly towards her or capriciously turned her out, is not opposed to S. 23 of the Act and is enforceable. (*Lindsay, and Kanhaiya Lal, JJ*) MUHAMMAD MUIN-UD-DIN *v.* JAMAL FATIMA.
19 A. L. J. 675 : 43 A. 650 : 63 I. C. 883 : L. R. 3 A. 21.

———S. 23—*Marriage contract—Contract to pay money at performance of marriage.*
A contract that the parent of either the boy or the girl who is a party to the marriage shall pay a certain sum of money if and when the marriage is celebrated is not void *ab initio* as being opposed to public policy. (*Walsh and Ryves, JJ.*) JAGDISWAR PRASAD *v.* SHEO BAKSH RAI.
51 I. C. 856 : 1 U. P. L. R. (H.C.) 119.

———S. 23—*Marriage contract—Illegality of—Hindu Law.*
A, who was in want of money, agreed to give his daughter, aged 11 years, in marriage to *B* aged 36, in consideration of certain sum of money. *B* paid the money to *A* but *A* subsequently refused to give the girl in marriage. In a suit to recover the money paid. *Held*, the contract was contrary to public policy especially as there was practically a sale of the girl to *B* and that, consequently, *B* could not get back the money paid to *A*. 23 A. 495 ; 13 M. 83, Foll. 32 M. 185 ; 22 B. 658 ; 128 P. R. 1889, Rel. (*Chamier, J.*) GIRDHARI SINGH *v.* NEELADHAR SINGH.
16 I. C. 1004 : 10 A. L. J. 159.

———S. 23—*Marriage contract.*
An agreement between a Mahomedan husband and his wife, providing for a certain maintenance to the wife in the event of a future separation between them, is void as being opposed to public policy. It is as much the policy of the Mohamedan Law as of the English Law that people, who are married should live together and not apart. (*Batchelor and Rao, JJ.*) BAIFATMA *v.* ALI MAHOMED.
37 Bom 280 : 17 I. C. 946 : 14 Bom. L. R. 1178.

———S. 23—*Marriage contract—Contract to maintain woman not married as wife.*
A contract by a Hindu to maintain as wife a woman, who is not his lawfully wedded wife, is opposed to public policy and consequently unlawful. (*Chandavarkar and Batchelor, JJ.*) BAI MASHI *v.* JAMNADAS.
16 I. C. 133 : 14 Bom. L. R. 547.

———S. 23—*Marriage contract—Agreement for marriage of ward by the guardian*
An agreement whereby a guardian, natural or appointed, consents to give his ward in marriage for his own pecuniary benefit is void under S. 23 and the fact that no injury resulted thereby to the ward is irrelevant. 22 B. 658 , 32 M. 185 : 10. C. 1054, Foll. 5 B. L. R. 395 : 25 P. W. R. 32 Dist 1 C. L. J. 201, Diss. (*Harrington, J.*) BULDEO DAS SINGH *v.* MOHAMAYAN PRASAD SINGH.
9 I. C. 652 : 15 C. W. N. 447.

——— Ss 23 and 65—*Marriage contract—Money paid under—Suit for recovery—Contract not performed.*

CONTRACT ACT (IX OF 1872), S. 23—Marriage Contract.

Plaintiff sued for recovery of a sum of money paid to the defendant, who had promised to marry his daughter to the plaintiff. The money was advanced by plaintiff on the faith of that promise and defendant admitted that he had married his daughter to another man. *Held*, that although the agreement was void under S. 23, the plaintiff could recover back the money paid under it as the agreement remained unperformed. 27 P. L. R. 1915 and 106 P. R. 1879, (*Abdul Raoof, J.*) JIWANA *v.* MALAK CHAND.

53 I. C. 407 : 113 P. R. 1919.

———**Ss. 23 and 65**—*Marriage contract—Illegal contract—In pari delicto—Effect.*

A breach of betrothal agreement gives rise to a claim for damages. Where the plaintiff advanced a sum to the defendant for betrothal of the defendant's daughter to the plaintiff's son but the fiance died whereupon plaintiff claimed the return of the sum. *Held*, his suit was not maintainable. (*Le Rossignol, J.*) HIRA *v.* JOWALA DAS. **224 P. W. R 1915 : 27 I. C. 1008 : 27 P. L. R. 1915.**

———**S. 23**—*Marriage contract—Stipulation to pay damages in case of breach—Enforceability—Public policy.*

A contract by *A* to give his daughter in marriage to *D's* son and in case of breach to pay a certain sum as damages is a contract giving the parties a pecuniary interest in the marriage taking place and is hence unenforceable. (*White and Sankaran Nair, JJ.*) DEVARAYAN CHETTY *v.* MUTHURAMAN CHETTY. **37 Mad. 393 : 24 M. L. J. 310 : 18 I. C 515 . (1913) M. W. N. 200.**

———**Ss. 23 and 26**—*Marriage contract—Agreement by Muhammadan husband not to contract second marriage—Validity of.*

An ante-nuptial agreement by a Muhammadan husband not to contract a second marriage is not illegal nor invalid as immoral or opposed to public policy or in restraint of marriage. (*Robinson, J.*) KHALILAL RAHAMAN *v.* MARIAN BIBI.

10 L. B. R. 194 : 59 I. C. 804 : 13 Bur. L. T. 89.

———**S. 23**—*Marriage contract—Brokerage—Consideration.*

An agreement to pay a sum of money for persuading a woman to marry the person paying the sum is opposed to the public policy and unenforceable. (*Saunders, J. C.*) MAUNG PYO *v.* MAUNG PO GYI. **50 I. C. 551 : (1918) 3 U. B. R. 119.**

Partial Illegality.

———**S. 23**—*Partial illegality—Illegality of promises.*

It is settled that if one of the several distinct promises is illegal it will not prevent the rest from being enforced. (*Griffin, J.*) BHOLA *v.* MOHAMMAD HABIBUL RAHMAN KHAN. **10 I. C. 465.**

———**Ss. 23 and 24**—*Partial Illegality—Document containing legal and illegal engagements—Enforceability.*

CONTRACT ACT (IX OF 1872), S 23.—Parties to illegal acts.

One cannot ask the court to make a new contract in plea of that which is illegal, but where in the same instrument there are distinct engagements, some of which use legal and some illegal the performance of those which are legal can be enforced. (*Miller, C. J. and Adami, J.*) GRANT *v.* EKLAL JHA. **3 Pat. L. T. 386 : 67 I. C. 49 : 1922 P. 171.**

———**S. 23**—*Partial illegality—Illegal contract—Part of consideration legal—Legal part not severable from illegal part.*

In an illegal contract even though a part of the consideration may be legal yet if the legal part cannot be severed from the illegal, the whole contract is vitiated, by the taint of illegality. (*Chapman and Atkinson, JJ.*) BINDESHARI PRASAD *v.* LEKHRAJ SAHU. **20 C. W. N. 760 : 1 Pat. L. J. 48 : 33 I. C. 711 : 3 Pat. L.W. 405.**

———**Ss. 23, 24 and 65**—*Partial illegality.*

The expression 'discovered to be void' in S. 65 has an application only to cases where the agreement is void for some reasons unknown at the time of making it, but where it is so far an illegality, restitutory suit will not lie, as the party will get no help from a Court on an illegal transaction. A agreed to suffer an award of payment to be proved by B in consideration of the withdrawal of his suit and application for sanction to prosecute B for perjury. A performed his part, but B failed. A then sued on the agreement. *Held*, (1) that the whole agreement was illegal as A could not ignore its illegal part and (2) A could not get relief on such illegal contract. (*Pratt, J. C. and Hayward, A. J. C.*) HEMANDAS RAMAKHIOMEL *v.* CHELLARAM DALOOMAL. **15 I. C. 836 : 5 S. L R. 267.**

Parties to Illegal acts.

———**S 23**—*Parties to illegal acts - Illegal Contract—Right to recover—Equity.*

Where the assistance of equity was not being asked to carry out an illegal agreement, defendants could recover on their counter claim. (*Heaton and Marten, JJ.*) WOLF & SONS *v.* DADIBA KHEMJI & Co. **44 Bom. 631 : 58 I. C. 465 : 21 Bom. L. R. 986.**

———**S. 23**—*Parties to illegal acts—Contract opposed to public policy—Restrictions on dealing in rice—Contract in contravention of—Enforceability.*

Where in contravention of the rules framed by the Government and of the terms of a license issued to one of them the parties entered into a contract for whole-sale supply of rice, the contract is illegal as opposed to public policy and where the plaintiff knew of restrictions on the defendants capacity to contract, both are in *pari delicto* and the plaintiff cannot recover monies advanced to the defendant on the basis of such contract. (*Phillips and Devadoss. JJ.*) JANU SAIT *v.* RAMASWAMI NAIDU. **(1923) M.W,N. 335 : 32 M.L.T. (H.C.) 330 : 18 L.W. 564 : 72 I. C. 735 : 1923 Mad. 626.**

———**S. 23**—*Parties to illegal acts—Plea of illegality—Duty of court to take notice.*

CONTRACT ACT (IX OF 1872), S. 23.—Parties to illegal acts.

If the illegality of a transaction is brought to the notice of the Court and the person invoking the aid of the Court is himself implicated in the illegality, the Court will not assist him.

Contracts which are expressly prohibited by Statute, contracts that are illegal at Common Law as involving the commission of a crime or tort and contracts which are unlawful as being contrary to the public policy are distinguishable from contracts which are not actually unlawful but merely void, either by statute, such as gaming or wagering contracts or on grounds of public policy such as contracts in general restraint of trade. (*Ross, J.*) JHINGUR OJHA *v.* MEGHNATH PANDY. **72 I. C. 653 : 1924 P. 321.**

——— **Ss. 23 and 65**—*Parties to illegal acts—Contract opposed to public policy—Suit for recovery of money.*

A party cannot recover money paid in respect of a contract which is tainted with criminality or immorality, even though the contract has not been performed, 43 C. 115; 1 C. L. J. 261. An agreement by the priest or spiritual adviser of a Hindu lady to use his influence to bring about the adoption by the lady of the particular person is illegal, immoral and opposed to public policy and any money paid under the agreement cannot be recovered though the purpose has not been accomplished. (*Miller, C.J. and Roe, J.*) RAGHU BER DAS MAHANT *v.* NATAHAR SINGH.
51 I. C. 280 : 4 Pat. L. J. 542.

——— **S. 23**—*Parties to illegal acts*—In pari delicto—*Illegality carried out—No relief.*

Where an illegal purpose of a void contract has been carried out even in part, a court of equity will not only refuse to enforce the obligations created or to restore property given away, but will also refuse to grant a relief by way of declaration on the principle that no relief could be given to a wrong doer.

Per *Chapman, J.*—Where the illegal portion of an agreement has been wholly carried into effect, the whole matter is outlawed and the court will not aid either party to retrieve if he is not able to show that he has been less to blame than the other. (*Chapman and Atkinson, JJ.*) BINDESHARI PRASAD *v.* LAKHRAJ SAHU. **20 C.W.N. 760 : 1 Pat. L.J. 48 : 33 I.C. 711 : 3 Pat. L.W. 405.**

——— **S. 23**—*Parties to illegal acts—Illegal contract—Part performance—Effect of.*

A party to an illegal and void contract cannot enforce performance though he may be willing to perform or has performed his part of the contract. (*Fox, C. J, Parlett and Richardson, JJ.*) HARI KRISHNA PILLAY *v.* AUTHILACHMY AMMAL. **9 Bur. L. T. 28 . 33. I. C. 238 : 8 L. B. R. 389.**

Prostitution.

——— **Ss. 23, 24 and 25**—*Prostitution—Past cohibitation.*

An agreement for paying a sum of money in consideration of services being rendered by a kept mistress of the promisor is not enforceable owing to the consideration being illegal, 3 A. 387, followed. (*Macleod and Crump, JJ.*) HUSSEINALI CASAM MAHOMED *v.* DINBAI. **25 Bom. L. R. 252 : 1924 Bom. 135.**

CONTRACT ACT (IX OF 1872), S. 23.—Religious purposes.

——— **S. 23**—*Prostitution—Transfer of property—Consideration—Past cohabitation.*

Where the past cohabitation is the consideration for a transfer of property the transfer is void. (*Macleod C. J. and Heaton, J.*) KISAN DAS LAXMAN DAS BAIRAGI *v.* DHONDHU THUKARAM.
22 Bom. L. R. 762 : 57 I. C. 472 : 44 Bom. 542.

——— **S. 23**—*Prostitution—Bond for future adulterous intercourse—Validity.*

Where the consideration for a bond was future adulterous cohabitation, the agreement is void under S. 23, Contract Act and is not enforceabel. The fact that the defendant in a suit to enforce the bond has already received the consideration does not disentitle him to raise the plea, and the court cannot enforce it. (*Phillips, J.*) KANDASAMI GOUNDEN *v.* NARAYANASWAMI GOUNDEN.
45 M. L. J. 551 : (1923) M. W. N. 566: 76 I. C. 306 : 19 L. W 617 : 1924 Mad. 15.

——— **S. 23**—*Prostitution—Money advanced—Suit for recovery—Maintainability.*

Where it is no part of the contract between the lender and the borrower that the money lent should be utilised for immoral purposes and the lender has no control over the application of the money, he is not prevented from recovering the money on the principle of *Ex turpi cause non oritur actio.* (*Spencer and Devadoss, JJ.*) NATARAJULU NAICKER *v.* SUBRAHMANIAN CHETTIAR.
(1922) M. W. N. 450 : 16 L. W. 705 : 69 I. C. 939 : 43 M. L. J. 695 : 45 M. 778 : 1922 Mad. 181.

Religious purposes.

——— **S. 23**—*Religious purposes—Offerings—Agreement for division—Public policy.*

An agreement between the panda and pariwal of a temple to participate in the offerings made by pilgrims is not contrary to public policy. (*Kanhaiya Lal and Sulaiman, JJ.*) KALLU TEWARI *v.* RAJINDER PRASAD. **20 A. L. J. 807 : L. R. 3 A. 474 : 70 I. C. 124: 45 A. 79 : 1923 A. 56.**

——— **S. 23**—*Religious purposes — Consideration—Public policy.*

A contract by which plaintiff sold a calf to defendant on condition that the former would have a right of pre-emption and that in case it was castrated, defendaut should pay damages and also the expenses of a purificatory ceremony is not opposed to public policy. (*Mookerjee and Beachcroft, JJ.*) SURENDRA NATH BASU *v.* TOWEJI MANDAL. **24 I. C. 86.**

——— **S. 23**—*Religious purposes—Agreement to pay money for procuring adoption—If valid—Public policy.*

An agreement to pay bribe to procure the adoption of a boy is one against public policy and cannot be enforced 37 M. 393 Foll. (*Sankaran Nair and Spencer, JJ.*) THURI KOTHANDA RAMA REDDIAR *v.* THESU REDDIAR. **26 I. C. 779 : 27 M. L. J. 416 : 1 L. W. 928.**

CONTRACT ACT (IX OF 1872), S. 23.—Religious purposes.

——Ss. 23 and 29—*Religious purposes—Uncertainty—Public policy—Agreement by a Gayawal to pay part of his earnings from certain ceremonies to an Acharya—Validity of the agreement.*

A *Gayawal* undertook, for a consideration, that on performing any ceremonies without the help of the *Acharya* the plaintiff, he would pay the latter, in one set of circumstances three-fourths and in another the whole of his (the defendants) income of the ceremonies, *Held*, that the agreement is not void as against public policy, or for uncertainty and the plaintiff can recover the amounts due to him under the terms of the agreement. 9 M. I. A 344 Dist. 15 W. R. 531, ref. 26 C 356 ; 10 W. R. 457 ; 29 C 470. Ref. (*Roe and Jwala Prasad, JJ.*) BAPU LAL BARIK GAYAWAL *v.* HARIHARA PANDIT.

1 Pat. L. J. 539 : 38 I. C. 116 : 3 P. L. W. 161.

Restraint of Trade.

——Ss. 23 and 27—*Restraint of trade.*

An agreement to form a combination of ginning factories to fix rates and to divide the profits in a certain manner, is either not in restraint of trade or opposed to public policy. (*Karamat Hussain ond Tudball, JJ.*) KUBER NATH *v.* MAHALI RAM. **10 A. L. J. 117 : 16 I C. 631 : 34 All. 587.**

——S. 28—*Restraint of trade—Public Policy—Government market—Issue of license to brokers.*

The action of the Government restricting, by the issue of licenses, admission of brokers into a market allowed to be held on Government land is neither illegal nor opposed to public policy. (*Mookerjee and Beachcroft, JJ.*) LAKHAN JENA *v.* ARJUN NAIK. **18 C. W. N. 1194 : 24 I. C. 387 : 19 C. L. J. 313.**

——S. 23—*Restraint of trade—Commission—Sale of goods.*

A person purchasing goods for himself cannot claim commission, the claim being opposed to public policy, 91 P. R. 1910 Dist. (*Martineau, J.*) BALA PRASAD SARNI MAL *v.* JWALA DATRAM KANWAR. **50 I. C, 975 : 16 P W. R. 1919.**

——S. 23—*Restraint of trade.*

Where the defendant executed a *kabuliyat* in favour of the plaintiff agreeing to pay him a specified rent for the privilege of carrying on a trade within a certain area and the rent fell into arrear, in a suit to recover the same it could not be pleaded that the contract was in the nature of a monopoly and therefore void as being opposed to public policy inasmuch as the lessor did not bind himself against giving a smilar lease to others: 28 M. 520 Dist. (*Mullick and Roe, JJ.*) MACKENZIE *v.* RAMESHWAR SINGH. **1 P. L. J. 37 : 34 I. C. 754 : 2 P. L. W. 446.**

——S. 23—*Restraint of trade.*

The agreement of plaintiff not to set up a business in consideration of which the defendant promised to pay a certain sum for life was held to be void being in restraint of trade, The promise of the plaintiff having no binding effect is void in

CONTRACT ACT (IX OF 1872), S. 23.—Slavery.

spite of the facts that it was partly carried out. (*Fox, C. J. Parlett and Robinson, JJ.*) HARI KRISHNA PILLAI *v.* AUTHILACHMY AMMAL.

9 Rur. L. T. 28 : 33 I . . : 8 L. B. R. 389.

Slavery.

——S. 23—*Slavery—Contract to engage dancing boy for a price, if valid.*

Plaintiff engaged the services of a dancing and singing boy for certain period. He then contracted with the defendant that for a monthly certain sum the boy should give exhibitions in accordance with arrangements made by the defendant. The defendant employed the boy for a period of about one month, but refused to make any payment to the plaintiff, *Held*, that the contract was not contrary to public policy. (*Teunon and Newbould, JJ.*) SHEIKH SAMIR *v.* SYED ALI. **47 I. C. 138.**

——S. 23—*Slavery—Public Policy—Service in lieu of debt.*

A provision in a bond that two brothers should receive a certain sum of money in advance and that one of the two brothers should always work for the plaintiff and that the interest of 2½ per cent. was to be liquidated by the work of one or the other was held to be a doubtful case of a slavery bond. A suit for recovery of money advanced under a bond opposed to public policy is maintainable. (*Teunon and Newbould, JJ.*) ANANDIRAM MADAL *v.* GOZA KACHORI.

45 I. C. 965 : 27 C, L. J. 459.

——S. 23—*Slavery—Halwahi bond—Agreement to perform manual labour in consideration of loan to be paid off at given time-Penal interest.*

A Halwahi bond executed by an agricultural labourer which binds the executant to daily attendance and manual labour until a certain sum is repaid in a certain month and penalises default with overwhelming interest is unenforceable, being opposed to public policy. (*Sharfuddin and Coxe, JJ.*) RAMSARUP BHAGAT *v.* BANSHI MANDAR. **19 C. W. N. 1118 : 30 I. C. 955 : 42 Cal. 742.**

——S. 23—*Slavery—Contract for labour in lieu of interest for a fixed period.*

A stipulation in a bond whereby the debtor contracts to work for a specified term instead of payment of interest is not contrary to public policy and is enforceable, There is liitle difference between such a contract and one of apprenticeship. 42 Cal. 742 Foll (*Phillips, J.*) PONNUSWAMY *v.* PALAYATHAN. **10 L. W 202 : 51 I. C. 52 : (1919) M. W. N, 534.**

——S. 23—*Slavery—Transfer of men as chattel.—An agreement.*

A contract that three of the defendant's servants should work with plaintiff in lieu of interest or the money lent and that if, the pannayals failed to do satisfactory work the money should become payable, is a transaction amounting to a transfer of possession of human cattle and is opposed to public policy. (*Srinivasa Aiyangar, J.*) SOURI AIYANGAR *v.* SUBBARAYAR.

40 I. C. 235 : 5 L. W. 706.

CONTRACT ACT (IX OF 1872), S. 23—Slavery bond.

——Ss. 23 and 24—*Slavery bond—Unlawful consideration—Indivisible agreement.*

A contract under which a labourer engages to work without any payment under conditions which made it practically impossible for him to discharge the debt, is wholly void. Such a contract is indistinguishable from slavery. A contract in which it is impossible to separate the unlawful part of the consideration from the lawful part is wholly void under S. 24 of the Act. (*Mullick and Thornhill, JJ.*) SATISH CHANDRA GHOSH *v.* KASHI SAHU. 46 I. C. 418 : 3 P. L. J. 412.

Stifling Prosecution.

——S. 23—*Stifling prosecution—Consideration—Abandonment of prosecution in non-compoundable case—Document void.*

Where the consideration for a bond is found to be an agreement to abandon the prosecution in a matter, and if the court comes to the conclusion that the parties were acting together with a view to perpetrate a fraud, and did in fact perpetrate that fraud and that there is no difference in the degree of guilt of the plaintiff (who is asking the court to give him some help) and that of the defendant, the duty of the Court is not to assist either party ; in other words, the duty of the court is to dismiss the claim, because the Court having then in its knowledge that it has before it, two persons equally guilty of fraud, will not assist either of them. Once it is established that the parties are *pari delicto*, the Courts will not assist an illegal transaction in any respect, that is to say, the person who asks the Court to do something will fail. (*Mears, C. J. and Banerji, J.*) VILAYAT HUSAIN *v.* MISRAN. 45 A. 396 : 21 A. L. J. 303 : L. R. 4 A 418 : 72 I. C. 92 : 1923 A. 504.

——S. 23—*Stifling prosecution—Illegal consideration.*

When an offence is compoundable by law, an agreement, the consideration for which is a compromise of criminal proceedings in connection with a compoundable offence is valid and enforceable. (*Richards, J.*) CHETAN DAS *v.* HARI RAM. 10 I. C. 216 : 8 A. L. J. 498.

——S. 23—*Stifling prosecution—Legality.*

Compromise to withdraw criminal complaint of compoundable offence for allowing a person to remain in possession of a house was considered to be a lawful compromise. (*Griffin, J.*) BADRI BHAR *v.* RAM SARAN PANDE. 10 I. C. 189.

——S. 23—*Stifling prosecution—Criminal offence—Felony—Compounding.*

If a part of the consideration for a contract of sale is the compounding of a felony, this part of the consideration is void as being opposed to public policy. If in a contract part of the consideration is void as being opposed to public policy or one of its essential conditions could not be complied with, then it becomes unenforceable. (*Beaman and Heaton, JJ.*) BANI *v.* JAYAWANTI. 42 Bom. 339 : 45 I. C. 566 : 20 Bom. L. R. 331.

——S. 23—*Stifling Prosecution—Agreement void.*

CONTRACT ACT (IX OF 1872), S. 23—Stifling prosecution.

Where the consideration of the bond is an agreement on the part of the plaintiff to a band on the prosecution of the delt. in a non-compoundable case, the bond is void even if part of the consideration is good in law. (*Newbould and Panton, JJ.*) KARUNA KRISHNA CHAUDHURY *v.* RAKHALDAS MUKERJEE. 68 I. C. 721 : 1923 Cal. 292 (1)

——S. 23—*Stifling Prosecution— Non-compoundable case—Arbitration—Award.*

An award is not enforceable if the agreement to refer to arbitration is invalid as tending to stifle a prosecution. (*Walmsley and Panton, JJ.*) THANDMOYEE DASI *v.* GOONAMANEE DASI. 47 I. C. 506.

——S. 23—*Stifling prosecution — Compounding of criminal case—Public policy —Compoundable and non-compoundable offences alleged.*

Though allegations were made of an offence under S. 147, I.P.C., the Magistrate after examining the complainant, summoned the accused under S. 325, I. P. C. An agreement was entered into between the parties and with the leave of the Court the case was compounded. *Held*, that there being no fear of conviction under S. 147 the contract is not void. (*N. R. Chatterjee and Newbould, JJ.*) MOULVI MAHAMMAD ISMAIL *v.* SAMAD ALI BHUIYAN. 32 I C. 227 : 20 C. W. N. 946.

——S. 23—*Stifling prosecution—Cr. P. C., S. 345.*

The compounding of non-compoundable offence being against public policy, any agreement to that effect is wholly void in law. (*Carnduff and Chapman, JJ.*) NUJEBAR RAHMAN *v.* MUKTASHED HUSAIN. 16 C. W. N. 854 : 15 I. C. 259 : 40 Cal. 113.

——S. 23—*Stifling prosecution — Non-compoundable case—Consideration, if can be recovered.*

Where in a case of theft the complainant dropped the proceedings on account of an agreement to pay a sum of money, he cannot sue to recover the same, as the agreement is opposed to public policy. (*Campbell, J.*) NAZAR *v.* MT. PARAS. 73 I. C. 668 : 1923 Lah. 689 (2).

——S. 23—*Stifling prosecution — Agreement to compound a non-compoundable offence—Consideration if unlawful.*

Where certain promissory notes were executed on the distinct agreement that they should be delivered over to the payee after he withdraws a complaint filed by him against the maker under S. 406 of the Indian Penal Code, the consideration for the notes is the agreement to compound a non-compoundable offence and is unlawful. (*Shahdin and Beadon, JJ.*) GULAM MOHIUDDIN *v.* DEOKI NAND. 54 P. L. R. 1914 : 57 P. W. R. 1914 : 22 I. C. 393 : 39 P. R. 1914.

——S. 23—*Stifling prosecution — Agreement to compound offence—Enforceability.*

A promissory note executed as consideration for compounding an offence committed against a person who died previous to the complaint is

CONTRACT ACT (IX OF 1872), S. 23—Stifling prosecution.

illegal and cannot be enforced. Such an agreement cannot be supported even on the ground that the party executing the agreement would be liable to damages. (*Sundara Aiyar, J.*) MOTTAI REDDY *v.* THANAPPA REDDY.

26 I. C. 181 : 37 Mad. 385.

——— S. 23—*Stifling prosecution— Agreement to withdraw application for sanction to prosecute —Cr. P. C, Ss. 195 and 345 (7).*

An agreement to withdraw an application for sanction to prosecute under S 195, Cr. P. C, is opposed to public policy. The prohibition in S. 345 (7), Cr P. C. is general and governs composition of offences whether any steps to prosecute have been taken or not. (*Drake Brockman, J. C.*) WARIS ALI *v.* MAHOMED AZIMULLAH. **46 I. C. 424.**

——— S. 23—*Stifling prosecution — Unlawful consideration.*

An agreement to prevent the due progress of prosecution of an offence, which cannot be lawfully compounded is unlawful and hence void. Private adjustment of damages caused by such offence is not unlawful if the public right to prosecute is left intact. A threat to prosecute or expectation not to be prosecuted by a compromise of the civil wrong is not an agreement not to prosecute. There must be collusion between the offender and the injured person, to affect the course of Criminal Law. It is immaterial whether or not the offence compounded could have been proved by the prosecution had it not been obstructed by the compromise if there was reasonable ground to prosecute. (*Stanyon, A.J.C.*) KISHAN LAL *v.* AMAN SINGH. **16 I. C. 555 : 8 N. L. R. 97.**

———S. 23—*Stifling prosecution.*

An agreement to stifle a prosecution in respect of an offence of a public nature is against public policy and illegal. But where the offence involves damages to an injured party, he can settle or compromise his private damage though the offence is of a public nature. (*Kanhaiya Lal, A. J. C,*) LACHMAN DAS *v.* NARAIN.

1 O. L. J. 553 : 25 I. C. 409 : 17 O. C. 213.

———S. 23—*Stifling prosecution — Withdrawal of non-compoundable case—Consideration —Validity.*

Where the consideration for a bond is the withdrawal of a non compoundable case, the bond is unenforceable under S. 23, Contract Act. (*Miller C. J. and Kulwant Sahay, J.*) BION *v.* SHEO GULAM LAL. **74 I. C. 843 : 1924 P. 305.**

———S. 23—*Stifling prosecution—Compounding of a compoundable offence.*

A contract arising out of the composition of a compoundable offence is not against public policy. (*Jwala Prasad and Ross, JJ.*) SUNDER SAHU *v.* BHAGOO MARIK. **62 I. C. 70.**

———S. 23—*Stifling prosecution —Agreement not to prosecute for non-compoundable Offence—Whether enforceable.*

Agreement not to prosecute for a non-compoundable offence, is not enforceable only where the consideration for the agreement was clearly such an illegal promise. Mere

CONTRACT ACT (IX OF 1872), S. 23—Unlawful object.

threat or apprehension of prosecution is not sufficient to vitiate the agreement. The distinction in such cases between the motive for coming to an agreement and the actual consideration for the agreement itself must be kept carefully in view and particularly in a case where there is a civil liability already existing which is discharged or remitted by the agreement, (*Chapman and Jwala Prasad, JJ.*) SUKHDEO DASS *v.* MANGAL CHAND.

2 P. L. W. 140 : 41 I. C. 812 : 2 P. L. J. 630.

———S. 23—*Stifling prosecution—Void contracts.*

Contract founded on the illegal consideration of compounding a non compoundable offence is wholly void, (*Chapman and Atkinson, JJ.*) BINDESHARI PRASAD *v.* LEKHRAJ SAHU.

1 P. L. J. 48 : 3 P. L. W, 405 : 33 I. C. 711 : 20 C. W. N. 760.

Unlawful object.

———S. 23—*Unlawful object —Consideration if lawful.*

A promissory note executed by a minor under the Court of Wards though void, is not unlawful consideration for a bond executed by his son after his death and after the estate had ceased to be under the Court of Wards. (*Lindsay and Sulaiman, JJ.*) BINDESHRI PRASAD *v.* SARJU SINGH.

21 A. L. J. 446 : L R 4 A. 241 : 73 I. C. 458 : 1923 A. 590.

———S. 23—*Unlawful object— Agreement by Parsi husband and wife to live separately—Legal —Reference to arbitration as to the quantum of maintenance—Award—Enforceable.*

An agreement by a Parsi husband with his wife that they should live separately is lawful and a reference to arbitration on the question as to the amount of maintenance to be paid to the wife is quite legal. 23 Bom. 279, Foll. (*Macleod, C. J. and Fawcett, J.*) ERUCHSHAW DOSABHAI *v.* BAI DINBAI. **45 Bom. 318 : 59 I. C. 189 : 22 Bom. L. R. 1293.**

———S. 23—*Unlawful Object — Government Servant's Conduct Rules, R. 14—Debt contracted by the father for trading purposes—Liability of sons.*

The plaintiff sued to enforce a mortgage effected in his favour by Deft. No. 1. The mortgage security consisted of a piece of land, the property of the first defendant, and of land which was the property of the family of the 5th defendant and his sons which was burdened with mortgage debt created by the 5th defendant in respect of liabilities incurred by the 1st defendant at the 5th defendant's request for trade carried on under the management of 1st defendant. The 5th defendant's sons refused *inter alia* that they were not bound to pay the debts of their father as they were contracted for illegal or immoral purposes contrary to Government Servants' Conduct Rule No. 14. *Held*, (1) that the rule is not based on any statutory prohibition, but was merely a rule of conduct, (2) that the debts contracted by the father could not be attributed either to his failings, follies or caprices and there was no immorality between himself and those with whom he traded,

CONTRACT ACT (IX OF 1872), S. 23—Unlawful object.

(3) that the sons were liabile to pay their father's debts. (*Scott, C. J. and Shah, J.*) RAMKRISHNA TRIMBAK NADKARNI *v.* NARAYAN SHIVRAO ARAS. 17 Bom. L. R. 955 : 31 I. C. 301 : 40 B. 126.

——Ss. 23 and 30—*Unlawful object—Suit to recover money on a hundi drawn to cover betting losses.*

Defendant was an owner of race horses and betted on horse races in considerable amounts. On 20—10—20 he owed a sum of Rs. 8,500 which he had lost to the plantiff's firm. As he did not pay, the plaintiffs reported him to the Turf Club whose Secretary intimated that he would publish the defendant's name as a defaulter. On 20—12—1920 defendant executed a hundi for Rs. 8,500 in consideration of his name being withdrawn from the defaulter's list and his being permitted to run his horses and make his bets. In a suit by the plaintiffs (who were a firm) to recover the money due under the Hundi. *Held* that the consideration for the Hundi was legal and that it could be enforced. Contracts by way of wagering and gaming are void but not illegal. There is nothing illegal in the agreements made by a partnership firm of bookmakers nor are such agreements probibited by law Consequently a suit by such a firm is maintainable. (1908) 2 K. B 696; (1920) 3 K. B. 451. Ref.(*Buckland, J.*) LEICESTER & Co. *v.* MULLICK. 27 C. W. N. 442: 1923 Cal. 445.

——S. 23—*Unlawful Objects—Commissioner appointed by Court—Taking bond from party—Propriety of—Enforceability of bond.*

Where a pleader is appointed by Court in a suit as commissioner, the work done by the Commissioner is no work done for the party but for the Court. Consequently where a Commissioner who had been appointed at the instance of a party to a suit took a bond from that party for a certain sum of money and subsequently sued upon it *held* that the consideration for the bond was illegal and that it rep esented an improper advantage obtained by an officer of Court by abuse of his position as such. Consequently the bond was unenforceable, 4 M. 399 dist. (*Rankin and Panton, JJ.*) PRAMATHA NATH SEN GUPTA *v.* SHEIKH ABDUL AZIZ MEAH. 27 C.W.N. 430 : 37 C.L.J. 406 : 75 I. C. 443 : 1923 Cal. 436.

——S. 23—*Unlawful object—Illegal Consideration.*

Money lent for assisting the borrower to visit brothels and bring in prostitutes cannot be legally recovered. (*Fletcher and Newbold, JJ.*) RAJENDRA NATH DAS *v.* ABDUL HAKIM KHAN. 39 I.C. 767.

——S. 23—*Unlawful object—Alienation of service inam lands.*

Under Sec. 60 of the T. P. Act a service inam granted to Swasthivachakam Service is inalienable and is opposed to public policy because it is burdened with the performance of a service of a Public nature. (*Schwabe, C. J. Coutts Trotter and Kumaraswami Sastri, JJ.*) NETI ANJANEYALU *v.* SRI VENUGOPAL RICE MILL. 15 L.W. 513 : 30 M.L.T. 255 : (1922) M.W.N. 307 : 45 M. 620 : 70 I. C. 466 : 42 M.L.J. 477 : 1922 M. 197 (F.B)

CONTRACT ACT (IX OF 1872), S. 23—Miscellaneous.

——S. 23—*Unlawful object—Transfer for purpose achieved—If transferor can get relief.*

When a transaction has been entered into for unlawful or immoral purpose and that purpose has been achieved, the Court would not interfere at the instance of a *Particeps criminus* to relieve him from the legal effect of the transaction. (*Abdur Rahim and Old-field, JJ.*) DEIVANAYAGA PADAYACHI *v.* MUTHU REDDI. 44 Mad. 329 : 12 L.W. 291 : (1920) M.W N. 547 : 39 M.L.J. 525 : 59 I.C. 1003 : 28 M.L.T. 255.

——S. 23—*Unlawful object—Hundi.*

A Hundi passed for an illegal consideration is unenforceable, 15 I. C. 253; 26 I. C. 181; (1892) 1 Ch. 173 followed. (*Wallis, C. J. and Seshagiri Aiyar, J.*) MUTHUVEERAPPA CHETTY *v.* RAMASWAMI CHETTY. 40 Mad. 285 : 34 I. C. 401 : 31 M. L. J. 264.

——S. 23—*Unlawful object--Transfer of Kabzadari.*

A mortgage of lands granted *Kabzadari* without the right of transfer, is not a transfer for an illegal purpose within the meaning of S. 6 of the T. P. Act or for unlawful object or consideration within the meaning of S. 23 of the Contract Act. (*Chamier, J. C.*) MIRDAY BEHARI *v.* PRAG TIWARI. 11 I. C. 527 : 14 O. C, 144.

Miscellaneous.

——S. 23—*Suit— Withdrawal — Consideration.*

A withdrawal of a suit by the landlord for rent against the tenant, is a lawful consideration for a note executed by the tenant to the landlord, (*Piggott, J.*) RAM KIRPAL *v.* GAYA DAT. 25 I. C. 80 : 12 A.L.J. 331.

——S. 23—*Agreement—Public policy—Scope.*

An agreement by a sub-overseer in the service of a Nawab contrary to the conditions of his service is illegal and opposed to public policy. (*Piggott, J.*) MUHAMMAD LUTFULLAH *v.* AZIZULLAH. 11 I. C. 2.

——S. 23—*Insurance Policy.*

A Clause in an insurance policy cutting down limitation period for bringing suit for rejection of claim is enforceable. (*Greaves and Buckland, JJ.*) GIRIDHARILAL HANUMAN BUX *v.* EAGLE STAR AND BRITISH DOMINIONS INSURANCE CO., LTD. 27 C. W. N. 955 : 1924 C. 186.

——S. 23—*Duty of Court to take notice of illegality.*

If the illegality of a transaction is brought to the notice of a Court, the Court will not assist the person invoking its aid, even though the defendant has not pleaded the illegality and does not wish to raise objection. (*Mookerjee and Panton, JJ.*) ATIKULLA *v.* HABIBULLA. 24 C. W. N 306 : 53 I. C. 773 : 30 C. L. J. 241.

——S. 23—'*Risk note.*'

The form of risk-note exonerating Railway company from liability except for loss of complete package, is not contrary to public policy. (*Woodroffe and Cuming, JJ.*) KALI DASS MULLICK *v.* EAST INDIAN RAILWAY Co. 40 I. C. 626 : 21 C. W. N. 815.

CONTRACT ACT (IX OF 1872), S. 23—Miscellaneous.

———S. 23—*Agreemnt to pay remuneration for settlement of civil dispute.*

An agreement to remunerate a person in order to induce him to exercise his influence to effect a settlement between two persons, one of whom enters into the agreement, is neither immoral nor opposed to public policy. (*Mookerjee and Carnduff, JJ.*) MAHOMAD SAHUR-UL-HAQ *v.* SHAH NASARUL HAQ. **14 I. C. 31 : 16 C. W. N. 480.**

———S. 23—*Contract to pay brokerage.*

A contract to pay brokerage is neither immoral nor opposed to public policy. (*Chevis, J.*) KISHEN CHAND *v.* KHUDA BAKSH. **60 I. C. 727.**

———S. 23—*Judgment-debtor —Transfer of decree—Object to defraud—If can be enforced.*

Where a judgment debtor got a decree against him assigned to a relation for a small amount with a view to induce other creditors to come to terms, and the understanding was that the transferee was not to sue on the assignment, the agreement is against public policy and the agreement is not enforceable in the court. The doctrine of *in pari delicto* will apply. (*Spencer and Venkata Subba Rao, JJ.*) KALAGARA SRIRAMA RAO *v.* BAPAYYA. **18 L. W. 453. 76 I.C. 845 : 1924. M.189.**

———S. 23—*Contract opposed to law of public policy—Contract legal according to French law but not according to law of British India—Enforceability.*

Contract opposed to law on public policy is legal according to French Law but not according to law in British India and hence not enforceable. (*Coutts Trotter, J.*) VENKATA SUBRAMANIA AIYAR *v.* SYED USUFF.

45 M L.J. 59 : 18 L.W. 314 : 1923 M.W.N 721 : 74 I.C. 1006 : 1923 M. 708.

———S. 23—*Agreement to pay vakil's clerk—Public policy.*

An agreement to pay vakil's clerk for special attention to his case is void being opposed to public policy. (*Wallis, C.J. Ayling and Kumaraswami Sastri, JJ.*) TENJERLA SURYANARAYANA *v.* PRAHCALA SUBBAYYA. **41 Mad. 471 : 33 M.L.J. 724 : 22 M.L.T. 552 : 7 L.W. 58 : 42 I. C. 911 : 1918 M. W. N. 54 (F.B).**

———S. 23—*Custom— Partition made by devolution among females in the family—Whether reasonable.*

The custom prevalent in the *Karvetnagar Zemindari* laying down a particular rule of inheritance with regard to property held by ladies of zemindar's family and derived from the zemindar is not uncertain, and is not opposed to public policy but calculated to provide a suitable provision for maintenance of the ladies in the family. 27 M.L.J. 156 Foll. (*Ayling and Tyabji JJ.*) BANGARU MUTHU VENKATAPPA NAYANIVARU *v.* GOLLA CHINNAPPA NAIDU. **31 I. C. 565.**

———S. 23—*Prohibition of illegal business—Right of suit.*

An illegal business may be prohibited lawfully and the prohibition gives no right of action. (*Sadasiva Aiyar and Bakewell, JJ.*) Ross *v.* SECRETARY OE STATE. **39 Mad. 781 : 31. I. C 224 : 29 M L J. 280.**

CONTRACT ACT (IX OF 1872), S. 24.

———S. 23—*Public policy—Money lending by Pleader.*

Where a pleader took a mortgage in his wife's name as consideration for pro-notes, *Held* there is a wide distinction between a contract which it may be improper for a pleader to enter into without the sanction of J. C.'s Court and a contract the operation of which is so injurious to the public welfare that even as between the parties who have voluntarily entered into it, the Courts will refuse to enforce it. The question in such cases is really one of professional etiquette rather than of public policy and the contract cannot be regarded as invalid. (*Kanhaiya Lal, J. C.*) RAM SINGH *v.* MT. RAGHUBANSA. **26 O. C. 201 : 9 O. and A. L. R. 29 : 72 I. C. 877 : 1923 Oudh 3.**

———S. 23—*Religious office — Agreement—Maha Brahmans offerings—Validity of agreement as to right to resile from agreement.*

An arrangement among the *Maha Brahmans* of a place regulating the turns in which they shall act or the method in which the offerings shall be collected or divided and which does not control or restrict the discretion of the persons to whom the services are to be rendered or by whom the offerings or gifts are to be made is valid and binding between parties. (*Kanhaiya Lal, A. J. C.*) RAGHUBIR *v.* MUSSAMMAT RUKUMI.

42 I. C. 794 : 20 O. C. 265.

———S. 23—*Illegal consideration — Public policy.*

The promise of pension for giving up the practice of a lawyer and payments to various persons to use their influence with Government in connection with private or quasi-political concerns cannot be regarded as illegal or immoral consideration. (*Chamier, C. J. and Sharfuddin, J.*) SHIV HARAM LAL *v.* KESHO PRASAD SINGH.

3 P. L. W. 302 : 42 I. C. 122 : 1918 Pat. 86.

———S. 23—*Arbitration— Parties— Restriction of evidence.*

Where the parties to an arbitration, contract that neither they nor their witnesses shall give evidence and the arbitrators cannot, on the slight and insufficient evidence before them, be fairly said to be able to use a judicial discretion in the matter, the submission merely amounts to a wager on the fancy of the arbitrators and is invalid. But where the reference provides for arbitrators hearing the parties or the witnesses or not as they chose. *Held*, such a submission is not necessarily invalid. (*Pratt, C. J. and Kemp, A. J. C.*) BASRIO *v.* MAHOMED LADHA.

24 I. C. 264: 7 S. L. R. 113.

———S. 24—*Mortgage void--Personal covenant is void.*

Where a usufructuary mortgage of an occupancy holding is void as Personal covenant to that effect is also void and unenforceable. (*Lindsay and Stuart, JJ.*) HAR PRASAD *v.* SHEO GOVIND. **20 A.L.J. 318 : 44 A. 486: 67 I. C. 792 : 1922 A. 134.**

———S. 24—*Applicability—Mortgage of an occupancy holding and a fixed rate tenancy in one deed.*

CONTRACT ACT (IX OF 1872), S. 24.

The provisions of S. 24, Contract Act do not render wholly invalid a mortgage in one deed of the mortgagor's occupancy holding which he has no right to mortgage and his fixed rate tenancy which he can validly mortgage. *Per Walsh, J.C,*—S. 24 does not apply to a case where the plaintiff is seeking to enforce an equity in respect of a perfectly valid security. (*Richards, C. J. and Walsh, J.*) RAJENDRA PRASAD *v.* RAM JATAN RAI. **39 All. 539 : 39 I. C. 785 : 15 A. L. J. 544.**

———S. 24—*Promissory note—Part of consideration illegal—Suit—Dismissal of.*

Where a part of consideration of a pro-note was loss at gambling and hence illegal, and where this could not be separated from the legal part of the consideration, the whole suit on the pro-note ought to be dismissed. (*Richards, C. J. and Piggott, J.*) BALGOBIND *v.* BHAGGU MALL.
35 All. 558 : 21 I. C. 878 : 11 A. L. J. 854.

———S 24—*Void contract—'Forbidden by law'—Occupancy holding—Transfer of.*

A transfer of an occupancy holding is forbidden by law, and a contract, a part of the consideration for which is such a transfer, is void under S. 24. (*Piggott, J.*) RAM PARTAP RAI *v.* RAM PHAL TELI. **18 I. C. 9.**

———S. 24—*One of several considerations unlawful—Validity of contract.*

In a contract where one of several considerations is unlawful, *e. g.*, a transfer of property which cannot be transferred under S. 6 (*a*), T. P. Act, the whole agreement is void. (*Lindsay, J.*) (*C*) SHIAM SUNDAR *v.* DILGANJAN SINGH.
20 O. C. 155 : 39 I. C. 540 : 4 O. L. J. 380.

———S. 24—*Champertous agreement not void.*

Plaintiff who married her mother's servant made an agreement with a certain person that if she succeeded in her suit for her mother's property he would get half the property and if she failed he was to bear the costs. *Held* the suit was not a speculative one at all. The plaintiff respondent had a natural right to succeed to her mother's estate and the burden of proving that she had lost the right by her marriage with the servant was on the defendants appellants. (*Mc Coll, A.J.C.*) MAUNG NYI MAUNG *v.* MANU.
70 I. C. 904: 1 Bur. L J. 78: 1922 U. B. 12.

———S. 24—*Scope.*

If the various promises of the two parties are quite interdependent, the fact that one large part of the contract is void must vitiate the whole (*Brown, A. J. C.*) MOHAMED *v.* ONA MAHOMED EBRAHIM. **70 I. C. 881: 1 Bur. L. J. 72 : 1922 U. B. 9 (2).**

———S. 25—*Consideration — Compromise—Partnership—Mortgage of partnership property by one partner—Binding character of mortgage disputed by the other partner—Compromise—Subsequent declaration of invalidity of mortgage as regards the disputing mortgagor's share—Effect of.*

Under the terms of a compromise arrived at between two partners, in a suit for dissolution of partnership, one of the partners agreed to accept as binding upon him a mortgage of partnership property executed by the other partner and originally disputed by him, and to pay a sum of money in consideration of his share in the mortgaged property being released, a major portion of which amount, however, he failed to pay. The Privy Council subsequently held in a suit brought by the mortgagee on the foot of the said mortgage, that it was not binding on the partner who originally disputed the same but subsequently accepted it and the whole of the mortgage money was realized by the mortgagee from the executant of the mortgage alone. *Held*, that the other partner was liable to contribute to the said debt by paying the amount originally agreed to be paid by him under the terms of the compromise notwithstanding the fact that the mortgage in dispute was subsequently pronounced by the Privy Council not to be binding on him. (*Lord Dunedin*) RAMLAL *v.* NARSINGDAS.

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17 Bom L. R. 404 : 2 L. W. 163 : 19 C. W. N. 193: 17 M. L. T. 45: 11 N. L. R. 53 : 21 C. L. J. 137 : 28 M. L. J. 448 : 26 I. C. 924 : 1915 M. W. N. 392 (P. C.).

———S. 25—*Valid contract—Writing Signed by agent—Pleader if authorised to admit liability.*

In order that a valid contract may be constituted under S. 25 (3) of the Contract Act it is necessary that the statement should be in writing and should be signed by the person charged therewith or by the agent generally or specially authorized. Where there was no proof at all that a pleader who made the statement relied upon as a contract had any general or special authority from the defendant which would entitle him to enter into a contract on their behalf to pay a time barred debt, and the pleader's authority was confined to conduct of the case his statement that if during the pendency of the suit the plaintiff obtained a succession certificate, the defendants were ready to submit to a decree for the amount claimed together with interest for six months did not constitute unqualified admission of liablity within the meaning of S. 25 of the Contract Act. Nor could the court treat the statement as showing in any way that the pleader who made it had authority to bind the defendant by a fresh contract under section 25 of the Contract Act. (*Lindsay and Sulaiman, JJ.*) BANSIDHAR *v.* BABU LAL.
21 A. L. J. 713 : 75 I. C, 309: L. R. 4 A 473 : 1924 A. 12.

———S. 25—*Adequacy of consideration.*

Adequacy of consideration is not under explanation 2 to S. 25, Contract Act a matter to be taken into consideration in deciding whether an agreement is valid. (*Lindsay and Sulaiman, JJ.*) BINDESHRI PRASAD *v.* SARJU SINGH.
45 A. 590 : 21 A. L. J. 446: L. R. 4 A. 241 : 73 I. C. 458 : 1923 All. 590.

———S. 25 — *Consideration—Forbearance to sue.*

The forbearance to enforce in a Court of law a claim *bona fide* believed to exist and to be enforceable, would be a good consideration for a contract. (*Gokul Prasad and Stuart, JJ.*) GULAB CHAND *v.* KAMAL SINGH. **44 All. 424 : 20 A. L. J. 285 : 4 U. P. L. R. (A) 154 : 67 I. C. 4 : L. R. 3 A. 242 : 1922 All. 260.**

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——S. 25—*No promise to pay.*

Simply acknowledging indebtedness without any promise to pay is not an agreement under S. 25. (*Beaman, J.*) JETHIBAI *v.* PUTLIBAI.
17 I. C. 722: 14 Bom. L. R. 1020.

——S. 25—*Agreement by a creditor with co-debtors, not to sue him if he helps in realisation.*

If a creditor agrees with one of his debtors not to sue him if he helps realization and to refund a deposit if realization actually takes place the agreement cannot be enforced. (*Chatterjee and Panton, JJ.*) HARENDRA CHANDRA *v.* ISWAR CHANDER SAHAI. 57 I. C. 844.

——S. 25—*Agreement to pay for future services.*

In the absence of a contract by the promissee for rendering future services, a promise to pay for services is without consideration and therefore void. (*Richardson and Beachcroft, JJ.*) BASANTA KUMAR *v.* MADAN MOHAN. 46 I. C. 282 : 23 C. W. N. 639.

——S. 25—*Consideration—Promise to defend a suit—Contract of sale.*

The promise of the vendee to defend a suit to be brought by a collateral of the vendors constituted a legal consideration for the contract of sale. As regards the validity of the contract, it matters little if collateral did not bring any suit and the vendee was consequently not called upon to expend any money on behalf of the vendors does not make any difference so far as the validity of the contract is concerned. (*Shadi Lal and Martineau, JJ.*) MUHAMMAD UMAR *v.* WALI.
2 Lah. L. J. 306.

——S. 25—*Abstention from suit—Validity.*

Bonds executed in return for plaintiff's abstaining to sue for the interest and which were executed before the decision declaring such bonds invalid are not bad. If an intending litigant *bona fide* forbears a right to litigate which is not vexatious or frivolous, he does give up something of value, even if the suit may turn out to be wrong. (*Chevis and Shadi Lal, JJ.*) GOPAL DAS *v.* GHULAM MOHY-UD DIN 23 P. L. R. 1915 : 27 I. C, 579 : 237 P. W. R. 1915.

——S. 25—*Compromise—Consideration—Withdrawal of proceedings.*

The withdrawal of proceedings under S. 523 of Act XIV of 1882 is a sufficient consideration for a compromise by the parties. (*Kensington, Offg. C. J. and Ratligan, J.*) MURLIDHAR *v.* GOBIND RAM. 306 P. L. R. 1913 : 205 P. W. R. 1913 : 20 I. C. 817 : 20 P. R. 1914.

——S. 25—*Settling disputed claims.*

A contract entered into by heirs of deceased to settle disputed and doubtful rights is valid and binds the minor members as adult members acted as *de facto* guardians for their benefit. (*Shahdin and Scott-Smith, JJ.*) BASHESHAR NATH *v.* DEVI PERSHAD. 20 P. R 1913 : 101 P. W. R. 1913 : 19 I. C. 411 : 185 P. L. R. 1913.

——S. 25—*Consideration—Maintenance—Agreement to pay entered after marriage.*

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An agreement to pay maintenance to a wife entered into after the marriage is not supported by any consideration, the marriage not being affected thereby. (*Johnstone, J.*) HUSSAIN BIBI *v.* NEK ALAM. 157 P. W. R. 1911 : 11 I. C. 833 : 245 P. L. R. 1911.

——S. 25—*Promissory note—Barred debts.*

When a promissory note is executed in respect of transactions which have gone on for some years and the items consist of advances which would be barred and of subsequent dealings, the settlement cannot be impeached as to the items which would but for the settlement, be barred so long as there is no fraud or mistake. (*Kumaraswami Sastri, Krishnan and Odgers, JJ.*) P. RAMA PATTER *v.* A. VISVANATHA PATTER.
41 M. L. J. 567 : 15 L. W 130 : (1922) M. W. N. 27 : 30 M. L. T. 209 : 45 Mad. 345 : 66 I. C. 155 : 1922 Mad. 23.

——S. 25—*Debt, meaning of.*

The word 'debt' in S. 25 is held in its ordinary meaning of a sum payable in respect of a loan recoverable by action. A promise to pay the amount which might be found due by the arbitrator on taking the accounts is not a promise to pay a 'debt' within S. 25 of the Act. (*Wallis, C. J., Abdur Rahim and Srinivasa Aiyangar, JJ.*) DORAISWAMI *v.* VAITHILINGA. 40 Mad. 31 : 32 M. L. J. 422 : 39 I. C. 220 : (1917) M. W. N. 353. (F.B.)

——S. 25—*Remission—Consideration.*

An intimation from the landlord that the reduction hitherto allowed would cease after the date of the letter, discharges the tenant from paying the contract rate for a particular period. No consideration is necessary for this remission and does not contravene S. 92 of the Evidence Act. (*Ayling and Seshagiri Aiyar, JJ.*) MAHARAJA OF ROBBILI *v.* RANGU APPALA NAIDU. 32 I. C. 703 : (1916) M. W. N. 149.

——S. 25—*Barred debt—Consideration.*

An agreement in respect of a barred debt is valid under S. 25 although the promisor did not at the time of the agreement know that it was barred. 23 M. 94, 33 M 159 Foll. (*Sankaran Nair and Sadasiva Aiyar, JJ.*) MRS C. SIMON *v.* AROGIASWAMI PILLAI. 25 I. C. 36 : 16 M. L. T. 122.

——S. 25—*Disputed claim—Valid and* bona fide *compromise.*

The abandonment of a *bonafide* claim is a good consideration for a compromise though the claim may be based on a void agreement, and the onus will be on the defendant to show that the claim was not *bona fide* (*Wallis, J.*) THANGAVELU CHETTY *v.* MUKUNDU NAIDU. 14 M. L. T. 491 : 21 I C. 768 : (1914) M. W. N 108.

——S. 25—*Compromise — Consideration—Forbearance to litigate legal claim.*

An intending litigant who *bona fide* forbears to litigate a question of law or fact which it is not vexatious or frivolous to litigate does give up something of value, but there must be in fact a serious claim honestly made. The forbearance of a claim which was not maintainable cannot be treated as

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a forbearance. As according to S. 108 of the Oudh Rent Act, the plaintiff had no right to sue at all, the relinquishment was gratuitous. (*Kanhaiya Lal, J, C.*) MAHMUDA *v.* SHANKAR BAKSH SINGH.
22 O. C. 163 : 6 O. L. J. 404 : 53 I. C. 104 : 1 U. P. L. R. (J. C.) 87.

——S. 25—*Compromise—Consideration for.*

An abandonment or compromise of a disputed claim, containing or implying a promise to do or to abstain from doing something is a valid consideration for an agreement, even if the claim is not well founded. 26 Cal. 81 Dist. (*Lindsay and Kanhaiya Lal, A. J, Cs,*) BHARATHA SINGH *v.* BALBHADHAR SINGH. 20 I. C. 429.

——S. 25—*Debt due by joint Hindu family—Division into three parts—Acknowledgment by members.*

Lim. Act, S. 19—*Distinction between.* There is a difference between acknowledgment sufficient for Lim. Act, S. 19 and Contract Act, S. 25. In order to create a new contract as required by the latter, the promise to pay must be expressed. A debt due by a joint Hindu family was divided into three equal parts and each of three branches acknowledged severally to pay each portion. *Held*, a new contract might be implied from the terms of the acknowledgment, apart from the terms of S. 25. (*Das and Ross, JJ.*) RAM BAHADUR SINGH *v.* DAMODAR PRASAD SINGH. 6 Pat. L. J. 121 : 60 I. C. 514 : 2 Pat. L. T. 303.

——S. 25—*Release of* bona fide *claim—Valid consideration.*

If the Manager of an Indigo Factory and the tenants believed in good faith in the existence of an obligation on the part of the tenants to grow indigo on a certain portion of their holdings and the latter in order to obtain a release from the obligation executed pro-notes in favour of the manager. *Held*, that the pro-notes were supported by valid consideration. (*Roe and Coutts, JJ.*) AJODHYA JHA *v.* H. E. COX. 48 I. C. 701.

——S. 25—*Promise to repay loan at a certain place—Consideration—Enforceability.*

A promise to pay something which the promisor is already under an obligation to pay is a promise without consideration and cannot be enforced. Any separate promise made to pay the amount at any particular place must be supported by a consideration before it can give rise to legal consequences under S. 25 (2), Contract Act (8 M. I.A. 291, 8 Bur. L. T. 101 : 30 M. 438 Rel). (*Maung Kin, J.*) MAUNG BA TU *v.* BAMAN KHAN.
9 L. B. R. 75 : 39 I. C. 132 : 11 Bur. L. T. 67.

——S. 25—*Gift—Revocation—Implied.*

A subsequent conveyance of property to a stranger is not enough to justify an inference that a prior gift of the same property is thereby revoked; an express act of revocation is necessary. (*Twomey, J.*) LAL MAHOMED *v.* MRA THA AUNG.
8 Bur. L. T. 269 : 30 I. C. 20 : 8 L. B. R. 185.

——S. 25—*Compromise—No consideration.*

A Composition with the debtor on the assurance of the joint debtor for payment of the balance amount is unenforceable. The agreement is void for want of consideration and the creditor can sue on the original obligation. (*Hartnoll, J.*) A. P. S. V. FIRM *v.* SHREE SAFATULLA
15 I. C. 363 : 5 Bur. L. T. 81.

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——Ss. 25 (2) and 11—*Minor—Benefit done to—Promise to pay after majority.*

An agreement by a person to compensate a promisee who had already done something to him even while he was a minor, falls within S. 25 (2) and is binding on the promisor. (*Abdul Raoof and Moti Sagar, JJ.*) RAM RATTAN *v.* BASANT RAI.
2 Lah. 263 : 64 I. C. 121 : 3 Lah. L. J. 563 :

——S. 25 (2)—*Consideration received during minority of executant—Interest.*

An agreement by a person of full age to compensate a promisee for something voluntarily done for the promisor at a time when the promisor was a minor, fall within S. 25, clause 2 of the Contract Act and is enforceable. But no interest can be recovered upon such an agreement (*Scott Smith, J.*) PRABH DIAL *v.* SHAMBU NATH.
54 I. C. 436 : 20 P. L. R. 1920.

——S. 25 (2)—*Minor— Agreement to pay monies received during minority—Validity.*

An agreement by a person of full age to pay for monies received by him and services rendered to him, comes within the purview of S. 25 (2) of the Contract Act, and is valid, although as a general rule, a promise by an infant is a mere nullity. (*Kensington and Ralligan, JJ.*) KARAM CHAND *v.* BASANT KUAR. 31 P. R. 1911 : 192 P. L. R. 1911 : 11 I. C. 321 : 236 P. W. R. 1911.

——S. 25 (3)—*Accounts—Barred items—Balance promised to be paid—Signature—Effect of.*

The words "The balance of the old account has to be paid" entered at the commencement of a fresh account, opened after the previous one has been checked and signed, constitute an agreement within the meaning of S. 25 (3) of the Contract Act and is enforceable. (*Ryves and Gokul Prasad, JJ.*) BENAYAK PRASAD PANDEY *v.* BISHEN DUTT PATHAK. L. R. 3 A. 308.

——S. 25 (3)—*Scope of—If includes judgment debt.*

A judgment debt comes under the meaning of S. 25 (3). (*Newbould and Rankin, JJ.*) IBRAHIM MULLICK *v.* LALIT MOHAN ROY.
50 Cal. 974 : 28 C. W. N. 322 : 79 I. C. 489 : 1924 C. 388.

——S. 25 (3)—*Barred debt—Acknowledgment—Promise to pay—Hatchitta.*

A *hatchitta* which was merely an acknowledgment of a debt does not come within S. 25 (3). There must be a promise to pay the debt for the purposes of the section. (*Suhrawardy and Cuming, JJ.*) PANCHANAN PODDAR *v.* KHITISH CHANDRA. 67 I. C. 298.

——S. 25 (3)—*Promise to pay barred debt—Knowledge of promisor.*

To bring a case under S. 25 (3) of the Contract Act, the creditor need not establish knowledge on

the debtor's part as to the debt having become wholly or partially barred. (*Mookerjee and Beachcroft, JJ.*) BHAWANI MISSER *v.* PEARI JHA. 21 I. C. 254 : 18 C. L. J. 329.

——S. 25 (3,—*Promise to pay a barred debt.*

A promise in writing to pay a barred debt is valid even if the promisor is not aware that the debt is barred. (1910) M. W. N. 547 Diss. from. (*Mookerjee and Beachcroft, JJ.*) MATU SHEIKH *v.* BAIKUNHTA NATH KAR. 20 I.C. 809 : 18 C.L.J. 269.

——S. 25 (3)—*Barred debt—Conditional promise to pay.*

Where the debtor promised to pay by a share of the profits of a business, *Held*, that the plaintiff could not recover in any other way. An acknowledgment of barred debt does not give a fresh period of limitation in favour of creditors. Under S. 25, Cl. (3), a barred debt is considered a good consideration for a promise to pay and the new promise is the measure of the creditor's right. The promise may be absolute or conditional. The whole of the promise whether free or clogged with a condition, gives the cause of action. (*D. Chatterjee and N. R. Chatterjee, JJ.*) BINDA DASYA CHUTIANI *v.* CHOTA. 14 I C. 133 : 16 C.W.N. 636.

——S. 25 (3)—*Written promise to pay a barred debt under—Suit on.*

A suit on a written promise to pay a barred debt under S. 25 (3) of the Contract Act lies as it is a contract. 23 Mad. 94 foll. (*Abdul Raoof and Campbell, JJ.*) DAVID SUTHERLAND CLARK *v.* ROSE GRIMSHAW. 73 I. C. 652 : 1923 Lah. 481.

——S. 25 (3)—*Contract to pay barred debt—Cause of action—Interest.*

If a debtor signs a balance struck after the period of limitation for the last item in a *Bahi* account with a statement promising interest with the balance the agreement amounts to a contract under S. 25 (3) and constitutes a fresh cause of action. (*Scott-Smith and Broadway, JJ.*) BHAGWAN SINGH *v.* MUNSHI RAM. 66 P. R. 1917 : 41 I. C. 915 : 135 P. W. R. 1917.

——S. 25 (3)—*Joint Hindu family—Debt by Manager—Promissory note by junior members Validity.*

A debt contracted by the Manager of a joint Hindu family for a joint family purpose is a debt due by the other members of the family within the meaning of S. 25 (3) of the Act and a promissory note executed by the latter, undertaking to pay such debt after it had become barred, is valid and binding on them. (*Kumaraswami Sastri and Krishnan, JJ. Odgers, J. dissenting.*) RAMA PATTAR *v.* VISWANATHA PATTAR. 41 M. L. J. 567 : 66 I. C. 155 : 45 Mad. 345 : 15 L. W. 130 : 1922 M. W. N. 27 : 30 M. L. T. 209 : 1922 Mad. 23.

——S. 25 (3)—*Debt of Guardian—Minor agreeing to pay.*

S 25 (3) applies to the case of a minor executing a promise in writing to pay a debt of his guardian. (*Batten, A. J. C.*) NANDRAM *v.* RANCHHODDAS. 5 N. L. J. 178 : 65 I. C. 716 . 1922 N. 250.

——S. 25 (3)—*Barred Debt—Consideration for sale.*

A barred debt is a good consideration for a sale. (*Piggott, J. C. and Kanhaiya Lal, A. J. C.*) BALDEO SINGH *v.* PUTU LAL. 21 I. C. 69.

——S. 26—*Restraint on marriage.*

An agreement to pay a woman certain annual allowance only 'until death or remarriage' or 'during widowhood' is not illegal. (*Piggott, J.*) MUHAMMAD HUSAIN *v.* NUR JEHAN 16 I. C. 13 : 10 A. L. J. 185.

——S. 26—*Kabinnamah—Authority given by Mahomedan husband to wife to divorce on husband's marrying a second wife if valid.*

A *Kabinnamah* by which a Mahomedan husband authorises his wife to divorce herself from him in the event of his marrying a second wife, is not void under S. 26. A Mahomedan husband may delegate his wife power to divorce on certain conditions. (*Woodroffe and Newbould, JJ.*) MAHARAM ALI *v.* AYESA KHATUM. 31 I. C. 562 : 19 C. W. N. 1226.

——S. 26—*Restraint of marriage.*

A custom to pay a bride price, while marrying a major girl is immoral and in restraint of marriage and is therefore unenforceable. (*Scott-Smith and Dundas, JJ.*) ABBAS KHAN *v.* NUR KHAN. 58 I. C. 167 : 1 L. 574 : 2 U P. L. R (L.) 160 : 58 P. W. R. 1920.

——S. 26—*Restraint of marriage — First marriage.*

An agreement for repayment of money spent on the boy's education if he married another during the life time of his wife is void. S. 26 is not restricted to the case of the first marriage only but also applies to a person already married. (*Hartnoll, Offg. C. J. and Twomey, J.*) UGA ZAN *v.* HARI PRU. 7 L. B. R. 304 : 24 I. C. 777 : 7 Bur. L. T. 98.

—— Ss. 26 and 57—*Restraint of marriage—Second marriage—Contract by husband to live with wife, and not take another wife—Breach—Damages.*

A wife took steps to divorce her husband and the latter agreed to live in her house to work and support her, and not to take another wife, but did not carry out the agreement. *Held*, that a suit for damages for breach was maintainable despite the subsistence of defendant's marriage with plaintiff. A stipulation not to take another wife was not contrary to the Buddhist Law, and therefore did not contravene S. 26 of the Contract Act. Though the stipulation not to take another wife may have been illegal as being in contravention of S. 26 of the Contract Act, yet the promises to live in plaintiff's house and to work and support her, were good and lawful, and, therefore, enforceable under S. 57 of the Contract Act. (*Shaw, J. C.*) NGA PO GYI *v.* MI ON. 15 I. C. 915 : (1912) 1 U. B. R. 108.

——S. 27—*'Good will'—Sale of—Construction of documents.*

Under an agreement called the *kisti bandi* bond, executed by a owner of a ferry boat on

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a river, in favour of another person having a ferry boat on the same river, the former purported to buy from the latter the good will of his trade in plying the ferryboats and every description of interest and ownership which the latter had acquired in several river landing places for plying the boats as well as the settlement obtained for the collection of tolls. The price was to be paid by instalment and if default was made in payment of any instalment the entirety was to become due at once. No question of title was to be raised by the buyer of the good will. In addition to the transfer of good will, there was an agreement or *kobala* executed about the same debt by the person selling the good will in favour of the buyer purporting to transfer the rights of the former, in the landing places and settlements and in the good wills of the business and plying the ferryboats, in consideration of the price promised to be paid under the first document. The transferee was to be able to enjoy and possess these rights by exercising whatever rights the transferor had in them and the latter undertook to close the business of plying further ferryboats and promised to return the whole amount, if he ever carried on the business again. The buyer made a default in paying instalment and a suit was brought by the seller. The other side contended that the agreement was in restraint of trade and therefore was void. *Held* that as the documents showed it amounted to a sale of good will and therefore was valid. (*Viscount Haldane, JJ.*) CHANDRA KANTA DAS *v.* SARASULLAH MULLICK. 47 M. L. J. 657 : 26 C. W. N. 345 : 3 U. P. L. R. (P. C.) 92 : 48 C. 1030 : 24 Bom. L. R. 603 : 48 I. A. 508 : 65 I. C. 271 : 1922 P. C. 167 (P. C.)

——Ss. 27 and 23—*Legal practitioner — Barrister—Agreement not to practise for a reasonable time.*

Where the two branches of the profession, *viz.*, barristers and solicitors are amalgamated in a place, an agreement by a barrister not to practise for a reasonable time is valid and its breach can be restrained by an injunction. (*Lord Macnaughten.*) HOME *v.* DOUGLAS.
19 I. C. 822 : 17 C. W. N. 215 (P. C.).

——S. 27—*Right to free contract—Not to be interfered with.*

The right of free contract cannot be ignored by Courts of Law without an express statutory prohibition. (*Walsh, J.*) BHAIRON PRASAD *v.* SAMARAPURI. 34 I. C. 441.

——S. 27—*Restraint of trade— Contract when void.*

An agreement between the neighbouring landowners that market for sale of cattle shall not be held on the same day on the lands of both is not void under S. 27. (*Chamier and Piggott, JJ.*) FOTHIRAM *v.* ISLAM FATIMA.
37 All. 212 : 27 I. C. 871 : 13 A. L. J. 281.

——S. 27, Exception 1—*Good will, what is —Restraint of trade, what amounts to.*

Where A who used to carry on business as a carrier of passengers by *Gatava* boat between certain places agreed to pay to B, the plaintiff a large sum in consideration of B abstaining from

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carrying on a rival business along the same route for a period of three years and also for some other consideration. *Held* (1) that, as the main consideration was the restraint of B's rival business, the contract was valid under S. 27 (2) that, as it was impossible to sever the legal part from the illegal part, the whole contract was unenforceable but the defendant should nevertheless pay for the advantages he actually received under S. 65 (3) that the contract did not fall within exception 1 to S. 27 as the plaintiff had no good will in his rival business. Good will is also defined. (*D. Chatterjee and Walmsley, JJ.*) PARASULLA MULLICK *v.* CHANDRA KANTA DASS.
39 I. C. 177: 21 C. W. N. 979.

——S. 27—*Theatrical party—Agreement not to play anywhere else.*

A contract by a theatrical party with the plaintiff not to play anywhere else or in any other theatre in any town till the termination of the period in question, is void as being one in restraint of trade and no injunction can be issued against the company restraining performance in any other place. (*Fletcher, J.*) COHEN *v.* ALLAN WILKIE. 14 I. C. 215 : 16 C. W. N. 534.

——S. 27—*Agreement not to supply coolies— Restraint of trade.*

Where one of two rival cooly-suppliers agreed not to supply coolies in consideration of the latter paying Rs. 50 monthly to the former, the agreement was void as being in restraint of trade. (*Wallis, J.*) THANGAVELU CHETTY *v.* MUKUNDA NAIDU. 14 M. L. T. 491 : 21 I. C. 768 : (1914) M. W. N. 108.

——S 27—*Contract in restraint of trade is void.*

Contracts in restraint of trade whether partial or total is void under S. 27 of the Contract Act. Where the plaintiffs entered into an agreement with the defendant to the effect that the former would sell beef for 14 days in the month and the latter for 16 days and that each party should sell goat's flesh for 15 days only in the month. *Held* the contract is void and unenforceable under S. 27 of the Contract Act. (*Brown, A. J. C.*) MOHAMMED *v.* ONA MOHAMED. 4 U. B. R. 110 : 70 I. C. 881 : 1 Bur. L. J. 72 : 1922 U. B. 9.

——S. 27—*Contract of personal service— Provision against service elsewhere.*

Where a contract of personal service for a specified period contains a stipulation prohibiting the servant from serving a third party during that period, the stipulation is valid and does not offend S. 27 of the Contract Act. (*Robinson, C. J. and Heald, J.*) INDO-BURMA OIL FIELDS, LTD. *v.* BURMA OIL COMPANY, LTD.
64 I. C. 794 : 11 L. B. R. 26.

——Ss. 27 and 23—*Restraint of trade.*

The agreement of a plaintiff not to set up a business in consideration of which the defendant promised to pay a certain sum for life was held to be void as in restraint of trade. The promise of the plaintiff having no binding effect, is void in spite of the facts that it was partly carried out.

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(*Fox, C. J., Parlett and Robinson, JJ.*) HURRAY KRISHNA PILLAI *v.* AUTHILUCHMY AMMIAL. 9 Bur. L. T. 28 : 33 I. C. 238 : 8 L. B. R. 389.

——Ss. 27 and 74—*Restraint of trade—Agreement between millers — Breach — Liquidated damages.*

An agreement for a fixed period between two millers not to charge less than a certain price for milling other people's rice and to work their respective mills during alternate weeks, and providing for a fixed sum as penalty in case of breach, is not a contract in restraint of trade under S. 27. In a suit for damages for a breach of the contract, the stipulated sum is recoverable without proof of damage under S. 74 of the Contract Act. (*Parlett, J.*) TAN KHWAN HONG *v.* MAUNG KEGAW. 18 I. C. 183 : 5 Bur. L. T. 236.

——S. 28—*Forfeiture of right—Condition in policy—For suit being brought within three months—Valid.*

A condition of forfeiture in a Fire Insurance policy to the effect that, on the rejection of a claim, a suit must if at all be brought within three months, is not prohibited by S. 28 and hence a suit after that period is invalid. The phrase 'thus to enforce his rights' refers to enforcement by the usual legal proceedings. (*Scott, C. J. and Batchelor, J.*) BARODA S. AND W. CO., LTD *v.* S. M. AND F. INSURANCE CO., LTD. 38 Bom. 344 : 21 I. C. 694 : 15 Bom. L. R. 948.

——S. 28—*Insurance—Construction.*

An insurance contract contained a clause, 'No suit shall be brought against the company in connection with the said policy later than one year after the time when the cause of action accrues'. *Held*, that the clause meant that if no suit were brought within a year, then neither party should be regarded as having any rights against the other. The condition contained in the clause meant that there was to be a waiver of the rights of the respective parties if no suit was brought within a year. Terms used in an insurance contract must be construed concerning the object and exigencies of insurance. (*Chandavarkar, Offg. C. J. and Batchelor, J.*) HIRABHAI *v.* MANUFACTURERS LIFE INSURANCE CO. 16 I. C. 1001 : 14 Bom. L. R. 741.

——S. 28—*Insurance policy.*

Clause cutting down period of limitation for suit is enforceable. (*Greaves and Buckland, JJ.*) GIRIDHARILAL HANUMANBUX *v.* EAGLE STAR AND BRITISH DOMINIONS INSURANCE CO., LTD. 27 C. W. N. 955 : 1924 Cal. 186.

——S. 28—*Promise to defer enforcing void contract.*

A promise to defer bringing a suit upon a contract which is void, does not amount to a consideration. (*Chapman and Mullick, JJ.*) GOPINATH BHAGAT *v.* LAKSHIMINARAIN SINGH. 32 I. C. 937.

——S. 28—*Agreement not to raise objections.*

An agreement that the parties to an arbitration will not raise any objections whatever to the award is opposed to the spirit of S. 28. (*Johnston, C. J. and Shadi Lal, J.*) RAM JAWAYA LAL *v.* DEVI DITTA MAL. 107 P. W. R. 1916 : 117 P. R. 1916 : 34 I. C. 192 : 70 P. L. R. 1917.

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——S. 28—*Restraint on execution is void.*

An agreement between a transferor and a transferee that the transferee shall not in any way enforce his rights under the transfer, *e. g.*, execute or intervene in execution is void under S. 28 of the Contract Act. (*Wallis, C. J., Spencer and Kumaraswami Sastri, JJ.*) MUTHIAH CHETTIAR *v.* GOVINDDOSS KRISHNADOSS. 44 Mad. 919 : 41 M. L. J. 316 : 14 L. W. 287 : 69 I. C. 337 : (1921) M. W. N. 649 (F. B.).

——S. 28—*Insurance Policy — Condition limiting time of suit.*

A condition in a Life Insurance Policy that no suit shall be brought on the policy after one year from the death of the accused is void. (*Ormand, J.*) MA YWET *v.* CHINA MUTUAL LIFE ASSURANCE CO., LTD. 11 I.C. 756 : 4 Bur. L. T. 173.

——S. 28—*Contracting out of statute.*

An agreement that award will not be affected against or objected to is void being a contract not to enforce rights conferred by the Arbitration Act in respect of the contract to refer. (*Crouch, A. J. C.*) SETH NARAIN DAS *v.* KEVALRAM. 42 I. C. 706 : 11 S. L. R. 43.

——S. 29—*Omission to fix a maximum limit of purchase.*

A contract is not indefinite by reason of the omission to fix a maximum limit of purchase and the Court will reject the dishonest claim for damages on the alleged failure to comply with large and unreasonable orders. Where there is a continuing contract to supply goods as orders are received, the obligor can withdraw from the transaction before any particular order is received after giving notice to the other party. (*Scott, C. J. and Heaton, J.*) GANI I ATIF *v.* MANI LAL. 34 I. C. 520 : 18 Bom. L. R. 217.

——S. 29—*Terms for renewal—Vague and uncertain—Inoperative in Law.*

A covenant in a lease that upon expiry of its term a fresh settlement will be come to, between the parties is inoperative in law, on the ground of vagueness and uncertainty. (*Mookerjee and Chatterjea, JJ.*) LANI MIA *v.* MUHAMMAD EASIN MIA. 33 I. C. 448 : 20 C. W. N. 948.

——S. 29—*Contract written ambiguous.*

A covenant of partnership giving one party the right of specifying the share of profits to be assigned to the other and affording not the slightest indication as to the proportion of losses which one party is to bear in the partnership, is void for uncertainty. 11 M. 200 Foll. 27 M. 382 : 5 C. 932, Dist. (*Shadi Lal and Leslie Jones, JJ.*) BARKAT RAM *v.* ANANT RAM. 31 I. C. 632 : 185 P. W. R. 1915.

——S. 29—*Void—Capable of being made certain.*

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An instrument is not void if it is capable of being made certain. (*Agnew and Shadi Lal, JJ.*) AZIZKHAN *v.* DUNI CHAND. **305 P L. R. 1913: 20 I. C 812 : 195 P. W. R. 1913.**

———S. 29—*Contract for rent in cash in lieu of paddy—Uncertainty*

An agreement to pay rent in cash without the rate being definitely fixed, is void for uncertainty. (*Spencer and Krishnan, JJ.*) MUTHIAH *v.* PERIYAN **11 L. W. 311 : 27 M. L. T. 226 : 55 I. C. 78 : (1920) M. W. N. 15.**

———S. 29—*Agreement to pay something for collection of old debts without specifying amount—Whether enforceable.*

A Nattukottai Chetty principal promised to give his agent something as remuneration in respect of sums collected from his old debtors without specifying the amount. *Held*, if it constituted an unqualified contract to give something, it was enforceable but, if the party agreed at the option of giving anything or nothing at all, there is no enforceable contract. (*Coutts Trotter and Srinivasa Aiyangar, JJ.*) VELLAYAM CHETTY *v.* KULLANDA VELLAPPA CHETTY.
31 I. C. 783 : 29 M. L. J. 749.

———S. 29—*Document capable of two meanings.*

Where a document is capable of two contrary interpretations and practically incapable of interpretation at all, and therefore it is not possible for the Court to allow the document to be enforced, it is void for uncertainty within S. 29. (*Findlay, A. J. C.*) GOPAL RAO *v.* GANA.
63 I. C. 48 : 4 N. L. J. 67.

———S 29—*Vague contract.*

A personal covenant to convey land which is too vague and indefinite in its nature is invalid and inoperative in law. (*Chamier, C. J. and Jwala Prasad, J.*) DAYA BHAI *v.* MAHARAJ BAHADUR SINGH.
1 Pat. L. J 238 : 34 I. C. 482 : 2 Pat. L. W. 333.

———S. 30—*Common intention to wager essential—Speculation not equivalent to wagering*—Pakka adatias, *their position.*

Speculation does not necessarily involve a contract by way of wager to constitute such a contract. A common intention to wager is essential. The mere fact that one party to a contract for sale of goods did not intend to deliver even if known to the other party does not vitiate the contract, unless there is a bargain or understanding between the parties that delivery, is not to be called for. Nor does the mere fact, that, as to the greater part of the goods there was no delivery but an adjustment of claims, vitiate the transaction. (*Sir Lawrence Jenkins.*) BHAGWANDAS *v.* BARJORGE RALLONGEE BOMANJEE.
42 Bom 373 : 23 M. L. T. 203 : 34 M. L. J. 305 : 4 Pat. L. W. 229 : 16 A. L. J. 241 : 27 C. L. J. 358 : 22 C. W. N. 625 : 20 Bom. L. R. 561 : 7 L. W. 577 : 11 Bur. L. T. 211 : 45 I. A. 29 : 44 I. C. 284 : (1918) M. W. N. 315 (P. C.)

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———S. 30—*Collateral contracts—If enforceable.*

Even in the case of wagering contracts, S. 30 of the Contract Act does not prevent a person who is employed as agent in connection with them, from recovering sums due to him by his principal. (*Lindsay and Daniels, JJ.*) BIDHI CHAND *v.* KACHHU MAL.
73 I. C. 477 : 45 A. 503 : 1923 All. 585.

———S. 30—*Wager—Speculative contract—Contract to supply goods at a future date.*

A contract for the supply of goods at a future date at fixed prices, though speculative, is not a wager and a suit for damages for its breach would be maintainable. 42 B. 373 Ref. (*Ryves and Daniels, JJ.*) FIRM OF HAZARI LAL *v.* FIRM OF KESHO DAS.
L. R. 4 A : 119 : 21 A. L. J. 153 : 1923 All. 273.

———S. 30—*Wagering contract—Intention.*

To determine whether a contract is one of wager it must be seen whether the parties intend to take delivery and whether the parties are dealing with actual commodities that they are handling or expecting to handle or agreeing to settle an account according to fluctuation in prices of commodities in which they do not have and cannot expect to have any real title. When persons, in a position to carry out a contract and expected to be in that position at the time of performance, contract to recieve or deliver goods at a future date such contracts are not necessarily wegering contracts because there is an element of speculation in them, even if the contracts provide for the alternative of receiving or paying on differences instead of for actual delivery. (*Gokul Prasad and Stuart, JJ.*) SRINIVAS *v.* RAMDEO.
64 I, C. 65 : 43 All 585 : 19 A. L. J. 522 : 1922 All. 360.

———S. 30—*Wagering contract.*

Where a grain pit was purchased by the plaintiff as Commission Agents on behalf of defendants and the latter not being able to pay the purchase money the former sold it at a loss and sued the defendants for the loss ; *held*, that the case did not come under S. 30. 33 All. 219 Foll. (*Richards C. J. and Banerji, J.*) BISESHER DAYAL *v.* JWALAPRASAD.
36 All. 426 : 25 I. C. 415 : 12 A. L J, 817.

———S. 30—*Wagering contract—Intention of parties—Question of fact.*

The question whether the contracts between the parties are of a wagering nature is really a question of fact, that is to say, the party disputing that he was liable under the contracts would have to show that at the time the contracts were entered into the parties did not intend to carry on the contracts but agreed to abide by the prices at the due dates, when differences would be received. (*Macleod, C. J. and Crump, J.*) GANGA DAS *v.* JEKISONDAS.
73 I. C. 1032 : 25 Bom. L R. 520 : 1923 Bom 458.

———S. 30—*Tejimundi contracts when void as a wager.*

The mere fact that a contract is a *teji* contract or a *mundi* contract or a *teji mundi* contract with double option does not give rise to an inference

that it is a wagering contract and therefore void. The question depends on the common intention of the parties and is one of fact. It may be that if a party desires to prove that a particular contract of theabove description was a wagering contract, he may be able to do so with slight proof. The mere fact of a contract being a *tejimundi* contract is not by itself sufficient to take it out of the ordinary rule that the party who pleads that the contract is void as being in the nature of a wager as to prove that fact. 37 B. 264; 12 Bom L. R. 590 ; 24 Bom. L. R. 60 Ref. (*Shah, A C.J. and Crump, J.*) MANI LAL DHARAMSI *v.* ALLIBHAI CHAGLA. **68 I. C. 481 : 24 Bom. L. R. 812 : 1922 Bom. 408.**

——S. 30—*Wagering contract—Burden of proof—Onus on defendant.*

The plaintiff sold two bales of yarn to the defendant, who at a later date re-sold them to the plff. at lower rates. The plaintiff sued to recover the difference between the two bales as damages. The defendant contended that the plaintiff was not entitled to recover, the contracts being a wagering one. At the hearing the Court examined both the plaintiff and the defendant, neither of them was cross-examined by the other side. As neither party produced any evidence, the Court decided the suit on the pleadings and statements of parties and dismissed the suit. *Held*, that the suit should be decreed inasmuch as the defendant has absolutely failed to prove, what he was bound to prove in order to succeed, in his defence, that the suit transactions were of the nature of wagering contracts. If the defendant does not choose to go into the witness box on his own behalf that is a matter for himself to decide. In any ordinary case however, the Court is entitled to consider that as a point against the defendant. The plaintiff is not bound to issue a summons to the defendant and unless the defendant gives evidence on his own behalf so as to give the plaintiff an opportunity of cross-examining him, then the Court is entitled to infer everything against the defendant. (*Macleod, C. J. and Shah, J.*) RAJMAL RAMNARAYAN *v.* BUDANSAHEB ABDULSAHEB. **66 I. C. 943 : 24 Bom. L. R. 115 : 1922 Bom. 81.**

——S. 30—*Wagering contract—Defence of wager—Onus on defendant to prove that both parties agreed neither to ask for nor to give delivery*—Tejimandi *transactions.*

In the transaction known as *teji* the buyer of the *teji* pays the seller a premium or *teji* over and above the contract price of the commodity or goods. If the market raises the buyer of the *teji* who is also a buyer of the commodity or goods can ask the seller of the *teji* to give him the commodity or goods or the value of such commodity or goods at the market rate on the settling day. If the market falls the buyer of the *teji* merely loses his premium. *Teji* and *vaida* transactions are on exactly the same footing and unless it can be positively proved that the parties agreed neither to ask for nor to give delivery the transactions are not wagering contracts. On 6th January 1919, the plaintiff bought from the defendant twenty-five cases of Japanese camphor at the rate of Rs. 2-12-0 a tin for delivery on the 15th April 1919. He paid the defendant Rs. 125 as *teji* at the rate of one anna on every Rs. 2-12-0. On 7th February 1919, he further bought for the same delivery one hunderd cases of camphor at Rs. 2-13-0 a tin and paid the defendant Rs. 500 as *teji* at the rate of one anna on every Rs. 2-13-0. On 15th February, he again bought one hundred and fifty cases of camphor for the same delivery at Rs. 2-15-0 a tin and paid the defendant Rs. 750 as *teji* at the rate of one anna on every Rs. 2-15-0. The price of the camphor rose to Rs. 5-2-0 pert in and the plaintiff wrote to the defendant, on the 14th April 1919, that he would take delivery on the next day. On the 15th of April 1919 he went to the defendant and tendered the contract price and asked for delivery of the camphor. The defendant had no camphor to deliver and he replied to the plaintiff's letter that the plaintiff was not entitled to any delivery as the transactions were wagering and therefore invalid. The plaintiff sued the defendant claiming the difference between the rate at which he bought the camphor and its price on the settling day.

Held, that, as the defendant had failed to prove that there was an agreement or understanding between him and the plaintiff that in case the market rose the plaintiff should not require the defendant to deliver to him any camphor the transactions were not wagering contracts.

The transactions known as *teji mandi, teji* and *mandi* explained and discussed. (*Kincaid, J.*) MANUBHAI PREMANAND *v.* KESHAVJI RAMDAS. **65 I. C. 682 : 24 Bom. L. R. 60 : 1922 Bom. 66.**

——S. 30 — Pakka adatia— *Wagering contracts.*

Where contracts between a *pakka adatia* and his constituents are shown to be by way of wager they cannot gain validity by the fact that the *pakka adatia* has entered into other contracts with third parties to shield the first named contracts. (*Shah and Crump, JJ.*) MOTICHAND MAGANDAS *v.* KESHAV APPAJ-KULKARNI. **57 I. C. 129 : 22 Bom. L. R. 406.**

——S. 30—*Lottery—Agreement to purchase ticket in lottery sanctioned by Government—Injunction in support of a void contract.*

An agreement entered into by the plaintiff with a club by way of wager which had organized a lottery though sanctioned by Government is void under the first part of S. 30 of the Contract Act and of the first part of S. 1 of Bombay Act III of 1865. The effect of the sanction of the Government of the lottery is that no prosecution would lie in respect thereof but that sanction did not affect the Civil Law on the subject of lotteries, as the Government had no power to overrule an Act of the legislature by correspondence. No injunction could be granted in support of a void contract, (*Marten, J.*) DORABJI JAMSHEDJI TATA *v.* EDWARD F. LANCE. **42 Bom. 676 : 41 I. C. 869 : 19 Bom. L. R. 697.**

——Ss. 30 and 182—*Forward contracts—No passing of goods—Dealing in differences alone—* Pakka adatia—*Principal and agent.*

The defendant's branch firm at Cawnpore was managed by *munim* from 1897 to 1911 who entered into forward contracts in the name of

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defendant with the plaintiff, and they were entered in the books at Cawnpore but no goods were ever actually delivered. An adjustment of accounts was made in 1908 and a balance was found due to the defendant. After 1908 no forward contracts were entered in the accounts though the *munim* carried on the transactions with the plaintiff who did not know that the *munim* was acting in his own behalf. The defendant asked the plaintiff for information about goods bought and sold through them. They supplied the same some days after demand and brought the suit for the balance due on the contracts. *Held*, that the defendant was bound by the transaction entered into by the *munim* both before and after 1908 up to 1911. But the transactions being only for differences was a wagering one and hence could not be enforced. (*Scott, C. J. and Batchelor, J.*) CHHOGMAL BALKISONDAS *v.* JAINARAYAN KANAIYALAL.
39 Bom. 1 : 24 I. C. 743 : 16 Bom. L. R. 213.

——S. 30—*Contract to pay differences.*

A seller may, technically speaking, be said to deliver goods to his buyer by giving him a delivery order on a certain person but just as mercantile contracts may be used for the purpose of transactions for payment of differences so also delivery orders may be used and passed from hand to hand amongst persons who have no other intention than that of adjusting differences amongst themselves. (*Macleod, J.*) CHHOGMAL *v.* JAINARAYAN. 20 I. C. 882 : 15 Bom. L. R. 750.

——S. 30—*Contract to pay differences—Wagering contract.*

In a case in which it is set up that the contract was a wagering contract the Court must examine the business of the parties and surrounding circumstances. If it is found that the parties intended to deal in differences only, it is a wagering contract. (*Scott, C. J. and Chandavarkar, J.*) BURJORJI BOMMANJI *v.* BHAGVANDAS PERSHRAM.
38 Bom. 204 : 20 I. C. 834 : 15 Bom. L. R. 716.

——S. 30—*Wagering contract forward commercial contracts.*

The Courts should incline strongly to the reality of a forward commercial contract, where it is regular in every outward particular, and is repudiated by one party, as a wager. (*Beaman, J.*) BHAGVANDAS PARASHRAM *v.* BURJORJI RUTTONJI. 19 I. C. 29 : 15 Bom. L. R. 85.

——S. 30—*Contract to pay differences — Essentials.*

Common intention of both parties neither to give nor receive delivery but merely to pay or receive differences must be proved. Such common intention can be inferred from the surrounding circumstances. (*Macleod, J.*) BHAGWANDAS *v.* BURJARJI. 37 Bom. 347 : 17 I. C. 152 : 14 Bom. L. R. 807.

——S. 30—Teji Mandi *contracts—Burden of proof.*

Teji Mandi contracts are wagering contracts and a person alleging to the contrary must prove it. Big firms may, in the course of extensive buying and selling business, carry on transactions similar to *Teji Mandi* of Bombay Bazaar, by way of providing a certain amount of cover. But parties who carry on a small business and indulge in *Teji Mandi* contracts by way of pledging ought not to be allowed to enforce their wager. Ability of the party to pay full price, is not a sure guide to decide that the party really intended to enter into the contract. Strict proof of the genuineness of the contract, must be insisted upon. (*Beaman, J.*) JESSIRAM JAGANNATH *v.* TULSIDAS.
37 Bom, 264 : 16 I. C. 576 : 14 Bom. L. R. 617.

——S. 30—*Wagering contract—Speculation.*

A common intention to wager is essential in a contract by way of wager within the meaning of S. 30 of the Act. Speculation does not necessarily involve a contract by way of wager whether a contract is speculation or wager is to be determined by the Court. It must look behind the form of the contract to the real intention of the parties gathered from the oral evidence and the transactions between the parties. A Court should scrutinize the evidence of the defendant when he accepts payments when the dealings are successful but pleads wagering contract when the transaction ends in loss. (*Mookerjee and Fletcher, JJ.*) BISSESWAR *v.* BASIR ALI. 64 I. C. 809: 33 C. L. J. 533.

——S. 30—*Contract to pay differences — Wager.*

If there are agreements for payment of differences alone and in which delivery of the stock is made optional or is excluded altogether, they are none the less agreements for gaming and wagering within the meaning of S. 30. (*Fletcher, J.*) BALDASDASS BASANT LAL *v.* LALIT MOHAN NANDY. 25 I. C. 747.

——Ss. 30 and 222 — *Commission agent—Wagering contract—Indemnity.*

Where an agent enters into a wagering contract he cannot claim to be indemnified by the principal for losses incurred thereby. In the case of a commission agent the onus is on him to show that he entered into the contract as agent and not principal. (*Martineau, J.*) FIRM OF SHIB LAL RAM LAL *v.* FIRM OF HARI RAM CHHADAMILAL
67 I. C. 959 : 1922 Lah. 408.

——S. 30—*Wagering contract—Badai.*

In a contract for purchase of sugar the price agreed to, was excessive. *Held*, that it was not a commercial transaction but only a wagering transaction and hence unenforceable. (*Shadi Lal, J.*) FIRM OF LAL CHAND GELA RAM *v.* NATHU RAM.
36 I. C. 48 : 74 P. L. R. 1916.

——S. 30—*Sale of goods—No delivery contemplated—Wagering.*

A transaction which is a sale of goods does not become a wagering agreement merely because both parties do not contemplate that delivery is likely to be demanded. A definite agreement that delivery cannot in any event be demanded without a breach of the understanding between the parties constitutes a gaming or wagering contract. (*Coutts Trotter, J.*) SUKDEVADOSS RAMPRASAD *v.* GOBINDOSS CHATURBUJDOSS.
45 M. L. J. 716 : 18 L. W. 911 : 76 I. C. 893 : 33 M. L. T. (H.C.) 223 : 1924 Mad. 378.

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——S. 30—*Lottery—Kuri in Malabar.*

Kuri as such in Malabar is not wagering contract. But a suit to recover money in excess of the amount subscribed towards 'Kuri' is not enforceable. (*Phillips, J.*) SANKUNNI *v.* IKKORAKUTTI. 10 L. W 155 : 37 M. L. J. 209 : 52 I. C. 989 : (1919) M. W. N. 570.

——Ss. 30 and 65—*Wagering contract—Money paid as security for performance of—Suit for recovery, if maintainable.*

Money deposited by the plaintiff with the defendant as security for the performance of his part of wagering a contract is recoverable, provided there is no fraud or moral delinquency on the part of the plaintiff. 33 Bom. 411 and 38 Bom. 249 Foll. But S. 65 of the Contract Act has no application to such a case. 43 Cal, 115 and 41 Bom. 546 Foll. (*Seshagiri Aiyar and Napier, JJ.*) VENKATARAJU *v.* RAMANUJAM. 34 M. L. J. 561: 23 M. L. T. 84 : (1918) M. W. N. 230 : 44 I. C. 319 : 7 L. W. 518.

——S. 30—*Contract to pay differences is wagering contract.*

Where the parties never intended to deliver the goods but only meant to pay differences and that was the understanding between the parties. *Held*, that the contracts between the parties were wagering. (*Kotval, A. J. C.*) HARNARAYAN JODH RAJ *v.* RADHAKISAN CHANDRABHAN. 75 I. C. 906 : 1923 Nag. 324.

——S. 30—*Wagering contract—Essentials of—Sale of a crop.*

The essence of gaming and wagering is that one party to win and the other to lose on a future event, which at the time of the contract, is of an uncertain nature, that is to say, if the events turns but one way he will lose, but if it turns the other way he will win. *Richards* v. *Storck* (1911) 1 K. B. 296 foll. The sale of a growing crop for cash is not gaming or wagering though the consideration is to be paid in kind out of the proceeds of the harvest. (*Macnair, A. J. C.*) VITHOBA *v.* SITARAM. 19 N. L. R. 21 : 65 I C 324 : 1923 Nag. 291.

——S. 30—*Scope of—Collateral transaction—Co-partner—Right of re-imbursement.*

S. 30 of the Contract Act does not affect agreements or transactions collateral to wagers. Where two partners enter into a contract, even assuming it to be one of a wagering nature, and one of them satisfies the whole liability under the contract, he has a right of reimbursement against the other. (*Prideaux, A. J. C.*) MOHAMMAD GULAM MUSTAFFA *v.* PADAMSI. 69 I. C. 186 : 1923 Nag. 48.

——S. 30—*Wagering contract—Speculative contract—Distinction between.*

A contract may be unenforceable, if it only amounts to a wager on the rise or fall of the market, and it is not accompanied by an intention to sell or to purchase goods, at a given time and place at a certain rate. To some extent, speculation forms an element in many transactions relating to the sale and delivery of goods at a certain rate, and because the market-rate for those goods

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may be liable to fluctuation ; but the existence of such an element does not make the contract void, because it may yet be accompanied by a real desire on the part of the vendor to sell and the buyer to purchase the goods agreed to be sold, at the contracted rate. Where such an intention exists, the contract is not a wagering contract and can be enforced. (*Kanhaiya Lal, J. C.*) NARAYAN DAS *v.* MAHESHI LAL. 9 O. & A. L. R. 538: 9 & O. A. L. R. 567 : 73 I. C. 309 : 1924 Oudh 186.

——S. 30—*Wagering contract—What amounts to.*

Where the plaintiff expects that the goods would be delivered to him and he enters into the contract with that expectation, and also in the hope of making some profit upon the difference in price. *Held* : the defendants might or might not have intended to deliver the goods, but that would not make the contract as a contract of wager. In order to bring a contract under S. 30 of the Contract Act it is necessary to show that both parties intended that no delivery or acceptance shall take place and agreed that the mere difference between the price at the time of the bargain and the price at some later time shall be paid ; but if only one of the parties intends that no delivery shall take place the contract is not vitiated. Speculation does not necessarily involve a contract by way of wager and to constitute such a contract a common intention to wager is essential. 44 Bom. 373 followed referred to. (*Jwala Prasad, J.*) FIRM SANEHIRAM BAIJNATH *v.* SURAJMAL MARWARI. 69 I. C. 769 : 1922 P. 220.

——S. 30—*Lottery—Suit to recover money received in a lottery.*

A suit to recover money by the defendant as agent for plaintiff on account of plaintiff's winnings in a lottery is not prohibited by S. 30. (*Rig, J.*) HORMASJI *v.* PO HMYIN. 51 I. C 530 : 12 Bur. L. T. 9.

——Ss. 30 and 65—*Wagering contract—Money paid to shareholder—If can be recovered.*

Money paid under an illegal contract may be recovered before the contract is carried out but not afterwards. (*Young, J.*) AH FOKE *v.* M. A. NAGAPPA CHETTY. 46 I. C. 755.

——S. 30—Teji *and* mundi *contracts—Whether wagering contracts.*

The purchase of an option or right to call for shares is not necessarily a wagering contract; the test is whether in such a contract, differences only are intended to be paid ; so also a double option is no more necessarily a gamble than a single option. A contrat is not a wagering contract unless neither of the parties intend to give or take delivery. (*Young, J.*) DHUNJI DEOSI *v.* POKERMALL ANANDROY. 24 I. C. 441 : 7 Bur. L. T. 54 :

——S. 30—*Common intention—Onus of proof*

Where a plea of wager is set up, in defence the onus of proof is on defendant ; and he has to prove that the common intention of the parties was to pay by way of difference and not by way of delivery. The question of common intention is

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one of fact in every case. (*Kennedy, J. C. and Madgaonkar, A. J. C.*) RADHOMAL KESHOWDAS *v.* HOLOMAL KESUMAL.
66 I. C. 489 : 15 S. L. R. 193.

——S. 30—*Wegering contract—Intention of parties.*

To constitute wagering contracts, the intention of both contracting parties at the time of entering into the contracts must be not to call for or give delivery from and to each other under any circumstances. (*Raymond, A. J. C.*) FIRM OF KIRPALDAS *v.* FIRM OF GAJANMAL.
70 I. C. 864: 15 S. L. R. 5.

——S. 30—*Wagering contract—Broker incurring losses—Presumption—Burden of proof.*

In a wagering contract, a common intention between the principal and the broker to wager is essential and the burden of proving it is on the principal. Where the broker is entitled to commission and any losses incurred, which he has paid, the transaction is not a wager. (*Fawcett, J C. and Kennedy, A.J.C.*) DWARKOMAL *v.* HARCHUMAL. 60 I. C. 944 : 14 S. L. R. 227.

——S. 32—*Conditional contract.*

A contingent contract is dependent for its performance on a future event and falls through if the future event on which it was dependent becomes impossible. Where the possibility of completing a contract is dependent on the will of a third person, a defendant who has entered into the contract to the performance of which such consent is necessary, will not, if such consent cannot be procured, be directed to obtain it and thus perform an impossibility. (*Batten, A. J. C.*) SHARDA PERSHAD *v.* SIKANDAR
34 I. C. 461 : 12 N. L. R. 69.

——S. 32— *Wager — Meaning — Collateral contracts—Lottery.*

A suit will lie for recovery of money, won in a lottery and paid to a third person as agent of winner, the former being liable to account. The taint is purged by its passing into the third person's hands. The words 'by way of wager' in the section are not different from 'gaming' and 'wagering' as used in the English Gaming Act and the Indian Act XXI of 1848. (*Young, J.*) MAUNG SANYA *v.* INDIAN TELEGRAPH ASSOCIATION CLUB
38 I. C. 566 : 9 Bur. L. T. 228.

——S. 37—*Payment by instalments.*

Where there is a contract to deliver goods in instalments spread over a number of months, the sellers cannot postpone the delivery of the whole until the last month as the buyers have the rignt to demand delivery in instalments. (*Sanderson, C. J., Woodroffe and Mookerjee, JJ.*) BILASIRAM THAKURSIDASS *v.* EZKIEL ABRAHAM GUBBAY.
43 Cal. 305 : 23 C. L. J. 62 : 33 I. C. 1 : 20 C. W. N. 240.

——S. 37—*Stranger.*

If person reaps the benefit of a contract without being party to it he must pay the money due under it. The doctrine that no stranger can enforce a contract though made for his benefit does not universally apply in India. Parties to a contract can only sue on it, except where the contract

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is made for the benefit of third parties and gives rise to a presumption in his favour. (*Wallis, C.J., Bakewell and Karamat Hussain, JJ.*) MANMATH VEETIL ITTI PANKU MENON *v.* DHARAMAN ACHAN.
41 Mad 488: 22 M L T. 543 : (1918) M. W. N. 98 : 34 M. L. J. 193 : 43 I. C. 625: 8 L. W. 118.

——Ss. 37 and 38—*Tender of performance.*

A tender of performance must satisfy all the requirements of the contract as to delivery. (*Young, J.*) JANOO & CO. *v.* JOSEPH HEAP & SONS, LTD. 46 I. C. 497 : 11 Bur. L. T. 9.

——Ss. 37 and 38—*Vendor's duty.*

Vendor is not bound to see that purchaser takes delivery within time. Where it is necessary for vendee to take samples before delivery, the vendor is bound to deliver goods some time before the specified date so as to give him time to satisfy himself. A vendee cannot refuse to accept the delivery on the ground of non delivery in time, when he has accepted the tender of delivery and had drawn samples. (*Pratt, J. C. and Crouch, A.J. C.*) FIRM OF RUTTONJEE BURJORJEE *v.* FIRM OF MOTUMAL BHAGCHAND. 32 I. C. 720: 9 S. L. R. 160.

——S. 38—*Tender with condition is not valid.*

If the tender is accompanied by a condition which prevented its being a perfect and complete tender, the other parties are under no obligation to accept it ; it follows therefore that that cannot be regarded as the equivalent of payment. (*Lord Buckmaster.*) NARAIN DAS *v.* ABINASH CHANDAR.
L. R. 3 P. C. 129: 31 M, L, T 217: 16 L. W. 780: (1922) M. W. N. 791: 27 C. W. N. 299 : 21 A, L. J. 201: 44 M.L J.728: 37 C. L. J. 457: 69 I. C. 273: 4 U. P. L. R. (P. C) 111: 1922 P. C. 347.

——S. 38—*Tender—Rent—Reduced amount tendered—Claim for abatement unsustainable—Tender bad.*

Where the tenant tendered a reduced amount of rent and interest on arrears, on the plea that not having been possession of the entire area he was entitled to an abatement of rent, but no ground was made out for such abatement by the tenant, the tender is not a good tender. (*Sir John Edge,*) DURGA PRASAD SINGH *v.* RAJENDRA NARAYAN BUGCHI. 41 Cal. 493: 40 I. A. 223: 26 M L. J. 25: 15 M. L. T. 68: 19 C. L. J. 95: 18 C. W. N. 66: 16 Bom. L, R, 42: 21 I. C. 750: (1914) M. W. N. 1 (P. C.).

——Ss. 38 and 45—*Co-mortgagees—Payment to one does not discharge.*

Payment of the money due under a mortgage to one of several co-mortgagees does not operate as a valid discharge. (*Ryves and Piggott, JJ.*) RAMJIT *v.* KHEMCHAND. 23 I. C. 8.

——S. 38—*Tender—Debtor and creditor—Tender of a portion of the debt—Conditions attached to tender.*

A debtor when tendering to a creditor really part of his debt, not the entire debt, and asking him to take that in full satisfaction of the debt. it

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is clear law that the creditor is entitled to refuse to accept the tender, because otherwise he would virtually preclude himself from saying that he had not been paid the full amount due. If you go and attach your offer to pay a debt the condition that the creditor must accept it as full satisfaction although really it is not the whole amount due, you attach a condition to your offer and the creditor is entitled to reject it. (*Fawcett, J.*) NADERSHAW *v.* SHIRINBAI. 25 Bom. L R. 839: 1924 Bom. 264.

———S. 38—*Conditional tender — Interest when ceases.*

A conditional tender of rent demanding a receipt that the tenant paying the rent was a kaimi raiyat is not a good tender. (*Fletcher, J.*) AMAR KRISHNA SEN *v.* CHANDRA KUMAR SEN. 51 I. C. 793.

——— S. 38—*Mortgagee—Payment to one co-mortgagee—Discharge.*

A payment of the mortgage money to one of several co-mortgagees, without the consent of the other mortgagees is not a discharge that will bind all the mortgagees. The section does not deal with the case of an offer accepted by one of several joint promisees but refers only to the case of an offer which has been rejected. 36 M. 461, 20 M. L. J. 109 Foll. 36 M. 544 cited. (*Chevis, Le Rossignol and Jones, JJ.*) MATHRA DAS *v.* NIZAM DIN, 68 P. R. 1917: 117 P. L R. 1917: 41 I. C. 921: 81 P. W. R. 1917 (F. B.).

———S. 38—*Tender--Without interest expressly stipulated—Not a valid tender.*

Where a bond recited that if three instalments fall in arrears the whole principal becomes payable, a tender by the debtor of principal only without interest on overdue instalments when the latter is stipulated expressly in the bond, is not a proper tender and interest on overdue instalments is recoverable. (*Srinivasa Aiyangar, J.*) THIRUVANNAMALAI SERVAI *v.* VARADARAJULU NAIDU. 31 I. C. 304.

———Ss. 38, 52, 54, and 83—*Failure to take delivery after notice of arrival—Damages.*

If a condition in a contract that notice should be given of the arrival of goods is not an essential part of it, failure to give such notice or a mistake in the notice given is not a breach of contract and a party to it, cannot avoid it. That notice by itself cannot be deemed to be an offer of performance within S. 38. Where on the receipt of notice of arrival of goods, one party has to apply for delivery of goods but fails to do so, he is liable in damages for breach of contract. (*Sadasiva Aiyar and Napier, JJ.*) THE SOUTH INDIAN EXPORT CO., LTD. *v.* KOKDIAH CHETTY. 29 I. C. 712.

———S. 38—*Mortgage—Tender—Conditional tender.*

A tender is not valid *pro tanto* if a larger sum is in fact due and if the tender is accompanied by a demand for cancellation and delivery of the mortgage deed. (*Bakewell, J.*) VARADARAJULU CHETTY *v.* DHANALAKSHMI AMMAL. 26 I. C. 184: 16 M. L. T. 365.

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———S. 38—*Tender—What is not.*

A mere offer by postal letter to tender the expenses of sale and registration by the vendee is not a legal tender. (*Sadasiva Aiyar and Napier, JJ.*) MULPURI VEEPAYYA *v.* SANAGAVARAPU SIVAYYA. 26 I. C. 121: 27 M. L. J. 482.

———S. 38—*Offer—By letter—Readiness to deliver.*

The mere expression by a registered posted letter of a willingness or readiness to deliver is not a proper offer nor of a willingness to execute a release deed without having a document ready to be delivered. Tender of money locked up in a box or of goods enclosed in a case, which the other party is not allowed to open is not sufficient tender and the tender as a plea in an action is incomplete unless accompanied by a tender in Court. (*Ayling and Sadasiva Aiyar, JJ.*) SABHAPATHY PILLAI *v.* VAYAMACHALINGA PILLAI. 38 Mad. 959: 15 M. L. T. 206: 26 M. L. J. 331: 23 I. C. 581: (1914) M. W. N. 226.

———S. 38--*Payment to one promisee--Effect of.*

The section seems to treat each joint promisee as a partner or agent of the other joint promisee to accept tender and payment. So payment to one has the legal effect of payment to all. *Per White, C. J.* The section does not deal with the legal consequences of an accepted tender. (*White, C. J. Sankaran Nair and Sadasiva Aiyar, JJ.*) MANNAVA ANNAPURNAMMA *v.* UPPALA AKKAYYA. 36 Mad. 544: 18 M. L. T. 268: 24 M. L. J. 333. 19 I. C. 12: (1913) M. W. N. 328 (F.B.).

———S. 38—*Tender—Stopping of interest.*

A valid tender must be an unconditional offer to pay a specific and ascertained sum. An offer to pay the amount found due on a settlement of accounts if the payee undertook to execute an indemnity bond, is not a valid tender. A valid tender improperly refused stops further interest. There cannot be a tender or an agreement to waive a tender of an unascertained sum. (*White, C. J. and Ayling, J.*) LAL BATCHA SAHIB *v.* ARCOTT NARAYANASWAMY MUDALIAR. 12 I. C. 502: 34 Mad. 320.

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Assuming that payment to one of several joint creditors operates in law as a payment to all, the rule does not apply where the payment is made fraudulently to one of the creditors and not for the benefit of all. (*Benson and Sundara Aiyar, JJ.*) SHEIKH IBRAHIM *v.* RAMA AIYAR. 35 Mad 685: 21 M L J 508: 10 I, C. 874: (1911) M. W. N. 442.

———S. 38—*Applies to mortgages.*

A tender to be valid must be a tender of the whole amount due and not of a part only and there is nothing to prevent this general law as to tenders applying to payments decreed in respect of a mortgage. (*Ashworth, J.C. and Simpson, A.J.C.*) NAWAB MIRZA FAGHFUR MIRZA *v.* KHUSHAL CHAND. 26 O.C. 59: 74 I. C. 246: 1923 Oudh 241.

———S. 38—*Applicability—Joint principals—Liability of agent to amount.*

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The liability of an agent to account to two principals who jointly appointed him is not a liability that arises by virtue of a contract between the parties but is a liability that is annexed by law to the office of the agent. S. 38 of the Contract Act does not apply to such a case. (*Das and Kulwant Sahay, JJ.*) JAGDIP PRASAD SAHI *v.* MT. RAJU KUER. 2 P. 585: 4 Pat. L. T. 531 : 75 I. C. 1022 : 1923 Pat. 177 : 1923 P. 464.

——— S. 38—*Payment to one mortgagee—Operates as discharge.*

S. 38 of the Contract Act applies to an offer which has been accepted as well as to an offer which has been refused, whether S. 38 applies to payment to one of several joint mortgagees or not, the rule of equity applicable in India is that in the absence of fraud or an intention to defeat the rights of other mortgagees, payment to a single mortgagee discharges the mortgagor. (*Pipon, J. C.*) GULMIRAN *v.* ABDUL RAHIM KHAN. 73 I. C. 682.

——— S. 38— *Co-mortgagees—Joint promisees—Payment to one whether discharges the mortgage.*

Payment of the mortgage debt to one of several mortgagees operates so as to discharge the liability of the mortgagor to other co-mortgagees.

In view of the difference in the conditions of social life in India as in England it appears to be doubtful, whether and to what extent the presumption prevalent in England, that when a claim is on a money bond to two or more obligees, they are to be presumed to be tenants in common and not joint tenants and discharge by one obligee does not operate as discharge by the others, should have effect given to it in this country, in cases in which equitable relief is claimed. (*Saunders, J. C.*) MAUNG NYAN MO *v.* MA PO. 44 I. C. 627 : 3 U. B. R. (1917) 42.

——— S. 38—*Goods sold—Examination of.*

S. 38 only requires a reasonable opportunity to be given to the buyer to examine the goods sold. (*Ormond, Offg, C. J.*) OOMERSEE RAISEC & Co. *v.* HARDIMAN. 42 I. C. 382.

——— Ss. 39, 55—*Performance accepted after time fixed—No right to compensation.*

The acceptance by the buyer of a waggon of coal at a time other than that agreed upon prevents him from claiming compensation for any loss occasioned by such failure unless he shows that at the time of such contract he gave notice of his intention to claim compensation. (*Knox, J.*) SAHU MAHADEO PARSHAD *v.* KANHAIA LAL. 14 I. C. 129.

——— S. 39—*Contract — Conveyance —Distinction—Mortgage, it can be cancelled under.*

Per Karamat Hussain, J.—A mortgage is different from a contract and the mere registration of a mortgage deed vests an interest in the mortgagee which cannot be defeated and so a mortgage cannot be cancelled under S. 39 of the Contract Act. (*Karamat Hussain and Chamier, JJ.*) RASHIKAL *v.* RAMNARAIN. 9 A. L. J. 198 : 13 I. C. 573 : 34 All. 273.

CONTRACT ACT (IX OF 1872), S. 39.

——— S. 39—*Refusal to perform—Right to cancel.*

To enable a party to a contract to be relieved from its future performance by the conduct of the other, the conduct must amount to a renunciation or absolute refusal to perform the contract, such as would amount to a revision if be had the power to rescind. Where a party to a contract complains about the delay in carrying out the contract and protests against the other party's right to put an end to it, refusal to perform is not effected, (*Sanderson, C. J. and Richardson, J.*) BURN & Co., LTD. *v.* THAKUR SAHEB SREE LUKHDIRJEE. 28 C. W. N. 104 : 1924 C. 427.

——— S. 39—*Default in performance—Damages.*

Where there is a contract of which specific performance would not be decreed by a Court of equity, the plaintiff is entitled owing to the wrongful repudiation of that contract by the defendants, to treat the contract itself as at an end and to recover damages for the loss of it in addition to damages in respect of those breaches of it which may have been committed before repudiation. (*Mookerjee and Roe, JJ.*) NILAKANTA ROY *v.* LALIT MOHAN. 29 I. C. 989 : 19 C. W. N. 933.

——— S. 39—*Delivery of goods—Cash payment on delivery of Railway receipts—Credit allowed—Rescission on refusal to pay.*

Where a contract for supply of goods contained a condition regarding cash payment on delivery of Railway receipts but credit has for long been allowed to the purchaser, the recission of the contract on the ground of the purchaser's refusal to pay cash on one occasion cannot be sustained under S. 39. (*Johnstone and Beadon, JJ.*) SUNDER SINGH *v.* KRISHNA MILLS CO., LTD. 11 P. L. R. 1914 : 22 P. W. R. 1914 : 23 I. C. 91 : 63 P. R. 1914.

——— S. 39—*Sale of immoveable property—Postponement of performance—Rescission by vendor—Damages.*

Where under a contract the vendee is required to purchase within a certain date and he defers performance till a litigation between the vendor and a third party no suit by the vendee in consequence of which the vendor rescinds the contract comes to an end is maintainable after a long lapse of time for damages for breach of contract. (*Wallis, C. J. and Odgers, J.*) SURI CHETTY RANGANATHAN CHETTY *v.* GADALA PARTHASARATHY. 40 M. L. J. 13 : 13 L. W. 77 : 29 M. L. T. 67 : 61 I. C. 457 : (1921) M. W. N. 94.

——— Ss. 39 and 64—*Sale—Purchaser's title.*

A purchaser under a contract of sale is entitled to a good and marketable title. If the title is doubtful. *e. g.* if a mortgage has been created by a third party and it requires investigation, the purchaser cannot be compelled to rescind the contract or to accept without investigation the doubtful title. 9 A. 705 P. C. Dist. (*Wallis, C. J. and Ayling, J.*) MADURAI CHETTY *v.* BABU SAHEB. 52 I. C. 971.

CONTRACT ACT (IX OF 1872), S. 39.

——Ss. 39 and 64—*Breach of contract of service.*

Ss. 39 and 64 and justice, equity and good conscience require that a servant who quits his master's service in India before the expiry of the contract period, should be ordinarily paid for the full period he worked under the master deducting the damages caused by the breach. (*Sadasiva Aiyar, J.*) CHOCKALINGA MUDALIAR *v.* MAHOMED SHERIFF SAHIB. 12 M. L. T. 594: 23 M. L. J. 680 : 17 I. C. 894 : (1912) M. W. N. 1212.

——S. 39—*Repudiation—Limitation.*

Repudiation of a contract by a party to it does not give rise to an action on the repudiation but it is the breach that gives right to the action and limitation runs from such time. (*White C.J. and Sankaran Nair, J.*) 22 M. L. J. 207: 10 I. C. 320 : 10 M. L. T. 496.

——S. 39—*Failure of one party.*

Under S. 39, a party to a contract can put an end to it when the other party to it fails to perform his promise in its entirety. But if he does not choose to do so, the contract holds good. (*Abdur Rahim and Ayling JJ.*) SUBBARAYA REDDI *v.* MANIKKA KOUNDAN. (1911) 1 M. W N. 265 : 10 I. C. 258 . 9 M. L. T. 479.

——Ss. 39, 49 and 93—*Failure on plaintiff's part.*

Appellant agreed to purchase from respondents certain flour, the terms of the contract being 'Ready delivery within one week.' Delivery was not taken and not asked for. On respondent's enquiry appellant asked for delivery of halt the goods, Respondent refused and cancelled the contract. Appellant then asked for the delivery of the whole and on respondents refusal brought a suit for damages. *Held*, that the appellant was entitled to no damages as he had failed to perform his part of the contract by not asking for the delivery of the whole as agreed (*Evans, A. J. C.*) TOTA RAM *v.* JOHN'S FLOUR MILL, DELHI. 10 I. C. 18

——S. 39—*Mortgage — Part consideration not paid.*

The section does not apply to a mortgage in which interest in the property has passed and under which part of the consideration has not been paid. (*Mullick and Jwala Prasad, JJ.*) MAKHAN LAL *v.* HANUMAN BAKSH.
1 P. L. W. 250 : 38 I. C. 877 : 2 P. L. J. 168.

——Ss. 39 and 223—*Rescission of Agency—Grounds.*

Where the agent who had suffered losses on contracts made for the principal, and the principal failed to indemnify the agent after demand was made, and failed to honour the hundy drawn on him and as the promise to indemnify is an implied term of the contract of agency, the default of the principal and his conduct afterwards justify a rescission of the contract of agency under S. 39. (*Pratt, J. C. and Boyd, A J. C.*) RAJARAM NANDLAL *v.* ABDUL RAHIM. 31 I. C. 450 : 9 S. L. R. 77.

CONTRACT ACT (IX OF 1872), S. 43.

——Ss. 39 and 75—*Rescission of contract—Notice of insolvency—Sale of goods.*

A purchaser of goods failed to take delivery of goods and the vendors on receiving notice of the insolvency of the purchaser served him with a notice declaring that they put an end to all the forward contracts to which they neither received a reply nor an offer to pay and take delivery. *Held* that the vendors had validly rescinded the contracts and were entitled to exact compensation for the loss occasioned thereby. (*Crouch and Hayward, A.J.Cs.*) MESSRS. JAMES FINLAY & Co., LTD. *v.* MESSRS. DAVID SASSOON & Co
27 I. C. 102: 8 S.L.R. 95.

——Ss. 39 and 73—*Breach of contract—Rescission and damages.*

Where a party repudiates or disables himself entirely before the date of performance from performing his part of the contract, the other party may rescind and without waiting for the date may sue for damages at once. The right to rescind and to damages is enacted in Ss 39 and 73 of the Contract Act. (*Pratt, J. C.*) *In re.* JIWANJI PIR BHOY. 19 I. C. 653 : 6 S. L. R. 187.

——S. 39—*Rescission—Right to*

The right of rescission arises only when the other party fails to perform the contract in its entirety. (*Pratt, J. C. and Hayward, A. J. C.*) AJUMAL *v.* SECRETARY OF STATE. 17 I. C. 37: 6 S. L. R. 103.

——S. 41—*Scope of—Mortgage—New invalid mortgage—Prior mortgage kept alive.*

S. 41 of the Contract Act which provides for the discharge of a contract by the acceptance of performance by a third party, applies only when the contract has in fact been performed. A Hindu mortgaged his five-sixths share of a village and died leaving a widow and a divided nephew as his reversioner, The nephew who owned the remaining one sixth of the village mortgaged it to the same mortgagee. Subsequently the widow and nephew jointly executed two mortgages of the whole village for the amounts due under their old mortgages. The mortgagee sued on the later mortgages bu the mortgage was held to be unenforceble so far as the widow was concerned. Thereupon he sued on the original mortgage. *Held*, that though the mortgagee's intention at the time of the later mortgages was to accept a new security in lieu of the old, yet as this was frustrated by the later mortgage being held invalid against the widow, it was inequitable for the nephew's sons who had succeeded as reversioners of the original mortgagor, to set up that the later deeds operated as a release of the mortgage effected by him. The mortgagee could therefore enforce the original mortgage against five-sixths share of the village. (*Lord Parker,*) HAR CHANDI LAL *v.* SHEORAJ SINGH. 39 All 178: 32 M. L. J. 241: 15 A. L. J. 223: 1 P L. W. 330: 5 L. W. 502: 25 C. L. J. 316: 2 M. L. J. 242 : 21 C. W. N. 765: 19 Bom. L. R. 444: 39 I. C 43: 44 I. A. 60: (1917) M. W. N. 290. (P. C.)

——S. 43—*See also* CONTRIBUTION.

——S. 43—*Joint promisors—Minority of one—Liability of the other.*

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One of two joint promisors cannot plead the minority and the consequent immunity of the other from liability, as a bar to the promisee's claim against himself. (*Sir Lawrence Jenkins.*) JAMNA BAI SAHEB MOHITAI AVERGAL *v.* VASANTA RAO. **39 Mad. 409: 43 I. A. 99: 14 A. L. J. 534: 18 Bom. L. R. 432. 31 M. L. J 18: 3 L W. 540: 24 C. L. J. 74: 20 M. L. T. 31: 34 I. C. 213: (1916) 1 M. W. N. 452 (P.C.).**

——S. 43—*Suit for contribution—Joint liability when extinguished.*

Where joint-debtors (who were joint tortfeasors in the suit) have under a compromise in Court contracted to pay a sum of money to the plaintiff and some of them pay of the sum and sue the rest for contribution, their claim cannot be resisted on the ground that all of them were joint tort-feasors before the compromise.

The doctrine that there is no contribution between joint tort-feasors' enunciated in *Merryweather* v. *Nixon* (2 Sm. L. C. 509) cannot safely be extended to India. (*Richards, C. J. and Rafique, J.*) NIHAL SINGH *v.* COLLECTOR OF BULANDSHAHAR. **38 All. 237: 33 I. C. 169: 14 A. L. J. 275.**

——S. 43—*Suit against firm's name.*

A suit against the firm in the firm's name bars a separate suit against the representatives of a deceased partner. (*Kajiji, J.*) MURKANDRAI KALYANRAI *v.* VIRANDRARAI CHANDRA. **42 I. C. 815 : 19 Bom. L. R. 837.**

——S. 43—*Scope—Co-contractors.*

The effect of S. 43 is to entitle plaintiff to get a decree against any of the co-contractors though plaintiff cannot get a decree against both. Case law discussed. (*Macleod, J.*) SHIVLAL MOTILAL *v.* BIRDICHAND JIVARAJ. **40 I. C. 194 : 19 Bom. L. R. 370.**

——Ss. 43 and 44—*Co-mortgagors—Release of one—Effect.*

A release of one of two mortgagors does not release the other. (*Mookerjee and Rankin, JJ.*) CHAND MALL BABU *v.* BAN BEHARI BOSE. **50 Cal. 18 : 74 I. C. 1021. 1924 Cal. 209.**

——S. 43—*Joint tenants—Liability for rent*

Where one of several joint tenants is liable for the whole rent on the death of one of such joint tenants leaving several heirs no question can arise as to whether the liability is joint or several.

All the parceners constitute in law one heir. (*C.C. Ghose and Panton, JJ.*) ABINASH CHANDRA ROY *v.* FULCHAND CHAUDHURI. **50 Cal. 737 : 74 I. C. 1032: 1924 Cal. 165.**

——S. 43—*Rent and cesses—Lessees—Liability of heirs of original lessee.*

A suit for rent and cesses was instituted against the heirs of the original lessees without serving some of them by proper notices. *Held* that so far as the original lessees were concerned, their liability for rent was, in the absence of a contract to the contrary, joint and several and any one of them could be sued for the entire rent. 11 C. W. N. 1026; 12 C. L. J. 591; 22 C. W. N. 289, 5 Pat. L. J. 32 Rel. A suit for cesses is maintainable against all the heirs of one of the original lessees although the heirs of the other original lessees

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are not properly made parties (*Chatterjea and Cuming, JJ.*) MAHENDRA NATH BOSE *v.* ABINAS CHANDRA BOSE **27 C. W. N. 521: 77 I. C. 364: 1923 Cal. 615.**

——S. 43 *Co-contractor—Bankruptcy of—Liability of others.*

It is no answer to a claim for rent against three tenants that if one of them becomes an insolvent, the other persons are not liable to pay the rent. (*Fletcher and Cuming, JJ.*) AMRITA LAL GHOSE *v.* NARAIN CHANDRA CHAKRAVARTHI. **53 I. C. 973 : 30 C.L.J. 515.**

——S. 43—*Judgment-debtors—Mesne profits—Release of some.*

A release granted to one of several judgment-debtors without any intention to release the others will discharge the others only *Protanto* and not in respect of the entire mesne profits decreed. 37 Cal. 559 Ref. (*Mookerjee and Beachcroft, JJ.*) MAKUND SINGH *v.* SARASVATI BIBI. **51 I. C. 98: 29 C. L. J 245**

——S. 43—*Suit for rent against one of several co-heirs of tenant.*

S. 43 of the Contract Act is not applicable to a suit for arrears of rent against one of several heirs of a deceased tenant. A landlord cannot maintain such a suit without joining the other heirs. (*Woodroffee and Smither, JJ.*) SIBA KRISHNA, SINHA SARMA *v.* JAGAT CHANDRA. **45 I. C. 732.**

——S. 43—*Co-heirs—Liability of, for rent.*

Per N. B. Chatterjea, J. When the contract is by a single person as a tenant and he dies, the liability of his heirs is a joint liability, for co heirs form a single person. The liability of joint tenants for rent is a joint and several liability. *Per Richardson, J.* Liability is joint; on the death one of the joint promisors the liability of the surviving becomes the liability promisors and no liability devolves upon the heirs of the legal representatives of the deceased promisor. The liability of co-tenants is presumably joint and several. There being no survivorship amongst co-tenants not having under S. 43, the right to be sued together, *prima facie* the liability is joint and several. (*N. R. Chatterjea and Richardson, JJ.*) KRISHNA DAS ROY *v.* KALI TARA-CHOUDHURANI. **44 I. C. 80: 22 C. W. N. 289.**

——S. 43—*Rent suit against some heirs of the deceased tenant.*

Suit for arrears of rent not falling due, in the life-time of the deceased tenant, can be maintained against some of his heirs. The suit is not bad though all heirs are not joined. (*Fletcher and Teunon, JJ.*) LALIT MOHAN SINHA ROY *v.* HARAN CHANDU KHAMRUI. **36 I. C. 243.**

——S. 43—*Parties jointly interested.*

Where parties are interested jointly by law in a contract by a single person, S. 43 cannot be applied. (*Chatterjee and Newbould, JJ.*) SHAIK SAHID *v.* KRISHNA MOHAN BARAK. **35 I. C. 563 : 24 C. L. J. 371.**

——Ss. 43 44—*Joint promisors—Dismissal of suit against—Appeal.*

In a case where the plaintiff's suit has been dismissed against a number of joint promisors

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there cannot be an appeal against some only of these promisors either on the footing of release under S. 43 or on the footing of joint and several liability under S. 44 because there cannot be a suit for contribution by the respondents impleaded against the respondents not impleaded. (*Chatterjee and Beachcroft, JJ.*) JOGESH CHANDRA *v.* BAMA SUNDARI DEBI. **34 I. C. 138.**

——S. 43—*Joint tenants—Representative.*

Ordinarily all tenants of a holding are necessary parties to a suit in order that a decree and the sale in execution thereof may have the consequences mentioned in Chapter XIV of the Act. Where one of a number of tenants is put forward by the rest as their representative, he can be regarded as a sole tenant, whether he can be a representative is a question of fact. (*Jenkins, C. J. and Mullick, J.*) CHAMAT KARINI DASI *v.* TRIGUNA NATH SARDAR.
19 I. C. 989 : 17 C. W. N. 833.

——Ss. 43 and 201—*Joint contract—Whether terminated by the death of one of the joint contractors—Limitation Act, Art.* 116.

A joint contract of agency created by a registered Kabuliyat is not put an end to by the death of one of the promisors as the agency is joint and several according to S. 43 of Indian Contract Act. The surviving agent will be liable to render accounts and a suit against him is governed by Art. 116 of the Limitation Act. (*Mookerjee and Beachcroft, JJ.*) BHAGIRATH SAMANTA *v.* PREM CHAND POL. **16 I. C. 852 : 17 C. L. J. 201.**

——S. 43— *Applicability—Debt due from firm—One of the parties or contributary—Liability to pay.*

S. 186 of the Companies Act can be resorted to to recover money from the firm by selecting one of the partners who is a contributory and calling upon him to liquidate the whole debt. The principle of S. 43, Contract Act applies to such a case. (*Broadway, J.*) GOBIND SINGH *v.* UNION BANK OF INDIA. **4 Lah. 239 : 77 I. C. 338 : 1924 L. 148,**

(On appeal from 1923 L. 85).

——S. 43—*Joint vendees—Major and minor—Enforceability.*

A contract of sale entered into by a major and minor vendee, in which shares were fixed but not the portion of purchase money to be paid by each, is a joint transaction which can be enforced against the major vendee. (*Harrison and Zafar Ali, JJ.*) SAIN DAS *v.* RAM CHAND. **4 Lah. 334 : 5 L. L. J. 469 : 1924 Lah. 146.**

——S. 43—*Suit against a partner in an individual capacity—Could not be continued against the firm.*

S. 43, Contract Act, does not enable a person suing one or two partners in their private capacity, and failing to establish his claim to continue the suit against them as against the firm. (*Johnstone and Le Rossignal, JJ.*) RAM ADIN *v.* MUNSHI RAM. **31 I. C. 209 : 154 P. W. R. 1915 : 76 P. R. 1915.**

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——S. 43—*Joint promisors—Liability to be sued singly.*

S. 43 of the Contract Act takes away the right of a joint-debtor to be sued jointly. Where two persons jointly take a lease of a house, in the absence of any agreement to the contrary, they are jointly and severally liable to pay the rent and it is open to the landlord to sue one or both of them. If in such a case, the landlord sues only one, the Court may require the other also to be made a co-defendant. (*Scott-Smith, J.*) LIVINGSTONE *v.* FEROZ DIN.
27 I.C. 94 : 107 P. R. 1914 : 203 P.L.R. 1915.

——S. 43—*Liability not determined*—Res-judicata.

The liability between two defendants *inter se* was left undetermined in a suit. One of the defendants then sued the other defendant for contribution. *Held* that the question that was left undecided was not *res judicata*. (*Johnstone, J.*) TAJA KHAN *v.* MUHAMMAD KHAN.
71 P. L. R, 1911 : 10 I. C. 839 : 66 P. W. R. 1911.

——S. 43—*Registered Pattadar with limited interest in land paying Government Revenue, can recover from other persons having interest.*

A registered pattadar of land with a limited interest therein, who pays the whole of the Government assessment is in the position of a co-mortgagor and has a right of contribution as against other persons interested in the land on which the revenue was a charge. (*Wallis, C.J. and Krishnan, J.*) MUHAMMED KHALI *v.* ALATHADI MALWA KUNHI RAMA NAIR. **12 L. W. 180 : 59 I. C. 262 : (1920) M. W. N. 477.**

——Ss. 43 and 253—*Loan by partner to the partnership—Suit for recovery of—Maintainability.*

A partner in a firm can have a dual capacity, that of creditor of the firm as well as that of partner in it.

In the absence of an express or implied stipulation or trade custom to the contrary, interest is payable to a partner for money paid or advanced by him to the firm, beyond the amount agreed to be subscribed as capital, the payment being regarded as a loan..

The partner who so lends is a promisee of the firm, but he is also one of the joint promisors to himself, and under the second paragraph of S. 43 of the Contract Act he can only call upon each of the other joint promisors to contribute equally to the payment to be made to himself as promisee. (*Halifax, A. J. C.*) GOVIND *v.* GAJRAJ SINGH. **64 I. C. 183.**

—— —S. 43—*Costs—C. P. Code, S.* 35.

A suit for contribution in respect of costs is not maintainable. (*Stuart, A. J. C.*) JAMSHAD ALI KHAN *v.* ZAHUR-UL-HASAN KHAN.
33 I. C. 357 : 18 O. C. 340.

—— —S. 43—*Handnote—Suit against one of two joint promisors is competent.*

A suit on a hand note executed by several persons is not bad simply because one only of the joint promisors has been sued. In such a case

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each of those liable under the hand note is liable to the full extent of the loan if not there are some special terms in the contract which in some way limit or restrict their liability, and under the provisions of S. 43 of the Contract Act the lender is quite competent to sue all or any, as he may choose, of those who have incurred the liability. (*Miller, C J. and Foster, J.*) BISHUNNATH SAHAY *v.* NANKU PRASAD. **76 I. C. 988 : 2 Pat. 466: 1924 P 164.**

——S. 43—*Joint and several liability under decree—Apportionment in execution—Remedy.*

Where a decree creates a joint and several liability, the judgment debtors cannot in execution claim an apportionment. If executed for the whole against any one his remedy is to sue for contribution. (*Mullick and Bucknill, JJ.*) SIA SHACHARI PEARI *v.* RAM KISHORI KUER. **2 Pat. 796 : 74 I. C. 867 : 1924 P. 262.**

——S. 43 (2)—*Contribution—Essentials.*

A person in wrongful possession cannot bring a suit for contribution if payment was made in support of his own title.(*Caspersz and Chatterjee JJ.*) JINNAT ALI *v.* FATEH ALI. **15 C. W. N. 332 : 9 I. C. 219 : 13 C. L. J. 646.**

——S. 43 (2)—*One judgment debtor paying full decree amount — Right to contribution—Basis of.*

Where one of several judgment debtors satisfies the whole decree, he can ask for contribution founded not on contract but on a general principle of equity. The community of burden and benefit is the real ground of the right to contribution (*Phillips and Venkatasubba Rao, JJ.*) ABBOY NAIDU *v.* RAMCHANDRA NAIDU. **19 L. W. 686 . 76 I. C. 905 : 1923 M. W. N. 925 : 1924 Mad. 279.**

——S 44—*Co-heirs--Liability for rent--Claim barred against some of them.*

Although under certain circumstances one of the several joint tenants may be made liable for the whole rent, yet where the claim for the arrears of rent against some of the heirs of the original tenants is barred, the remaining heirs cannot be made separately liable for entire rent, (*Newbould and Panton, JJ.*) KISHORI MOHAN TALA PATRA *v.* OSI PRAMANICK. **48 I. C. 536.**

——S. 44—*Release of some mortgagors.*

Under the Indian Law a release by the creditor of one of the mortgagors, jointly and severally liable without expressly reserving his remedies against the other mortgagors, has not the effect of releasing the others. (*Sanderson, C J. and Mookerjee, J.*) KRISHNA CHARAN BARMAN *v.* SANAT KUMAR DAS. **44 Cal. 162 : 25 C. L. J. 24 : 34 I. C. 609 : 21 C. W. N. 740.**

——S. 44—*Applicability—English Law.*

The English Law doctrine that the release of one of several joint debtors releases all from liability, has no application to India as evidenced by S. 44 (*Mookerjee and Carnduff, JJ.*) BHAWANI KOER *v.* DARSAN SING, **11 I. C. 450 . 14 C. L. J. 354.**

CONTRACT ACT (IX OF 1872), S. 45—Co-heirs.

——S. 44—*Joint judgment-debtors—Release of one.*

The release of a joint judgment-debtor does not operate as a release of the others. It confers on them no higher rights than they would have had prior to the judgment but they can claim the benefit of the amount actually paid by the released judgment-debtor. 5 M. 37, diss : 33 M. 317 : 37 C. 559 : 14 C. L. J. 354 ref. (*Sadasiva Aiyar and Napier, JJ.*) MOOLCHAND *v.* ALWAR CHETTI. **39 Mad. 548 : 29 I. C. 303 : 17 M. L. T. 449**

——S. 45

Applicability.
Co-heirs.
Co-mortgagees.
Co-parcener.
Co-sharer.
Firm.
Joint Promisees.

Applicability.

——S. 45—*Applicability of—Suit for possession of land.*

It is doubtful whether S. 45 applies to a claim for possession of land. Where, however, the suit is really for specific perforance of a contract, the defendant may plead S. 45 as a bar. (*Reid, C. J. and Rattigan, J.*) MUHAMMAD ALI *v.* MUHAMMAD SHAIB. **57 P. R. 1911 : 49 P. L. R. 1912 : 12 I. C. 850 : 242 P. W. R. 1911.**

Co-heirs.

——S. 45—*Co-heirs—Cause of action—Joint promisees—Right of suit.*

One debt creates a single and indivisible liability which gives rise to one single cause of action. One of several heirs of a deceased obligee cannot sue for his share in the money due under the bond. 7 A. 313 F. (*Knox Karamat Husain and Griffin, JJ.*) GHARFOOR KHAN *v.* KALANDARI BEGAM. **33 All. 327 : 9 I C. 127 : 8 A. L. J. 79.**

——S. 45—*Co-heirs—Bond in favour of manager—Payment one of the heirs—Not a discharge.*

Payment to one of the co-heirs of a promisee under a bond would not discharge the promisor from his liability. So also are payments made to a junior member of a Hindu family during the life time of its manager in whose favour the bond was executed. A payment made to one of the sons of a promisee under a bond, while the latter was under a sentence of transportation and while there were other sons of the promisee alive at the time, does not discharge the bond. (*Seshagiri Aiyar and Napier, JJ.*) ANKALAMMA *v.* BELLAM CHENCHAYYA. **41 Mad. 637 : 7 L W. 221 : 34 M. L. J. 315 : 45 I. C. 419 : 23 M. L. T. 215.**

——S. 45—*Co-heirs—Payment to one--If valid discharge.*

A payment made to one of the several heirs of a deceased promisee is not binding on other heirs. 36 M. 544 Dist. (*Sadasiva Aiyar and Hannay, JJ.*) MUNIANDI SERVAI *v.* RAMASAMI. **29 I. C. 586**

CONTRACT ACT (IX OF 1872), S. 45—Co-heirs.

———S. 45—*Co-heirs—Payment to one of mortgagees.*

Where money is advanced on a mortgage by a single individual, a release of the mortgage debt by one of the heirs of the deceased mortgagees on payment to him of the entire mortgage money does not bind the other heirs of the mortgagee. (*Stuart and Kanhaiya Lal, A. J. C.*) RUDRA SINGH *v.* JANGI SINGH. **18 O. C. 154 : 30 I. C. 371 : 2 O. L. J. 361.**

Co-mortgagees.

———S. 45—*Co-mortgagees—Suit by one—Others to be impleaded as defendants—Decree for whole amount—Procedure—Form of decree.*

Where a property is mortgaged to two persons as tenants in common and there is no covenant to repay each separately a moiety of the amount, the right of either mortgagee, who desires to realize, failing the consent of his co-mortgagee is to sue for a mortgage decree in respect of the whole sum secured, joining his co-mortgagee as defendant. In such a case the decree should provide for all necessary accounts and payment, except that there can be no judgment for a sum of money entered as between the mortgagee defendant and the mortgagor. (*Lord Buckmaster.*) SUNITABALA *v.* DHARA SUNDARI.

46 I. A. 272 : 37 M. L. J. 483 : 17 A. L. J. 997 : 22 Bom. L. R. 1 : 24 C. W. N. 297 : 53 I. C 131 : 11 L W. 227 : (1919) M. W. N. 821 (P.C.)

———S. 45—*Co-mortgagees—Payment to one in disregard of notice by the other not to pay—Effect.*

A mortgagor who paid the whole of the mortgagees in disregard of a notice by the other not to pay and who is compelled to pay again, the share of the other, cannot claim a refund from the mortgagee whom he has paid in full. (*Tudball and Chamier, JJ.*) DAKUNI DIN *v.* BHAWANI PRASAD. **24 I. C. 88.**

———S. 45—*Co-mortgagees—One of several, if can sue for sale for his share of debt.*

One of several co-mortgagees cannot maintain a suit for sale of the entire mortgaged property to recover his share of the debt only. A.W.N. (1896) 153 Dist. A. W. N. (1892) 246 F. (*Tudball and Rafique, JJ.*) LACHHMI NARAIN *v.* BISHNATH PRASAD. **20 I. C. 151.**

———S. 45—*Co-mortgagees—Right to sue—Right of one, when others estopped.*

Co-mortgagees are presumed in equity to be tenants-in-common of the mortgage debt and their interests are severable or partible among themselves. Each of them can sue joining the unwilling co-obligors as defendant. Similarly if some of the co-mortgagees are estopped from suing, the Court can sever the debt and give decree to the others for their share. (*Richardson and Beachcroft, JJ.*) SAKHUDDIN SAHA *v.* SONAULLA SARKAR. **27 C. L. J. 453 : 45 I. C. 986 : 22 C. W. N. 641.**

———S. 45—*Co-mortgagees—Payment to one not a discharge.*

A payment of the mortgage debt by the mortgagor to one of the several mortgagees is not a valid payment as against the other mortgagees. (*Mookerjee and Beachcroft, JJ.*) UMASH CHANDRA BANERJEE *v.* DINABANDHU MAHANTI **29 I. C 956 : 21 C. L. J. 670.**

CONTRACT ACT (IX OF 1872), S. 45—Co-mortgagees.

———S. 45—*Co mortgagees—Payment to one: Discharge.*

Where money was lent on joint account by two brothers who were appointed executors of the deceased testator by his will, the mortgagor in making repayment must see that he made the payment to and obtained a receipt from a person entitled to give him a discharge. Notwithstanding the fact that the money lent formed a portion of the estate of the deceased, it d d not vest in the executors as such under S. 4 of the Pro. and Adm. Act, but vested in them by virtue of the bonds which were given to them by the mortgagor and therefore an endorsement of payment by one mortgagee did not amount to a discharge under S. 92 of the Pro. and Adm. Act. (*Fletcher and Teunon, JJ.*) CHANDRA MOHAN *v.* SATYA KRIPAL. **29 I. C. 139.**

———S. 45—*Co mortgagees—Several mortgagees—Suit by one for his share on allegation that others had received their shares.*

A suit by one of several mortgagees for recovery of whatever was due under the mortgage securtiy cannot, when all the mortgagees are parties thereto, be defeated on the ground that the plaintiff could not sue for a portion of the mortgage money. (*Mookerjee and Beachcroft, JJ.*) RAMCHANDRA MARWARI *v.* BHADHAI SINGH. **25 I. C. 440 : 19 C. L. J. 327.**

———S. 45—*Co-mortgagees—Payment to one—Not effective as a discharge.*

Payment of the entire mortgage money to one of several co-mortgagees without the consent of the others does not operate as a good discharge of the liability of the mortgagor. 68 P. R. 1217 Foll. (*Shadi Lal, C. J. and Harrison, J.*) MT. MALAN *v.* TARA SINGH. **4 Lah. L. J. 23 : 1922 Lah. 64.**

———S. 45—*Co-mortgagees—Payment to one—Not effective as a discharge.*

The mortgage debt is not completely discharged by the payment of the mortgage money to one of several co-mortgagees without the consent of the others even though the name of the payees was entered in the revenue record as sole mortgagees 68 P. R. 1917 foll. 7 P. R. 1913 : 35 P.L.R. 1916, Ref. (*Broadway, J.*) MAYA RAM *v.* HABIB. **3 Lah. L. J. 502.**

———S. 45—*Co-mortgagees—Payment to one—Discharge.*

Payment to one of several co-mortgagees does not preclude the other co-mortgagees from enforcing their security. (*Shadi Lal, C. J. and Harrison, J.*) MALAN *v.* TAN SINGH. **63 I. C. 744.**

———S. 45—*Co-mortgagees—Payment to one—Liability of mortgagor.*

The mortgagor is bound to pay the debt to all the co-sharers according to their shares. The mortgagor is not responsible for the manner in which the money is spent after it leaves his

CONTRACT ACT (IX OF 1872), S. 45—Co-mortgagees.

hand. (*Kensington and Beadon, JJ.*) FAFTEB MAHAMMAD *v.* SULTAN MAHAMMED.
97 P. W. R. 1913: 19 I C. 122: 137 P. L. R. 1913.
This view is no longer good law *Vide* 58 I. C. 131 : 24 C. W. N. 297 (P. C.).

——— S. 45—*Co-mortgagees—Payment to one—Discharge of debt.*

Payment to one of two mortgagees is not discharge of mortgagor's liability to the other. Unless the contrary is shown, mortgagees must be regarded as having a separate interest in the money advanced by them although they take a joint security and must be treated as tenants in common and not joint tenants. 20 M. 416 : 36 M. 544. Not foll. 38 Cal 342: 21 C.L.J. 570. Foll S. 38 (3) of the Contract Act relates to joint promisees and not to co-mortgagees whose interests are several. (*Miller, C.J. and Coutts, J.*) SYED ABBAS ALI *v.* MISRI LALL 5 Pat L J. 376 : 56 I. C. 403: 1921 Pat. 86 : 1 Pat. L. T. 339.

———S. 45—*Co-mortgagees— Mortgage debt jointly payable to three brothers—Release by one.*

A release given by one of the co-mortgagees is not a discharge of the entire mortgage much less a release given by one of the heirs of a deceased mortgagee. The mortgage subsists to the extent of the shares of the others who are entitled to get a mortgage decree to the extent of their proportionate shares. (*Jwala Prasad and Adami, JJ.*) BANAMALI SATPATHI *v* TALUA RAMHARI PATTRA.
5 Pat. L. J. 151 :
55 I. C. 841 : 1 Pat. L. T. 102.

Co-parcener.

——— S. 45—*Co-parcener—Joint Hindu family—Manager.*

The manager of a joint Hindu family can enforce a contract made with the family and the junior members are not necessary parties. (*Lord Robson.*) KISHEN PARSHAD *v.* HAR NARAIN SINGH. 33 All. 272: 38 I. A. 45: 15 C. W. N. 321: 8 A. L. J. 256: 9 M. L T. 343 : 13 C. L. J. 345: 21 M. L. J. 378: 13 Bom. L. R. 359: 9 I. C. 739: (1911) 2 M. W. N. 395 (P. C.).

——— S. 45—*Co-parcener—Tender to Manager of Hindu family is valid.*

Where a mortgage is really entered into by a joint Hindu familly though it is in the name of a minor member, tender of the mortgage-money to the managing member is a good and valid tender in law. (*Lindsay and Stuart, JJ.*) SHEO SARAN *v.* RAM LAGAN. 19 A. L. J. 852 : 64 I. C. 413: 44 A. 64: 1922 A. 355.

——— S. 45—*Co-parcener—Hindu joint family—Suit on debt—Parties—Addition as co-defendant.*

The members of a joint Hindu family entitled to a debt, whether secured or not, occupy the position of joint-creditors and are necessary parties to a suit for the recovery of the debt. If some of them refuse to join as plaintiffs they might be added as defendants in order that the debtors might be relieved of all liability, 33 A 272 P. C. Ref. to all. (*Griffin and Chamier, JJ.*) NAHT LAL *v.* LALA. 14 I. C. 35 : 9 A. L. J. 410.

CONTRACT ACT (IX OF 1872), S. 45—Firm.

Co-sharer.

——— S. 45—*Co-sharer— Rent—Payment to co-sharer landlord—How far binding on others.*

A co-sharer in whose sole name the title deed stands is not entitled to object to the tenants paying to his co-sharers their shares. He is not bound by payments beyond their share unless they were made *bona fide* in which case he is entitled to maintain a suit for his own share of the rent without making his co-sharers parties. (*Sadasiva Aiyar and Napier, JJ.*) CHOCKALINGAM CHETTY *v.* PERIYA KARUPPAN.
28 I. C. 141 : 28 M. L. J. 197.

Firm.

———S. 45—*Firm—Death of partner—C. P. Code O. 30, R. 4.*

O. 30, R. 4, C. P. C., contains a modification of S 45 of the Contract Act and a suit by firm could continue without the legal representative of a deceased partner being brought on record as co-plaintiff. 9 C.L.J. 331 Rel. on. (*Fletcher, J.*) BAL KISSEN DAS DAGA *v.* KANHYA LAL.
21 I. C. 509: 17 C. L. J. 648.

———S. 45—*Firm—Debt due to—Partnership—Death of partner—Rights of surviving partners.*

The rule of Law is firmly established that debt due to trading partnerships stand on a different footing from debts due under ordinary contracts and that when one of the partners in a firm dies the surviving partners can sue for the recovery of the debts due to the firm without making the legal representatives of the deceased partner parties to the suit. 9 A. 486: 17 C. L. J. 648: 20 A. 365: 32 A. 638: referred to 18 C. 86 dissented. *Abdur Raoof and Moti Sagar, JJ.*) MOOLCHAND *v.* SOMBA RAM.
4 Lah. 142 : 71 I. C. 951: 1923 Lah. 197.

——— S. 45—*Firm—Payment of debt to one of the partners—Discharge.*

A payment to one of two partners constituting a firm operates as discharge of liability (*Rattigan, C. J.*) HODI *v.* NIDHA. 54 I. C. 273 : 210 P. W. R. 1920.

——— S. 45—*Firm—Partnership—Collection of firm debt by one partner—Suit by others for recovery of their share—Maintainability.*

S. 45 of the Contract Act does not prohibit the action where a partner of a dissolved firm collects his share of debt impleading the other partners as defendants. It is open to the latter to sue again for their share of the debt. (*Martineau, J.*) BHAGMAL SADHU RAM *v.* WALIA. 53 I. C. 416 : 128 P. R. 1919.

———S. 45—*Firm—Partnership—Suit by one—Costs.*

One partner cannot sue alone to recover a partnership debt. He can, however, use the name of the firm and the names of his co partners so as to enable him to sue and the partner unwilling to join in the suit has only a right to claim, as against the partner who wishes to sue, an indemnity for costs. *Seal v. Kingstone.* (1908) 2 K. B. 579, Fol. (*Chapman and Atkinson, JJ.*) SHEO LAL SAHU *v.* SAGAR MAL. 1 Pat. L. W. 650 : 40 I. C. 108 : 1917 Pat. 239.

CONTRACT ACT (IX OF 1872), S. 45—Firm.

———S. 45—*Firm—Partnership—Representatives of deceased partner—Right to recover debts due to partnership by surviving partners*

Surviving partners can sue for the recovery of debts due to the partnership without making legal representatives of the deceased partner parties, to the suit. If the surviving partners refuse to sue for recovery of debts due to the firm, the remedy of the legal representative of the deceased partner lies in a suit against the others for winding up, for account and for the appointment of a receiver. (*Hortnoll, Offg, C.J., and Twomey J.*) ODDAYAPPA CHETTY *v.* RAMASWAMI CHETTY. 7 Bur. L. T. 261 : 24 I. C 268 : 8 L. B. R. 130.

Joint Promisees.

———S. 45—*Joint promisees.*

A payment to one of several joint creditors does not necessarily operate as a discharge as against all of them. (*N. R. Chatterjea and Newbould, JJ.*) ABDUL HAKIM *v.* ADYATA CHANDRA DAS. 49 I. C. 63 : 22 C. W. N. 1021.

———S. 45—*Joint promisees.*

Payment to one of three persons who are jointly entitled to receive the money is not a good payment against the other. (*Mookerjee and Beachroft, JJ.*) PEARY LAL *v.* MADHOJI JIBAN. 19 I. C. 865 : 17 C. L. J 372.

———S. 45—*Joint promisees — Payment to sue—Discharge.*

One of two or more payees of a negotiable instrument can give a valid discharge of the entire debt without the concurrence of the other payees. 20 M. 461 Foll. (*White, C. J., Sankaran Nair and Sadasiva Aiyar, JJ.*) MANNAVA ANNAPURNAMMA *v.* UPPALA AKKAYYA. 36 Mad. 544 : 13 M. L. T. 268 : (1913) M. W. N 328 : 19 I. C. 12 : 24 M. L. J. 333 (F. B.).

———S. 45—*Joint promisees—Specific performance.*

One of several promisees in a contract for specific performance cannot claim specific performance. (*Sundara Aiyar and Spencer, JJ.*) KOILPALLI RAMIAH *v.* SAJJA SUBBIAH. 11 M. L. T. 192 : 13 I. C. 315 : (1912) M. W. N. 415.

———S. 45—*Joint-creditor—Discharge.*

Payment to a Joint creditor is a valid discharge of the debt. (*Mullick and Atkinson, JJ.*) PRABU RAM PANDE *v.* JAHALA KUER. 2 Pat. L. J. 520 : 4 Pat. L. W. 57 : 42 I. C. 408 : 1917 Pat. 258.

——— —Ss. 45 and 38—*Joint promisees.*

A payment to one of several joint promisees does not operate as a complete discharge of the debt. 36 M. 544 and 20 M. 461 Diss. 20 M. L. J 709 and 38 C 342 Fol. (*Pratt, J.C. and Hayward A. J. C.*) JERAMIDAS *v.* WADER SHAH ALI. 40 I. C. 405 : 10 S. L. R. 203.

———Ss. 46, 76, and 77—*Delivery in instalments—Dates not fixed—Construction of.*

In a contract where the dates of delivery in instalments are not indicated, the instalments must be deemed to have been distributed rateably over the period appointed for delivery of the whole quantity of goods. (*Sanderson, C.J. Woodroffe and Mookerjee, JJ.*) BILASIRAM *v.* GUBBAY. 43 Cal. 305 : 20 C. W. N. 240 : 33 I. C. 1 : 23 C. L. J 62.

CONTRACT ACT (IX OF 1872), S. 49.

———Ss. 46 and 55—*Agreement by puisne mortgagee to pay of prior encumberances—Default—Damages.*

Where a subsequent mortgagee agrees as part of the consideration of his mortgage to redeem prior mortgages on the property and particular time is specified for such redemption, it is the duty of the puisne mortgagee to redeem the prior mortgages within a reasonable time *i.e.*, by the first date upon which redemption is obtainable. If the mortgagee fails to redeem the prior mortgages. the mortgagor is entitled to recove- from the mortgagee damages sustained by him in consequence of the failure of the mortgagee to redeem. (*Lindsay, J. C.*) PARTAB SINGH *v.* BALWANT SINGH. 48 I. C. 550 : 5 O. L. J 670.

———S 47—*Sale—Vendor's duty to tender goods at the time specified—Delivery of Ry. receipt not sufficient—Bom Cotton Trade Association, R.* 17.

Under the Bombay Cotton Trade Association the vendor is bound to tender a delivery order backed by the goods before 1 p. m. on the due date. Where the plaintiff is in breach, he cannot sue to recover damages on the contract. Tender in rule 17 has its full legal meaning. Giving Ry. Receipt is not tender. (*Beaman, J.*) MUKANCHAND *v.* NIHALCHAND. 40 Bom. 517: 32 I. C. 948 : 18 Bom. L R. 96.

———Ss. 49 and 50—*Money payable on demand.*

S 49 of the Contract Act does not apply where the money is payable on demand and not without application by the promisee. 31 M. 223, 228 Foll. S. 50 of the Contract Act lays down that a promisor is discharged from liability if he performs the promise in a manner or at a time prescribed or sanctioned by the promisee. (*Mookerjee and Holmwood, JJ.*) SAILENDRA NATH MOOKERJEE *v.* RAM SUNDAR GHOSE. 15 I.C. 885 : 16 C. L. J. 279.

———S. 49—*Repudiation of—Limitation—Promise to wait for reasonable time.*

The question as to what is reasonable time, is a question of fact in each case. (*White, C.J. and Sankaran Nair, J.*) GOPALA AIYAR *v.* RAMASWAMI SASTRIGAL. 22 M. L. J. 207 : 10 I.C. 320 : 10 M. L. T. 496.

———S. 49—*Debtor's duty.*

Ordinarily the debtor is to see the creditor to ascertain the amount of the debt and pay it. (*Drake Brockman, J. C.*) MEGHRAJ *v.* JOHNSON. 31 I. C. 880 : 11 N. L R. 189.

———S. 49—*Payment of debt—Place not specified—English law.*

S. 49 of the Act is in accordance with the rule of English Law that, in the absence of any specification of the place of payment. the debtor must seek out the creditor. The section leaves it to the creditor to appoint a reasonable place of payment (*Twomey, J.*) YAR MAHOMED KHAN *v.* AMIR UDDIN. 20 I. C, 683 : 6 Bur. L. T. 143.

CONTRACT ACT (IX OF 1872), S. 51.

——S 51—*Repudiation—Sufficiently definite statement.*

Where in a contract for delivery of goods at a certain port on a certain day in each month the promisor intimated to the promisee that "unless you give us a definite reply whether you will pay extra war insurance rates within two days, we shall consider the contract as cancelled" there is not a sufficiently definite statement of repudiation as time for further consideration negotiations and correspondence was given thereby. (*Sanderson, C. J Woodroffe and Mookerjee, JJ.*) BILASIRAM *v.* EZEKIEL ABRAHAM GUBBAY.
43 Cal. 305 : 20 C. W. N, 240 : 33 I. C. 1 : 23 C. L, J. 62.

——S. 51—*Contract —Consideration —Promise—Performance.*

Where the consideration for a contract consists of a promise, the party who is bound to do the act promised, fully performs his part of the contract if he is ready to do the act when required. (*Stephen and Mullick, JJ.*) MOHENDRA LAL *v.* AKHIL CHANDRA. 20 I. C. 47 (1) : 20 C. L. J. 424.

——S. 51—*Vendor not bound to tender if vendee unwilling.*

Vendor is not bound to tender the purchase price unless the purchaser is ready and willing to perform his part of the promise. In a suit for specific performance, the strict law as to tender is not applicable. (*Kennedy, C. J. and Raymond, A. J. C.*) BEGRAJ *v.* ALISHER. 16 S. L. R. 278 : 1923 Sindh. 50

——Ss. 52 and 54—*Vendor and purchaser — Delay in payment of purchase money—Vendor's default in showing title.*

If delay in the payment of the purchase money is due to the vendor's own default in showing a good title, he will not be entitled to take advantage of his own fault and claim interest. (*Sadasiva Aiyar and Spencer, JJ.* PULIYADI NAVANNA ELLARAYAN *v.* NAGENDRA AIYAR. 42 I. C. 509 : 6 L. W. 233.

——S. 54—*Breach of contract—Defence by party committing a breach.*

A party cancelling a contract without any justification is precluded from making any defence which would have been open to him in an action for damages by the other party. (*Macleod, C. J.*) RUSTOMJI *v.* HAJI. 59 I. C. 515 : 22 Bom L. R. 1165,

——S. 54—*Contract consisting of many parts —Non-performance of one—Effect.*

Where a contract consisted of twelve parts, non-performance of one does not necessarily indicate an intention to put an end to the contract. (*Scott, C. J. and Batchelor, J.*) ANDREW YULE & Co. *v.* ARDESHIR. 24 I. C. 758: 16 Bom. L. R. 178.

——Ss. 54 and 55—*Contract—Sale of goods —Failure to deliver in time—Duty of purchaser.*

As soon as the contract for the sale of goods within a specified date is broken, the obligation of the purchaser to accept delivery of the goods vanishes; he is not bound to take the goods when delivered later. (*Mookerjee and Beachcroft, JJ.*) KALIKANTASAHA *v.* ISMAIL. 20 C. L J. 133 : 27 I. C. 7: 20 C. W. N. 159

CONTRACT ACT (IX OF 1872), S. 54.

——S. 54—*Reciprocal promises—Sale of goods —Delivery of telegram—Condition of contract.*

Where on a contract for the sale of goods, the seller agrees to give the buyer a delivery telegram for the goods sold, the provision as to the delivery telegram is a condition of the contract and if for any reason, it is broken, the buyer is entitled to rescind the contract and sue the seller in damages. A covenant as to delivery is as much an essential part of a contract for the sale of goods as a covenant for payment of price or any other condition in the contract (1919) 1 K B. 198; (1920) 2 K. B. 1 (9). (*Schwabe, C. J. and Krishnan, J.*) ADAM HAJI PEERA MAHOMED ISHAK *v.* HUSSAIN AKBARI. 43 M. L. J 199 : 31 M. L. T. 40: 70 I. C. 736: (1922) M W. N. 434 : 1923 Mad. 103.

——S. 54—*Breach of contract—Rights of parties.*

Where one of the parties to a contract breaks it, the other is justified in rescinding the contract and claiming damages for its breach. (*Spencer and Krishnan, JJ.*) ZAMINDAR OF BODOKIMIDI *v.* SEESIL KUMAR LAHIRI. 49 I. C. 811: (1918) M. W N. 772.

——Ss. 54 and 55—*Liability of Shipowner— Carriage by sea.*

A ship need not remain for the whole of the laying days at a port if the charterer dispenses with it. Engagement to ship goods and to keep space for goods must be punctually performed. The shipper must be ready with cargo before he can enforce the obligation on the shipowner to call at the port of shipment and take action against him in damages for its breach. (*Wallis, C. J. and Phillips, J.*) GOVINDA PILLAI *v.* MESSRS BEST & CO., LTD. 34 I.C. 843.

——S. 54—*Reciprocal promises—Breach by act of both parties—Suit for specific performance, whether lies—Compensation—Claim for.*

Where parties to a contract consisting of reciprocal promises failed to perform their respective promises one wilfully and the other because he was not bound to perform his part until the other had fulfilled his, the contract is broken by act of both parties, and a suit for specific performance will not lie though the latter is entitled to compensation for breach of contract. (*Ayling and Sadasiva Aiyar, JJ.*) SABHAPATHY PILLAY *v.* VAUMAHALINGA PILLAI. 38 Mad. 959: 15 M. L. T. 203: 26 M. L. J. 331: 23 I. C. 581: (1914) M. W. N. 256.

——S. 54—*Contract—Consolidated sum agreed to be paid from time to time.*

In case of a contract loan for a consolidated sum of money to be paid from time to time if the lender refuses to lend a small portion remaining due to the borrower, it has the effct of the lender putting an end to the contract and is not entitled to claim interest at the contract rates. (*White, C.J. and Tyabji, J.*) RAMASWAMI NAIK *v.* RAMANADHAN CHETTY. 1 L. W. 136: 22 I. C. 627 : (1914) M. W. N. 240,

CONTRACT ACT (IX OF 1872), S . 55—Contract to sell.

——— S. 55.
Contract to Sell.
Effect of Failure.
Mercantile Contracts.
Payment by third Person.
Sale
Sale of land.
Test of Time being essence of Contract.
Waiver.

Contract to Sell.

———S. 55—*Contract to sell—Delay—Rescission—Liability.*

Under a contract for the sale of yarn, the goods were to be delivered on steamer at Madras in July, August and September, in three shipments No yarn was shipped in July and August but ten bales were shipped together in September. The defendant had made no complaint of even the delays in the deliveries but just before the tender of the goods, gave notice to the plaintiffs of his intention to put an end to the entire contract. In a suit by plff. for damages for breach of the contract: *Held*, the partial breach did not go to the root of the contract, as by non-delivery of the thing contracted for, the whole object of the contract was not frustrated. Hence defendant was not entitled to rescind the entire contract but plaintiffs should be awarded damages in respect of the bales allocated for the September shipment, (*Ayling, Offg. C. J., and Odgers, J.*) MESSRS SWAMI- & Co. *v.* NUKALA VENKATASUBBIAH
69 I. C. 41 : (1922) M. W. N. 47.

———S. 55—*Contract to sell—Purchaser should be ready and willing to perform his part.*

Even where time is not of the essence of contract, the purchaser must show his readiness and willingness to perform his part of the contract within a reasonable time after the agreed date. (*Spencer and Phillips, JJ.*) MARUDANAYAGAM *v.* MUNUSAWMY. 37 I. C. 776.

Effect of failure.

———Ss. 55 and 63—*Effect of failure--Contract—Time, essence of—Failure to perform—Extension of time.*

Where time is of the essence of a contract and there is a breach thereof, the promisee may under S. 63 of the Act avoid the contract but if he extends the time for performance, he cannot claim damages for non-performance at the original agreed time. (*Lord Duncdin.*) MUHAMMAD HABIBULLAH *v.* BIRD & Co. 43 All, 257 : 14 L. W. 350: 48 I. A 175: 63 I. C. 589: 24 Bom L. R. 687 : 1922 P. C. 178 (P. C.)

———S. 55—*Effect of Failure--Contract—Construction—Sale of goods—Delivery to be taken within a specified period—Default—Delivery of part of goods after expiry of time fixed—Refusal to take delivery of the rest—Damages.*

On 18th September 1913, the plaintiffs entered into a contract with the defendants for the sale of two hundred bales of yarn No. 20s, and 20½s. The yarn was to be delivered in October-November 1913 as manufactured. Under the terms of the contract, if the defendants failed to take delivery of the bales from time to time as they became ready, the plaintiffs were entitled to resell them on the defendants' account and risk by public

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auction or private sale and the defendants were bound to make good to the plaintiffs any loss that they might suffer by the re-sale. No delivery was asked for by the defendants during October-November 1913 and the goods were manufactured by the plaintiffs against this contract. Up to July 1914 the defendants took delivery in small quantities of sixty-six bales of 20s and forty-two bales of 20½s. On 9th July 1914, the plaintiffs wrote to the defendants to arrange to take immediate delivery of the remaining ninety-two bales. On 13th January 1915, the plaintiffs gave notice to the defendants that if they did not take delivery within twelve days they would resell the bales by public auction. On 10th of February 1915, the bales were sold by auction and they realised Rs. 9,951—1—6 against the contract price of Rs. 14,946-1-6 leaving a difference of Rs. 4.995. The plaintiffs claimed from the defendants this amount together with interest and godown rent and fire insurance as per terms of the contract, in all Rs. 5,858-6-3. The defendants replied that under the contract, the delivery was to be in October-November 1913 that the defendants were ready and willing to take delivery of the bales but as the bales were not ready the plaintiffs were not in a position to give delivery and the defendants therefore repudiated their liability in the matter. The plaintiffs having sued the defendants to recover the amount: *Held*, (1) that, as there was no evidence to show that the terms of the contract were altered by mutual consent and therefore the contract remained in existence after the end of November as altered by the parties, the Court could not say what was the altered contract: (2) that, whenever after the end of November 1913 the defendants asked for delivery it was optional to the plaintiffs to give them delivery and if the plaintiffs chose to give them delivery at the rates mentioned in the previous contract, that was a separate transaction, and the Court could not imply from the plaintiffs having given delivery of some bales in December 1913 to the defendants, that the parties had entered into a new contract whereby the plaintiffs agreed to give delivery to the defendants of the remaining bales according as the defendants should choose to ask for them. (3) that the Court could only read the contract according to the plain intention of the words in the written contract, and that as the parties did nothing under the contract within the contract period, the written contract thereby came to an end. (*Macleod, J.*) THE PHOENIX MILLS, LTD. *v.* MADHAV DAS RUPCHAND.
69 I. C, 9 : 24 Bom. L. R, 142.

———S. 55—*Effect of failure—Time for performance—A holiday—Right to perform on day following.*

In the absence of Statutory Provision or trade custom or usage, the fact that the performance of a contract falls due on a holiday does not alter the rights of the parties by suspending the transaction of private business. A seller is bound to establish that he was entitled to perform the contract on the day following the holiday, by reason of the existence of a valid usage which is deemed to have been incorporated in the contract between the parties. He must not only prove the existence

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of a trade usage, but also establish that the usage when read into the written contract does not make it insensible or inconsistent. (*Mookerjee, C. J., and Fletcher, J.*) KASIRAM PANIA *v.* HARNUNDROY FULCHAND. 58 I. C. 396 : 32 C L. J. 140.

——S. 55—*Effect of failure—Contract—Time when essence of the contract—Date fixed for performance and penalty for breach—Laches—Party—Guilty of—Rights and liabilities of.*

If a party to a contract promises to do a certain thing at or before specified time, it must be ascertained whether, in fact, performance of the contract by one party was meant to depend on the other party's promise being fulfilled by day named or whether a day was named merely to secure a performance within a reasonable time. The mere fact that a date has been mentioned does not conclusively prove that the time was the essence of the contract. Although in contracts for a sale of land the time fixed for completion is not initially of the essence of the contract, either party may be guilty of unnecessary delay and may entitle the other party to serve upon him a notice limiting the time at the expiration of which, he will treat the contract as at an end. The reasonableness of the time so limited, is determined by the Court with reference not merely to what remains to be done at the date of the notice, but all the circumstances of the case including the previous day of the party in default and the attitude of the other side in relation to it. (*Mookerjee and Panton, JJ.*) MAHADEO PRASAD *v.* NARAIN CHANDRA.

30 C. L. J. 224 : 57 I.C, 121: 24 C. W. N. 330.

——S. 55—*Effect of failure—Contract of loan—Time being essence of the contract—Agent if entitled to commission.*

In a contract by which an agent agreed to procure his principal a loan within a certain time, and time was definitely known to be of the essence of the contract, the agent will not, where the loan is not secured within the stipulated time, be entitled to any commission. (*Mookerjee and Carnduff, JJ.*) KRISHNA PRASAD SINGHA *v* PURNENDHU NARAIN SINHA. 15 C. L J. 40 : 11 I. C. 820 : 16 C. W. N. 753.

——S. 55—*Effect of failure—Malabar—Furnishing of security.*

The rule in *Kuri* transactions being that the amount which is payable to the bidder is to be paid to him only on his furnishing security for future instalments, time is of the very essence of the contract. Time being essence of the contract, unless the security is furnished within the prescribed period, the bidder loses his right to the amount payable to him. (*Abdur Rahim and Spencer, JJ.*) AYYA PATTAR *v.* ATTUPURATH MANAKKAL.

52 I. C. 938 : (1919) M. W. N. 805.

——S. 55, Cl. 2—*Effect of failure—Contract for completion of building work within stipulated period—Default—Damages.*

Where under a building contract it was agreed that the work was to be completed within 4 months and a fine of Rs. 5—was to be paid for every day after that date that the work remained incomplete, *Held* that time was not of the essence of the contract in the case. The very fact that a penalty was stipulated for in case of failure to complete the work within the stipulated time indicated that in case of such failure it was not the avoidance of the contract that was contemplated but acceptance of performance after the stipulated time subject to payment of damages which were fixed. (*Kotwal, A. J. C.*) ROBERTS *v.* SHAIKH HYDER.

6 N L. J. 91 : 69 I. C. 894 : 1923 Nag. 140.

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——S 55—*Effect of failure*—Quantum meruit.

Where time is the essence of the contract, claim for *quantum meruit* is unsustainable when work is delayed. (*Parlett, J.*) PETER VERTANNES *v.* MUTIAH CHETTY.

19 I. C. 48 : 6 Bur. L. T. 53.

——S. 55—*Effect of failure—Contract for sale—Payment of purchase money—Time for.*

A purchaser at a private sale by auction must pay the balance of purchase money on the day fixed in the advertisement, though vendors do not execute sale-deed as that was not the condition agreed upon ; the payment made already is liable to be forfeited if balance is not paid on date agreed if time was of the essence of the contract which fact can be gathered from contract, nature of property and other surrounding circumstances. (*Pratt, J. C. and Fawcett, A. J. C.*) ALLIBHOY *v.* DOWLATT RAM. 50 I. C. 41 : 12 S L R. 144.

——S. 55—*Effect of failure—Time essence of contract—Failure to comply—Right of rescission by promisee—Promisee entitled to damages only.*

Where time is of the essence of the contract, failure to comply by specified time entitles promisee to immediately rescind. Where time is not of the essence of the contract, he has a right to damages only. But whether time is of the essence of a contract or not, in any case a contract must be performed within a reasonable time. (*Crouch, A. J. C.*) DOULATRAM VALAB DAS *v.* ALI BHAI IBRAHIMJI. 33 I. C. 668 : 9 S. L. R 137.

Mercantile Contracts.

——S. 55—*Mercantile contracts—Time, essence of contract—Sale of goods.*

Where goods are sold on condition that they would be taken delivery of, on payment within a certain time, failing which the seller being at liberty to re-sell the same to another, time is of the essence of the contract (*Reid, C. J. and Chevis, J.*) DELHI CLOTH AND GENERAL MILLS CO. LTD. *v.* KANHAIYA. 194 P L. R. 1913 : 111 P. W. R. 1913 : 19 I. C. 93 : 80 P. R 1913.

——S. 55—*Mercantile contracts.*

In spite of S. 55. in England as well as in India, time is of the essence of the contract in mercantile contracts. (1877) 2 A. C. 455 at 463, Ref. (*Pratt, J. C. and Boyd, A. J. C.*) FIRM OF TRIKAMJI JIWANDAS & CO. *v.* TRUSTEES OF PORT TRUST OF KARACHI. 36 I. C. 96 : 10 S. L. R. 4.

Payment by third person.

——S. 55—*Payment by third person—Discharge of lien.*

Where a pre-emption decree proved abortive, after payment by the pre emptor of the unpaid purchase money to the vendor, the vendor is not

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entitled to enforce his lien for unpaid purchase money, against the original vendee, till he has reimbursed the pre-emptor, the money paid by him. (*Kanhaiya Lal, A. J. C.*) MUBARAK ALI SHAH *v.* ADITYA PRASAD.

17 I C 288 : 16 O, C. 1.

Sale.

——— S. 55—*Sale—Consideration to be paid by the vendee to a creditor of the vendor—Vendee's default—Vendor entitled to recover.*

In a sale, the consideration was directed to be paid by the vendee to a creditor of the vendor but the vendee had not paid it, and the vendor sued the vendee for that amount; *Held*, that he was entitled to succeed and the fact that the vendor had not paid his creditor is no answer to his claim. (*Abdur Rahim and Sundara Aiyar, JJ.*) RAGHUNATHA CHARIAR *v.* SATAGOPA CHARIAR.

36 Mad. 348 : 10 M. L T. 300 : (1911) 2 M. W. N. 227 : 12 I. C. 353 : 21 M. L. J. 983.

Sale of Land.

———S. 55—*Sale of land—Contract for sale of land—Time of essence of contract—Default by vendee—Rescission of contract.*

Where in a contract for the sale of land, time is expressly made 'of the essence of the contract in all respects' specific performance cannot be decreed in favour of the party in default and the default, though trivial, will entitle the other party to stand on the letter of the agreement. Time being of the essence of the contract, the vendor was entitled to rescind it, on the expiry of the prescribed period though delay was due to unexpected and sudden causes (*Lord Atkinson.*) BRICKLES *v.* SNELL.

38 I. C, 123 : 86 L.J. (P.C.) 22.

———S 55—*Sale of land—Time not essence of the contract—Suit for specific performance—Relief when refused.*

S. 55 of the Contract Act does not lay down any principle which differs from the law of England as to contracts for sale of land. In such cases, equity, looks at the substance and not at the letter of the agreement in order to ascertain whether the properties notwithstanding that they named a specific time within which the sale was to be completed, really and in substance intended more than that it should take place within a reasonable time. *Prima facie* equity treats the importance of such time limits as being subordinate to the main purpose of the parties. Specific performance of a contract to sell land, will be granted, although there has been a failure to keep the dates assigned to it, if justice can be done between the parties and if nothing in the express stipulations of the parties the nature of the property or the surrounding circumstances, make it inequitable to grant relief. An intention to make time of the essence of the contract must be expressed in unmistakable language; it may be inferred from what passed between the parties before but not after the contract is made. (*Viscount Haldane.*) JAMSHED KHODARAM IRANI *v.* BURJORJI DHUNJIBHAI,

40 Bom: 289 : 43 I. A, 26 : 30 M L. J. 186: 3 L. W. 239: 19 M. L. T. 184: 14 A. L. J. 225 : (1916) 1 M. W. N. 229: 18 Bom. L. R. 163: 23 C. L. J. 358: 32 I. C. 246 : 20 C.W.N. 744 (P, C.).

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——— S. 55—*Sale of land—Contract for sale of immoveable property—Time made essence of the contract by notice—Breach—Notice unreasonable—Specific performance.*

By an agreement, dated 27th February, 1919 the defendant agreed to sell to the plaintiff certain immoveable property and the plaintiff paid to the defendant Rs. 500 as earnest money. Clause (3) of the agreement provided that the sale should be completed within three months from the date thereof and time was made of the essence of the contract. Subsequently both the parties agreed that the time for completion of the contract should be extended beyond the three months mentioned in the clause. There was considerable delay on both sides in preparing requisition for title, in answering requisitions, and in the preparation and approval of the draft conveyance. After some correspondence as to the engrossment of the conveyance, the defendant wrote to the plaintiff on 27th August 1919, that unless the sale was completed before 1st September 1919, time being of the essence of the contract, the contract would be treated as broken by the plaintiff and the earnest money would be forfeited. The plaintiff did nothing further until the 2nd September 1919 on which date he sent the engrossment of the conveyance to the defendant who in reply wrote on the same day that he had forfeited the earnest money. The plaintiff, thereafter, tendered the purchase money but it was refused. The plaintiff, thereupon, filed a suit for specific performance of the agreement of 27th February 1919. *Held*, (1) that as there were no special circumstances which would demand that the contract should be completed on the 1st September 1919, the notice given on 27th August 1919 to complete the contract in four days was not a reasonable notice: (2) that considering the extremely leisurely way in which both the parties had proceeded from the date of contract, there was no reason why the defendant should be entitled to demand of the plaintiff that the matter should be completed within four days and that in default the contract should be considered as broken; (3) that there was nothing in the surrounding circumstances to indicate that the defendant would be so prejudiced by further delay in the completion of the contract that equity would not assist the plff. in getting it performed; and (4) that the plff. was, therefore, entitled to the assistance of the Court in obtaining specific performance. 40 Bom. 289 followed. (*Macleod, C. J. and Shah, J.*) MUSSA MAHOMED *v.* MOTILAL ITCHALAL.

24 Bom. L. R, 203 : 69 I. C. 13 : 1922 Bom. 14.

———S. 55—*Sale of land—Contract — Time limits—Rules of justice, equity and good conscience.*

In all matters of specific performance of contract for sale of land, time is not of the essence unless the parties make it expressly so. Where the Specific Relief Act is inapplicable in a suit for specific performance of an agreement to sell land, the rules of justice, equity and good conscience apply to such a case. Where time is specified in an agreement to sell, it is not until

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one side or the other gives the opposite party reasonable time that can be tied down to the time so mentioned. (*Chitty and Richardson, JJ.*) JANARDHAN *v.* BHAIRAB CHANDRA. **30 I. C. 365.**

——S. 55—*Sale of land—Time, essence of contract—Sale of immoveable property.*

In contracts for the sale of immoveable property, time is not ordinarily considered to be of the essence of the contract unless there is anything in the express stipulation between the parties, the nature of the property and the surrounding circumstances which would make it inequitable to apply the rule. (*Wallis, C. J. and Odgers, J.*) SURI CHETTY RANGANATHAN CHETTY *v.* GADALA PARTHASARATHY.
40 M. L. J. 13 : 13 L. W. 77 : (1921) M. W. N. 94 : 61 I. C. 457 : 29 M. L. T. 67.

——S. 55—*Sale of land—Sale—Option of repurchase—Time of the essence of the contract.*

The doctrine that time may not be essence of a contract does not apply to a contract for resale of property conveyed. The right to repurchase being optional must be exercised according to the strict terms of the power. 36 M. L. J. 385 Rel. (*Sadasiva Aiyar and Napier, JJ.*) SAMARAPURI *v.* SUTHARSANA. **42 Mad. 802 : 37 M. L. J. 109 : (1919) M. W. N. 598 : 26 M. L. T. 269 : 52 I. C. 590 : 10 L. W. 376.**

——S. 55—*Sale of land—Presumption—Rebuttal.*

The presumption that time is not of the essence of a contract to sell land, is rebuttable when the sale is arranged to meet the expenses of a marriage taking place on a certain date. (*Sadasiva Aiyar and Napier, JJ.*) MULPURI VEERAYYA *v.* SANAGAVARAPU SIVAYYA. **26 I. C. 121 : 27 M. L. J. 482.**

——S. 55—*Sale of land—Option to repurchase land under contract of sale—Time if of the essence of the contract.*

Though in the case of a contract for sale of land, time may or may not be of the essence of the contract, in the case of an option for repurchase before a fixed date, time is of the essence and option must be exercised before that date. 42 Mad. 802 : 30 M. L. J. 186 Ref. (*Maung Kin, J.*) MAUNG POYIN *v.* MAUNG SHWE KIN.
11 L. B. R. 441 : 70 I. C. 126 : 1 Bur, L. J. 167 : 1923 Rang. 42.

——S. 55—*Sale of land—Sales of immoveable property—'Tenure'—The essence of such contracts.*

In sales of immoveable property, time is not of the essence of contract, unless it be quite clear that the parties specially agreed that it should be so. (*Crouch, A. J. C.*) DOWLAT RAM VALABDAS *v.* ALI BHAI IBRAHIMJI. **33 I. C. 668 : 9 S. L. R. 137.**

Test of time being Essence of Contract.

——S. 55—*Test of time being essence of contract—Intention.*

The question whether time is of the essence of the contract depends on the intention of the parties. Equity has never laid it down that a man must never be allowed to mean what he says. (*Marten and Fawcett, JJ.*) SHANKAR SAKHARAM *v.* RANTANJI PREMJI. **47 B. 607 : 25 B. L. R. 328 : 1923 Bom. 441.**

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——S. 55—*Test of time being essence of contract.*

In order to make a contract voidable under S. 55, intention of the parties to make time of the essence of the contract must be proved. Forfeiture of earnest money and liberty to re-sell on failure to perform the contract within a fixed time indicate time to be of the essence of the contract. (*Scott, C. J and Chandavarkar, J.*) BURGORGI DHUNJIBHOY *v.* JAMSHED KHODARAM IRANI.
38 Bom. 77 : 20 I. C. 469 : 15 Bom. L. R. 405.

——S. 55—*Test of—Time being essence of contract—Waiver—Notice.*

In a contract to supply waggons, the price was to be made in 3 instalments, the last being on delivery. There was default in payment of the second instalment, still a number of waggons were completed and delivered. *Held* such delivery showed time was not of the essence of the contract. It is open to the parties in such a case to give reasonable notice of the default and is made time the essence of the contract. (*Sanderson, C. J. and Richardson, J.*) BURN AND CO. LTD. *v.* THAKUR SAHEB SREE LUKHDIRJEE.
28 C. W. N. 104 : 1924 Cal. 427.

——Ss. 55 and 73—*Test of time being essence of contract.*

When stipulations regarding time for performance are made by the parties who are merchants and especially when the promisor obtains an extension of time from the promisee, the conclusion is that time was of the essence of the contract according to the true intention of the parties and the defaulting party is liable to pay damages. (*Mookerjee and Roe, JJ.*) BHUDARCHANDRA *v.* BETTS. **33 I. C. 347 : 22 C. L. J. 566.**

Waiver.

——S. 55—*Waiver—Consent decree—Time essence of contract.*

The consent decree provided for exchange of the houses of plaintiff and defendant, after the plaintiff had constructed wall in his house. The exchange was to be effected by a certain date. The plaintiff applied for execution long after this date. The contention of the defendant that time was the essence of the contract was ruled out since it was clear from his conduct in not protesting against the delay that he condoned the delay. (*Seaman and Heaton, JJ.*) BHAGWANT GOPAL *v* APPAJI GOVIND. **36 I. C. 598 : 18 Bom. L. R. 503.**

——S. 55—*Waiver—Time—Stipulation.*

Acceptance of payment after the expiry of the time fixed operates as a waiver of the limitation as to time in the contract. (*Mullick and Atkinson, JJ.*) PRABHU RAM PANDEY *v.* JAHALO KUER.
2 Pat. L. J. 520 : 4 P. L. W. 57 : 42 I. C. 408 : 1917 Pat. 258.

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——S. 56.
Becomes Impossible.
Becomes Unlawful.
Implied Term.
Landlord and Tenant.
Non-Liability for Accident.
Test of Impossibility.

Becomes impossible.

——S. 56—*'Becomes Impossible.'*

Where a contract for supply of coal within a certain time was entered into by the defendants but failed to make the delivery in accordance with its terms owing to Government restriction on the transport of coal from colieries but it was admitted that coal was available and could be purchased in the local market. *Held*, as the contract had not become impossible of performance the defendants are liable to the plaintiffs for the damages claimed by them. (*Atkinson, J.*) KESHAV LAL BROTHERS AND CO. *v.* DIWAN CHAND AND CO. **50 I. A. 142 : 74 I. C. 396 : 25 Bom. L. R. 854 : 27 C. W. N. 974 : 47 B. 563 : 45 M. L. J 630 : 33 M. L T 342 : 1 P. L. R. 434 (Cr) : 1923 M. W N. 583 : 1923 P. C. 105 (P. C.)**

——S. 56—*Becomes Impossible—Contract of service—Wrongful dismissal—Broker employing under broker—Termination of broker's appointment—Dependent contract.*

Respondent agreed to employ appellant in 1911 as under brokers for the supply of sugar for a company during the subsistence of an agreement which respondent entered into as broker to the company for a period of five years. In August 1912 respondent wrongfully terminated the agreement with appellant. In December respondent *bona fide* and not with the idea of minimising damages, entered into a new agreement on different terms with the company which put an end to the original agreement between them. In an action by appellant for damages against respondent, *held*, that damages were limited to the amount which appellant would have earned as underbroker up to December 1912. The new agreement entered into by the broker would not enure to the benefit of the underbroker so long as it was not entered into as a means of defeating the underbroker's right. (*Lord Buckmaster.*) LACHMANDAS *v.* RAGHUMULL. **47 Cal. 290 : 46 I. A. 314 : 24 C. W. N. 577 : 11 L. W 551 : 58 I. C. 851 : 2 U. P. L. R. (P.C.). 68**

——Ss. 56 and 65—*Becomes Impossible—Contract of lease.*

Where in a contract to lease lands, the performance of contract becomes impossible by acquisition of land by Government, the promisee is entitled to compensation for loss. (*Banerjee, J.*) MUHAMMAD HASHIM *v.* MISRI.
20 A. L. J. 41 : 65 I. C. 253 : L. R. 3 A. 575 : 44 A. 229 : 1922 All. 6

——S. 56—*Becomes Impossible—Impossibility of performance.*

Mere difficulty or the need to pay exorbitant prices is not such physical impossibility as is contemplated under S. 56. (*Beaman, J.*) KARL ETTLINGER & Co. *v.* CHAGANDAS & Co.
40 Bom. 301 : 33 I. C. 205 : 17 Bom. L. R. 1087.

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——S. 56—*Becomes impossible by a rule of the Govt.—Sp. Rel. Act, S. 18—T. P. Act, S. 43.*

A, the occupant of certain survey numbers in a Taluka agreed to sell to B, stumps of teak and blackwood trees in those survey numbers. By Government Resolution No. 7114, dated 27th October 1897 in force at the time of this contract, A had a privilege of pre-emption in respect of such stumps. Subsequently on 11th May, 1905, the Government abolished the right of pre-emption and instead directed that the forest department should sell the trees and 20 per cent of the net proceeds should be paid to the occupant as a gift from Government and subject to no *tribunal*. A received from Government the said percentage of the net proceeds of the trees agreed to be sold to B. B under the contract above mentioned, claimed the sum received by A from the Government. *Held*, that the plaintiff was not entitled to recover the sum. What B, was claiming was a gift of bonus from the Government to A, which was not and could not have been in the contemplation of the parties when the contract was made and which by itself was not transferable. S. 43 of the T. P. Act could not apply to the contract as standing timber is not immoveable property. The position of A was not that of a person having only an imperfect title to the property he contracted to sell; consequently S. 18 of the Sp. Rel. Act was not applicable. (*Russel and Chandavarkar, JJ.*) JASUDDIN *v.* SAKHARAM. **36 Bom. 139 : 12 I. C. 693 : 13 Bom. L. R. 1042.**

——S. 56—*Becomes impossible—Frustration.*

Per *Richardson, J.*—S. 56 of the Contract Act is applicable only to the physical impossibility and therefore does not cover every case of frustration. S. 9 however recognises that promises may be implied. (*Sanderson, C. J. and Richardson, J.*) GOWRI SHANKAR AGARWALLA *v.* MOITRA.
70 I. C. 379 : 26 C. W. N. 573.

——S. 56—*'Becomes Impossible'—When a discharge—Economic unprofitableness—Rise in freight*—Force majeure.

Impossibility as an excuse for non-performance of a contract, must be a physical or legal impossibility and not merely an impossibility with reference to the ability and circumstances of the promiser, a mere economic unprofitableness is not equivalent to impossibility of performance; but a rise in freights may be equivalent to such a scarcity of ships as to amount to physical impossibility. The expression *'force majeure'* has more extensive meaning than *'act of god'* or *'vis major'* though it may not include all, "causes you cannot prevent and for which you are not responsible." (*Mookerjee, C. J. and Fletcher, J.*) GUBBAY *v.* RAMJUS RAY. **63 I. C. 267 : 33 C. L. J. 151.**

——S 56—*Becomes impossible—Contract—Impossibility of performance—Damages.*

Where the parties, fully aware of the restriction imposed by Government on the supply of railway waggons on account of the war, entered into contract for the sale of goods and delivery on the assumption that by the time the goods would become deliverable under the contract, the said restriction would be removed. *Held*, that the

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contract was void being impossible of performance and the buyer was not entitled to recover any compensation from the seller who was excused from the performance of the contract. (*Rankin, J.*) KUNJILAL MANOHAR DAS *v.* DURGAPRASAD. 58 I. C. 761 : 24 C. W. N. 703.

——S. 56—*Becomes impossible—Owing to war—Effect.*

Where a contract became void owing to impossibility of performance due to the outbreak of the war because one essential element of affreightment became unlawful under law, the fact that the defendants offered to deliver goods on certain terms did not estop them from relying on S. 56. If a contract enures to the aid of the enemy or is incapable of suspension, it is dissolved by the outbreak of war. (*Sanderson, C. J. and Mookerjee, J.*) MADHORAM HURDEODAS *v.* G. C. SETT. 45 Cal. 28 : 21 C. W. N. 670 : 40 I. C. 383 : 26 C. L. J. 62.

——S. 56—*Becomes impossible.*

A promise is excused by a supervening impossibility caused by act of law but a temporary interruption followed by the possibility of proceeding with the contract does not avoid the contract. But unconditional contracts are, as a general rule, not dissolved by their performance becoming impossible owing to war. (*Chaudhuri, J.*) G. C. SETT *v.* MADHORAM HURDEO DAS. 33 I. C. 540.

——S. 56—*Becomes Impossible—Exorbitant rise in price.*

Deft. agreed to send certain amount of gold every week from London to the plff. In the meantime war broke out and gold could not be had at the ordinary rates in the market of London. *Held* that such a rise in the market price of the gold did not render the performance of the contract 'impossible' and the deft. was liable for the breach. (*Shadi Lal, C. J. and Wilberforce, J.*) HUKAM CHAND JAGADHAR MAL *v.* MERCANTILE BANK OF INDIA, LTD. 62 I. C. 815.

——Ss. 56 and 55—*'Becomes impossible'—No time fixed for performance.*

Where the language of a contract does not expressly or by necessary implication fix any time for the performance of a contract, the law implies that it shall be performed within a reasonable time. If the delay in transit is attributable to causes beyond the control of the defendant, he has acted neither negligently nor unreasonably. The condition of a reasonable time means that the party upon whom it is incumbent duly fulfils his obligation notwithstanding protracted delay so long as such delay is attributable to causes beyond his control and he has neither acted negligently nor unreasonably. The question of what is reasonable time for the performance of the contract is one to be decided by the particular circumstances of each case. (1893) A. C. 22 ; (1898) A. C. 486 and (1903) A. C. 389 Ref. But the defendant was not excused by the impossibility of performance. It is impossible to say that the parties based their contract on the supposition that clear facilities of transport existed in such a sense that their contract could be said to be deprived of its fundamental assumption and to

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become meaningless and insignificant, if those facilities do not exist. (1903) 2 K B. 740. *Held*, having regard to all the circumstances, the property in the goods did not pass on shipment but the vendor kept them as his property until they should be paid for and delivered and the appropriation at the port was only conditional. (1878) 3 Ex. Din. 164, Ref. (*Coutts-Trotter, J.*) MAHOMED IBRAHIM MAHOMED JAFFIR SAHIB AND CO. *v.* NALAM LAKSHMIKANTAM. 53 I. C 125 : 26 M. L. T. 24.

——S. 56 (2)—*Becomes impossible—Sp. Rel. Act, S. 18 (a)—Agreement to sell land—Performance of.*

Where the defendant, a purchaser at Court auction, agreed to convey property he purchased to the plaintiff, after applying for cancellation of the sale, and where the plaintiff deposited Rs. 100 before a certain date as agreed, but where defendant failed to get the sale cancelled according to the agreement in spite of the plaintiff's depositing the sum, *Held*, in a suit for specific performance of the contract, that the defendant's failure to apply for cancellation of the sale did not make the contract impossible of performance, that the defendant was still liable to perform the contract, and that money would not afford adequate relief in the case. (*Spencer and Phillips, JJ.*) NATARAJA PADAYACHI *v.* NAGAMUTHU PADAYACHI. 37 I. C. 761.

——S. 56—*'Becomes impossible'—Cancellation of principal contract—Effect on sub-contract.*

Where a sub-lease is entered into in the belief that the original contract will be subsisting during the period during which the sub-contract is to be worked, the cancellation of the contract terminates the sub-contract as well. (*Seshagiri Aiyar and Kumaraswami Sastri, JJ.*) GOPALASAMI PILLAI *v.* CHIDAMBARAM, 29 I. C. 151 : 2 L. W. 411.

——S. 56—*Becomes impossible.*

A contract is not rendered impossible of performance merely on account of a difficulty in performing it or a need to pay high prices. (*Mitra, A.J.C.*) MILL STONES TRADING CO. *v.* MATHURADAS. 57 I. C. 636 : 17 N. L. R 1.

——Ss. 56, 35 (2)—*'Becomes Impossible'—Surety for production of judgment debtor—Imprisonment—Effect.*

Where a person stands surety to produce a person in court on a particular day, but by that time the person had been convicted and lodged in jail, the promise becomes impossible to perform and the agreement becomes void. The agreement is not one falling under the second part of S 35 of the Contract Act. (*Mac Coll, J. C.*) MAUNG KY. WE *v.* MAUNG SAN TIN. 4 U. B. R. 99 : 1 Bur. L. J. 236 : 70 I C. 870 : 1923 Rang. 26.

'Becomes unlawful.'

——S. 56—*Becomes unlawful—War—Effect of, on contracts.*

The effect of war on contracts between subjects of countries which were at peace, unless they are of a very special kind is not to avoid them totally but to merely suspend the remedies of one or the other of the parties to them. Such contract remains in abeyance during the continuance of

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hostilities and can be enforced when peace is established. But if the contract requires continuous performance of mutual duties by the parties to it and such duties cannot be so mutually performed during the war, and, further if the suspension of such mutual rights and obligations for an indefinite period would go much beyond merely placing he contract in abeyance, the contract becomes, in the outbreak of war, void, as taking it up upon cessation of hostilities would be something more than renewing it. It would, in fact, be substituting for it an entirely new contract. A like rule would be applied to a partnership between subjects of belligerent states. On outbreak of hostilities between the Governments of the shipper and the shipmaster all contracts of affreightment are put an end to. (*Beaman, J.*) MARSHALL & Co. *v.* NAGINCHAND FULCHAND. **42 Bom 473 : 37 I. C. 644 : 18 Bom. L. R. 915.**

———**S. 56 (2)**—*Becomes unlawful--Proclamation and Ordinances owing to war.*

Where the plaintiff contracted with an alien enemy who could not fulfil the contract due to the Proclamations and Ordinances prohibiting alien enemies from carrying on trade and the contract was declared to be illegal, the contract dissolved on the declaration of the war and it also became impossible to be performed. The defendants were entitled to a return of their deposit because the plaintiffs waived any breach committed by giving defendants time after breach. (*Maclcod, J.*) TEXTILE MANUFACTURING CO. LTD. *v.* SOLOMON BROS. **40 Bom. 570 : 33 I. C. 353 : 18 Bom. L R. 105.**

———**S, 56**—*Becomes unlawful — Executory contract.*

An executory contract concluded before outbreak of war even with an alien enemy is merely suspended during the war and is dissolved or avoided only in certain circumstances among them, if its performance necessitates intercourse with the enemy during the war. (*Chaudhuri, J.*) G C. SETT *v.* MADHEORAM HURDEO DAS. **33 I. C. 540.**

———**S. 56**—*Becomes unlawful—Sale of goods —C. I. F. contract—Goods in a German ship—Outbreak of war—Effect of.*

Plaintiff agreed to buy glass under a C. I. F. contract and the goods were shipped, war broke out while she was on her voyage on the third August 1914 between England and Germany, but she was, after being condemned as a prize, allowed to proceed to such ports in the British Empire as she had cargo for and to discharge the cargo there. The defendant was thus in a position to hand over the cases of the glass to the plaintiff and take the price for them. In a suit for damages for the breach of the contract by the defendant, *held*, the buyer could not in such circumstances enforce the contract and judgment must be entered for the defendant. (*Coutts Trotter, J.*) THIRUVARANGIAH *v.* PANIA & Co. **43 I. C. 673 : 33 M. L. J. 410**

———**S. 56**—*Becomes unlawful—Declaration of hostilities—Breach of contract.*

Defendant's agents of German firm contracted on 25th August 1914 to deliver to plaintiff certain

CONTBACT ACT (IX OF 1872), S. 56.—Implied Term.

casks of dye to be delivered on arrival of each steamer. One of the steamers left Hamburg before the outbreak of hostilities and soon after war broke out, she was captured, condemned by the prize Court, but subsequently allowed to proceed to Colombo. The defendants were precluded from taking delivery till they deposited twice the value of the goods. In an action against defendants for damages for breach of contract. *Held*, that the defendants were not liable to deliver when there were no contracted goods in it (2) that capture of the ship was one of the possibilities contemplated which relieved defts. of liability. (3) the condemnation made the performance of the contract illegal and that the defendants were under no obligation on subsequent release to purchase the goods at twice the value from the Prize Authorities and make them over to the plaintiffs. (*Wallis, C J. and Oldfield, J.*) BANGHY ABDUL RAZAK SAHIH *v.* KHANDI RAO, **40 I. C. 851 : 41 Mad. 225.**

———**S. 56**—*Becomes unlawful—Contract, C. I. F.—Declaration of hostilities.*

A buyer who had entered into a contract for supply of goods by an enemy firm before commencement of hostilities under a C. I. F. contract cannot enforce its performance if before the delivery of documents to him, war was declared and the contract had become impossible of performance and void by the combined operation of S. 56 and the proclamation of 12th September, 1914. (1915) 2 K. B. 379 : 33 I C. 540; Dist. Release of goods by Government will not validate the contract that had become void before the order of release was passed. (*Abdur Rahim, O.C.J. and Burn, J.*) SOORTHINGJEE SAKAL CHAND *v.* MAHOMED NASIRDEEN. **40 I. C. 526 : 32 M L. J. 146.**

———**Ss. 56 and 23**—*Becomes unlawful—Contract of sale—Outbreak of war—Effect of.*

Contract to buy German goods becomes illegal and so void by the Royal Proclamation after the outbreak of the war. The contract of affreightment also becomes illegal and so the seller could not tender valid shipping documents under A C.I. F. contract. (*Robinson, J.*) BUCHANAN *v.* MALL. **48 I. C. 310 : 11 Bur, L, T. 84.**

———**S. 56**—*Becomes unlawful.*

If after a contract is entered into, it becomes illegal owing to declaration of war, etc., it cannot be enforced. (*Fox, C. J.*) CAMA &. Co. *v.* K. K. SHAH. **33 I. C. 96 : 9 Bur. L. T. 99.**

Implied Term.

———**S. 56**—*Implied term—Sale of goods to be supplied to vendor by third party—Goods not so supplied—Vendor—Liability of, to vendee.*

A vendor agreed to supply bales of *dhoties* manufactured by a certain mill, the agreement containing words 'the goods under manufacture are sold.' The mill failing to supply the vendor, the vendee sued for damages. It was held that both parties to the contract anticipated that goods were to be supplied to the vendor by the mill and the mill having failed to do so, neither party had any claim against the other. (*Heaton and Marten, JJ.*) HURNAND RAI *v.* PRAGDAS. **56 I. C. 632 : 22 Bom L. R. 343.**

CONTRACT ACT (IX OF 1872), S. 56—Non-liability for Accident.

Non-liability for Accident.

——— S. 56—*Non-liability for accident—Contract of sale—Promise to deliver on certain date—Accident excepted—Accident due to promisor's negligence—Liability.*

A clause in a contract, providing for the promisor's non-liability for failure to perform by a particular date his part of the contract in case of accident cannot be taken advantage of, if the accident is caused by the promisor's own negligence. (*Hartnoll, C. J. and Young, J.*) MOOSAJEE AHMED & Co. *v.* BUN SWEE SOON & Co.
25 I. C. 924 : 7 L. B. R. 105.

Test of Impossibility.

——— S. 56—*Test of impossibility.*

In a suit for damages for breach of contract to supply 151 bales of cotton twist of a particular quality within 75 days, *Held*, that test of impossibility is whether it was practically impossible for the defendant to get the quality contracted for within the specified time. (*Seshagiri Aiyar and Napier, JJ.*) SURYA PRAKASA LINGAM GARU *v.* SHAH TRIKAN LAL. **35 I. C. 625: (1916) 2 M. W. N. 131.**

——— S. 58—*Applicability of.*

Section 58 does not apply where there is no alternative promise separable from the illegal portion of the agreement. A covenant for indemnity for failure to do an illegal act is unenforceable. (*Piggott, J.*) RAM PRATAB RAI *v.* RAM PHAL TELI. **18 I. C. 9.**

——— S. 58—*Divisibility.*

Where a contract is only partly unenforceable, the whole contract goes unless it is severable. (*Wallis, C. J., Sadasiva Aiyar and Seshagiri Aiyar, JJ.*) POTHINAIKAN *v.* HAGANMA NAIKER.
19 M. L. T. 50: 30 M. L. J. 62 : 3 L. W. 115 : 32 I. C. 486: (1916) 1 M. W. N. 79 (F. B.).

——— Ss. 59 and 60—*Appropriation—Principles.*

A creditor is entitled to appropriate an indefinite payment to the payment of interest. A debtor may stipulate that a payment should be applied to the principal. If the creditor accepts the money he must appropriate it in the manner directed by the debtor. If he is not willing so to receive it he must return the money (*Lord Dunedin.*) TEEKAM CHAND *v.* RADHA KISHEN.
14 L. W. 391: 26 C. W. N. 153: 63 I. C. 904: 30 M. L. T. 39: (1921) M. W. N. 411 (P. C.).

——— Ss. 59 and 60—*Appropriation—Change of, when valid.*

Where money is paid to satisfy the kist and received and acknowledged on that account it is not in the power of one of the parties to the transaction to vary the effect of the transaction by altering the appropriation in which both originally concurred. (*Sir Arthur Wilson, J.*) MAHOMED JAN *v.* GANGA BISHEN SINGH. **38 Cal. 537: 38 I. A. 80: 15 C. W. N. 443: 9 M. L. T. 446: 8 A. L. J. 480: 13 C. L. J. 525: 13 Bom. L. R. 413: 21 M. L. J. 1148 : 10 I. C. 272 : (1911) 2 M. W. N. 277 (P. C.)**

CONTRACT ACT (IX OF 1872), S. 60.

——— S. 59—*Surety—Rights.*

A surety has no right to control the appropriation by customer or banker of moneys paid in by the principal debtor in the absence of special agreement (*Sanderson, C.J., Woodroffe and Mookerjee, JJ.*) GHUZNANI *v* NATIONAL BANK OF INDIA, LTD. **23 C. L. J. 256 : 33 I. C. 34 : 20 C. W. N. 562.**

——— Ss. 59 and 60—*Appropriation—Right of creditor—Interest.*

A creditor is entitled to appropriate all payments made by the debtor towards the interest whenever the amount of such interest due at the time of any payment absorbed the sum paid. (*Rattigan and Scott-Smith, JJ.* KHIALIA SHAH *v.* HANSARI MAL NATHU MAL. **24 P. R. 1915: 29 I. C. 346: 23 P. L. R. 1916.**

——— Ss. 59, 60 and 61—*Appropriation.*

When the defendant has failed to intimate and there are no circumstances to show appropriation, the plaintiff can appr priate a payment to any lawful debt due. (*Johnstone and Shadi Lal, JJ.*) ABDUL ALI *v.* PURAN MAL.
82 P. R. 1914: 25 I. C. 560 : 277 P. L. R. 1914.

——— Ss. 59 and 60—*Appropriation—Secured debts.*

Where a security has been given for a debtor, the creditor remains at liberty to appropriate payments after security given just in the same way as they were before. The fact that the payments were appropriated to clear off the indebtedness prior to the period of security does not affect the plaintiff's claim. 20 C. W. N. 562 Foll. (*Wallis, C. J. and Ayling, J.*) SANKARARAMA AIYAR *v.* PONNUSAMI PILLAI.
25 M. L. T. 257 : 9 L. W. 198 : 49 I. C. 273 : (1919) M. W. N. 23.

——— Ss. 59 to 61—*Decree debt—Payment of portion—How to be appropriated—Principal or interest.*

In the absence of any agreement to the contrary, payments made by a judgment-debtor have first to be appropriated towards the interest and the balance of the payment, if any, is then to be credited to the principal. Ss. 59 to 61 of the Contract Act do not expressly deal with interest, but the principle underlying these sections can well apply to interest as well. 8 B. L. R. 110 (P. C.) relied upon. (*Jwala Prasad and Bucknill, JJ.*) MALIK MOKHTAR AHMED *v.* MT. BIBI RAHIM UNNISSA BEGUM. **1922 P. 369 : 67 I. C 606 : 1922 Pat 66.**

——— Ss. 60 and 61—*Appropriation.*

In the absence of any appropriation either by debtor or by creditor, the payment must be applied to the earliest debt. (*Richardson, C. J. and Rafique, J.*) KUNDAN LAL *v.* JAGANATH
37 All. 649: 30 I. C. 92: 13 A. L. J. 908.

——— S. 60—*Appropriation of payments—Interest.*

Where payments are made in liquidation of a debt and the amount due on account of interest largely exceeds the amount paid, the creditor may properly appropriate such payments towards

CONTRACT ACT (IX OF 1872), S. 60.

interest. (*Chitty and Panton, JJ.*) BISWANATH BATTACHARJEE *v.* GOVINDA CHANDRA DAS.
23 C. W. N. 534: 51 I. C. 88: 29 C. L. J. 305.

——S. 60—*Appropriation to interest—Applicability of section to decree debts.*

Where interest is payable under an express stipulation, the interest becomes a debt accessory to the principal debt and the section will apply. In the absence of any appropriation by a debtor, it is open to the creditor to apply the payments first towards the interest and the balance towards the principal. The rule will apply to decrees, where there is an express provision for the payment of interest in the decree whether the decree is an instalment decree or a decree of an ordinary kind. (*Richardson and Walmsley, JJ.*) BISWANATH BHATTACHARJEE *v.* SAMESHWAR.
41 I. C. 348 : 21 C. W. N. 1055.

——S. 60—*Appropriation—Right of creditor.*

A creditor is entitled to appropriate payments made by his debtor to the discharge of prior dues then outstanding and not barred by limitation. (*Holmswood and Chapman, JJ.*) ANATH BANDAU SAHA *v.* BIPIN BEHARI PODDAR. 19 I. C. 6.

——S. 60—*Creditors' rights.*

A payment without specific directions for its appropriation, can be utilised by a creditor in full satisfaction of the interest due on the debt till the respective dates of payment and the balance towards the principal. (*Sadasiva Aiyar and Spencer, JJ.*) DHULI PALLIA *v.* KUPPA VENKATAKRISHNAYYA. 58 I. C. 797 : 36 M. L. J. 296.

——S. 60—*Appropriation of debts—Mortgage debt and simple debt—Creditors' right.*

A creditors' right of appropriation is preserved to him until the moment of his filing the plaint in Court. (1897) A. C. 986 Foll. He should not be deprived of this right so long as it was not inequitable to do so. (1905) 1 K. B. 716 Ref. Applying these principles, the appropriation by the plaintiff towards the simple money decree and not to the mortgage debt was right and could not be questioned. (*Seshagiri Aiyar and Burn, JJ.*) MANAMATHI MUNISAMI MUDALI *v.* PERUMAL MUDALI.
37 M. L. J. 367: 52 I. C 950: 10 L. W. 329.

——Ss. 60 and 61—*Creditors' right of appropriation—Interest—Principal.*

Where a debtor has failed to indicate the appropriation it is open to the creditor to do so, up to the very last date and even in the course of the trial unless something has happened which renders it inequitable to allow him to do so It is always a question of the intention of the creditor to be gathered from the circumstances of each case. An account of the creditor in which he pays in full, the interest due to him on the date of settlement and applies the balance towards the principal is a clear indication of an intention to make the appropriation towards the interest in the first place. 28 A 25 Foll. (*Wallis, C. J and Coutts-Trotter, J.*) KRUPASINDHU SAHU *v.* RAJA OF KALLIKOTTA. 29 I. C. 718.

——S. 60—*Deposit for special purpose.*

Where a deposit of money is made by a debtor with a creditor for a special purpose, the former cannot subsequently claim to have appropriated the same to any other debt due by him. (*Mitra, A. J. C.*) NARAYAN *v.* WAMAN. 59 I. C. 121.

CONTRACT ACT (IX OF 1872), S. 61.

——S.60—*Payment when can be appropriated towards interest.*

Where a document is silent with regard to interest or rate of interest, repayment must be deemed to be of the interest actually due under the written instrument. (*Sharfuddin and Roe, JJ.*) GITA PROSAD SINGH *v.* RAGHO SINGH.
40 I. C. 809 : 1 Pat. L. W. 777.

——Ss. 60 and 61—*Appropriation of payments.*

If a debtor who has the first right does not appropriate the payments made by him, then the creditor may appropriate to any particular debt or to any particular portion of a running account; but if neither party does so, the Court can under S. 61 declare that such payment shall be appropriated in discharge of the debts in order of time. 1897 A. C. 286 Ref. (*Atkinson and Jwala Prasad, JJ.*) BISHUN PERKASH NARAIN SINGH *v.* MUHAMMAD SADIQUE. 35 I. C. 375: 1 Pat. L. J. 474.

——S. 61—*Principal and interest due—No definite appropriations.*

Where moneys are received by the creditor without any definite appropriation on either side, the money so received must first be applied in payment of interest and then in payment of the capital. (*Lord Buckmaster.*) VENKATADRI APPA RAO *v.* PARTHASARATHY APPA RAO. 44 Mad. 570 : 48 I A. 150 : 19 A. L. J. 465 : 23 Bom L. R. 644: 40 M. L. J. 549 : 33 C. L. J. 447 : 14 L. W 25 : (1921) M. W. N. 347 : 3 U. P. L. R. (P C) 27 : 61 I. C. 81 : 26 C. W. N. 33 (P. C.).

——S. 61—*Appropriation—Mode of.*

Where the creditor has not appropriated in taking accounts, a debt which did not carry interest should rank last. (*Sir John Edge.*) GANGA BAHU DEBI *v.* APURBA KRISHNA ROY.
18 I. C 535 : 17 C. W. N. 25 (P.C.).

——S. 61—*Application—Railway receipt—Money advanced on security of--Specific advances, whether*

The application of S. 61 is always subject to the condition that the parties had indicated no intention inconsistent with its application Where the purchaser of goods under a railway receipt, endorsed in his favour, had advanced money on the security of such endorsement, *Held*, that though the advance was entered on general account, the endorsement of the railway receipt as security induced the advance and therefore it was specifically made. (*Scott, C. J. and Chandavarkar, J.*) KUMARCHANDRA *v.* RAM DAS DURBAR. 38 Bom, 255 : 21 I. C. 343 : 15 Bom. L. R. 890.

——S. 61—*Payments by some debtors towards joint debt.*

Payments by some of the debtors who were jointly and severally liable for the debt could be appropriated in order of time towards barred items even though all debtors did not concur in making payments. (*Fletcher and Richardson, JJ.*) KRISHNA KUMAR DE *v.* KALINATH GUHA RAY. 41 I. C. 421.

CONTRACT ACT (IX OF 1872), S. 61.

——S. 61—*Payment—Credit towards arrears of rent—Arrears must be shown to exist.*

If a creditor has credited certain payments towards arrears of rents it is for him to show that arrears were due and what they amounted to, and in the absence of evidence on these points it must be held that he was not entitled to do so. (*Coutts and Adami, JJ.*) SIBNARAYAN SAH *v.* MAISA TADA PRODHAN. **1922 P. 446.**

——S. 62.

Effect of Novation.
Essentials of Novation.
Invalid Novation.

Effect of novation.

——S. 62—*Effect of novation—Contract—Rescission—Stipulation empowering a party to rescind—Legality of.*

Parties to a contract may stipulate that one or both of them shall have the power to rescind the contract on the happening of some specified contingency. Such a stipulation is to be construed according to its natural meaning; subject to the principle of law that a party shall not take advantage of his own wrong, 1919 A. C. 1 Ref. The mere fact that the option to rescind the contract is not made dependent on the happening of any specified contingency, but an option to terminate the contract for any reasons whatsoever does not render the contract void for want of mutuality. (*Mulla, J.*) CHOTALAL LALLUBAI *v* CHAMPSEY UMERSEY & SONS.

75 I. C. 233 : 24 Bom. L. R. 877 : 1923 Bom. 75.

——S. 62—*Effect of novation.*

Where for a note from a firm, another was accepted from surviving partners, the estate of the deceased partner is free from liability under the principle of S. 62. (*Kajiji, J.*) MARKANDRAI KALYANRAI *v.* VIRENDRARAI CHANDRA.

42 I. C. 815 : 19 Bom. L. R. 837.

——S. 62—*Effect of novation— Stranger to contract—Vendee retaining money to pay off creditors of vendor—Right of creditors to sue.*

A contract by the purchaser of a property to pay the whole or part of the consideration retained by him for payment to the vendor's creditors can be enforced by the latter, though they were not parties to the contract. The basis of the purchaser's liability is not novation or a substituted contract, but because of the fact that the purchaser is a trustee of the vendor's creditors for the money in his hands to be used for their benefit. Sometimes an agreement may be enforced by a stranger to the contract that is in cases of trust, *quasi*-contracts or near relationship. 41 C. 137: Gregory *v.* Williams (1817) 3 Mer 582 : Tweddle *v.* Atkinson (1861) 1 B. and S. 393 Ref. (*Mookerjee and Cuming, JJ.*) DWARKA NATH ASH *v* PRIYA NATH MALKI.

22 C. W. N. 279 : 36 I. C. 792 : 27 C. L. J. 483.

——S 62—*Effect of novation— Substituted contract falling through— Rescission—Right to enforce old contract.*

Where a debtor has disabled himself from performing his promise under a later contract which had been intended to be a substitute for an earlier one it is open to the creditor to enforce

CONTRACT ACT (IX OF 1872), S. 62—Effect of novation.

the earlier contract rescinding the later and S. 62 of the Contract Act is no bar. 66 P. R. 1888 foll. 15 P.W.R. 1918: 63 P. R. 1917: 53 P. R. 1916 : 41 Cal. 137 dist. (*Wilberforce and Martineau, JJ.*) NAJAF SHAH *v.* RANGU RAM. **66 I. C 47 : 2 Lah. 323.**

——S. 62—*Effect of novation—Lim. Act, Art 85 as altered by the Punjab Loans Lim. Act.*

A balance signed by the defendant which states as payable a rate of interest different from the rate usually charged in the previous accounts, amounts to a new contract which can form the basis of a suit. The period of limitation for such a suit is 6 years under Art. 85 of the Lim Act as altered in the Punjab Loans Lim. Act. (*Johnstone and Shah Din, JJ.*) MAKHAN LAL *v.* GANESHI LAL. **42 P. R 1915 : 49 P L R 1916 : 30 I. C. 84 : 130 P. W. R 1915.**

——S. 62—*Effect of novation— Mortgage by conditional sale—Alteration of terms by mutual consent.*

When the terms of a mortgage by conditional sale are altered by mutual consent, there is novation of contract and the original sale clause cannot be enforced. (*Kensington, C. J.*) BISHAIN SINGH *v.* INDAR SINGH. **24 I. C 684 : 189 P. L. R. 1914 : 91 P. W. R. 1914.**

——S. 62—*Effect of novation—There can be novation even after breach.*

Under S. 62 of the Act, there can be an agreement to cancel or vary the old contract or substitute a new contract, even after the breach of the original contract. 15 Cal. 319, Diss. from. (*Ayling, O.C.J. and Odgers, J.*) K. M. P. R. N. FIRM *v.* P. THEPERUMAL CHETTY. **14 L. W. 660 : (1921) M.W.N. 861 : 45 Mad, 180: 42 M. L. J. 236 : 67 I. C. 905 : 31 M. L. T. 478 : 1922 Mad. 314.**

——Ss. 62 and 63—*Effect of novation—Agreement to pay debt.*

A new contract changing the place of performance falls under S. 62 and as the original contract is substituted by the new contract no fresh consideration is necessary. In such a case the place of performance mentioned in the new contract settled the jurisdiction of the Court. (*Sadasiva Aiyar and Phillips, JJ.*) VASUDEVA MUDALIAR *v.* VELAPPA NADAR, **(1917) M.W.N. 779 : 6 L. W. 717 : 45 I. C. 401 : 22 M. L. T. 512.**

——Ss. 62 and 63—*Effect of novation—Contract varying terms after breach—Specific performance—Sp. Rel. Act, S 26 (2).*

If a subsequent contract to sell lands other than those at first agreed upon was executed for the original consideration, then under S 26 (*e*) of the the Sp. R. Act, the plaintiff is entitled only to specific performance of the contract with the subsequent variation. The rule of English Law that a fresh consideration is necessary for the new contract after breach does not apply in India. (1 Sm. L. C. 338. 9 A.C. 605 F.) Ss. 62 and 63 have entirely altered the English Law in this respect and the original contract subsists notwithstanding the variation. (*Seshagiri Aiyar and Kumarasawmi Sastri, JJ.*) RAMAYYA BAGAVATHAR *v.* SOMASI AMBALAM. **29 M. L. J. 125 : 29 I. C. 449 : (1915) M. W. N. 408.**

CONTRACT ACT (IX OF 1872), S. 62—Effect of novation.

——— S. 62—*Effect of novation— Negotiable instrument—Discharge of debt--Effect of novation —Right of creditor to fall back on original debt*

A negotiable instrument given in discharge of a debt does not extinguish the debt, but only suspends payment ; but if the debtor can prove that it was a novation, it will be a complete defence to an action by creditor on the original cause of action. The creditor can fall back on the original contract if for any reason, *e. g.* want of stamp on a negotiable instrument the new contract fails. 26 M. 526, 29 M. 111, 5 C 215 and 11 A. 13 relied upon 4 A. 330 dissented from. (*Stanyon, A. J. C.*) NATHUSA *v.* PHULCHANDSA.

14 I. C. 399 : 8 N. L. R. 7.

———S. 62—*Effect of novation—Mortgage—Agreement to substitute fresh deed—Not fulfilled —Effect of—Estoppel.*

Where a mortgagee agreed to have an existing mortgage substituted by another on more favourable terms to the mortgagor, the latter cannot subsequently claim the benefit of the terms. The duty of the mortgagor in that case is to sue for specific performance of the new agreement within the period of limitation prescribed by law and there can be no legal novation where there is a qualified acceptance only of a proposal to modify an existing contract. The debtor is not at liberty to invoke the doctrine of inequitable estoppel unless he can show that he was induced by the creditor to break his contract with a third person on favourable terms. (*Stuart and Kanhaiya Lal, A.J.C.*) NARENDRA BAHADUR SINGH *v.* OUDH COMMERCIAL BANK.

30 I. C. 323 : 2 O. L. J. 402.

———S. 62—*Effect of novation—Novation—Stranger to contract.*

A person not a party to a novation is not discharged from his liability under the original contract, (*Harlnoll, C. J. and Young, J.*) J. E. LOADER *v.* THE CHARTERED BANK OF INDIA, AUSTRALIA AND CHINA. **6 Bur. L. T. 171: 21 I. C. 222.**

Essentials of novation.

———S. 62—*Essentials of novation—Stipulation empowering a party to rescind—Legality of.*

Parties to a contract may stipulate that one or both of them shall have the power to rescind the contract on the happening of some specified contingency. Such a stipulation is to be construed according to its natural meaning, subject to the principle of law that a party shall not take advantage of his own wrong, 1919 A. C. 1. Ref. The mere fact that the option to rescind the contract is not made dependent on the happening of any specified contingency, but an option to terminate the contract for any reasons whatsoever, does not render the contract void for want of mutuality. (*Mulla, J.*) CHOTALAL LALLUBHAI *v.* CHAMPSEY UMERSEY & SONS. **24 Bom. L. R 877 : 75 I. C. 233 : 1923 B. 75.**

———S. 62—*Essentials—A contract for the sale of cloth was entered into on 27th April and delivery was to be made half in May and half in June.*

CONTRACT ACT (IX OF 1872), S. 62—Essentials of novation.

The delivery not being made the goods were resold by respondent to the petitioner under two contracts one on May 31st, and 2nd on 6th June ; the respondent sent the bills but petitioner withheld payment and claimed set-off. The dispute was referred to arbitration and respondent succeeded on the award. On the petitioner's application to have the award set aside. *Held*, that the original contract was not completely discharged by the two subsequent settlement contracts by virtue of S. 62. (*Rankin, J.*) UTTAMBAND SALIGRAM *v.* MAHOMED JEWS MAMOOJI.

46 Cal. 534 : 54 I. C. 285 : 23 C. W. N. 704.

———S. 62--*Essentials of novation- Rescission of contract—New agreement during existence of old contract—Effect.*

A contract need not be rescinded by an express agreement. If the parties make a new and independent agreement concerning the same matter, the latter may be said to discharge the former especially when the latter is very inconsistent with the former. 20 C.W.N. 370 Ref. (*Sanderson, C.J., Woodroffe and Mookerjee, JJ.*) RAGHUMULL *v.* LUCHMAN DAS. **38 I. C. 278 : 20 C. W. N. 708.**

———Ss. 62 and 64—*Essentials of novation—Contract—Rescission of, by another contract—When effected.*

One contract is rescinded by another between the same parties when the latter is inconsistent with and renders impossible the performance of, the former, but though they differ in terms, their legal effect is the same. The second is merely a ratification of the first and the two must be construed together where the new contract is consistent with the existence of the former one. It has no effect unless or until it is performed and further where parties enter into a contract which if valid, would have the effect, by implication, of rescinding a former contract, and it turns out that the second transaction cannot operate as the parties intended, it does not have the effect, by implication of affecting their rights in respect of the former transaction. (*Mookerjee and Chatterjee, JJ.*) MATHURA MOHAN SAHA *v.* RAMKANWAR SAHA. **43 Cal. 790 : 23 C. L. J 26 : 35 I. C. 305 : 20 C. W. N. 370.**

———S. 62—*Essentials of novation—Contract for delivery of goods —Extension of time—New contract.*

A mere extension of time for delivery of goods does not necessarily convert the original contract into a new one. Addition of a clause, *viz.*, the inspection of the goods, etc., amounted to a new contract so that the original arbitration clause in the original contract could not be enforced. (*Chaudhury, J.*) LACHMI NARAIN BHARIODAN *v.* HOARE MILLER & Co. **41 Cal. 35 : 21 I. C. 217 : 17 C. W. N. 1098.**

———S. 62—*Essentials of novation— What constitutes.*

If a landlord came to know after the execution of the kabuliyat that the tenant had allowed his brother an interest in the tenancy, that would not amount to novation. (*Coxe and Richardson, JJ.*) SARAT CHANDRA ROY *v.* RATUBUDDIN.

17 I. C. 227 : 16 C. L. J. 271.

CONTRACT ACT (IX OF 1872), S. 62—Essentials of novation.

——— S. 62—*Essentials of novation—Evidence Act*, S. 102.

A party who relies on a new contract in substitution for the old must prove that it was supported by consideration. A mere promise by a creditor made at the request of his debtor to forbear from suing him is regarded as a voluntary promise and is therefore of no effect. (*Shah Din and Agnew, JJ.*) CHHABIL DAS *v.* MASU.

243 P. L. R. 1913 : 145 P. W R. 1913 ; 207 P. W. R. 1913 : 19 I C. 981 : 4 P. R. 1914.

———Ss. 62 and 63—*Essentials of novation—Promissory note—Agreement to give time*

An agreement to give time for the payment of money due under a pro-note is operative in India; this principle is recognized in Art. 73, Lim. Act. (*Wallis, C. J., Abdur Rahim and Seshagiri Aiyar, JJ.*) ANNAMALAI CHETTY *v.* VELAYUDHA NADHAR. **39 Mad. 129 : 30 M. L. J. 51 : 19 M. L. T. 62 : (1916) 1 M. W. N. 93 : 32 I. C. 869 : 3 L. W. 38. (F. B.)**

———S. 62—*Essentials of novation—Dissolution of contract by repudiation—Rights of property, if affected by the principle.*

In the case of mere contracts, a repudiation by one party assented to by the other might put an end to the contract. But this principle is not applicable to rights of property. (*Benson and Sundara Aiyar, JJ.*) VADALMANETI SHRINIVASA *v.* VADALMANETI VENKATARAMIAH. **14 M. L. T 157 : 20 I. C. 908 : (1914) M. W. N. 144.**

———S. 62—*Essentials of novation—Settlement of damages is not novation.*

Where the contract subsisted and had failed the cause of action would be the failure of the contract. The settlement that a certain amount of money was payable for the failure is not a new contract. (*Prideaux, A. J. C.*) KAMAL NARAYANA *v.* BANIRAM. **75 I. C.440 : 1923 Nag. 332.**

———S. 62—*Essentials of novation—Mortgage—Sale with a view to discharge mortgage—Nature of the transaction.*

A suit was brought for foreclosure of a mortgage executed on 14th of August 1908. It was of the simplest possible character, being a claim for the amount still due on the mortgage after making allowance for a payment of Rs. 9,000 made on 17th October 1917. On that date the mortgagor sold a portion of the property and paid the Rs. 9,000 he received for the sale to the mortgagees towards satisfaction of the mortgage debt. The purchasers happened to be the mortgagees. The mortgagor originally agreed to sell the property for Rs. 9,000 on the 9th January 1916, and he agreed also that the purchaser might retain enough of the purchase-money to pay off the mortgage.

But the defendant mortgagor did not carry out his agreement till he was compelled to do so by a decree of a Civil Court in a suit instituted under the Specific Relief Act. The sale-deed was eventually executed by the Court for him on 17th October 1917, by which time the amount due on the mortgage was considerably in excess of Rs. 9,000. *Held* the effect of the sale was not to relieve the mortgagor of his liability to pay the mortgage debt. (*Hallifax, A. J. C.*) NARAYAN *v.* VENKATA RAO. **72 I. C. 422 : 1923 Nag. 213.**

CONTRACT ACT (IX OF 1872), S. 62—Invalid novation.

Invalid Novation.

———S. 62—*Invalid novation—Mortgage deed executed in consideration of previous bonds—Non-registration—Effect of—Remedy of promisee—Registration Act (XVI of 1908), S. 49.*

Where a mortgage deed which was executed in consideration of previous bonds, was unregistered and hence unenforceable, the promisee is entitled to sue on the original bonds as there is no merger of the bonds in the mortgage deed and as there is no novation since the deed is unenforceable, for want of registration. (*Russel and Chandavarkar, JJ.*) ABDUL KAYAN *v.* BAHADUR VITHOBA. **13 I. C. 858 . 14 Bom. L. R. 26.**

———S. 62—*Invalid novation—Effect of—Original contract.*

To effect a novation pursuant to an agreement to accept a new contract, the contract which was substituted must be one capable of enforcement in law and that as S. 6 of the Sonthal Perganahs Settlement Regulation laid down that no compound interest arising from any intermediate adjustment of account should be decreed, and as the result of the devise of the *roka*, the mortgagee was in a position to claim compound interest, the original liability under the mortgage subsisted. (*Mookerjee and Beachcroft, JJ.*) RAMJIBAN SHA *v.* DHIKU SINGH. **16 I. C. 246 : 16 C. L. J. 264.**

———S. 62—*Invalid novation—Insufficiently stamped Hundi—Effect of—Suit on original cause of action.*

Where an insufficiently stamped hundi was given in renewal of a prior hundi, the plaintiff could fall back on the prior hundi. The giving of the second hundi would have operated as a discharge of the first one only if the new contract could have been legally enforced and as the plff. could not sue on the second hundi as being unstamped, he could fall back on the first one ; and S. 62 of the Contract Act was no bar to his doing so. 27 M. 540 Rel. (*Martineau, J.*) SUNDAR DAS *v.* PURAN SINGH. **11 P. W. R. 1922 : 67 I C. 856 : 1922 Lah 56.**

———S. 62—*Invalid novation — Substituted contract void—Original contract revived.*

Where the contemplated substituted security itself fails, the parties could not be taken to have intended that the liability under the original contract would also cease. (*Abdur Rahim and Spencer, JJ.*) DURAISAWMY AIYAR *v.* KRISHNAIER. **10 L. W. 466 : 54 I. C 318 : (1919) M. W. N. 797.**

———S. 62—*Invalid novation — Renewal of debt—Puts an end to original security.*

A renewal of a debt does not *ipso facto* extinguish the security which a person has unless such renewal is accompanied by a fresh contract giving fresh security. An attempt made to apportion the security which was in fact invalid would not deprive the person of the security which he already has. 3 B. 312 rel. on. (*Kumaraswami Sastri, J.*) VENKATARAMIAH PANTULU *v.* SUBRAMANIAM PILLAI. **26 I. C. 393 : 16 M. L. T. 489.**

CONTRACT ACT (IX OF 1872). S. 62—Invalid novation.

———S. 62—*Invalid novation— Accord and satisfaction- Pro-note accepted in full satisfaction.*

A pro-note accepted in full satisfaction of a claim, debars the plaintiff from bringing a suit on the original claim though the defendants by subsequent fraud on their part might have made the pro-note invalid. (*Crouch, A. J. C.*) EWART RYRIE & Co *v.* TARACHAND. **9 I. C. 896.**

———S, 63--*Acceptance of performance--Cheque for smaller amount accepted and cashed—Effect of,*

Defendant sent a cheque to plff. for a portion of the sum claimed by the latter with a condition that this sum was being paid in full discharge of the total amount due to plff. The plff. retained the cheque and eventually cashed it. Two days after casbing the cheque, plff. wrote to the deft. that the cheque bad been cashed but he did not agree to receive the amount in full discharge of the payment of the sum due to him. *Held*, that the mere fact that the plff. retained the cheque and cashed it and at the same time refused to receive the amount in full discharge of the payment of his debt, does not raise any conclusive presumption that they had accepted it as a conditional offer made by deft, 6 A L. J. 67 : 22 Q. B. D. 610 Ref. (*Stuart and Sulaiman, JJ.*) BASDEO RAM SARUP *v.* DALSUKHRAI SEWAK RAM.
20 A. L. J. 717 : L. R. 3 A. 548 : 68 I. C. 783 : 44 A. 718 : 1922 All. 461.

———S. 63—*Applicability to parties standing in the relation of decree-holder and judgment-debtor.*

Sec. 63 is not applicable where the parties stand in the position of decree-holder and judgment-debtor and not in that of promisor and promisee (*Mookerjee and Beachcroft, JJ.*) DEBENDRA NARAIN SINGH *v.* SOURENDRA MOHAN SINGH.
24 I. C. 391.

———S. 63—*Release of dower.*

Under Mahomedan Law, the dower is a debt and the moment it is settled, it is enforceable as a debt. The dower becomes the property of the wife by the mere contract and she may therefore deal with or dispose of it before taking its possession. The woman is entitled to give it up or relinquish it in the continuance of the contract. Such relinquishment need not take place immediately after the husband's death. She can relinquish it at any time. It can be remitted in favour of the heir after the husband's death. No consideration is needed for such relinquishment, but free assent must be established. As the debt is enforceable under the Contract Act, it can also be released under S 63. It is doubtful, however, whether a dower debt could be discharged by verbal relinquishment. (*Chaudhury and Cuming, JJ.*) NURLEIMESSA KHANUM *v* KHAJE MAHOMED SAKREE.
47 Cal. 537 : 56 I. C. 8 : 24 C W. N. 335 : 31 C. L. J. 14.

———S. 63—*Scope of.*

S. 63 of the Contract Act does not entitle a promisee for bis own purposes and without the consent of the promisor to extend time to his own advantage. There must be an agreement or

CONTRACT ACT (IX OF 1872), S. 63.

mutual understanding to waive. (*Abdul Raoof and Campbell, JJ.*) ASMAD ULLAH *v.* MESSRS. BEHARI LAL & SONS. **68 I. C. 912 : 1923 L. 117.**

———S. 63—*Promisee—Not bound to accept part performance.*

A promisee is not bound to accept part performance of a contract. (*Le Rossignol and Wilberforce, JJ.*) SHAMS DIN MEHR BAKSH *v.* MUHAMMED KHALIL. **59 I. C. 971 : 3 Lah L. J. 141.**

———S. 63—*Conditional remission.*

A promise to remit rent coupled with conditions is not an absolute promise of remission and the landlord is not estopped from enforcing his rights in full. (*Sadasiva Aiyar and Hannay, JJ.*) SUBBARAYA AIYAR *v.* KOLANDAVELU MUDALI.
26 I. C. 958.

———S. 63—*Relinquishment—Consideration.*

Under S. 63 no consideration is necessary to forego a portion of the rent payable. (*Seshagiri Aiyar and Kumaraswami Sastri, JJ.*) VEDACHALLA MUDALIAR *v.* SIVAPERUMAL MUDALI.
25 I. C. 741 : 16 M. L. T. 184.

———Ss. 63 and 73—*Contract for supply of goods—Breach—Damages.*

The promisee in a contract of sale of goods cannot extend the time for performance of the contract to his own advantage without the promisor's consent. If a breach occurs and he brings a suit for damages for breach, such damages cannot include any aggravation of damages caused by his action or inaction after breach, because the promisee cannot repudiate the contract at any time he pleases. Damages will be the difference between the contract price and the market price on the due date. (*White, C. J. and Ayling, J.*) MUTHAYA MANIGARAN *v.* LAKKU REDDIAR.
37 Mad. 412 ; 14 I. C. 255 : 11 M. L T. 301 : (1912) M. W. N. 436 : 22 M. L. J. 413.

———S 63—*Remission—Suit for sum remitted not maintainable.*

A suit cannot be brought for the recovery of the amount remitted when a remission had been made and communicated by the creditor to the debtor. 19 M. 391 Foll. (*Munro, J.*) GOPALA KRISHNA *v.* VENKATASUBBA.
9 I. C. 763 ; 9 M. L. T. 270.

———S. 63—*Waiver—Evidence of—Mortgage—Discharge of.*

Waiver may be evidenced by conduct inconsistent with the continuance of the rights waived. There is nothing in law to prevent a discharge by acceptance of something in lieu of the performance of the contract. (*Prideaux, A J.C.*) KAWADAJI *v.* GANGARAM. **64 I. C. 461.**

———S 63—*Agreement—Consideration.*

An agreement to discharge a previous debt in consideration of the prompt receipt of a shorter sum is a valid agreement (*Lindsay A. J. C.*) BISHESHAR SINGH *v*, RAMBHAROSE.
20 I. C. 544.

———S. 63—*Promisor accepting cash from promisee—Breach of contract—Effect.*

Where a party to a contract of marriage having accepted cash and jewels repudiates the marriage

CONTRACT ACT (IX OF 1872), S. 64.

he is bound to return what he has taken. 15 C. 319. (*Coutts and Bucknill JJ*) MATHURA PRASAD SINGH *v.* SATYA NARAIN PRASAD SAHAI.
65 I. C 812.

——Ss. 64 and 73—*Breach of contract—Refund of earnest money.*

A party guilty of a breach of contract cannot claim damages arising out of his own default Nor can he claim a refund of earnest money advanced as a guarantee for the fulfilment of the contract. 38 M. 801 : 33 A. 166 : 19 A 489 Rel. (*Rafique and Lindsay, JJ.*) MD HABIB-UL-LAH *v.* MD. SHAP. 41 All 324 : 50 I. C. 948 : 17 A. L. J. 309.

——Ss 64 and 65—*Minor—Suit to cancel mortgage—Refund.*

Where a minor sues to cancel a mortgage executed by him during his minority, the Court could not direct compensation to be paid by the minor as a condition of his getting the relief, the contract itself being void. (*Piggott, J.*) GAYA PRASAD *v.* SARFARAZ CHAUDHRI. 29 I. C. 972.

——S. 64—*Limitation Act* (1908), *Art.* 114.

Suit for compensation. recovereble under S. 64, is barred if brought after ten years. (*Stephen and (Holmswood, JJ.*) ARIDOYTRA *v.* SHRINATH CHAKRAVARTI. 19 I. C. 624.

——S 64—*Alienation by minor—Alienation set aside—Minor's liability to restore benefit received.*

If an alienation is set aside at the instance of the alienor on the ground that he was minor at the time of alienation, the alienor is not bound to restore the benefit received by him except in the case of fraud. 30 Cal. 539 (P.C.) and 38 Mad. 1071 Rel. (*Chevis, J.*) KEHAR SINGH *v.* ASA SINGH. 60 I. C. 519 : 3 U. P. L. R. (Lah) 94.

——Ss. 64 and 65—*Alienation of guardian void ab initio—Improvements by vendee—Agreement to sell suit property to stranger—If illegal.*

Where a sale by a guardian on behalf of a minor is held to be void *ab initio*, the vendee cannot claim for the improvement effected by him, on the property. Ss. 64 and 65 do not apply to this case. (*Robertson, J.*) DULLA *v.* FARID. 98 P. L. R. 1913 : 18 I. C. 485 : 115 P. W. R. 1913

——S. 64—*Minor's property—Sold by guardian—Purchase of other property—Suit by vendee from guardian for possession—Plea of invalidity of sale by ward.*

If a guardian sells his ward's property for purposes not binding and the price is utilized for the purchase of other lands for the ward not contemplated at the time of the sale, the lands so purchased does not constitute 'the benefit' within S 64 and need not be conveyed to the vendee from the guardian when the ward avoids the sale by the guardian. Per *Kumaraswami Sastri, J.*—Ordinarily the benefit which a party receives when he sells property is the money which the vendee pays Any profits which the vendor might make with the moneys would be too remote in estimating what he has to return in case he is entitled to avoid the sale and elects to do so. Where however for the protection of a purchaser

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contracting with a guardian or a qualified owner, a particular dealing with the money was in the direct contemplation of the parties such as the purchase of other lands with the consideration and the money is so applied, the benefit which the other party obtains will be the land or other party acquired with the consideration (*Phillips and Kumaraswami Sastri, JJ.*) CHINNASWAMI REDDI *v.* KRISHNA SWAMI REDDI. 42 Mad. 36 : 48 I. C. 856 : 35 M. L. J. 652.

——Ss. 64 and 65—*Financing of litigation—Money advanced in part—Repudiation—Right to recover.*

Where a person agrees to advance moneys to another from time to time up to a certain limit with the object of financing a litigation by the latter, but fails or refuses to pay the full amount, he is nevertheless entitled under S. 64 to a refund of the amount actually advanced by him. 23 M, L. J. 680 Foll. (*Ayling and Seshagiri Aiyar, JJ.*) PUSAPATI VENKATAPATHIRAJU *v.* VENKATASUBHADRAYAMMA. 47 I. C. 563.

——S. 64—*Who can rescind.*

Under S. 64 a person who puts an end to a contract under S, 39 is the party rescinding a voidable contract (*Batten and Sanyon, A.J.C.*) BALLABHADAS *v.* A. PAIKAJEE. 38 I. C. 915 : 12 N. L. R. 177.

——S. 64—*Voidable contract—Rescinding—Effect of- Further performance dispensed with.*

Where an agreement is rescinded its further performance cannot be enforced. S. 64 of the Contract Act will apply where an agreement has been rescinded. S 64 is not restricted to contracts voidable under S. 39 but extends also to cases of contracts voidable by reason of breach under S. 39. (*Lyle and Ashworth, A. J C.*) MAHAMMAD MUMTAS ALI KHAN *v.* ALTAPFUL RAHMAN. 25 O. C. 169 : 69 I. C. 789 : 10 O. L. J. 166: 1922 Oudh 259.

——Ss. 64 and 65—*Mistake—Restoration of benefit.*

Where the parties are found to have been in ignorance of any discrepancy, then it follows that both of them were labouring under a mistake of fact and when restoration of one party to his original position takes place he cannot recover from the other party without surrendering the benefit which he derived under the mistaken act. This principle is not limited only to cases of agreements, which are provided for by Ss. 64 and 65 of the Contract Act but extends even to acts committed under a common mistake of fact. (*Wazir Hasan, A. J C.*) MAQBUL AHMAD *v.* FARHAT ALI. 4 U. P. L. R. (J.C.) 6 : 66 I. C. 461 : 8 O. L. J. 546 : 1922 Oudh 152.

——S. 64—*Contract, revocable, breach of—Remedy, choice of, lies with whom.*

In the case of a breach of a revocable contract or trust. the choice of the remedy lies with the party whose rights are infringed, and not with the promisor or trustee. (*Piggott, J. C. and Kanhaiya Lal, A. J. C.*) SITLA BAKSH SINGH *v.* HARPAL SINGH. 20 I. C, 783.

CONTRACT ACT (IX OF 1872), S. 65—Becomes void.

——S. 65.
Becomes Void.
Contract with Lunatic.
Discovered to be Void.
Illegal Contract.
Minor's Contract.
Scope of.
Voidable Contract.

Becomes Void.

——Ss. 65 and 56—*Becomes void—Contract of lease—Impossibility of performance—Compensation for advantage received.*

Where by reason of the acquisition of a lower garden by Government under the Land Acquisition Act the plff. lessee was deprived of the garden and the contract having become impossible of performance under S 65 of the Contract Act, the plff. was entitled to be compensated by the deft. for the loss sustained by him. (*Banerji, J.*) MUHAMMAD HASHIM *v.* MISRI.
44 A. 229 : 20 A. L. J. 41 : L. R. 3 A 575 : 65 I C 253 : 1922 All. 6.

——S. 65—*Becomes void—Contract void*, ab initio—*Section not applicable.*

Section 65 does not apply where it cannot be said that the agreement was discovered to be void or became void after it had been entered into. (*Piggott, J.*) RAM PRATAP RAI *v.* RAM PHAL TELI. **18 I. C. 9.**

——S. 65—*Becomes void—Application—Broach and Kaira Incumbered Estates Act, S. 28.*

S. 65 Contract Act does not apply to mortgages which are valid up to the mortgagor's lifetime; therefore the mortgagee cannot recover the mortgage money when after the mortgagor's death the mortgage becomes void under S. 28, Broach and Kaira In. Est. Act. (*Batchelor and Shah, JJ.*) PARSHOTTAM VERIBHAI *v.* CHHATRASANGJI MADHAVASANGJI
41 Bom. 548 : 40 I. C. 1002 : 19 Bom. L. R. 545.

——S. 65—*Becomes void—Damages for breach of marriage contract*

Under the Mahomedan Law, damages peculiar to English Law of marriage contract cannot be recovered. Under S. 73 the promisee can recover compensation for any loss or damage caused to him by the breach or which the parties knew at the time of contract to be a possible result of the breach. Under S. 65 he can get the refund of money, ornaments, clothes, etc., given by him as consideration for the promise or compensation as on a failure of consideration (*Kemp, J.*) ABDUL RAZAK *v.* MOHOMED HUSEIN. **42 Bom. 499 : 38 I. C. 771 : 19 Bom. L. R. 1 64**

——S. 65—*Becomes void.*

When a contract with a ship company to convey cotton could not be performed (having been prohibited by Government) and the Company asked the charterer to deposit freight charges for unloading, etc, before redelivery; *held*, that under S. 65 the plaintiffs were entitled to recover with interest the amount paid for freight and that the defendants were entitled to charge reasonable expenses for unloading, (*Macleod, J.*) BOGGIANO & Co. *v.* ARAB STEAMERS, LTD.
40 Bom. 529 : 33 I. C. 536 : 18 Bom. L. R. 126.

CONTRACT ACT (IX OF 1872), S. 65—Becomes void.

——S. 65—*Becomes void—Applicability of.*

Where consideration for a mortgage failed *ab initio*, S 65 is not applicable A covenant to compensate is collateral and not merely dependent upon the mortgage and though the main contract was wholly null and void, the plaintiff was entitled to claim under the covenant (*Scott, C. J. and Batchelor, J.*) JOVERABHAI JORABHAI *v.* GORHAN NAISI. **17 Bom L. R. 259 : 28 I. C. 442 : 39 Bom. 358.**

——S. 65—*Becomes void—Applicability of—Agreement not to prosecute—Undue influence—Refund of consideration.*

If money or security be given under an agreement not to prosecute under such circumstances that there has been pressure or undue influence, the transaction will be set aside and the money or security will be returned. In every case of illegal composition of a non-compoundable criminal offence, a refund cannot be demanded at law. S. 65 does not apply to a case of this kind. (*Holmswood and Chapman, JJ.*) AMJADNESSA BIBI *v* RAHIM BAKAS SIKDAR. **42 Cal. 286 : 21 C. L. J. 642 : 28 I. C. 713 : 19 C. W. N. 383.**

——S. 65—*Becomes void—Payment under—Right to recover.*

S. 65 of the Contract Act applies even though the contract was not void *ab initio* but becomes void subsequently and a suit to recover money paid under such a contract is maintainable. (*Abdul Raoof and Martineau, JJ.*) BADLU *v.* SHEO CHAND. **67 I. C. 367 : 56 P. L. R. 1922.**

——S. 65—*Becomes void—Impossibility—Action of executive.*

In a suit for damages for non-publication of an almanac for which plaintiff had paid an advance and for recovery of advance. *Held*, that as the defendant had carried out his agreement of printing the plaintiff's advertisement in the specified number of copies of his almanac and had put them on the market and as the confiscation by the Government was due to causes over which he had no control, S. 65 was inapplicable in the absence of any express provision and the principle 'that the loss must lie where it has fallen,' should be followed and consequently plaintiff's claim must fail. The plaintiff could not recover the advance (*Scott-Smith, J.*) DEVI DAYAL *v.* BAINI RAM. **51 I. C. 412 : 42 P. R. 1919.**

——S. 65—*Becomes void—Applicability—Contract void*—Ab initio.

S. 65 does not apply to contracts known to be void *ab initio* by reason of the illegality of the consideration. (*Le Rossignol, J.*) HIRA *v.* JOWALA DAS. **27 P. L. R. 1915 : 27 I C. 1008 : 224 P. W. R. 1915.**

——S. 65—*Becomes void—Applicability—Unregistered exchange—Suit for.*

A person exchanging a house worth more than 100 rupees by an unregistered deed, can recover possession of the same but must refund the consideration he received in exchange. *Kensington and Beadon, JJ.*) UTTAM SINGH *v.* BASANTA. **203 P L. R 1913 : 19 I. C. 236 : 155 P. W. R. 1913.**

CONTRACT ACT (IX OF 1872), S. 65—Becomes void.

——S. 65—*Becoming void.*

A contract by a grantee of Government land to concede a portion of the land to another on condition of his helping him to comply with the stipulations on which the grant was made to him becomes void if the Government cancels the grant and a suit may be filed by the grantee for a declaration that the contract is void irrespective of the promisee's right to damages. (*Johnstone, J.*) DARA *v.* MUHAMMAD.

9 I. C. 743 : 16 P. W. R. 1911.

——S. 65—*Becomes void—Contract—Receipt for advance—Material alteration—Right to recover advance.*

Where a document containing the terms of a contract between plaintiff and defendant was materially altered by plaintiff without the knowledge of the defendant and the payment of advance was acknowledged on the same piece of paper by the defendant. *Held*, on breach of contract by defendant that the plaintiff, though he could not recover damages under the contract, was entitled to recover the advance under S. 65 treating the contract as void. (*Spencer and Krishnan, JJ.*) KANDREGULA ANANTHA RAO PANTULU *v.* KANDIKONDA SURAYYA.

38 M. L. J. 256 : 11 L. W. 390 : 27 M. L. T. 134 : 55 I. C. 697 : 43 Mad. 703 : (1920) M. W. N. 187.

——S. 65—*Becomes void—Enforceability.*

The expression 'becoming void' in the section pre-supposes enforceability and that which is not enforceable cannot become void. (*Kotval, A. J. C.*) BHOJRAJ *v.* DUKALA. 57 I. C. 680.

——S. 65—*Becomes void—Agreement to transfer decree—Death of decree holder—Recovery of earnest money.*

A decree-holder agreed to execute a transfer of his decree in favour of the plaintiff's predecessor in title to the proposed transferee, paid a sum of Rs. 2,000 out of the stipulated consideration to the decree-holder in advance. Subsequently the proposed transferee died and the original decree-holder realised the decretal amount by execution of the decree against the judgment-debtor. The plaintiffs thereupon instituted a suit for recovery of the amount advanced with interest. It was found that the contract was a personal one So that on the death of the proposed transferee it was incapable of fulfilment. *Held* that the plffs. were entitled to recover the earnest money with interest. (*Das and Macpherson, JJ.*) MT. RAMDULARI KUER *v.* JANG BAHADUR SINGH.

1923 Pat. 247 : 77 I. C. 378 : 1923 P. 589.

——S. 65—*Becomes void.*

S. 65 does not apply to a mortgage, which becomes unenforceable for want of legal necessity and benefit to the family. (*Miller, C. J and Mullick, J.*) RAM BILAS SINGH *v.* RAMYAD SINGH.

5 Pat. L J. 622 : 1 Pat. L. T. 535 : 58 I. C. 303 : 2 U. P. L. R. (Pat.) 228.

——S. 65—*Becomes void—Exception as to 'Restraints of princes'.*

A ship-owner may refuse to ship goods on a reasonable apprehension of 'restraints of princes'

CONTRACT ACT (IX OF 1872), S. 65—Discovered to be void.

in spite of there being no restraint actually in existence at the time of the refusals and events occurring after such refusal may be taken as a test to show the true state of affairs at the time of the refusal. *Obiter*—An apprehension though unfounded may yet be reasonable. The impossibility of performance of a contract makes it void under the Indian Law. (*Pratt, J. C.*) SANDAY PATRICK & Co. *v.* BRITISH INDIA STEAM NAVIGATION Co. 37 I. C. 285 : 10 S. L. R. 100.

——S. 65—*Becomes void—Contract void ab initio—Applicability.*

S. 65 does not apply to contracts that are void *ab initio.* (*Pratt, J. C. and Hayward, A. J. C.*) MIR MAHOMED VALAD HAYAT KHAN *v.* KHUBOMAL VALAD DINOMAL.

21 I. C. 517 : 7 S. L. R. 58.

Contract with Lunatic.

——S. 65—*Contract with lunatic—Effect of unenforceable contract—Refund of consideration.*

A Vendee is not entitled to a refund of consideration money where the contract is unenforceable, vendor being of unsound mind. (*Chatterjee and Beachcroft, JJ.*) DOULATUDDIN *v.* DHANIRAM CHHUTIA. 32 I. C. 804.

——Ss. 65 and 12—*Contract with lunatic.*

S. 65 cannot bind a party for a contract with a person of unsound mind. Such contract being void, no refund of money paid to unsound person can be claimed. (*Johnston and Rattigan, JJ.*) KAMOLA RAM *v.* KAURA KHAN.

41 P. R. 1912 : 117 P. W. R. 1912 : 15 I. C. 404 : 149 P. L. R. 1912.

Discovered to be void.

——S. 65—'*Discovered to be void.*'

A Hindu reversioner to an estate in Oudh sued for a declaration that a will alleged to have been made by the last male owner directing his widows to adopt was invalid and void and obtained a decree to that effect. He was also declared entitled to succeed to the estate on the death of the last surviving widow. Subsequently the reversioner transferred his right to half the estate in favour of the plaintiff's predecessor in title, for a consideration of Rs. 25,100—agreeing to put the vendee in proprietary possession of the estate after the death of the last surviving widow. In a suit by the plaintiff after the death of the widow for recovery of the estate or for the purchase money. *Held* that there was no valid transfer of the estate in favour of the plaintiff's predecessor-in-title inasmuch as the vendor had at the date of the conveyance a mere *spes successionis* which he could not validly transfer under S. 6 of the Transfer of Property Act; that the suit for possession must therefore fail; that the plaintiff however was entitled to recover the consideration paid for the sale with interest thereon from the date of suit: and that the case was governed by S. 65 of the Contract Act, the cause of action having arisen after the death of the last surviving widow when alone the vendee discovered that

CONTRACT ACT (IX OF 1872), S. 65—Discovered to be void.

the transfer was void and unenforceable. (*Sir Lawrence Jenkins.*) HARNATH KUG *v* INDRA BAHADUR SING. 9 O. L. J. 652 : 44 M. L. J. 489 : 50 I. A. 69 : 37 C. L. J. 346 : 26 C. W. N. 949 : 26 O. C. 223 : 71 I. C. 619 : 33 M. L T. 2 6 : 9 O. & A. L. R. 270 : 18 L. W. 383 : 1922 P. C. 403 (P. C.)

——S 65- *Discovered to be void—Meaning of.*

The word 'agreements' as used in the expression 'agreements discovered to be void' in S. 65 does not apply to pre-war contracts, for at their inception they were contracts within the meaning of the Contract Act and not 'agreements'. The words 'discovered to be void' are not applicable to agreements which are void if the parties knew all the material facts. (*Heaton and Marten, JJ.*) WOLF & SONS *v.* DADIBA KHIMJI & Co. 44 Bom. 631: 58 I. C. 465: 21 Bom. L. R. 986

——S. 65—*Discovered to be void.*

A person purchasing occupancy rights, at his own risk, knowing that his vendor is selling the same to him, without the consent of the landlord and the landlord afterwards ousts him, cannot avail himself of S. 65 of the Act against his vendor (*Martineau, J.*) KULLA MAL *v.* UMRA 61 I.C. 604.

——S. 65—*Discovered to be void—Contract* ab initio *void—Suit for recovery of money.*

S. 65 has no application to contracts which are void *ab initio* and it does not authorise recovery of monies paid under such contract. 41 B. 546: 43 C. 115 Foll. But under the general law a plaintiff whose hands have not been tainted with corruption and who has not been a party to a fraud, is entitled to get back the money which he left with another. (*Seshagiri Aiyar and Napier, JJ.*) VENKATARAJU *v* RAMANUJAM. 34 M. L. J. 561: 23 M. L. T 84: 7 L. W. 518: 44 I. C. 319: (1918, M. W. N. 230.

——S. 65—*Discovered to be void—Marriage brokerage contract—Suit of recovery of money—Discovered to be void, meaning of.*

Per Backewell J.—The words 'discovered to be void' in S. 65 are more apt to describe an agreement which was void *ab initio* but was not then known by the parties to be so than an agreement of which the illegality must be taken to have always been known to them. (*Oldfield and Bakewell, JJ.*) SRINIVASA AIYAR *v.* SHESHA AIYAR. 41 Mad. 197: 34 M. L J. 282: 41 I. C. 783: 6 L. W. 42.

——S. 65—*Discovered to be void—Guardian and ward.*

If it is proved in a suit by minor for possession of properties alienated by guardian, that a substantial part of the money was not required for minor's benefit the whole sale is void and the minor shall have to pay the remaining portion to the purchaser but if a substantial portion is spent for his benefit, the sale would be upheld and in such a case, there can be no decree for partition between the purchaser and the minor. (*Sadasiva Aiyar and Napier, JJ.*) KUKMANI SUNDARAMMAL *v.* MUTHAMMAL. 26 I. C. 489: (1915) M. W. N. 8.

CONTRACT ACT (IX OF 1872), S. 65—Illegal contract,

——S. 65—*Discovered to be void—Mortgage invalid—Right to sue for money.*

Where a mortgage is found to be void and unenforceable for want of proper attestation, the mortgage is entitled to a money decree for the amount advanced by him (*Lindsay, J.C. and Kanhaiya Lal, A. J. C.*) GANGA PRASAD *v.* RAM SAMUJH. 43 I. C. 266 : 20 O. C. 306.

Illegal Contract.

——S. 65—*Illegal contract—Contingency—Contract void—Refund, right to*

Where after a sale in execution, of defendant's property, plaintiff purchased it for Rs. 983 with an agreement for return of the purchase-money if the plaintiff did not get possession and a plaintiff's application to set aside the sale was dismissed. *Held*, the contract between the parties was not against public policy, but was a good and valid contract and gave the plaintiff a right to sue for his money as on failure of consideration. (*Rafique and Walsh, JJ.*) MAHABIR PRASAD *v.* GANGA DEHAL. 42 All 7: 52 I.C. 331: 17 A. L J. 878.

——S. 65—*Illegal contract*—Valatdan *patta (Mortgage)—Void—Personal covenant to compensate, if enforceable,*

A *valatdan* patta (mortgage) of an unrecognised portion of a *Bhag* is void, but a personal covenant to compensate if possession of the mortgagee were disturbed can be enforced. (*Heaton and Shah, JJ.*) HARI BHAI HANSJI *v.* NATHUBHAI RATANJI 38 Bom. 249: 23 I, C. 602: 16 Bom L. R. 62.

——Ss. 65 and 72—*Illegal contract—Corporation*—Ultra vires—*Money received under agreement—Duty of Corporation.*

The obligation to do justice rests upon all persons natural and artificial and where a corporation receives money or property under an agreement which turns out to be *ultra vires* or illegal, it cannot retain it but must either return it or make compensation for it. (*Mookerjee and Chatterjee, JJ.*) MATHURA MOHAN SAHA *v.* RAMKAMAR SAHA. 43 C. 790: 23 C L J. 26: 35 I. C. 305: 20 C. W. N. 370.

——S. 65—*Illegal contract—Applicability of—Contract void* ab initio.

S. 65 applies to a case where a person has received an advantage under an agreement subsequently discovered to be void or under a contract which becomes void or which is subsequently found to be void on account of some latent defect or of circumstances unknown at the date of the agreement or of an agreement which is afterwards made void by circumstances which supervene, and not where the agreement is void *ab inito* as being illegal or opposed to public policy (*Mukerji and Pichardson, JJ.*) LEDU COACHMAN *v.* HIRA LAL BOSE. 43 Cal. 115: 19 C. W. N. 919: 29 I. C. 625: 21 C. L. J. 537.

——Ss 65 and 70—*Illegal contract—Mortgage by guardian—Void—Right to refund.*

A mortgage by a guardian of a lunatic without the sanction of the Court is void. *Quaere.*—Whether the creditor is entitled to a refund of the consideration and if so within what period must he

CONTRACT ACT (IX OF 1872), S. 65—Illegal contract.

sue. (*Sankaran Nair and Tyabji, JJ.*) MARIMUTHU UDDAYAN *v* RAMIENGAR. **14 M. L. T. 489 : 21 I C. 879: (1913) M. W. N. 969.**

——S. 65—*Illegal contract—Right to recover moneys advanced.*

S. 65 bas no application where the contract embodies a purpose known to be illegal to which both sides are parties. (*Drake-Brockman, J. C.*) BHURE *v.* SHEO-GOPAL. **54 I. C. 794**

——S 65—*Illegal contract—Contract not in accordance with a statutory requirements—Effect of.*

A contract not in accordance with statutory requirements is no contract at all and does not 'become void' and 'is not discovered to be void' within S 65. 27 A. 592 Fol. (*Batten, J.C.*) ANANDA RAO *v.* TUKARAM. **46 I. C. 326.**

Minor's Contract.

——S. 65—*Minor's contract—Money received by—Liability to refund—Fraud—Misrepresentation.*

A minor cannot be made to repay money which he has spent merely because he received it under a contract induced by his fraud. In a suit on two mortgages the defendant pleaded that at the time of execution of the bond he was a minor. There was no allegation nor proof that the defendant had made any fraudulent misrepresentation as to his age whereby he had induced the plaintiff to advance the money. *Held*, that the plaintiff was not entitled to recover. (*Piggott and Walsh, JJ.*) RADHEY SHIAM *v.* BIHARI LAL. **40 All. 558 : 48 I. C 478: 16 A. L. J. 592**

——S. 65—*Minor's contract—Transfer of Property Act* (1885), S. 55—*Minor vendee—Suit to recover consideration.*

Vendee, who was minor at the date of purchase, can recover consideration money, if he is subsequently dispossessed of the property purchased. 30 C. 539 P. C., 39 C. 232 P. C., Dist. (*Griffin and Ryves, JJ.*) WALI DAD KHAN *v.* JANAK SINGH. **35 All. 370: 19 I. C. 610: 11 A. L. J. 512.**

——Ss. 65 and 11—*Minor's contract—Section does not apply.*

S. 65 has no application to a case where there never was or could have been any contract between competent parties, as for instance where one of the parties to a contract is a minor. (*Macleod, C. J. and Fawcett, J.*) MOTI LAL MANSUK RAM *v.* MANEKLAL DAYABHAI. **45 Bom. 225 : 59 I. C. 245 : 22 Bom. L. R. 1195.**

——S. 65—*Minor's contract—Mortgage—Duty to refund.*

Where a mortgage is found to be invalid owing to minority of the executant at the date of the mortgage he cannot be held liable to refund the mortgage money even if he misrepresented his age. (1916) 2 Ap. C. 575 : 7 L. W. 124 Foll. (*Wallis. C. J. and Sadasiva Aiyar, J.*) GURUSWAMY PANTULU *v.* BUDHA KARAN LALL. **10 L. W. 225 : 63 I. C. 14 : 26 M. L. T. 245.**

——S. 65—*Minor's contract—Restoration of money taken under contract.*

CONTRACT ACT (IX OF 1872), S. 65—Scope of.

A minor cannot in equity be forced to restore the amount of a loan taken by him on a void contract. A distinction in this connection must be drawn between a case where a particular specific property passes and is capable of recovery and a case where money passes. A contract made by a minor is *nudum pactum ab initio* and the provisions of S. 38 of the Specific Relief Act dealing with the rescission of the contracts have no application thereto. (*Findlay, A. J.C.*) MT. MULLIA BAI *v.* GARUD. **53 I. C. 65 : 15 N. L. R. 149.**

——S. 65—*Minor's contract — Avoidance—Duty to restore benefit.*

A minor who seeks to recover the property sold by him after cancellation of the sale, must restore the benefit he had received. 11 O. C. 1 Foll ; 40 All. 558 ; 8 O. L. J. 287 Ref. (*Daniels, J. C.*) RAGHUNATH SINGH *v* DHONDHE SINGH. **24 O. C. 348 : 9 O. L. J. 31 : 64 I. C. 771: 1922 Oudh 30.**

Scope of.

——S. 65—*Scope of.*

The section deals with (*a*) agreements and (*b*) contracts Section 65 deals with (*a*) agreements enforceable by law and (*b*) with agreements not so enforceable. By clause (*g*) of S. 2 an agreement not enforceable by law is said to be void. An agreement discovered to be void is one discovered to be not enforceable by law, and on the language of the section, would include an agreement that was void in that sense from its inception as distinct from a contract that becomes void.

The agreement to sell the right of reversioner is manifestly void from its inception, because its subject-matter is incapable of being bound by sale. The vendee in this case was given the purchase money and interest at 6 per cent from the date of suit. (*Sir Lawrence Jenkins*) THAKURAIN HARNATH KUAR *v.* THAKUR INDAR BAHADUR SINGH. **44 M. L. J. 489 : 45 A 179 : 50 I. A. 69 : 26 O. C 223 : 18 L. W 383 : 37 C. L. J. 346 :9 O. L. J 652 : 26 C. W. N 949 : 9 O. & A. L. R. 270 : 71 I. C. 629 : 33 M. L. T. 216) 1922 P. C. 403 (P. C.:**

——S. 65—*Scope of.*

S. 65 is not applicable when the object of the agreement was illegal to the knowledge of both parties. (*Woodroffe and Carnduff, JJ.*) NATHU KHAN *v.* SEWAK KOWRI. **9 I. C. 161 : 15 C. W. N. 408.**

——S. 65—*Scope of—Malguzar—Transfer of holding by tenant—Agreement between transferee and malguzar giving up for consideration right to object to transfer—Subsequent dispossession of transferee by tenant—Liability of malguzar to refund.*

A malguzar who, being entitled to object to a transfer by his tenant, agrees with the transferee for consideration to give up his right to question the validity of the transfer, is not bound to refund the consideration received by him merely on the ground that the transferee is deprived of possession by his transferor. An agreement for refund will not be implied in such a case. (*Mitra, O. A. J. C.*) SHARDA PRASAD *v.* SHAIKH HUSSAIN. **41 I. C. 877 : 13 N. L. R. 114.**

CONTRACT ACT (IX OF 1872), S. 65—Voidable contract.

Voidable Contract.

——Ss. 65 and 19—*Voidable contract—Mortgage—Fraud—Rescission—Refund.*

A mortgagor who sues for the cancellation of a mortgage must refund to the mortgagee the amount paid by the mortgagee under the contract of mortgage. A contract brought about by fraud is voidable at the option of the party defrauded under S. 19. A rescinded contract becomes a void contract and the person who has received any advantage under it is bound to restore it to the other party. (*Sadasiva Aiyar and Hannay, JJ.*) KIZHAKOT PARATHAT MARIZAMA *v.* NANDANESSARI ILLATH GANPATHI MUSSAD.
27 I. C. 130.

——Ss. 66 and 67—*Contract, abandonment of, by one person when proved by rescission by another.*

Where one party shows by acts and conduct, amounting to a clear renunciation or absolute refusal to perform the contract, the other party will be justified in regarding himself as discharged from all continued liability under the contract. (*Mookerjee and Chatterjee, JJ.*) MATHURA MOHAN SAHA *v.* RAM KUMAR SAHA. 43 Cal 790 : 23 C. L. J. 26 : 35 I. C. 305 : 20 C. W. N. 370.

——S. 67—*Repudiation—Tender.*

Where the defendants had practically repudiated the terms of the contract, it is not necessary that any actual tender of money should have been made to them and it is sufficient for the plaintiffs to show their readiness to pay the money. (*Shadi Lal, C. J. and Abdul Qadir, J.*) (FIRM RAM DYAL SHEO PERSHAD *v.* FIRM GHAMANDI LAL NARAIN DAS. 1923 Lah. 56.

——S. 67—*Breach of contract—What amounts to*

The period fixed for redemption was of 30 years but the mortgagee and the purchaser of the equity of redemption entered into a contract which provided that the mortgagee should convey his rights to the purchaser on the latter's paying Rs. 1,350 to A and N two stake holders of a certain date. And that on failure the purchaser should get a right of immediate redemption. N did before that date and no payment was made by the mortgagee. The purchaser brought a suit for ejectment. *Held*, that no suit for ejectment lay and that there was no breach on mortgagee's part though he did not pay after N's death the intention being to make payment to the two stakeholders together. (*Benson and Sundara Aiyar, JJ.*) KUPPU NAIDU *v.* SUBBARAYA REDDI.
(1911) 1 M W. N. 355 : 10 I. C. 105 : 9 M. L. T. 454

——S 68—*Consideration.*

During the lifetime of his father, money borrowed by a person incapable of entering into a contract, to pay for the *Sradh* of his mother, is not a 'necessary within the meaning of S. 68. (*Chapman and Mullick, JJ.*) GOPINATH BHAGAT *v.* LAKSHMINARAIN SINGH 32 I. C. 937

——S. 68—*Minor.*

A money lender, advancing money to a minor alleging that it was for necessaries must draw the bond so as to bind the minor's estate. (*White, C.J. and Spencer, J.*) KRISHNAN CHETTY *v.* VELLACHAMI THEVAN. 37 Mad. 38 : 21 M. L. J. 1077 : 10 M. L. T. 385 : 12 I. C. 668 : (1911) 2 M. W. N. 461.

CONTRACT ACT (IX OF 1872), S. 68—Voidable contract.

——S. 68—*Litigation expenses—Payment of father's debts.*

The general rule is that a minor is incapable of entering into contract and that such a contract is absolutely void and unenforceable. S. 68 of the Contract Act is an exception to the general rule and the minor's estate is liable for the necessaries supplied to him. Moneys paid to a minor for the discharge of his father's decretal debts, for the recovery of which, nothing was done, cannot be called necessaries but moneys borrowed by him for the necessary costs of a Civil or Criminal proceeding are held as necessaries within S. 68 of the Contract Act. (*Dhobley, A. J. C.*) NILKANTH *v.* CHANDRA BHAN. 18 N. L R. 119 : 64 I. C. 851 : 1922 Nag 247.

—— S. 68—*C. P. Court of Wards Act of 1915—Ward not liable for necessaries.*

Neither the property nor the person of a ward, under the C. P. Court of Wards Act is liable for necessaries under S. 68 of the Contract Act. (*Mitra, A. J. C.*) HEMRAJ SHA *v.* PANNA LAL.
61 I. C. 563 : 17 N. L R. 20.

——S. 68—*Guardian borrowing money.*

When a guardian borrows money for the necessaries of a minor in such circumstances as to give him a right to be reimbursed from the latter's estate, his creditor may be subrogated to the guardian's rights (*Macnair, A.J.C.*) CHHOGALAL MEGHARJ *v.* KANHAYALAL TARACHAND.
56 I. C. 740.

——S. 68—*Money when recoverable under—'Necessary'.*

Under Hindu Law, a minor is under an obligation to provide for the marriage expenses of his sister and such a provision is a 'necessary' within the meaning of S. 68 of the Act, which the minor is 'legally bound' to make but the money cannot be recovered unless the money is spent and constitutes a 'debt' (*Daniels and Wazir Hasan, A. J. Cs.*) JAI INDRA *v.* DILRAJKUAR
61 I. C. 278 : 8 O. L. J. 94.

——S 68—*Minor—Marriage expenses.*

Minor is liable for the money borrowed by him for his marriage expenses as the expenses are a necessity and as the debt is a legal debt. (*Atkinson and Jwala Prasad, JJ.*) PATHAK KALI CHARAN RAM *v.* RAM DESSI RAM. 42 I. C. 963 : 2 Pat, L. J. 627.

——S. 68—*Ratification—Minor.*

A sale by the administrator of the estate of the deceased, of property of his minor heirs is void and cannot be supported under S. 68, nor can the sale be ratified by minor subsequently. (*Twomey, C. J. and Ormond, J.*) MA NYI MA *v.* AUNG MYAT. 9 L. B. R. 186 : 50 I. C. 324 : 12 Bur. L. T. 27.

CONTRACT ACT (IX OF 1872), S. 69.—'Bound by Law to Pay.'

——S. 69.
'Bound by Law to Pay.'
'Interested in Payment.'
Scope of.

——S. 69.
See also (1) SECTION 70.
(2) CONTRIBUTION.

'Bound by Law to Pay.'

——Ss 69 and 70—*Bound by law to pay.*

A landlord cannot under S. 69 or 70 recover from his tenant the cost of sweepers and *bhistis* employed under an order of the Municipal Board to keep the premises clean. (*Chamier, J.*) NOBIN CHANDER BOSE *v.* GADDA BERHAI
26 I. C. 77 : 12 A. L. J. 931.

——S. 69—*Bound by law to pay—Co-judgment-debtors.*

A joint decree was passed against A and B and properties belonging to both were sold. B applied under S. 310-A of the C.P.C., 1882 (O. 21, R 89 of 1908) and got the sale set aside B then brought a suit against A for contribution which included the five per cent, paid by him over and above the decretal amount. *Held*, that the five per cent. additional amount was gratuitous and voluntary and that the sale price was binding. (*Banerji, J.*), DORI LAL *v* PATTI RAM. **10 I. C 458 : 8 A. L. J. 622.**

——S 69—*Bound by law to pay—Payment of* Judi—Inamdar *losing his right of levying assessment.*

Where the *Inamdar* loses his right of levying assessment on occupancy tenants, he cannot recover the sum paid as *judi* from them as the tenants are not bound by law to pay *judi*. S. 69 only applies where a person is interested in the payment of money which any other is bound by law to pay and therefore if be pays it, he has a right to be reimbursed by the other. (*Macleod, C. J. and Fawcett, J.*) BHIMABAI PADAPPA *v.* SWAMIRAO SHRINIVAS. **45 Bom. 638 : 60 I. C, 892 : 23 Bom. L. R. 100.**

——S. 69—*Bound by law—Meaning of.*

The words 'bound by law to pay' in S. 69 do not mean bound by law to the plaintiff but that the defendant at the suit of any person might be compelled to pay. (*Beaman and Heaton, JJ.*; SOMASHASTRI VISVANATH *v.* SWAMI RAO KASHINATH. **43 I. C. 482 : 42 Bom 93 : 19 Bom. L. R. 939.**

——Ss. 69 and 70—*Bound by law to pay—Sale of putni in execution of rent decree—Payment by dar patnidar—S* 171, *Bengal Tenancy Act—Liability of patnidar.*

Defendant, a darpatnidar, deposited the amount of a decree, which was the result of the suit brought by the landlord against some of the patnidars, to save the tenure from being sold and was put in possession as mortgagee under S. 171, B. T. Act. The patnidar is liable under Ss, 69 and 70. (*Fletcher and Richardson, JJ.*) RAJANI KANTA MONDAL *v.* LAL MUHAMMAD.
41 I. C. 242 : 21 C. W. N. 628.

CONTRACT ACT (IX OF 1872), S. 69.—'Bound by Law to Pay.

——S. 69—*Bound by law to pay—Rent—First charge on a tenure—Person buying at execution sale takes subject to liability.*

Rent is by operation of law, the first charge on a tenure and a person who purchases the same at an execution sale must, in the absence of anything to the contrary, be taken to purchase it charged with the rent due at the time of the purchase and there being no privity between him and the judgment-debtor, he cannot recover from the latter the money which he is liable to pay for the rent. 1 C. W. N. 458 ; 32 C. 643, Foll. The second defendant bought in execution the first defendant's share of a taluk, of which the plaintiff was a co-sharer. In a suit by the landlord for arrears of rent, the plaintiff paid up the whole amount and sued for contribution. *Held*, that though there is no personal liability, the plaintiff is a person bound by law to pay and hence a suit for contribution lay, though plaintiff may not insist on his claim against defendant No. 1, 4 C. 369 Foll. (*Chatterjee and Newbould, JJ.*) CHANDRA DAYA SEN *v.* BHAGABAN SEN.
32 I. C. 200 : 23 C. L. J. 125.

——Ss. 69 and 70—*Bound by law to pay—Contribution, suit for—Rights between co-sharers.*

Where one of the judgment-debtors satisfies the decree by payment, under compulsion of legal process, he is entitled under Ss. 69, 70 to call upon the other judgment-debtors for contribution. (*Mookerjee and Beachcroft, JJ.*) RAJANI KANTA *v*, RAMA NATH. **20 C, L. J. 200 : 27 I. C. 56 : 19 C. W. N, 458.**

——Ss. 69 and 70—*Bound by law to pay—Rent decree by co-sharer landlord—Sale under decree—Satisfaction of decree by person likely to be affected.*

A party liable to be affected by a sale under a rent decree obtained by a co-sharer landlord can satisfy the decree and sue for reimbursement, under Ss. 69 and 70. 21 I C. 207 Rel. (*Mookerjee and Beachcroft, JJ.*) SATYA BHUSAN *v.* KRISHNAKALI. **20 C. L. J. 196 : 24 I. C. 259 : 18 C. W. N. 1308.**

——Ss. 69 and 70—*Bound by law to pay—Decree for rent against tenant of certain mouza—Subsequent purchase of mouza—Payment of the decree amount by purchaser—Purchaser if can recover the amount from tenant.*

Where a certain mouza of a tenant is purchased by a stranger and later, to avoid an execution sale of the same by the landlord in a decree for rent obtained by him against the tenant, the purchaser pays the decree amount to the landlord. he is entitled to recover from the tenant the amount so paid by him. (*Stephen and Mullick, JJ.*) MAHATHA HARSANKAR SAHAI *v.* BANDHU SAHU.
22 I C. 720,

——S. 69—*Bound by law to pay—Contribution—Joint judgment-debtors—Purchase by..*

One of several judgment-debtors who purchases the decree, cannot execute it against the other judgment debtors, but can sue them for contribution under S. 69 (*Coxe and Ray, JJ.*) RAM LAL MANDAL *v.* KHIRODA MOHINI DASI.
20 I. C. 569 : 18 C. W. N. 113.

CONTRACT ACT (IX OF 1872), S. 69.—Bound by Law to Pay.

———S 69—*Bound by law to pay — Decree against recorded tenant.*

The amount due under a decree against the defendant as recorded tenant is one which he becomes 'bound by law to pay' though he has parted with his interest under the lease and so a co sharer paying off the amount is entitled to contribution from him. A co-sharer paying off the amount due under a decree against another co-sharer as recorded tenant is interested in the payment of the debt under S. 69. (*Stephen and Richardson, JJ.*) BATUK NATH MANDAL *v.* BAPIN BEHARI CHAUDHURI.

16 C. W. N. 975 : 17 I. C. 90 : 17 C. L. J. 179.

———S. 69—*Bound by law— Co-sharer paying full decretal amount if entitled to compensation.*

A co sharer who pays the full decretal amount due to the landlord on account of a decree obtained against all the co-sharers is entitled to contribution from the co-sharers. (*Stephen and Coxe, JJ.*) HARI NARAYAN *v.* ISWAR CHANDRA.

13 I. C. 457.

———Ss. 69 and 70—*Bound by law to pay—Money paid to avoid attachment—Applicability.*

A man can recover the money paid to avoid attachment of his property in execution of a decree against another, from the judgment-debtor, under Ss 69 and 70. (*Johnstone and Rattigan, JJ.*) KANHAIYA LAL *v.* NATIONAL BANK OF INDIA, LIMITED, DELHI. **9 I. C. 966 : 32 P. W. R. 1911.**

———S. 69—*Bound by law to pay—Surety.*

The section applies to the case of a surety who pays a decree debt, which other persons besides the judgment debtor for whom he stood surety, were bound by law to pay. (*Spencer and Ramesam, JJ.*) TIRUMALAI SAVURI NAICKER *v.* ROYAR.

13 L. W. 559 : 40 M. L. J. 529 : 62 I. C. 706: (1921) M. W. N. 334

———S. 69—*Bound by law to pay—Hindu family—Bangle and* Seemantham *ceremony of daughter—Co-parceners—Limitation.*

The widow is not entitled to recover the amounts spent by her for her daughter's bangle ceremony or *seemantham*. Nor is she entitled to the price of the customary presents made on these occasions. The expense of the daughter's nuptials are recoverable either under S. 69, Contract Act, or under principle analogous to the same and the period of limitation is 6 years. (*Sadasiva Aiyar and Burn, JJ.*) VISALAKSHI AMMAL *v.* KALLI NARAYANASWAMI AIYAR

10 L. W. 540 : 53 I. C. 796 : (1919) M W N. 878.

——S. 69—'*Bound by law to pay*'.

The expression 'bound by law to pay' in S. 69 of the Contract Act means a legal liability and not a contractual liability. (*Seshagiri Aiyar and Napier, JJ.*) KUNCHITHAPATHAM PILLAI *v.* PALAMALAI PILLAI. **(1917) M W. N. 166 : 39 I. C. 405 : 32 M. L. J. 347**

———Ss. 69 and 70—*Bound by law—Purchaser of—Equity of redemption—Payment of amount not charged on property—Right of contribution—Option to decline.*

CONTRACT ACT (IX OF 1872), S. 69.—Bound by Law to Pay.

If a purchaser of the equity of redemption pays off at the time of redemption the amount of a bond not charged on the property, he cannot recover it from the mortgagor under S. 69. (*Hannay, J.*) KALIPPA *v.* RANGACHARIAR.

28 I. C. 697.

——S. 69—*Bound by law to pay—Mortgage of two items to one person.*

Where two items of property are mortgaged with one person and subsequently they are sold to two different persons, one free of incumbrances and the other charged with the payment of the whole mortgage amount, and the latter refuses to pay, and the mortgagee gets a decree for sale against both items and the first purchaser pays down the whole amount of the decree to save his property from being sold, he is entitled to recover the amount from the defaulting purchaser. (*Miller and Sadasiva Aiyar, JJ.*) MUTHURAKKU MANIAGARAN *v.* BAKKAPPA MANIAGARAN.

14 M. L. T. 591 : (1913) M. W. N. 1047 : 22 I. C. 9 : 26 M. L. J. 66.

———S. 69—*Bound by law to pay—Who is—Interested in payment.*

The words 'interested in payment' do not exclude a person who is interested as well as bound by law to pay. The words 'bound by law to pay' include persons legally bound to pay whether under contract or otherwise, and whether the contract is enforceable by the person to whom the payment is to be made. (*Hallifax, A. J. C.*) UMED SINGH *v.* BIHARI LAL.

62 I. C. 881 : 4 N. L. J. 76.

——S. 69—*Bound by law to pay—Usufructuary mortgage—Rent paid by mortgagee if recoverable from mortgagor.*

S. 76 of the T. P. Act requires a usufructuary mortgagee of under-proprietary plots to pay to the superior proprietor the rent due in respect of those plots. He cannot recover it by way of contribution from the mortgagor under S. 69. (*Lindsay, J. C.*) GAYA PRASAD *v.* SADA SUKA. **48 I. C. 69.**

———Ss. 69 and 70—*Bound by law to pay—Redemption by one person—Other in possession not parties to the mortgage suit—No contribution under S 69 or 70 when payments made not in their interest.*

Where in a foreclosure suit, the defendant redeems the property by paying the decretal amount in full, he cannot claim contribution under S. 69 or 70 from persons said to be transferees in possession of parcels of the property, who were not parties to the foreclosure suit since the payment made by the plaintiff was in his own interest. (*Lindsay, J. C.*) SURAJ DIN *v.* WAJID ALI.

34 I. C. 367 . 3 O. L. J. 494.

——Ss. 69 and 70—*Bound by law to pay—Right to reimbursement—Mortgagee purchaser—Rent decree prior to purchase.*

The burden of rent of the original tenant falls on the buyer of a holding. It becomes a first charge and therefore a mortgagee purchaser cannot have a right of suing his mortgagor for

CONTRACT ACT (IX OF 1872), S. 69.—'Bound by Law to Pay.'

reimbursement if he pays such arrears of rent accrued due before his purchase in order to save it from sale. (*Jwala Prasad and Ross, JJ.*) RANG LAL SAHU *v.* KALI SHANKAR SAHI.
1923 Pat. 353 : 77 I.C. 73 : 2 P. 890 : 1924 P. 235.

——S. 69—*Bound by law to pay—Co-sharers—Payment of rent decree by one—Right to contribution—Appropriation.*

A co-sharer who is not bound by law to pay a rent decree in favour of the superior landlord is not also liable to contribution where the decree is paid off by the other co-sharer. There is no question of appropriation in a suit for contribution under S. 69. (*Das, J.*) KAMLESWARI PRASAD *v.* JAGARNAT SAHAIB. 56 I. C, 949

Interested in Payment

——S 69—*Interested in payment—Usufructuary mortgagee in possession—Sale of property in execution—Deposit under O. 21, R. 89, C. P. Code—Right to recover.*

In execution of a money decree against the deft. by a third person, property usufructuarily mortgaged to plff. was sold. Plff. deposited the required amount to set aside the sale under O. 21, R. 89 and said deft. for the same. *Held* that in the circumstances plff. was not a mere volunteer but a person interested and therefore was entitled to be reimbursed. (*Banerji, J.*) BENI MADHO *v.* SANWAR DAT. 64 I. C. 918 : 20 A. L. J. 42 : 1923 A. 127.

——S. 69—*Interested in payment—Puisne mortgagee of prior mortgage—Right to reimbursement.*

A puisne mortgagee discharging the prior mortgage acquires a charge on the property on the date of the payment of the prior mortgage and his right to reimbursement accrues to him on the date on which he pays off the amount of the decree and relieves the mortgagors of the obligation which, under the decree exists on them. (*Banerji and Gokul Prasad, JJ.*) BORA SHIB LAL *v.* MUNNI LAL. 63 I. C. 604 : 3 U. P. L. R. (A) 193 : 19 A. L. J. 840.

——S. 69—*Interested in payment—Reason and prudence.*

A man, interested in the payment of money which he has proper grounds for thinking, another is bound to pay and but who cannot or does not intend to pay, is entitled to pay that money and should be allowed to recover it if in the opinion of the Court he has acted as a reasonable and prudent man would act under the circumstances. (*Mears, C. J. and Knox, J.*) JHANKU LAL *v.* REWATI LAL. 19 A. L J. 73 : 61 I. C. 822 : L R. 2 A. 45.

——S. 69—*Interested in payment—Decree and sale on prior mortgage—Decree on subsequent mortgage— Satisfied by auction-purchaser—Reimbursement.*

The sale proceeds of an auction sale in execution of a decree on a prior mortgage was sufficient to satisfy the decree with a surplus over, and a subsequent mortgagee, who obtained a decree on his mortgage, applied to be paid out of the surplus. The application was dismissed and the surplus was withdrawn by the mortgagor. Thereupon

CONTRACT ACT (IX OF 1872), S. 69.—Interested in Payment.

the subsequent mortgagee applied for sale of the property in execution of his decree. In order to prevent the sale the auction purchaser paid the amount and sued the mortgagor to recover the amount so paid.

Held, that he was entitled to be reimbursed the money which he had paid in discharge of the subsequent mortgage and for which the mortgagor was primarily liable. (*Banerji and Gokul Prasad, JJ.*) KARAN SINGH *v.* ISHTIAQ HUSAIN. 19 A. L J, 16 : 61 I. C. 376 : 43 All. 268.

——S. 69—*Interested in payment—Pre-emptor paying off mortgage when vendee had undertaken with vendor to pay—If can recover from vendee.*

A pre-emptor cannot maintain a suit against the vendee for recovery of the money paid by him to pay off the mortgage on the property which the vendee had undertaken with the vendor to pay, as there is no privity of contract between the pre-emptor and the vendee. (*Richardson, C. J. and Banerjee, J.*) RAMA RICHCHA PRASAD *v.* RAGHUNATH PRASAD, 46 I. C. 83 : 16 A. L. J. 531.

——Ss. 69 and 70—*Interested in payment—Money paid under mistake.*

Where a person redeemed a mortgage under the *bona fide* belief that he was entitled to the property under mortgage, he will be allowed a refund of his redemption money in a suit for possession by the legal owner. (*Rafique, J.*) GANGA SAHAI *v.* KANHAIYA LAL. 18 I, C. 811 : 11 A. L. J. 179.

——Ss. 69 and 70—*Interested in payment—Suit for rent—Sale—Deposit of decretal money and statutory compensation by Co-sharer not a party—Suit for contribution.*

Plaintiff who was part owner of a darpatni which was sold by the patnidar in execution of a decree for rent obtained by him in a suit in which the plaintiff had not been made a party had the sale set aside by depositing the decretal money and the statutory compensation of five per cent of the purchase money due to the auction purchaser and then sued the other co-sharers for contribution.

Held, that if the plaintiff was not bound by the decree, as the entire darpatni had been put up to sale, the plaintiff had the right to sue under S. 70 of the Contract Act, though not under S. 69 and that not merely in respect of the decretal amount but also of the statutory compensation money intended for the auction purchaser. 38 Cal. 1 : 16 C. L J. 156 : 16 C. W. N. 976 ref. (*Richardson and Huda, JJ.*) KANGAL CHANDRA PAL *v.* GOPI NATH PAL. 68 I. C. 104 : 24 C. W. N 1068.

——Ss. 69 and 70 — *Interested — Calcutta Municipal Act, S 228—Payment of consolidated rate by owner of premises—Occupier—Contribution.*

In view of S. 228 of the Calcutta Municipal Act, which makes the consolidated rate a first charge upon the building or land the owner is a person interested in the payment of the rate within S. 69 and if he pays the share of the occu-

pier, he is entitled to recover it from the latter under S. 69 or 70. (*Teunon and Newbould, JJ.*) FIRM OF BHUDAR MAL RAM CHANDRA MARWARI *v.* SEW NARAYAN MARWARI. **44 I. C. 669.**

——— Ss. 69 and 70—*Interested in payment—Contribution—Joint decree paid by one.*

The words interested in the payment of money in S. 69 are wide enough to include cases of persons who are under apprehension of any kind of loss or inconvenience and are not restricted to cases where actual loss capable of assessment in money is suffered. Where a person puts forward a *bona fide* claim to the property in dispute he is entitled to the protection of Ss. 69 and 70. A payment in satisfaction of a decree by a party to the decree is a payment made lawfully within the meaning of S. 70 even though his interest was unaffected by the decree. *Quære* :- Whether S. 69 is applicable to suits for contribution properly so called. 22 C. W. N. 347 Rel. (*Mookerjee and Walmsley, JJ.*) SERAFT ALI *v.* ISSAR ALI. **22 C. W. N. 347 : 27 C. L. J. 607 : 42 I. C. 30 : 45 Cal. 691.**

——— Ss. 69 and 70—*'Interested' — Interest must be lawful.*

A person who deposited the decree amount in Court and averted the sale, under the pretence that he had a mortgage on the property subsisting in his favour cannot recover back the deposit either under S.69 or 70 as the payments recoverable under those sections must have been lawfully made that is by persons having lawful interest and not claiming some interest in the property. (*Sanderson, C.J. and Mookerjee, J.*) PANCHKORI GHOSH *v* HARI DASJAT.

34 I. C. 341 : 21 C. W. N. 394 : 25 C. L. J. 325

——— S. 69—*'Interested in payment of money which another is bound by law to pay'—Decree for rent against Hindu widow—Deposit by Reversioner—Sale cancelled—Reversioner whether entitled to re-imbursement*

The words 'interested in payment of money which another is bound by law to pay' may include the apprehension of any kind of loss or inconvenience and not merely the actual detriment capable of assessment in money. Where a reversioner, by depositing the requisite amount under S. 310-A, C. P. Code (1882) got cancelled the sale in execution of a decree for arrears of rent against a Hindu widow, and subsequently sued her for the recovery of the money, *held*, that the reversioner, was a person interested in payment of money which another is bound by law to pay and entitled to recover the money except the compensation payable to the execution purchaser. (*Mookerjee and Beachcroft, JJ.*) PUNKHLATI CHOUDHARANI *v.* NANIHAL SINGH.

19 C. L. J. 72 : 21 I. C. 207 : 18 C. W. N. 778.

——— Ss. 69 and 70—*Interested in payment—Bound by law to pay—Suit for recovery of payment.*

The plaintiff, an one-anna sharer as a Patnidar had an interest to make the payment to avert a sale of the *patni* in execution of a decree against the Patnidars who were bound by law to pay and could sue for recovery of the amount paid by him from the *patnidars*. As the payment was made

not gratuitously and lawfully and the defendant enjoyed its benefit, the plaintiff could recover the amount also under S 70 of the Contract Act. (*Beachcroft and Mullick, JJ.*) KHETTRA NATH ROY *v.* MAHOMED UZIR MUKTEAR.

21 I.C. 102 : 19 C. L. J. 525.

——— Ss. 69 and 70—*Interested in payment—Decree for rent against co-sharer—Satisfied by one alone—Suit for contribution.*

A and C were joint owners of a non-transferable holding. C transferred his share to B, but the transfer was not recognized by the landlord who obtained a decree against A and C for the rent due. A paid the whole and brought a suit against B for the recovery of his share : *Held*, that the rent was payable by B and he was bound by law to pay the same under S. 69. 4 C. 369 and 6 C.W. N. 90 Rel. The payment of the whole rent due by A was not an officious interference of one man with the property of another and was not made gartuitously ; B having had the benefit of the payment must repay the amount to A. 18 M 88 Ref. 12 C. 213 Ref. (*Harrington and Mookerjee, JJ.*) PROSANNO KUMAR *v.* JAMALUDDIN MAHOMED.

15 I. C. 55 : 18 C. W. N. 327.

——— Ss. 69 and 70—*Interested—Purchase of jote by plaintiff from defendant—Subsequent sale of jote in execution of decree against defendant—Deposit of decree amount and compensation to set aside sale—Right to recover same from defendant.*

Where the plaintiff purchased a jote from the defendant which, however, was subsequently sold in execution of a rent decree obtained by the landlord, prior to the sale and the plaintiff deposited the decree amount and compensation money, to set aside the sale, to protect his interest, he is entitled to recover the amount so paid (but not compensation money and interest), as he was interested in paying the money which the defendant was bound in law to pay within S. 69. *Held*, also that the payment was not made voluntarily but it was a lawful act, the benefit of which the defendant has enjoyed. (*Chitty and N. Chatterjee, JJ.*) BHADRA MAHOMED *v.* GUNAMONI PALI. **11 I. C. 155.**

——— S. 69—*Interested in payment of money.*

Where the amount of a rent decree against a morigagor was paid by the plff. alleging to be a mortgagee, but it was afterwards decided in a case that he was not a mortgagee, *Held*, that he was not 'a person interested in the payment of money' within S. 69 (*Coxe, J.*) HARIDAS JATI *v.* PANCH KOWRI. **9 I. C. 615.**

——— S. 69—*'Interested.'*

The person interested in the payment of money under S. 69 must be a person not compellable to pay the whole or any portion of it ; hence a co-sharer who his under any obligation in respect of a party to pay Government revenue, is not a 'person interested' so as to entitle him to recover the whole but only a share of it against co-sharers which the other co-sharer is personally bound to pay. Only co-owners or co-sharers who are registered holders are bound to pay Government revenue though Government revenue may be a charge upon the lands. 33 M. 41, Foll.

CONTRACT ACT (IX OF 1872), S. 69—Interested in payment.

26 M. 686 Dist. (*Wallis, C. J. and Srinivasa Aiyangar, J.*) VENKATA SIMHADRI *v.* SRI LAKSHMI NARASIMHA ROOPA. **39 Mad. 795: 29 M.L.J. 639: 2 L. W. 1046 : 31 I. C. 255 : 18 M. L. T. 464**

——— Ss. 69 and 70—*Interested in payment—Payment made in good faith to preserve the property—Right of recovery.*

When a person *bona fide*, believing himself to have a claim to a property, pays off the charges on the property, he is entitled to recover the amount. 7 C. 573 : 26 C. 826 Foll. Though a person's title in the property is subsequently found to be non-existent, he is still entitled to recover the money, which he has paid for the preservation of the property, from the persons who are the actual owners, under sections 69 and 70 of the Contract Act. 31 B. 439 (Ref.) (*Banker, J. C.*) THAKURSA *v.* BEHARI.
78 I. C. 177.: 1923 Nag. 301.

——— S. 69—"*Interested in the payment*"—*Person obtaining probate and paying off claim against deceased—Probate revoked—Suit to recover amount paid.*

A person obtained probate of a Will and afterwards admitted a claim against the deceased, and a decree was passed against the assets of the deceased in his hands and he made payment. The probate was subsequently revoked and he brought a suit to recover the sum paid by him stating that no immoveable property of the deceased was in his hands. *Held*, that plff. was not interested in making payment and that the suit must fail. (*MacNair, A. J. C.*) CHANDRABHAGA *v.* HARSUKDAS. **59 I C. 128.**

——— S. 69—*Interested—Right to recover.*

A suit for contribution where both plff. and deft. were liable for the money paid by the plff. falls within Ss. 69 and 70, Indian Contract Act which contemplates persons who not being themselves bound to pay the money, or to do the act, has allowed the act to be done, do it under circumstances which give them a right to recover from the deft. who allowed the act to be done and has benefited by it (*Drake Brockman, J. C.*) MOJIRAM *v.* SAGARMAL. **55 I. C. 60.**

——— S. 69—*Interested in payment.*

The 'interest' of the person lending the money under this section must be one as would be recognised by law An interest resting merely on grounds of sentiment or on moral or social obligations is not 'an interest' which would give in law a right to repayment. (*Daniels and Wazir Hasan, A. J. C.*) JAI INDRA *v.* DILRAJ KUAR.
61 I. C. 278 : 8 U L. J. 94.

——— S. 69—*Interested in payment.*

It is not necessary for a person to show that his interest in the property would be adversely affected by the sale of the property as regards which he had paid the money which he seeks to recover from the party who is bound to pay. It is sufficient if the person who pays the money has an apprehension founded upon an impression that his interest will be adversely affected whether or not he may, as the result of more careful investigation, find that his apprehension was really in

CONTRACT ACT (IX OF 1872), S. 69—Scope of.

law justified, does not affect at all. (*Bucknill, J.*) SRIMATI SURADHANI DEBI *v.* HARI CHARAN MAHTO. **(1921) Pat 298 : 3 P. L. T 122 : 64 I. C. 226 : 1922 P. 337.**

——— Ss. 69 and 70—*Interested—Interested in the payment of money—One of several judgment debtors paying off decree.*

The words 'interested in the payment of money, in S 69 include the cases of any persons, who are under apprehension of any kind of loss or inconvenience and are not restricted to cases of individuals who are sure to suffer actual detriment capable of assessment in money. Where the whole of the decree is paid off by one of several judgment debtors, his right to recover compensation from the other judgment-debtors whether he was interested in the property or not, accrues under S. 70 of the Contract Act inasmuch as the other judgment-debtors enjoyed the benefit of the payment which was not obviously meant to be gratuitous. (*Jwala Prasad, J.*) SAKAL SINGH *v.* CHANDER DIPLAL. **49 I. C. 627.**

Scope.

——— S. 69—*Scope of—Test of contribution.*

Contribution means payment by each of the parties interested, of his share in any common liability. So a suit for contribution is a suit brought by one of such parties who has discharged the liability, to compel others to make good their shares. Mutuality is the test of contribution. 17 I C. 45, 13 I. C. 144, Rel. (*Mookerjee and Beachcroft, JJ.*) SATYA BHUSHAN *v.* KRISHNAKALI.
20 C. L. J. 196 : 24 I. C. 259 : 18 C. W. N. 1308.

——— S. 69—*Scope of—Applicability of—Plaintiff himself not liable to pay.*

S. 69 only applies to cases in which the person who makes the payment of money is himself not liable to pay. (*Mookerjee and Carnduff, JJ.*) MOTICHAND *v.* BAJRANG SAHAI. **17 I. C. 45 16 C. L. J. 148.**

——— S. 69—*Scope of—Applicability.*

Where arrears are advanced by the *darpatnidar* to save the patni from sale and he is put in possession of the patni and subsequently makes default in consequence of which the patni is brought to sale and purchased by a mortgagee, S. 69 does not apply because the mortgagee is not to pay the rent. (*Woodroffe and Carnduff, JJ.*) RAM JIBAN *v.* TAJUDDIN. **9 I. C. 489: 15 C. W. N. 404.**

——— S. 69—*Scope of—Payment by co sharer—Applicability.*

In order that S. 69 may apply, the person paying should be under no legal liability to pay the amount. But as co-sharers are jointly as well as severally liable, payment by one co-sharer does not fall within the terms of S 69. (*Caspersz and Chatterjee, JJ.*) JINNAT ALI *v.* FATEH ALI.
15 C. W. N. 332 : 9 I. C. 219 : 13 C. L. J. 646.

——— Ss. 69 and 70 *Scope of—Vendee aware of defect in title—Discharge of incumbrance—Right to amounts paid when title fails—Relief.*

CONTRACT ACT (IX OF 1872), S. 69—Scope of.

Per Spencer, J.—The vendee of properties who had received specific notice that the sale deed standing in the name of his vendor was only nominal, unenforceable and had not been given effect to, is not a *bona fide* purchaser without notice. But where after taking the sale deed he pays off incumbrances and tries to preserve the property from the clutches of creditors, his payments are *bona fide* and he is a person "interested" within the meaning of S. 69 of the Contract Act—Though it is well established that Ss. 69 and 70 of the Contract Act were not designed for the benefit of persons who are mere volunteers, a person who pays off incumbrances on the property purchased after his title is decreed in one court and before his title is declared bad by the court of appeal is entitled to claim the same in spite of the notice he had. In such a case, the ordinary relief he is entitled to is a personal decree and not a charge on the property.

Per Devadoss, J.:—In order to claim payments made to discharge incumbrances on property, plaintiff must show he was a volunteer and did not make the payments officiously. The onus is heavily on him to show he paid the amounts *bona fide*. The equitable doctrine of subrogation can not have any application to volunteers or persons whose conduct is officious. The distinction should always be kept in view of sales which are void, voidable and merely sham. The fact that the incumbrances were discharged after the vendee's title was declared to be good in the court of first instance but before the same was upset in appeal, will not make any difference as courts do not confer rights to property where the person had admittedly none. (*Spencer and Devadoss, JJ.*) GOPALA IYENGAR *v.* MUMMACHI REDDIAR.

17 L. W. 254 : 74 I. C. 416 : 1923 Mad. 392.

———Ss. 69 and 70—*Scope—Vendee discharging debts of true owner out of sale consideration—Sale void—Subrogation—Sp. Rel. Act, Ss.* 39 *and* 41.

Where property is sold by a person having no title, and the true owner sues to recover it, the purchaser is not entitled to be reimbursed for the simple debts of the true owner which he has paid out of the sale consideration, before the property is surrendered. The right cannot be supported either on the general principles of equity or under S. 41 of the Sp. Rel. Act. The Court will not make an order for compensation where the property has been sold by a stranger as his own property, even though the true owner has benefitted thereby. 28 I. C. 365 ; 36 I. C. 365 : 27 M. L. J. 93 : 42 Cal. 56 : 12 A. L J 1185 : 16 B. L. R. 796 : Expl. and Dist. The case would be different as regards mortgage debts. 21 M. 143 : 31 M. 739 Ref. (*Sadasiva Aiyar and Napier, JJ.*) AMMANI AMMAL *v.* RAMASWAMI NAIDU. 37 M. L. J. 113 : 10 L. W. 75 : 51 I. C. 57 : (1919) M. W. N. 866.

———Ss. 69 and 70—*Scope—Applicability to claims by contribution—T. P. Act, S.* 82.

Ss. 69 and 70 of the Contract Act do not apply to claims for contribution under S. 82 of the T. P. Act. (*Seshagiri Aiyar and Napier, JJ.*) KUNCHITHAPATHAM PILLAI *v.* PALAMALAI PILLAI.

32 M. L. J 347 : 39 I C. 405 : (1917) M. W. N. 166.

CONTRACT ACT (IX OF 1872), S. 69—Scope of.

———S. 69—*Scope of.*

The interests postulated in S. 69 have always been restricted to those arising either in course of law or through mistake or in virtue of some existing relation with the person on whose behalf the payment is made and have never been held to include interests created by mere officious interference. (*Ayling and Napier, JJ.*) MUTHU RAMAN *v.* CHINNA VELLAYAN. 39 Mad. 965 : 30 M. L. J. 369 : 19 M. L T. 278 : 3 L. W. 393 : 33 I. C. 508 : (1916) 1 M. W. N. 290.

———S. 69—*Scope of,*

Per Sadasiva Aiyar, J.:—Where crops on a portion of the land in the possession of a tenant are attached by Government for rent due by him for another plot and both the plots are in one *patta*, the tenant is entitled to pay off the dues and claim to be re-imbursed from the landlord notwithstanding the illegality of the attachment. (*Oldfield and Sadasiva Aiyar, JJ.*) LAKSHMI AMMA *v.* VENKAPPA ULLURA. 33 I. C 234 : (1915) M. W. N. 643.

———Ss 69 and 70—*Scope of—Government Revenue—Jointly charged on two lands—Payment by one—Charge—Personal liability—Contribution*

A person who owns one of two lands on both of which the Government revenue was jointly assessed and pays the whole revenue is entitled to claim contribution for the proportionate sum due from other land. *Semble* : Neither S. 69 nor S. 70 is applicable. 33 M. 15: 25 M, L. J. 433 : 16 M.L.T. 375: 26 M. 866 Ref. (*Sadasiva Aiyar and Hannay, JJ.*) NARAINA PAI *v.* APPU.

28 I. C. 456.

———S. 69—*Scope of.*

The section contemplates only a personal liability and does not refer to any lien or charge on any property. (*Ayling and Tyabji, JJ.*) KARUPPAN AMBALAGARAN *v.* MAHOMED SAKUTH.

14 M. L. T. 478: 26 M. L. J. 74: 22 I. C. 253: (1914) M. W. N. 131.

———Ss. 69 and 70—*Scope of—Interested in payment—Prior Mortgagee—Omitting to pay off charge—Payment by puisne mortgagee—T. P. Act., S.* 101.

S 69 contemplates an existing interest which the payment is intended to protect and not an interest which is created by payment or is part of the transaction in which the payment is made or which is merely security for the payment. S. 70 does not apply where a person making payment makes it for himself and not for the other person against whom his claim for reimbursement is made. Salvage lien does not exist where there is no interest to preserve. (*Miller and Abdur Rahim, JJ.*) VEERARAGHAVA *v.* LAKSHMANA.

13 M. L. T. 345: 18 I. C. 247: 25 M. L. J. 312.

———Ss. 69 and 70—*Scope of—Hindu reversioner—Payment of mortgage—Right to recover.*

A Hindu reversioner who pays off a mortgage decree against the estate in the hands of a widow is entitled under S. 69 to be reimbursed by the widow in respect of the money which the latter was bound by law to pay. The scope of S. 69 and of Ss. 85 and 91 of the T. P. Act, is not

CONTRACT ACT (IX OF 1872), S. 69—Scope of.

co-extensive. The daughters of a deceased mortgagor, therefore have sufficient interest in the land to entitle them, to discharge the mortgage debt, when the property is brought to sale in execution of the mortgage decree against the mortgagor's widow. By so discharging they obtained a charge over the land which they are entitled to assign in favour of a third person who has enabled them to discharge the mortgage debt. (*Sundara Aiyar and Spencer, JJ.*) NARAYAN KUTTI GOUNDAN *v.* PECHIAMMAL. 35 Mad. 428 : 22 M. L. J. 364 : 11 M. L. T. 174 : 15 I. C. 206 : (1912) M. W. N. 353.

——S. 69—*Scope of.*

A trustee of a temple borrowed money for the temple. He must be indemnified from the trust estate for the debt if he pays it though the case is not covered by Ss. 69 and 70 of the Contract Act. (*Abdur Rahim and Phillips, JJ.*) SRETHARAMA AIYAR *v.* MURUGAYYA. 12 I.C. 335.

——S. 69—*Scope of.*

S. 69 contemplates cases where one person is bound to pay money to a third person and another person is interested in such payment: it has no application where the person is bound to pay directly to the person who has incurred the expenses. The interest referred to in S. 69 is a pecuniary one. 25 M. 548 Ref. (*Benson and Sundara Aiyar, JJ.*) ACHA RANGANAIK AMMAL *v.* ACHA RAMANUJA. 35 Mad. 728: 21 M. L J. 600 : 10 M. L. T. 57: 11 I. C. 570: (1911) 2 M. W. N. 285.

——S. 69—*Scope of—Liability to pay—By whom enforceable.*

There is no justification at all for the proposition that the legal liability to pay contemplated by the section in respect of the person who does not make the payment is only such a liability as can be enforced by the person to whom the payment is made. (*Hallifax, A. J. C.*) UMED SINGH *v.* BIHARI LAL. 1922 Nag. 50.

——S. 69—*Scope of—Contribution—Doctrine—Applicability.*

The doctrine of contribution applies only when the position under a joint contract by two or more persons remains unaltered. (*Lindsay, A. J. C.*) SARDHA BAKSH SINGH *v.* DURGA BAKSH SINGH. 22 I. C. 263: 16 O. C. 285.

—— Ss. 69 and 70—*Scope of—Payment by person expecting to get title.*

Payment by a person without title and without possession but expecting to get title in a pending litigation does not entitle him to take advantage of Ss. 69 and 70. (*Sharfuddin and Roe, JJ.*) NAND KISHORE JHA *v.* PARAOO MIAN. 3 Pat. L. W. 255: 2 Pat. L. J. 676: 42 I. C. 839: 1917 Pat. 292.

—— S. 69—*Scope of—Volunteer.*

A volunteer who pays off a previous attaching creditor of the person liable to pay, does not stand in the shoes of the debtor but has only a cause of action against him personally. (*Ormond, J.*) MAUNG MAUNG *v.* SG FIRM. 8 L. B. R. 233: 35 I. C. 448: 10 Bur. L. T. 67.

CONTRACT ACT (IX OF 1872), S. 70—Enjoying Benefit.

——S. 70—
Enjoying Benefit.
Extent of Benefit.
Gratuitously.
Landlord and tenant.
Lawfull.
Scope of.

——S. 70—
See also CONTRACT ACT, S. 69.

Enjoying Benefit.

——S. 70—*Enjoying benefit—Assets of a deceased person—Purchaser from an unauthorised person satisfying decree—Not entitled to recover the decretal debt from the assets.*

B died leaving a widow R. and a son M. R. survived M., one S. the heir of B, after M's death sold the property to plffs. One A, got a decree against S and widow R. and attached the property in question. The defts. purchased the property from R. and paid off the decretal amount. The plffs. brought a suit to recover the property from the defts. without being required to pay the decretal amount. *Held* that as the defts. had purchased the property from a person who had no title to sell it, they cannot expect to be recouped for the amount which they paid to clear off the decree: because of their purchase they did not acquire any interest. (*Gokul Prasad, J.*) GYA PRASAD *v.* METHAI LAL. 75 I. C. 624 : 1923 A. 404 (2).

——S. 70—*Enjoying benefit—Compensation for non-gratuitous work.*

Plaintiff is not entitled to compensation under S. 70 where payment was not made by him for defendant's benefit or with his knowledge or consent. (*Batchelor and Shah, JJ.*) FANGYA FABLA *v.* TRIMBAK DAGA. 40 Bom. 646: 35 I. C 794: 18 Bom. L. R. 700.

——S. 70—*Enjoying benefit—Suit for share—Expenses of filling tank.*

One of two joint owners of a tank undertook to fill it up at the request of the other, as they were asked by the Municipality to do so owing to sanitary reasons. He paid for the expenses of filling it up and sued the other for a share of the expenses. The other contended the claim time barred *Held*, that the article of the Lim. Act applicable was 120 and the suit was not barred and that the case fell under S. 70 of the Contract Act. (*Mookerjee, A. C. J. and Fletcher, J.*) UPENDRA KRISHNA *v.* NABA KRISHNA. 62 I. C 615: 25 C. W N. 813.

——S. 70—*Enjoying benefit—Money paid for benefit of defendant—Darputnidar—Putnidar.*

Payments made by the plaintiff, in his character as darputnidar by which the putnidar was profited could be recovered from the putnidar. 13 C. L. J. 646 Dist. The claim of the plaintiff could not be postponed merely because accounts were not taken of the possession of the plaintiff for an anterior period for which a suit for accounts would be time barred (*Mookerjee and Beachcroft, JJ.*) UMESH CHENDRA DE *v.* JAKHOMAL MEHERA. 53 I. C. 90 : 30 C. L. J. 34.

CONTRACT ACT (IX OF 1872), S. 70—Enjoying Benefit.

——S. 70—*Enjoying benefit—When obligation to repay arises.*

The obligation to repay by a person enjoying the benefit of a non-gratuitous act under S. 70, should be either express or implied, and does not arise from the fact that he was benefited thereby especially when the payment is made against his wish, (*Sanderson, C J. and Mookerjee, J.*) PANCH KORI GHOSH v. HARI DAS JATI.

21 C. W. N. 394 : 34 I C. 341 : 25 C. L. J 325.

——S 70—*Enjoying benefit — Contribution Suit for—Joint tenancy—Payment of rent by one—Liability of others.*

The liabilities of joint tenants for rent is joint and several under S. 43 of the Contract Act and if one of them pays the whole rent, he can sue the others for contribution under S. 70 and is entitled to a decree to recover jointly from the others. (*Mullick, J.*) NIRDOSY MUNDA *v.* JAKARIA MUNDA.

27 I. C. 334 : 20 C. L. J. 492.

——S. 70—*Enjoying benefit—Co sharer—Recovering joint property—Contribution.*

One co-sharer who spends money for the recovery of joint property from trespassers, without the authority of the others is not entitled to claim contribution from them. S 70 of the Act does not apply to such cases. 21 C 496 (P. C), 30 M 526 Foll. (*Shah Din and Chevis, JJ.*) DULLA SINGH *v.* KHAZANA.

61 P. R. 1914 : 25 I. C. 542 : 267 P. L. R. 1914.

——S. 70—*Enjoying Benefit—Acceptance of benefit—Doing an act for another.*

Where it is proved that defendant co-sharer was asked to join in the suit and pay his quota of the expenses and was warned that he would be responsible for the loss that might accrue by his not joining the plaintiffs in filing a suit on the mortgage; it cannot be said that he has not had the option. But it is not necessary that he should have had option of joining in the suit when he gladly availed himself of the benefit of the plff.'s action. Where a person does an act which is greatly beneficial to himself and which is sure to benefit another, the former cannot claim contribution from the latter ; in other words where a person is bound to do an act, or would do an act, whether another consents to it or not, the former cannot claim contribution even though the latter derives benefit in consequence of the act. In short, where the benefit to himself is great, a person cannot be said to do the thing for another within the meaning of S. 70 but where defendant applied to be and become co-plaintiff he is liable to contribute. 45 I. C 786, 21 Cal. 496 : 33 Mad 15, 16 M, L T. 375 Foll. (*Odgers and Devadoss, JJ.*) T. M. SUNDARA AIYAR *v.* T. M. ANANTHAPADMANABHA.

16 L. W. 231 : 31 M. L. T, 164 : 70 I. C. 405 : 1922 M. W. N. 608: 43 M. L. J. 271 : 1923 Mad. 64.

——S. 70—*Enjoying benefit—Lawful payment—Person paying himself interested—Indian and English Law—Difference.*

Under S. 70 it is sufficient if the payment is lawful and not intended to be gratuitous, *i, e*, it should be a *bona fide* payment. It is not necessary that the payer should be interested in paying the money as in S. 69. A payment made against the protest of the person on whose behalf, it purports to be made would not be covered by the section S 70 is wider than the English Law. 18 M. 88 ; 33 M. 15 : 28 M. L J. 384; 25 M. L J. 433 Foll. 39 M 795, Ref. 11 A. 234 not Foll. (*Abdur Rahim, J.*) T. VENKATAKRISHNAMACHARLU *v.* KARNAM ARUNACHALAM PILLAI.

1919 M. W. N. 244 : 51 I. C. 857 : 9 L. W. 435.

——S. 70—*Enjoying benefit—Application.*

The authorities do not sanction recovery under S. 70 when the person primarily liable has no knowledge actual or imputed that expenditure is or probably may be necessary on his behalf. (*Ayling and Napier, JJ.*) MUTHURAMAN CHETTY *v* CHINNA VELLAYAN CHETTY.

39 Mad. 965: 30 M. L J, 369: 19 M L. T. 278: 3 L. W. 393 : 33 I. C. 508 : (1916) 1 M. W. N. 290.

——S. 70—*Enjoying benefit.*

To enable a party to recover money paid by him for another, under S. 70, it is necessary that the party sought to be made liable not only benefitted by the payment but must also have had the opportunity of accepting or rejecting such benefit. (*Hannay, J.*) PALANIAPPA CHETTY *v.* RANGACHARIAR.

28 I. C. 697.

——S. 70—*Enjoying benefit—Co-owners—Irrigation—Contribution—English and Indian Law.*

Plaintiff before effecting certain repairs to the irrigation works, by which lands of plaintiff and defendant were irrigated, submitted to the defendant an estimate of repairs and called upon him to pay contribution. The defendant denied liability to pay. The plaintiff executed repairs and brought suit for recovery. It was found that the repairs were lawfully executed, that defendant was benefitted by them and that plaintiff did not intend to do gratuitously. *Held* the defendant was liable to contribute. The section does more than reproduce the English Law as laid down in *Lampleigh* v. *Braithwait* and the courts in India should follow the section without considering the restrictions imposed by English Law. An option to decline or accept is not necessary under the Indian Law. 33 M. 15 Diss. (*Ayling and Tyabji JJ.*) SAPTHARISHI REDDI *v.* SECRETARY OF STATE FOR INDIA. **1915 M.W.N. 256: 2 L.W. 329 : 17 M. L, T 234 : 28 I C. 309 : 28 M. L. J. 384.**

——S. 70—*Enjoying benefit—Benefit conferred without knowledge or consent—Contribution.*

A person cannot be made liable to pay for a benefit conferred on him without his knowledge or consent without giving him an option of accepting or rejecting it. 25 M. L J. 433 : 33 M. 15 Foll 18 M. 88 Dist. (*Sankaran Nair and Spencer, JJ.*) RAJAH OF PITTAPUR *v.* SECRETARY OF STATE.

25 I. C. 783 : 16 M. L. T. 375.

——S. 70—*Enjoying benefit—Pleader's right to sue for services rendered to client—Legal Practitioner's Act, Ss. 27 and 28.*

Where an agreement between a pleader and his client is invalid under S. 28 of the Legal Practitioner's Act or there is no agreement, the pleader can sue under S. 70 of the Contract Act

CONTRACT ACT (IX OF 1872), S. 70.—Enjoying Benefit.

and is entitled to a fair remuneration for the services actually rendered and in the former case the terms of the agreement may be considered in determining the proper remuneration and, except as evidence as to the amount of remuneration, the 'party and party' fee under S. 27 of the Legal Practitioner's Act, does not come into question (*Hallifax, A J. C.*) VITHAL RAO *v.* BALWANT HARI. 59 I. C. 172 : 17 N. L. R 8.

——**Ss. 70 and 69**—*Enjoying benefit—Bound by law to pay.*

S. 69 of the Contract Act does not authorize a person who made a payment to protect his own interest from recovering from the person on whose behalf he ostensibly paid it, unless the latter was bound in law to pay the money. He cannot also recover under S. 70 of the Act unless the person for whom he paid the money had not only benefited from the payment but had also had the opportunity of expressing his acceptance or rejection of such benefit. The plaintiff purchased a tenure in execution of a money decree against the tenants when the latter were in arrear with their rents. The landlord having later on obtained a decree for such rents against the out going tenants put up the tenure to sale which was set aside on plaintiff depositing the decretal amount: the plaintiff is not entitled to recover the amount from the original tenants either under S. 69 or under S. 70 (*Bucknill, J.*) SRIMATI SURADHANI DEBI *v.* HARI CHARAN MAHTO. 1921 Pat. 208 : 3 Pat. L. T. 122 : 64 I. C. 226 : 1922 P. 337.

——**S. 70**—*Enjoying benefit—Contribution—Co plaintiffs.*

Where several persons join together in instituting a suit to secure a common benefit, and one of them bears the expenses of the litigation, he is entitled to be reimbursed by his co plaintiffs under S. 70, in the absence of an express agreement between them setting the proportions which each had to bear. (*Chapman and Atkinson, JJ.*) UMATAL SOGHRA *v.* ZOHRA. 34 I. C. 54 : 2 Pat. L. W. 437.

Extent of Benefit.

——**S. 70**—*Extent of benefit—Satisfied by one co-tenant.*

One of two co-tenants holding estate in the proportion of 1 : 2, satisfied a rent-decree by paying the entire amount due and sued the other co tenant to recover his share from him. *Held*, that the payment was not a voluntary payment and as the other co-tenant had benefited by the payment he was bound to reimburse his co tenant. (*Teunon and Newbould, JJ.*) HARI PROSAD ROY *v.* RAM PROSAD RAI. 60 I. C. 414.

——**S. 70**—*Extent of benefit—Proof of.*

In order to take advantage of S. 70 the plaintiffs must prove the extent of benefit derived by the Zemindar. (*Oldfield and Tyabji, JJ.*) BOMMADEVARA SATYANARAYANA *v.* DASIKA SRIRAMALU. 30 I. C. 178 : 29 M L. J. 597. (1915) M. W. N. 467 :

——**S 70**—*Extent of benefit—Essentials for compensation.*

Plaintiff claiming compensation, must prove that defendant actually derived benefit from the act. It is not sufficient that he would derive benefit if he (defendant) would do some more acts to be done by the plff. 18 M. 88 ; 27 A. 592 Rel. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) SUBRAMANIA *v.* ARUNACHALAM. 16 I. C. 692 : (1912) M. W N. 956.

CONTRACT ACT (IX OF 1872), S. 70.—Gratuitously.

——**S. 70**—*Extent of benefit—Contract—Part performance* Quantum meruit.

Where the contract is to do work for a lump sum nothing could be recovered as *quantum meruit* for part only of work done. (*Parlett, J.*) PETER NERTANNES *v.* MUTHIAH CHETTY. 19 I. C. 48 : 6 Bur. L. T. 53.

Gratuitously.

——**S. 70**—*Gratuitously—Pleader and client—Quantum meruit—No contract.*

Where a pleader works for a client without any contract as to remuneration he will be entitled to a reasonable payment for his services. (*Stephen and Mullick, JJ.*) MOHENDRA LAL BISWAS *v.* AKHIL CHANDRA PAKRASHI. 20 I. C. 47 (1) : 20 C. L. J. 424.

——**S. 70**—*Gratuitously—Hindu joint family—Execution of decree against individual member—Payment by him—Suit for refund.*

If, in execution of a decree against the members of a joint family, property in the possession of one of them is attached and he deposits the decree amount in court to avert the attachment and applies for its refund he would be entitled to a refund only if he proves that the payment was occasioned by the decree being executed against his own self-acquisition and he had no joint family properties in his hands at the time of attachment. (*Krishnan, J.*) MUTHUSAWMI ASARI *v.* ANGAYAKANNU ASARI. 54 I. C. 807 : 11 L. W. 115.

——**S. 70**—*Gratuitously—Scope of—Plaintiff interested in doing act—Benefit to another—Right to reimbursement.*

S. 70 is not applicable to a case where a person does some act for his own benefit which unavoidably benefits his neighbours or any other person. A suit for contribution of the expenses of digging a tank which benefits both the plaintiff and the defendant is not maintainable unless it can be shown that the act done by the plaintiff is done solely for the defendant and but for which it would not have been done. Even if the defendant was liable, plaintiff was not entitled to a charge on the defendant's property. The fact that the proportionate expenses have been collected by coercive process by the Collector does not affect the non-liability of the defendant under S. 70. 26 M. 686 Dist. (*Abdul Rahim and Oldfield, JJ.*) VISWANADHA VIJIA KUMARA BANGAROO *v.* R. G. ORR. 45 I.C. 786.

——**S. 70**—*Gratuitously—Compensation for work done.*

When it is proved that the plaintiff has really done some work under a contract, which he alleged but failed to prove the alleged contract, reasonable compensation should be given to the plaintiff for the work done. (*Lindsay, J. C.*) JWALA PRASAD *v.* BACHARAM. 30 I. C. 223 : 2 O. L. J. 332.

CONTRACT ACT (IX OF 1872), S. 70--Gratuitously.

——— S. 70—*Gratuitously—Medical fee—Implied contract—Reasonable amount.*

Where there has been no express agreement abo t the fees to be paid to a medical man he is entitled to a reasonable amount to be fixed by the Court. (*Shaw, J.*) HODG KINSON LACK *v.* P. GALLA GHER. 25 I. C 777 : (1914) 11 U. B. R. 19.

Landlord and Tenant.

——— S. 70—*Landlord and tenant—Unauthorised use of water.*

Where a tenant used Government water without permission and the landlord paid the water rate and sued for the recovery of the same, it was held that the only consequence of non-payment of water rate would be a sale of the proprietary estate of the landlord and that, as the tenant was not benefited by such payment, he would not be liable (*Oldfield, J.*) DISTRICT BOARD OF TANJORE *v.* MUNA MAVANA. 22 I. C. 34 : (1914) M. W. N. 66.

Lawfully.

——— S. 70—*Lawfully—Money left with Vendees for payment to mortgagees—Property mortgaged different from property sold—Delay on the part of the vendors.*

On a sale of the land, the vendors left a portion of the consideration in the hands of the vendees for payment to certain of their (vendors') creditors who held a mortgage over property other than that sold. The vendees paid a sum in excess of the sum directed to be paid by the vendors and sued to recover it from the vendors : *Held*, that the vendees were not entitled to recover the amount claimed inasmuch as the money paid as interest was a gratuitous payment, the property mortgaged to secure the sum due to the creditors being no part of the property sold and the fact that the vendors benefited by the payment was immaterial. (*Richards, C.J. and Banerji, J.*) SURAJ BHAN *v.* HASJIM BEGAM. 40 All. 555 : 47 I. C. 903 : 16 A. L. J. 581.

——— S. 70—*'Lawfully'—Hindu Reversioner paying money to prevent sale for road cess.*

The word "lawfully", in S. 70 is not a mere surpulsage and a person must have lawful interest in making the payment. A Hindu Reversioner's interest in the estate is a mere expectancy, and he has no lawful interest in the payment of money to prevent a sale (of the estate held by a widow as heiress to her husband) for non-payment of road-cess, and is not entitled to be reimbursed. (*Sanderson, C. J. and Cholzner, J.*) GOPESWAR BANERJEE *v.* BROJO SUNDARI DEBI. 25 C. W. N. 1029: 67 I. C. 40: 49 Cal. 470: 1922 Cal. 353.

——— S. 70—*Lawfully—C. P. Code, O. 21, R. 89—Payment under, if payment under S. 70.*

A payment under O. 21, R 89 of the C P Code is a valid payment for the purposes of S 70. (*Mookerjee and Carnduff, JJ.*) JOG NARAIN SINGH *v.* BADRI DAS. 13 I. C. 144: 16 C. L. J. 156.

——— S. 70—*Lawfully payable.*

Where the plaintiff alleging himself to be a mortgagee paid the amount of a rent decree against his mortgagor and it was afterwards decided in a case between the parties that he was not a mortgagee, it was held that the deposit was not lawful, 30 A 167 : 33 M. 15 : 2 C. L. J. 311 F. 14 C. W. N. 945 Dist. (*Coxe, J.*) HARI DAS JATI *v.* PANCHKOWARI GHOSH. 9 I. C. 615.

CONTRACT ACT (IX OF 1872), S. 70.—Scope of.

——— S. 70—*Lawfully—Applicability.*

A person paying rent in order to create title must be deemed to be making it voluntarily and not lawfully and so S. 70 would not apply. 21 C. 142, Foll. (*Caspersz and Chatterjee, JJ.*) JINNAT ALI *v.* FATEH ALI. 15 C. W. N. 332: 9 I. C. 219: 13 C. L. J. 646.

——— S. 70—*Lawfully—Essentials.*

A person who pays assessments honestly and under the belief that he has title to the land could not recover them from the defendant, if it is clear that the defendant and not he is the real owner. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) MOOLINTI VEERANNA GOWD *v.* DEVARINTI BHIMA REDDI. 12 M. L. T. 261: 17 I. C. 253: (1912) M. W. N. 880.

——— S. 70—*Lawfully—Co-sharer — Improvements.*

The defendant co-sharer who has incurred expenditure on repair or improvements of the common property can claim a rateable contribution for it from his co-sharers if he did not intend to benefit them gratuitously and if they are really benefited (*Skinner, A. J. C.*) SHANKAR LAL *v.* MUPCHAND. 10 I. C. 694: 7 N. L. R. 11.

Scope of.

——— S. 70—*Scope of—Property sold in execution—Third person paying off—Compensation*

S 70 applies to a case where the person for whose benefit the payment is made is a large caste and is sued in a representative character, under O. I., R. 8, C. P. C. The section though wide will enable the Court to do substantial justice. 38 C, I. Rel. on. It would be unfair to pass a personal decree against the members of a large caste as it would enable the plaintiff to select one member to bear the whole burden. (*Marten, J.*) BICCOOBAI *v.* HARIBAI RAGHUJI. 42 Bom. 556: 42 I. C. 9: 19 Bom. L. R. 650.

——— S. 70—*Scope of—Implied contract—Use and occupation.*

Compensation for use and occupation which is described sometimes as fair rent or occupation rent which in English Law is looked upon as based on implied contract cannot be so viewed in India inasmuch as the Indian Contract Act does not speak of it in Chapter V. (*Sadasiva Aiyar and Moore, JJ.*) GOVINDASWAMY PILLAY *v.* RAMASWAMY AIYAR 3 L W 408: 30 M. L. J. 492: 34 I. C 6: (1916) 2 M. W. N. 79.

——— S. 70—*Scope of.*

There is nothing in S. 70 which requires the Court to deal with the cases coming under at is cases of implied contract. It is not necessary under the section that the defendant must have an option before the benefit is conferred, of accepting or declining it. 33 M. 15 Diss. 16 C. L. J. 156. app. Section 70 is intended to apply to all cases of benefit *bona-fide* conferred by one person upon another and which benefit is enjoyed by the other

CONTRACT ACT (IX OF 1872), S. 70.—Scope of.

person. And in construing the section, Courts in India should be guided more by justice, equity and good conscience than by English precedents. Even though plaintiff might have an interest in paying the money, yet it might none the less be for defendant. (*Miller and Sadasiva Aiyar, JJ.*) SRI SRI SRI GAJAPATHI KRISHNA CHANDRA DEO GARU *v.* SRINIVASA CHARLU. **38 Mad. 235: 14 M. L. T. 20: 25 M. L. J. 433: 20 I. C. 445: (1914) M. W. N. 99.**

——S. 70—*Scope of—Applicability—Express contract.*

When A delivers goods to C according to the express contract between A and B, C. is not bound to compensate A though he uses the goods. S. 70 applies only in the absence of express contracts. (*Parlett, J.*) SADIK MAISTY *v* MUHAMMAD AZZAM. **32 I. C. 511.**

——S. 72—(1) Coercion.

(2) Mistake.

Coercion.

——S. 72—*Coercion—Money paid under pressure of legal proceedings—Patni sale, payment to avert—Not a voluntary payment.*

In proceedings under S. 14 of the Bengal Reg. (VIII of 1819 the Collector acts not in a judicial but in a ministerial capacity Those who deposit money on receipt of a notice under S. 14 are not in the same position as persons who pay off a claim brought against them in an ordinary suit in which they had a full opportunity of resisting and who, not having availed themselves of such opportunity then, are debarred from doing so thereafter. Whether or not he contests the claims, a talukdar, to stop a sale under S. 14, has to deposit the full amount claimed, and such deposit does not preclude him from suing for its recovery in an ordinary suit. (*Viscount Haldane, Ameer Ali, Sir John Edge and Phillimore*) JYOTI PRASHAD SINGH DEO BAHADUR *v.* KUMUD NATH. **46 Cal. 1: 45 I. A. 108: 16 A. L. J. 569: 5 P. L. W. 64: 24 M. L. T. 66: 28 C. L. J. 165: 8 L W 186: 22 C. W. N. 1009: 20 Bom. L. R. 856: 35 M. L. J. 347: 45 I. C. 827: (1918) M. W. N. 441 (P. C.)**

——Ss. 72 and 15—*Coercion—Wrongful attachment of property—Payment of claim—Suit for recovery of money paid—Voluntary payment.*

Where property of one person is wrongfully attached in execution of a decree against another and the real owner pays off the decree amount under protest to save the property from seizure, the owner is entitled to demand repayment of that sum from the decree holder as being an involuntary payment made under coercion. This is the law both in England and in India. 8 I.A. 93 Rel. The word 'Coercion' in S. 72 is used in its general and ordinary sense in which it is defined in S. 15. The fact that the real owner could have sued the judgment-debtor under S. 69 or S. 70 of the Contract Act for reimbursement or that he could have preferred a claim against the attachment under O. 21, R. 58, C.P. Code, will not deprive him of his right to recover the money actually paid to the

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wrong doer. (*Lord Moulton*) KANHAIYA LAL *v.* NATIONAL BANK OF INDIA. **40 Cal. 598: 40 I. A 56: 17 C. W. N. 541: 13 M. L. T. 406: 11 A. L. J. 413: 17 C. L. J 478: 15 Bom, L. R. 472: 184 P. L. R, 1913: 25 M. L. J. 104: 18 I. C. 949: (1913) M. W. N. 406 (P. C.).**

——S. 72—*Coercion—Decree—Money recovered under—Suit to recover back.*

The rule laid down in *Marriot* v. *Hampton* that money received under a judgment or decree cannot be recovered back in a fresh suit while the decree under which it was recovered remains in force rests on the ground that the original decree must be taken to have been subsisting until it was reversed. In order to bring this rule into force there must be *bona fides* on the part of the party who has got the benefit of the opponent's payment. The principle will not bar a suit by the other party if the party enforcing payment acts unconscientiously and knows he has no right to the money. (*Chandavarkar, A. C. J. and Batchelor, J.*) SANKAR VISHNU GOKHALE *v.* RAGUNATH HARI DHARAP. **17 I. C. 205: 14 Bom. L. R. 854.**

——S. 72—*Coercion—Money paid under—Meaning of.*

The word "coercion" referred to in S.72 of the Contract Act is used in its general and ordinary sense, its meaning not being controlled by the definition of "Coercion" in S. 15 of the Act. 40 C. 598 P. C. Rel. (*Chatterjea and Panton, JJ.*) ADHOR CHANDRA DASS *v.* RAMESWAR MANNA. **65 I. C. 517.**

——S. 72—*Coercion—Execution of rent decree—Payment by purchaser of portion of the taluk—Suit for refund.*

The superior landlord of a taluk obtained a decree for rent against the auction purchaser and threatened to bring the whole taluk to sale. The purchaser of a portion of the taluk deposited the decree amount in Court so as to stop the sale and sued for its recovery. *Held*, that plaintiffs were not entitled to get back from the landlord the decretal amount deposited by them as they were jointly liable for the rent payable for the whole taluk. As the deposit was made under S. 174 of B. T. Act not by mistake or under coercion or under stress of legal process, S. 72 of the Contract Act did not apply to the case. (*Chitty and Cuming, JJ.*) KAMAL KRISHNA *v.* PEARY MOHON. **53 I. C. 553.**

——S. 72—*Coercion—Money paid under legal process—Recoverability—Ex parte order.*

The principle, that where money has been paid by the plaintiff to the defendant under compulsion of legal process which is afterwards discovered not to have been due, the plaintiff cannot recover it back in an action for money had and received, cannot apply to a case where money was deposited by the plaintiff on the faith of an order which stated explicitly that the money would be retained in Court pending the determination of the question whether the money belonged to rival claimants and the Court without notice to the depositor and his alleged creditor, paid it out to a claimant on his application. A deposit made to a Court pending an adjudication is a conditional one. Rule of the

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Supreme Court in England, the rights of depositor and duty of Court in such cases considered (*Mookerjee and Roe, JJ.*) HARINATH *v.* HARA DAS ACHARJA. 43 Cal. 269 : 20 C. W. N. 188 : 29 I. C. 580 : 23 C. L. J. 163.

——S. 72—*Coercion—Money paid under legal process—Refund.*

Amounts even if paid within the period of limitation, cannot be recovered being money paid by compulsion of legal proceedings. The plaintiff had an opportunity of reasoning this question in former suits. (*Chitty and Teunon, JJ.*) JAGANNATH MARWARI *v.* GIRIDHARI SINGHA.
29 I. C. 429 : 19 C. W. N. 102.

——S. 72—*Coercion—Payment of decretal amount to decree holder—Applicability.*

S. 72 will not apply in the case of a person who, to avoid attachment of property belonging to himself, paid the amount due under the decree even though under protest; because such payment cannot be said to be under coercion and without establishing coercion the decree-holder cannot be sued But, if objections are taken to attachment and in spite of them the property is ordered to be sold and to avert the sale, the objector pays the amount of the decree, S. 72 will apply if the objector succeeds in establishing the claim. (*Johnstone and Kattigan, JJ.*) KANHAIYA LAL *v.* NATIONAL BANK OF INDIA LTD., DELHI. 9 I. C. 966 : 32 P. W. R 1911.

——S. 72—*Coercion.*

Money paid by a person under arrest in a non-compoundable case with a view to stifle a prosecution amounts to payment under coercion under S 72 so that the person who receives it is bound to retain it so long as the parties are not in *pari delicto*. The right of a person who pays money to another under coercion or by virtue of an illegal agreement, to claim it refund is not lost by the fact that it was really due to the payee. (*Wallis, C. J. and Seshagiri Aiyar, J.*) MUTHU VEERAPPA CHETTY *v.* RAMASWAMI CHETTY
40 Mad. 285 : 34 I. C. 401 : 31 M. L. J. 264.

——S. 72—*Coercion.*

A landlord collected water-cess from plaintiffs at a penal rate and paid it to the Government. He is not liable to be sued by the plaintiffs for the recovery of the water-cess so paid by them. (*Oldfield and Tyabji, JJ.*) BOMMADEVARA SATYANARAYANA *v.* DASIKA SHRIRAMULU.
29 M. L. J. 597 : 30 I. C. 178 : (1915) M W. N. 467.

——S. 72—*Coercion—Levy of cess by Government.*

A payment of water cess made under fear of coercive process is not a voluntary payment. (*Miller and Sankaran Nair, JJ.*) SECRETARY OF STATE *v.* KANNEPALLY JANAKIRAMAYYA.
37 Mad. 322 : 13 M. L T. 235 : 24 M L. J. 365 : 18 I. C. 770 : (1913) M. W. N. 235.

——S 72—*Coercion—Legal process—Money paid under compulsion of—If can be recovered.*

Money paid under compulsion of a legal process cannot be recovered as money had and received unless it was realized by fraud or some unconscionable dealing or by a grave mistake which a Court of equity will relieve against. (*Mullick and Atkinson, JJ.*) SREENATH DAS *v.* GHANASHYAM NAICK.
46 I. C. 534 : 3 P. L. J. 465.

CONTRACT ACT (IX OF 1872), S. 72.—Mistake.

Mistake.

——S. 72—*Mistake—Set of.*

To append a consideration of the relation of parties *inter se* apart from actual circumstances which enforced the payment for the refund of which the suit was brought under Contract Act S. 72 is simply to allow counter claim under another name, and a counter claim in the Punjab is not admissible. (*Viscount Finlay, Lord Dunedin, Lord Atkinson, Sir John Edge and Ameer Ali*). (KANHAIYA LAL *v.* NATIONAL BANK OF INDIA.
45 M. L. J. 497 : 4 Lah. 284 : 33 M. L. T. 349 : 25 Bom. L. R. 1243 : 75 I. C. 7 : 50 I A. 162 : 1923 P. C. 114 (P. C.).

——S. 72—*Mistake—Presumption under—Money paid by mistake or coercion.*

As the section lays down, that a person to whom money is paid by mistake or coercion, must repay or return it, it implies that the money was not really due to the person to whom it was paid. (*Piggott and Walsh, JJ.*) MAHADEO PRASAD *v.* DIRGBIJAI SINGH. 43 All. 272 : 60 I. C. 881 : 19 A. L J. 41.

——2. 72—*Mistake.*

Money paid to the principal can be recovered but if it is paid to an agent, it can be recovered only where, without knowledge of the mistake he has paid it or settled such an account with principal as amounts to payment of the money to him or has done something which has so prejudiced his position that it would be inequitable to require him to refund. (*Scott, C. J. and Beaman, J.*) SOLOMON JACOB *v.* NATIONAL BANK OF INDIA.
42 Bom. 161 : 42 I. C 869 : 19 Bom, L. R. 789.

——S. 72—*Mistake—Money paid under a mistake of fact is recoverable.*

Money paid under a mistake of fact on the part of both the parties is recoverable. (*Sir Lancelot Sanderson, C. J. and Chozner, J.*) ERFANUDDI *v.* BHARAT CHANDRA SARKAR. 1922 Cal. 1 (2).

——S. 72—*Mistake—Money paid under wrong decree of Court—Recovery of.*

Money realized under a decree or judgment cannot be recovered in a fresh suit or action whilst the decree or judgment remains in force. 10 M. I. A, 203; 3 W. R. 11 (P. C.) Rel. But it is recoverable in a suit or by summary process if the decree or judgment is reversed or is superseded. 3 C. 30; Dist. (*Mookerjee and Holmwood, JJ.*) DWARKA NATH KUNDU *v.* MOHENDRA NATH ROY.
16 I. C. 131 : 16 C. L. J. 437.

——S. 72—*Mistake—Sale of goods—Delivery of excess quantity by mistake—Subsequent sale to third persons—Right to equitable restitution.*

Where plff. sold 70 bales of grey mulls, each bale to contain 100 pieces, to deft. and deft in his turn *bona fide* sold the bales as containing each 100 pieces to several persons, and it was eventually ascertained that plff. had delivered an excess number of pieces. *Held* that deft. was not liable to return or pay the price of the excess number of

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pieces. The doctrine of equitable restitution has no application where the deft. labouring under the same mistake as the plff. has *bona fide* parted with the goods to others. (*Coutts Trotter and Ramesam, JJ.*) K. M. P. R. FIRM *v.* THE OFFICIAL ASSIGNEE OF MADRAS. **43 M. L. J. 142 : 16 L. W. 75 : 70 I. C. 751 : 1923 M. 17 : (1922) M. W. N. 498.**

——S. 72—*Mistake—Money paid under Decree—If can be recovered by fresh suit.*

Money paid under a decree which is afterwards found not to be due cannot be recovered as money had and received, in a fresh suit, unless the decree is set aside or superseded by some ulterior proceeding. (*Jwala Prasad, J.*) UPENDRA CHANDRA SINGH *v.* A. B. CHIODITTI. **46 I. C. 562.**

——S. 72—*Mistake.*

A person was a bailiff of the municipal committee, who was to receive commission on his realization of the taxes failed to be collected by the ward headman within 45 days from the date of the issue of the tax tickets. The headman used to retain some of the so uncollected tickets and realize after the expiry of the prescribed period. The bailiff complained of it to the president, and claimed the commission. The president ordered to that effect and got a resolution passed in the committee accordingly. The payment was made and afterwards reclaimed on the ground that he was not entitled to the commission on the tax tickets which he did not realize personally. *Held*, that the money, if to be recovered at all, must be recovered under S. 72 which requires the payee to refund the same if paid by mistake but this payment was voluntary and with full knowledge of the facts. (ii) the bailiff was an employee and received the sum as part remuneration of his services and so the committee could not show some mistake as to the existence of an obligation, the necessary element to succeed under S. 72 (iii) If the payment be regarded as made under a mistake of law, this must be read subject to the common law rule that ignorance of law is no excuse. (*Twomey, J.*) MOHOMED SULTAN *v.* MOULMEIN MUNICIPAL COMMITTEE.
15 I. C. 361 : 5 Bur. L. T 75.

——S. 73.

Applicability of.
Breach of Marriage Contract.
Effect of Plaintiff's Failure.
Extent of Damages
Interest as Damages.
Interest on Damages.
Measure of Damages.
Plaintiff's Duty to Minimise Damages.
Proof of Damages.
Quantum Meruit.
Remote and Indirect Loss.
Special Damages.
What is a Breach.

See also DAMAGES.

Applicability of.

——Ss. 73 and 161—*Applicability of.*

The section relates to breaches of contract and not to torts. (*Banerjee, J.*) EAST INDIAN RAILWAY CO. *v.* SHEORATAN DAS.
19 I. C. 870 : 11 A. L. J. 335.

CONTRACT ACT (IX OF 1872), S. 73.—Breach of marriage contract.

——S. 73—*Applicability of—Breach of contract—Party cancelling contract when cannot set up alternative defence.*

Where the buyer wrongfully cancels the contract without justification he cannot set up any defence which he might otherwise have done to any action for damages. (*Macleod, C. J.*) RUSTOMJI A DUBASH *v.* HAJI HUSSAIN LARI.
59 I. C. 515 : 22 Bom. L. R. 1165.

——S. 73—*Applicability of—Specific performance not granted for special reasons*

Where a party is entitled in law to specific performance, but the court for special reasons does not grant this is entitled to damages in lieu of the same (*Moti Sagar, J.*) GENDA RAM *v.* RAMCHANDER. **73 I. C. 1013 : 1924 Lah. 163.**

——S. 73—*Applicability of.*

S. 73 applies to all suits for damages for breach of contract, whether it is for sale of moveable or immoveable property. (*Abdur Rahim, Napier and Seshagiri Aiyar, JJ.*) ADIKESWAN *v.* GURUNATH.
40 Mad. 338 : 32 M. L. J. 180 : (1917) M. W. N. 171 : 5 L. W. 425 : 39 I. C. 358 : 22 M. L. T. 300.

——S. 73—*Applicability of—Breach of contract—Immoveable property—Measure of damages.*

Though the illustrations to S. 73 refer mainly to breaches of contract with regard to moveables, the section is also applicable to contracts dealing with immoveable property. A party suffering from any such breach is entitled to recover from the party responsible for the breach compensation for any loss or damage caused to him thereby naturally arising in the usual course of things from such breach. (*Lyle, A. J. C.*) JAGAR NATH *v.* MUSAI.
53 I. C. 889.

Breach of marriage contract.

——S. 73—*Breach of marriage contract—Compensation.*

Even if a marriage contract is broken for good reasons, yet the party making breach has to pay the expenses incurred for betrothal. (*Macleod, C. J. and Heaton, J.*) BALUBHAI *v.* NANALAL.
44 Bom. 446 : 55 I. C. 624 : 22 Bom. L. R 143.

——S. 73—*Breach of marriage contract.*

Under the Mahomedan Law, damages peculiar to English Law for the breach of marriage contract cannot be recovered. Under S. 73 the promisee can recover compensation for any loss or damage caused to him by the breach or which the parties knew at the time of contract to be possible result of the breach. Under S. 65 he can get the refund of money, ornaments, clothes, etc. given by him as consideration for the promise or compensation on a failure of consideration. (*Kemp J.*) ABDUL RAZAK *v.* MAHOMED HUSEIN. **42 Bom. 499 : 38 I. C. 771 : 19 Bom. L. R. 164.**

——S. 73—*Breach of marriage contract—Mahomedan Law.*

Under Mahomedan Law a girl is at liberty to choose her husband on attaining age of majority. Consequently if she breaks a betrothal arranged by her guardian, neither the guardian nor her representative in interest will be liable for any

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damages for the breach. 7 P. R. 1880 ; 197 P R, 1882 Dist. (*Shadi Lal, J*) IMAM DIN *v.* KAMAL.
82 P, W. R. 1915 : 29 I. C. 750 : 168 P. L, R. 1915.

——S. 73—*Breach of marriage contract—Damages—Elements to be considered in assessing*

In assessing damages in the case of breach of a betrothal contract, the Court must take into consideration the annoyance which the breach of contract has caused and also the possible loss of reputation and injury that may result from the breach. (*Rattigan and Beadon, JJ.* BUDHA *v.* MANSHARAM. **86 P. L. R. 1914 : 22 I, C. 644. 42 P. W, R. 1914.**

——S. 73—*Breach of marriage contract—loss of reputation.*

In a case of breach of betrothal contracts' something should be allowed as damages for loss of reputation in addition to the expenses actually incurred. (*Chevis, J*) RAM RAKHA *v.* ATMA RAM. **181 P. L. R. 1912 : 16 I C. 851 : 232 P W. R. 1912.**

Effect of Plaintiff's failure.

—— S.73—*Effect of plff's failure—Agreement not to claim damages for breach—Effect.*

Where in a contract for the sale of goods it was provided that in the event of the vendor failing to deliver the goods, the contract will be cancelled but that there would be no right to claim damages, *Held*, the vendor could not arbitrarily refuse to carry out the contract, but should adduce reasonable grounds for the refusal—(1919) A. C. 1 folld. (*Macleod, C. J. and Shah, J.*) CHUNILAL DAYABHAI & CO., *v.* AHMEDABAD SPINNING AND WEAVING CO. **24 Bom L. R. 295 : 67 I C. 223 : 1922 Bom. 44.**

——S. 73—*Effect of Plaintiff failure—Damages—Suit by person not performing his portion of the contract.*

A plaintiff who has himself failed to perform his part of contract and has given no evidence that he has suffered any damage, cannot succeed in a suit for damages for breach of the contract by the defendant. (*Fletcher and Huda, JJ.*) NARENDRA LAL *v.* MANMOTHARANJAN **47 I. C. 197.**

Extent of damages.

——S. 73—*Extent of damages—Measure—Contract for sale of goods—Breach--Rise in value after breach--Mitigation of damages.*

On a breach of contract for the sale of negotiable securities, where the breach is due to the fault of the buyer, the measure of damages is the difference between the contract price at the date of the breach with an obligation on the part of the seller to mitigate the damages by getting the best price he can upon that date. If the seller retains the shares after the breach, the speculation as to the way the market will subsequently go is the speculation of the seller, not of the buyer ; the seller cannot recover from the buyer the loss below the market price at the date of the breach if the market fails ; nor is he liable to the purchaser for the profit and to submit to a corresponding reduction of damages, if the market rises. A plaintiff who sues for damages owes the duty of taking all reasonable steps to mitigate the loss consequent upon the breach and cannot claim as damages any sum due to his own neglect. But the loss to be ascertained is the loss at the date of breach. If at that date the plaintiff could do something to mitigate the damage, the defendant is entitled to the benefit of it. But the fact that, by reason of the loss of the contract which defendant has failed to perform, the plaintiff obtains the benefit of another contract which is of value to him does not entitle the defendant to the benefit of the latter contract. Staniforth *v.* Lyall 7 Bing 169 : Yates *v.* White 4 Bing, N. C. 272 : Brandburn *v.* G.W. Ry. L.R. 10 Ex. 1: Jebson *v.* East and West India Docks Co. 10 C. P. 300 Williams Bros. v. Agius (1914) A.C. 510 relied on. S. 73 is merely declaratory of the English Law as to damages. (*Lord Wrenbury.*) JAMAL *v.* MOLLA DAWOOD SONS & Co. **43 Cal. 493: 43 I. A. 6: 20 C W. N. 105: 30 M, L. J. 73: 14 A L. J. 89: 19 M. L T. 80: 3 L. W. 181: 23 C. L J. 137: 18 Bom. L. R, 315: 9 Bur. L. T. 8: 31 I. C. 949: (1916) 1 M. W. N. 70 (P. C.).**

——Ss. 73 and 74—*Extent of damages—Deposit—Breach of contract—Forfeiture—Repudiation of contract.*

In a contract of sale a deposit serves two purposes. If the purchase is carried out, it goes against the purchase money but its primary purpose is this, it is a guarantee that the purchaser means business. Money paid as deposit is paid on the implied understanding that if the purchaser refuses to complete the deposit it is to be the property of the payee. If the purchaser repudiates the contract he forfeits the deposit and cannot claim its refund on the ground that the purchaser has had no loss. 19 A. 489: 43 A. 166: 17 C. W. N. 100: 24 C. W, N. 40. 38 M 178 Ref. (*Chatterjea and Pearson, JJ.*) MANGOBINDA DATTA *v.* BAISOGOMAFF. **67 I C. 714: 1922 Cal. 104.**

—— S. 73—*Extent of damages—Sale of goods—Rescission—Right to return of advance—Further damages.*

Where the plff. lawfully rescinds a contract he is entitled to the return of his advance and to such further damages as where within the contemplation of both the parties at the time when the contract was made. (*Schwabe, C. J. and Krishnan, J.*) ADAM HAJI PERA MAHOMED ISHAK *v.* HUSSAIN AKBARI. **43 M. L. J. 199 : 31 M. L. T. 40 : 70 I C. 736 : (1922) M. W. N. 434 : 1923 Mad. 103.**

—— S. 73—*Extent of damages—Damages—Contract to give lease—Breach.*

In an action for damages for breach of a contract to give a lease, the plaintiff is entitled to the profit he would have made had he cultivated the lands in a husbandlike manner with interest at six per cent per annum. The opportunity which the plaintiff had of renting other lands and thereby remedying the inconvenience should also be taken into account. 25 Mad. 587 at page 598 Foll.

CONTRACT ACT (IX OF 1872), S. 73.—Extent of Damages.

Seshagiri Aiyar and Burn, JJ.) AMMANCHI VENKATA RAMA *v.* NAMA VENKANNA.
37 M. L. J. 335: 10 L. W. 405: 26 M. L. T 287: 53 I. C. 191: (1919) M. W. N. 683.

——S. 73—*Extent of damages—Liability for damages.*

The defendant who had covenanted with the lessee of a mine to reserve barrier between his mine and another one, on breach of the covenant was held to be liable for damages which actually accrued to the plaintiff and not the loss to which plaintiff might put himself to prevent loss. (*Dass and Adami, JJ.*) THE LODANA COLLIERY CO. *v.* BIPIN BIHARI. 57 I. C. 307.

——S. 73—*Extent of damages—Damages for breach.*

On breach of contract, the party guilty of the breach must pay the injured person such damages as may accrue within a reasonable time after the breach takes place (*Mullick and Atkinson, JJ.*) MADAN MOHAN *v.* N. N. MUKHERJI.
39 I. C. 919 : 3 P. L. W. 373.

——S. 73—*Extent of damages—Contract for sale of goods—Passing of goods to buyer.*

Goods sold under a C. I. F. contract pass to the buyer on shipment by the seller and the latter is not liable for subsequent damage. (*Hayward, A. J. C.*) KARACHI STEAM ROLLER FLOUR MILLS *v.* INDO CONTINENTAL AGENCY, 37 I. C. 7: 10 S. L. R. 118.

——S. 73—*Extent of damages.*

Where a defaulting purchaser delays to take delivery of goods purchased by him, resulting in the deterioration of goods in the ordinary course of things, e. g., by rainfall, even though the property in the goods did not pass to him, he has to compensate the seller under S. 73 for any loss occasioned by reason of such delay. (*Hayward, A. J. C.*) FIRM OF TARACHAND GHANSHAMDAS *v.* MESSRS. LOUIS DREYFEES & CO.
35 I. C. 449 : 10 S. L. R. 14.

Interest as Damages.

——S. 73—*Interest as damages.*

A creditor, if not entitled to any interest under the Interest Act, is not debarred from claiming interest by way of damages under S. 73 of the Contract Act, if the creditor proves actual loss: 26 Cal. 955 (965) Foll. Interest by way of damages is not recoverable for the mere wrongful detention of an ordinary debt. 27 Cal, 814 Foll. (*Walmsley and Shamshul Huda, JJ.*) PRASANNA GHOSHAMI *v.* GOPAL LAL.
55 I. C. 737 : 31 C. L. J. 348.

——S. 73—*Interest as damages.*

Where money has been advanced without an express agreement for payment of interest, the creditor can claim damages in lieu of interest. 18 A 240; 26 C. 955 : 17 A. 511; 26 A. 299. If a debtor voluntarily agrees to pay interest or damages upon sums used or retained, he cannot contend that the agreement to pay such interest or damages was without consideration. (*Mookerjee and Beachcroft, JJ.*) RAMJIBAN SHA *v.* DHIKU.
16 I. C. 246 : 16 C. L. J. 264.

CONTRACT ACT (IX OF 1872), S. 73.—Measure of Damages.

——S. 73—*Interest as damages.*

Interest is not awardable by way of damages in the absence of an express stipulation in the contract. (*Rattigan, J.*) ARJAN DAS *v.* HAKIM RAI.
39 P. R. 1913 : 20 I. C. 299 : 263 P. L. R. 1913.

——S. 73—*Interest as damages.*

Interest cannot be claimed as compensation under S. 73 where there is no provision in the contract of the parties or when it is not a case of damages for breach of contract. 38 A. 581, P. C. Dist. (*Sadasiva Aiyar and Phillips, JJ.*) VASUDEVA MUDALIAR *v.* VELAPPA.
(1917) M. W. N. 779 : 6 L. W. 717 : 45 I. C. 401 : 22 M. L. T. 512.

——S. 73—*Interest as damages—Rent—Arrears.*

Interest may be awarded as damages on arrears of rent. (*Khanhaiya Lal, A. J. C.*) SHEIKH KIFAYAT *v.* PROTAL BAHADUR. 21 I. C. 82.

Interest on Damages.

——S. 73—*Interest on damages—Money detained by agent.*

A principal is not entitled to interest on moneys received by an agent from customers in the absence of a contract to the contrary. Such interest cannot be awarded under the general law or under the Interest Act or as damages. (*Piggott and Walsh, JJ.*) LALMAN *v.* CHINTAMANI.
41 All. 254 : 49 I. C. 696 : 17 A. L. J. 169.

——S. 73—*Interest on damages—Pakka adatias*

A *Pakka Adatia* who sues relying upon his character not as agent but as principal, can demand interest upon the amount which he claims as ordinary damages for breach of contract from the person who employed him. (*Beaman, J.*) HUKKAMCHAND *v.* ABRAHAM. 52 I. C. 519 : 21 Bom. L. R. 783.

——S. 73—*Interest on damages—Damages—Measure of.*

In case of a contract which is broken the loss caused on the date when contract was to be fulfilled is the measure of damages to be awarded. Interest can be allowed only on damages from the date of written demand. Interest is not allowable on liquidated damages. (*Sadasiva Aiyar and Tyabji, JJ.*) CODDU SANYASIRAJU *v.* KOTRA RAMAMURTHI. 21 I. C. 543 : (1913) M. W. N. 874.

——S. 73—*Interest on damages—Interest for use and occupation.*

Interest on a sum claimed for use and occupation cannot be allowed under S. 73 for there is no contract at all in such a case. (*Chamier, J. C.*) MUHAMED HUSAIN *v.* DEPUTY COMMISSIONER, BAHRAICH. 9 I. C. 221.

Measure of Damages.

——S. 73—*Measure of Damages—Breach of Contract.*

On 11th October 1917 the Respondent Company entered into contract with the appellant. Company to supply 200 tons of coal monthly from November to April 1917. The respondent Com-

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pany failed to supply the coal as agreed upon, and the appellant Company sued for damages for breach of contract assessing the damages at the difference between the agreed price and the market price. There was no contract to supply to the former the identical coal obtained from the collieries. On the contrary, it was expressly provided that that coal purchased, from the respondents was to be supplied from the respondents' stock. Again no contract was entered into between the appellants and respondents or between the appellants and the Ice Factory in whose favour the special indent certified by the Dy. Controller "Coal Supplies", was obtained the supply of coal being regulated on account of war, that the appellants should deliver over to the Ice Factory the coal that should be delivered to them under the contract of the 11th October, 1917 The indent was, no doubt manipulated in the way in order to get the use of wagons. The appellant's name did not appear on the indent. The respondents did appear. No evidence was given as to a particular relations between the respondents and the Ice Factory. *Held*, whatever those relations may have been and whatever obligations rest upon the respondents, the appellants would not have been bound, had the agreement of the 11th October been performed, to sell or deliver to the Ice Factory the coals which should be delivered to the appellants out of the respondent stock. The Ice Factory was not the appellants only customer. Had the coals purchased been delivered to the appellants in pursuance of their contract, the latter would have been entitled to sell them in the open market at the market price, and that being so, the damages were rightly assessed at the difference between the contract price and that market-price. (*Lord Atkinson,*) KESHAVLAL *v.* DIWAN CHAND, (1923) M. W N. 583 : 50 I. A. 142 : 27 C. W N. 974 45 M. L. J. 630 : 33 M. L. T. 342 : 74 I. C. 393 : 1 Pat L. R 434 25 B. L. R. 854 : 47 B, 563 : 1923 P. C. 105

——S. 73—*Measure of Damages—Considerations..*

In estimating damages for the breach of a contract of sale the law does not take into account anything that is incidental as between the plff. and the defendant. *e. g.* an intermediate contract with a third party for the purchase or sale of goods. (*Lord Dunedin.*) MUHAMMAD HABIBULLAH *v.* BIRD & Co. 43 All. 257 : 48 I. A 175 : 14 L. W. 350 . 63 I C. 589 24 Bom L. R. 687 : 1922 P. C 178. (P. C)

——S. 73—*Measure of Damages—Contract to convey immoveable property—Breach*

When a person who has entered into a contract to convey a house is unable to fulfil it by reason of his having no title to the property, he is liable in damages, the measure of damages being the difference in the market price on the date agreed on for the completion of the sale and the contractual price. (*Banerji and Gokul Prasad, JJ.*) PANNA LAL *v.* HUSAIN BEG. L. R. 4 A. 540 : 75 I. C. 460 : 21 A. L. J. 425 : 1924 A. 167.

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——S. 73—*Measure of damages.*

Generally damages for breach of contract to sell are to be calculated at the market rate prevailing on the date on which a breach was committed and where notice of non-acceptance after a certain date was given, when no date for delivery of the goods sold had been fixed, the contract must be deemed to have subsisted till the date fixed in the notice and the damages should be calculated on the difference between the rate prevailing in the market on that date and the contract rate. (*Banerji J.*) GAURI DUTT BASDEO *v.* NANIK RAM. 35 I. C. 203 : 14 A L. J. 597.

——S. 73—*Measure of damages—Sale of goods—Breach—Late shipment—Late arrival.*

Under a contract in writing dated 21—8—1918 defts. agreed to buy from plaintiffs 25 bales of yarn. The contract was in these terms : "This day we have purchased from you the undermentioned goods in accordance with the bazaar rules cotton yarn of Japan shipment for February. March 1918 is to be given whenever the same arrive earlier or later, and on the safe arrival of the same by steamer." On 25—9—1918 defts. wrote to plffs. that unless the goods were delivered in 8 days the contract was to be treated as cancelled. On 12—10 -1918 the goods arrived in Bombay and the plffs. required the defts. to take delivery On 15 —10 —1918 defts replied that that the 8 days' period having already expired the contract was cancelled and that they were not bound to pay for the goods or take delivery of them. In an action for damages, *Held* that having regard to the express provisions of the contract with reference to late shipment, the September shipment was contract shipment which the defendants were bound to accept. The date of breach was 15—10—1918 when defendants improperly repudiated the contract. As the property in the goods had not passed to the defendants, plffs. were entitled to recover the difference between the contract price and the market price on the day of the breach. (*Mulla, J.*) CHOTALAL LALLU BHAI *v* CHAMPSEY UMERSEY & SONS. 24 Bom L. R. 877 : 75 I. C. 233 : 1923 B. 75.

——S. 73—*Measure of damages—Sale of goods—Date of breach.*

On 13th September 1920, the plffs. sold to the defts. one hundred bales of yarn of which seventy-five were for ready and twenty-five for September delivery. The defts. took delivery of twenty-four bales on 17th September 1920, twelve bales on 4th October 1920, and a further lot of twelve bales on 21st October 1920, but they failed to take delivery of the remaining fifty two bales. After writing several letters to the defts. the plffs. sold the bales by public auction on 2nd March 1921, and claimed Rs. 11,035 1-4 as difference in the contract price and the amount realised on sale. The defts contended that the date of the breach of contract as regards twenty-five bales of September delivery was at the end of September 1920, and that of twenty-seven bales of ready delivery was in September 1920 but that they were not liable to pay damages on the basis of rates prevailing in January or March 1921.

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Held, (1) that the property in the goods did not pass to the defts. and the plffs could not, therefore, rely on the auction sale in March 1921, (2) that there was no understanding between the parties after the due date that if the defts. failed to take delivery of the goods the plffs. were entitled to go into the market and sell at the then market price; and (3) that the whole of the forty-eight bales of which delivery was taken must be taken to be appropriated to the ready contract, and that the date of the breach as regards ready delivery was eight days from 13th September 1920 and as regards September delivery it was 30th September 1920. (*Marlen, J.*) TOYO MENKA KAISHA, LTD *v.* CHABILDAS NATHUBHAI.

24 Bom. L. R. 149 : 69 I. C. 29 : 1922 Bom. 203.

——— S. 73—*Measure of damages—Vendor and purchaser.*

In an ordinary contract for the purchase and sale of land where the vendor contracts to make out a marketable title the Court may find an implied agreement that without any fault on the part of the vendor if he was not able to make out a marketable title the bargain will be off and that the vendor would have only to pay the purchasers' cost of the agreement and the inspection of the title deeds. However, if the vendor is found to be guilty of default of a deliberate nature in breaking the contract the damages will be calculated on a higher scale the measure of which will be the difference between the contract price and the market price on the date of the breach. (*Macleod, C. J. and Shaw J.*) VALLABHDAS *v.* NAGARDAS.

23 Bom. L. R. 1213.

———S. 73—*Measure of damages—Contract—Indent.*

When the deft. through whom plff. ordered goods by an indent placed the order with their London agents the plff. who indented practically contracted with the deft's London agent and plff became the purchaser from the agents of the deft. The plff. under the contract was bound to retire the draft on the due date. He having failed to do so the property in the goods did not pass to the plff. and the London agents remained the owner of the goods. The deft. who was the drawee in case of need retired the draft and obtained possession of the shipping documents but he had no right to cancel the contract and retain possession of the goods after he had retired the draft since the original contract of purchase and sale still existed. But on retiring the draft the property in the goods passed to on retiring the deft. But under the contract of purchase and sale it would only dispose of the goods on plff's account and until he did so the plff's right as purchaser to the goods on payment existed and deft. could no refuse the tender of the cheque made by the plff. after deft. retired the draft. Therefore the plff was entitled to damages namely the difference between the market value of the goods on the day of which he sent the cheque and the amount due by him on the draft. (*Macleod, J.*) NAZARALI *v.* MALWA AND CO.

64 I. C. 943 (2) : 23 Bom. L. R. 1108.

——— S. 73—*Measure of damages—Variation of contract—Delivery not to be made—Effect of.*

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Plffs. agreed to buy goods from M which they agreed to sell to defendants. Subsequently it was agreed that the defts. should pay M direct against delivery and should get M to give credit to the plffs for the amount. Defts failed to take delivery *held*, that the original contract as to delivery was subsequently modified, and that the plffs. were entitled to the difference between the price which they had agreed to pay to M, and the price which the defts. had agreed to pay to them. (*Heaton and Marten, JJ.*) HIRALAL AMBALAL *v.* GOPALJI KALLIANJI.

59 I. C. 263. 22 Bom L. R. 338.

———S. 73—*Measure of damages—Breach of contract.*

The measure of damages is the difference between contract rate and the market rate at the date of the breach. *i. e.*, the date when the seller ought to have tendered goods and failed. If the purchaser takes time for surveying the goods after tender, the date of the breach is not postponed in absence of a contract to the contrary. (*Macleod, C. J. and Heaton, J.*) RAMCHANDRA RAMVALLABHA *v.* VASANJI SONS & Co.

45 Bom. 129 : 57 I. C. 978 : 22 bom. L. R. 874.

———Ss. 73 and 107—*Measure of damages—Contract for sale—Default.*

The defendant committed breach of contract to purchase cotton from the plaintiff but the ownership of the cotton had passed to the defendant. The plaintiff sent notice and resold the goods. Plaintiff was held entitled to recover from the defendant the difference between the contract price and the price realized by resale (*Beaman and Macleod, JJ.*) NIMBA *v.* MOTIRAM.

41 I. C. 223 : 19 bom. L R. 635.

———S. 73—*Measure of damages—Infringement of right—Nominal damages.*

Though every breach of duty arising out of contract gives rise to an action for damages without proof of actual damage the amount of damages recoverable is, as a general rule, governed by the extent of the actual damages sustained in consequence of the defendant's act. In cases admitting proof of such damage the amount must be established with reasonable certainty. But this does not mean that absolute certainty is required; nor in all cases is there a necessity for direct evidence as to the amount. Damages are not uncertain for the reason that the loss sustained is incapable of proof with the certainty of mathematical demonstration or is to some extent contingent and incapable of precise measurement. Only such approximation to certainty is required as would satisfy the mind of a prudent and reasonable person: Cases on the subject reviewed (*Mookerjee and Chotzner, JJ.*) KINGSLEY *v.* THE SECRETARY OF STATE FOR INDIA.

36 C. L. J. 271 : 72 I. C 270 : 1923 C. 49.

———S. 73—*Measure of damages—Carrier—Suit against, for damages—Measure of—Loss of profit of re sale.*

Where goods entrusted to a carrier, are not delivered according to the contract the measure of damages is the value of the goods at the place of destination, in the condition in which the carrier undertook to deliver them at the time when

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they should have been delivered, less the proper charges of transportation and delivery, if these have not been paid by the consignee. The consignee is not entitled to the profit of re-sale, where he has procured them for re-sale. (*Mookerjee and Fletcher, JJ.*) INDIA GENERAL NAVIGATION AND RAILWAY CO., LTD *v.* EASTERN ASSAM CO., LTD
47 Cal. 1027 : 61 I. C. 14 : 33 C. L. J. 72.

——S. 73—*Measure of damages—Breach of contract.*

A a dealer asked for rates of goods of the firm *B*. *B*, supplied *A* with the rates whereupon *A* gave orders for the despatch of goods. *B* again sent to *A* list of the same rates but on the next day *B* sent a telegram quoting different rates. *A* sued *B* for damages. It was held, that the contract was complete when *A* accepted the rates and gave orders for the goods, the measure of damages being the price prevailing in *A*'s city on the day of delivery and the contract rate plus cost of freight. (*Chatterjee and Duval, JJ.*) MADHUSUDHAN KOER *v.* BADRIDAS.
56 I. C. 693 : 31 C. L. J. 93.

——S. 73—*Measure of damages*

In a contract for sale of goods to be delivered by instalments which were repudiated before the dates of delivery by the seller, the true measure of damages is the sum of the differences between the contract price and the market price at the appointed dates, for delivery notwithstanding that the last date has not elapsed when the action is brought or the cause is tried ; but the seller can show in mitigation that in the interval the buyer could have obtained a new contract on better terms. Roper *v.* Johnson, 21 W. R. 384 ; Brown *v.* Muller, 21 W. R 18 ; Simpson *v* Crippin, 21 W R. 141 Foll. (*Sanderson, C. J., Woodroffe and Mookerjee, JJ.*, BILASIRAM *v.* EZEKIEL ABRAHAM. 43 Cal. 305 :
20 C. W. N. 240: 33 I. C. 1 : 23 C L. J. 62.

——S. 73—*Measure of damages—Breach of contract, not made subject of suit.*

To make a decree for damages for the breach of a contract, which is not the subject matter of the litigation, would be to assume that there has been a breach of the contract which has never been attempted to be specifically enforced. (*Mookerjee and Roe, JJ.*) NILAKANTA ROY *v.* LALIT MOHAN. 29 I. C. 989 : 19 C. W. N 933.

——S 73—*Measure of damages—Sale of goods—Breach of contract.*

On breach of a contract to deliver goods within a particular period the right measure of damages is the difference between the contract price and the market price on the date of delivery originally agreed upon by the parties. (*Mookerjee and Beachcroft, JJ.*) KALIKANTA SAHA *v* ISMAIL.
20 C. L. J. 133 : 27 I. C. 7 :
20 C. W. N 159.

——S. 73—*Measure of damages—Contract for purchase of articles—Re-sale—Powers of.*

Where a contract provided that the delivery was to be taken on a certain date and on default the seller could recover from the buyers, the damages resulting from re-sale, *Held*, in a suit by the sellers for the difference between the market price after a month from the due date and the contract price, that as the articles were not appropriated by the sellers for re-sale, they were not entitled to make the result of re-sale, a month after the due date, the measure of damages and that the suit should fail. (*Jenkins, C. J. and Woodroffe, J.*) ANGULIA & Co. *v.* SASSOON & Co.
39 Cal. 568 : 13 I. C. 705 : 16 C. W N. 593.

——S. 73—*Measure of Damages—Contract for sale of land.*

In a case of breach of contract of sale of immoveable property which had been acquired by Government the plaintiff is entitled to the difference between the contract price and the price fixed in land acquisition proceedings apart from the statutory allowance. (*Stephen, J.*) NABIN CHANDRA *v.* KRISHNA BARONE DASSEE.
38 Cal. 458 : 9 I. C. 525 : 15 C. W. N. 420.

——S. 73—*Measure of damages.*

The measure of damages in a case of breach of contract to deliver, is the sum by which the contract price fell short of the price at which the purchaser might have obtained goods of like quality at the time when they should have been delivered (*Abdul Raoof and Campbell, JJ.*) ASMAT ULLAH *v.* MESSRS. BEHARI LAL AND SONS.
68 I. C. 912 : 1923 Lah. 117.

——S. 73—*Measure of damages—Default of Plaintiff—Effect.*

Where the defendant has committed a technical breach of contract and the plaintiff himself had no intention of performing his terms of the contract, nominal damages are awardable. (*Shadi Lal, C. J. and Wilberforce, J.*) WELD & COMPANY *v* HAR CHARN DAS. 4 Lah. L. J. 317.

——S. 73—*Measure of Damages—Breach of contract—Sale of goods.*

In a suit for breach of contract to deliver goods on a certain date the market price *on that date* is the standard for the computation of compensation and not on a later date on which the goods may have been demanded and refused. The position of a seller would be very precarious, indeed, if such were the case and he would be entirely at the mercy of the purchaser who could demand goods on any date he liked after breach and then claim damages on the basis of the rates prevailing on that date if the goods remained undelivered. (*Broadway and Motisagar, JJ.*) FIRM OF MAUSA RAM GORDHAN DAS *v.* FIRM OF MANGAL SAIN DUNI CHAND. 65 I. C. 497 : 1922 Lah. 149.

——S. 73—*Measure of damages—Promise of a share in partnership—Breach—Damages—Measure of.*

Where the defendant promised to admit plaintiff to a partnership but broke his promise, the plaintiff is entitled to damages for loss arising from the breach thereof, the measure of damages being the difference between value of plaintiff's estate after breach of promise and its value if there had been no breach. (*Johnstone and Shah Din, JJ.*) TANSEY *v.* RIVETT. 64 P. R. 1915 :
31 I. C. 73 : 142 P. W. R. 1915.

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———Ss. 73, 54—*Measure of damages—Mercantile contracts—Terms—Damages for breach—When to be awarded.*

In construing mercantile contracts it must be assumed that every clause in it was inserted by the parties to some good purpose and with some definite meaning as merchants are not in the habit of inserting in their contracts stipulations to which they do not attach some value and importance. In order that the latter part of S, 73 of the Contract Act may apply it has to be proved that not only the plaintiff but the defendant also knew when the contract was made that such loss was likely to result from the breach. Remfrey on Sale of Goods (*Schwabe, C. J. and Krishnan, J.*) ADAM HAJI PEERA MOHAMED ISHACK *v.* SAKAVATHA HUSSAIN AKBARI.

43 M. L. J. 199 :
(1922) M. W. N. 434 : 70 I C. 736 :
31 M, L T. 40 : 1923 Mad. 103.

———Ss. 73 and 74 — *Measure of damages—Breach of contract.*

For breach of contract to purchase propetry, the damages though fixed by parties may be awarded according to the difference between contract price and value of the property. (*Wallis, C. J. and Spencer*, J.) LAXHSMANAN CHETTY *v.* SUBRAMANIAN CHETTY.

9 L. W. 312 :
25 M. L T 221 :50 I.. C. 69 :
(1919) M. W N. 431.

———S. 73—*Measure of damages—Delivery of goods—Breach.*

The measure of damages for breach of contract to deliver goods where there is no market at the place of delivery and the goods are not intended to be sold but required only for the buyer's use, is the difference between the contract price and the price of the goods of a like quality at the time when the goods ought to have been delivered. Ill (a) to S. 73 correctly interprets the section and it makes no exception on account of special circumstances, e.g., availability of substitute for goods ordered, etc. (*Wallis, C. J. and Sadasiva Aiyar, J.*) ISMAIL SAIT & SONS *v.* WILSON & Co.

41 Mad 709: 93 M. L. T. 320:
45 I. C 942: (1918) M. W. N. 399.

———S. 73—*Measure of damages—Sale of Land—Defective title.*

In the indemnity contract against loss of possession. the measure of damages would be the necessary expenses required for the plaintiff to cure the defect or loss of title. (*Oldfield and Sadasiva Aiyar, JJ.*) BHAWANI *v.* ANANTHA KAMTHI

20 M. L. T. 263 . 31 M. L J 556: 4 L. W. 357:
35 I C. 789: (1916) 2 M. W. N. 244.

———S. 73—*Measure of damages — Sale of goods.*

In case of a breach of contract for sale of goods the damages to be fixed are—the price of the goods on the date on which the contract was finally cancelled is to be taken into account and no other rate or price of the goods on any previous occasion is to be looked to. (*Sadasiva Aiyar and Napier, JJ.*) HOPE PRUDHOMME & Co. *v* EARNEST MAX.

29 I. C. 575.

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———S. 73—*Measure of damages—Death of one partner subsequent to suit.*

Where a cause of action exists, the damages must be estimated with regard to the time when the cause of action came into existence Where the suit is one for damages for breach of a partnership contract, the death of one partner subsequent to the suit does not affect the measure of damages. (*Wallis, C. J. and Hannay, J.*) PAKALA RAMA RAO *v.* APPANA KUMARASWAMY.

29 I. C. 471.

———S. 73—*Measure of damages—Goods not according to sample.*

When goods delivered under a contract of sale of goods by sample were all not equal to the sample, the measure of damages recoverable by the purchaser is the difference between the market rates of the goods delivered and those contracted to be delivered on the date of delivery. (*Wallis, J.*) VENKATESAPERUMAL *v.* S. PARTHASARADHY.

13 M. L. T. 220: 18 I. C. 986:
(1913) M. W. N. 772.

———S, 73—*Measure of damages—Breach of contract for sale of goods.*

Where a contract for sale of goods is broken and the goods are not delivered on the appointed day and the promisee intimates his intention to rescind the contract, he will be entitled by way of damages only to the difference between the contract price and market price on the day of breach not on the day when he gives notice of the breach. (*White, C. J. and Ayling, J.*) MUTHAYA MANIGARAN *v.* LAKKU REDDIAR.

37 Mad. 412: 11 M. L T. 301: 22 M L. J. 413 :
14 I. C. 255: (1912) M. W. N. 436.

———S. 73—*Measure of damages—Anticipatory Breach.*

When the promisee repudiates the contract before the fixed date on account of the refusal to perform on the part of the promisor, he is entitled under S. 73 to compensation for any damage which he has sustained through the non-fulfilment of the contract, *i.e.*, the non-fulfilment of date fixed for performance. Damages therefore should be ascertained with reference to the date fixed for performance. Even regarding the case as governed by S. 73 as for damages naturally arising from such breach, the result will be the same. (*White, C. J. Wallis and Ayling, JJ.*) KRISHNA JUTE AND COTTON MILLS CO, LTD. *v.* INNIS.

9 M. L. T. 174 : 21 M. L J. 182:
9 I. C. 104: (1911) 1 M. W. N. 17.

———S. 73—*Measure of damages—Contingent Contract.*

The defendant entered into a contract with plaintiffs that if any grain should remain in his hands, after he had satisfied the demands of his *asamis* for seed grain, he would sell the balance of his stock, the amount of which was named to the plaintiffs at a named rate. It was common ground that the contract was to be completed within a week. The defendant parted with no grain at all to his *asamis* and failed to deliver any grain to the plaintiffs. *Held*, the contract was an ordinary contract which was not to be carried out or only to be partially

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carried out if certain events occrued namely the taking of some of the grain by *asamies*. Those events had not occurred and hence the contract should be enforced. The question of measure of damages is one quite apart from the fact that the contract is a contingent contract The contingency on which the contract was to be enforced having occurred damages have to be ascertained in the usual manner. (*Batten, J. C.*) SATH KANCHEDILAL *v.* MOTIRAM.

68 I. C. 720: 1922 Nag. 192.

———S. 73—*Measure of damages—Rate of exchange at the date of breach to be considered—Interest as damages to be awarded.*

The defendant appellant bought two lots of sateens through the plaintiff respondent by verbal arrangements was that the price was to be as per Home invoice plus 5 per cent. commission and usual charges ; payment to be made 83 days after the buyers at the rate of 8 per cent. per annum from the date of invoice to due date. To this the plaintiffs added that thereafter the rate of interest was to be 12 per cent. per annum. This was denied by the defendants. *Held*, that the date at which damages for breach of contract are to be calculated is the date of the breach and the date on which the rate of exchange is to be taken for the purposes of converting the amount in English Currency into rupees is the date on which under the agreement the money was to be paid and on which a breach occurred by its not being paid, and that the rate of interest that should be fixed so as to save plaintiffs from loss is indicated by the rate of interest fixed for the 83 days. (*Robinson, C J and Beasley, J.*) Y. A. SHAKOOR & Co. *v.* FINLAY FLEMING & Co. **1 Rang. 339: 2 Bur. L. J. 130: 1923 R. 265**

———S. 73—*Measure of damages—Sale of goods—Short delivery—Damages.*

Where the seller is ready to give delivery on the date fixed, but the buyer takes delivery on a later date and there is shortage of delivery, the seller is liable for the difference between the contract and the market rates on the date fixed for delivery and not on the date on which the buyer actually takes delivery. (*Maung Kin, J.*) A. L. S. V. CHETTY *v.* MAUNG KYIN KE.

13 Bur. L. T. 214: 64 I. C. 60: 1922 L. B. 1.

———S. 73—*Measure of damages—Sale of goods—C. I. F.—Breach.*

A. C. I. F. contract is not a sale of documents relating to goods but a sale of the goods by delivery of documents Consequently where the seller does not put the goods on board the Ship the true measure of damages is the difference between the contract price and the market price at the time of breach (*Robinson, C. J. and Duckworth, J.*) S. K. R. S. L. CHETTY FIRM *v.* AMAR CHAND MADHOWJEE & Co. **66 I. C. 579: 11 L. B. R. 141.**

———S. 73—*Measure of damages—Sale of goods—Breach—Repudiation.*

Where defendant has utterly repudiated a contract or put it out of his power to perform it, the plaintiff may at his option sue at once or wait till the time when the act was to be done. But the measure of damages is the same in both cases, *viz.* the difference between the contract rate and the market rate on the due date. The election to take advantage of the repudiation of the contract goes only to the question of breach and no to the question of damages, and the damages are to be calculated with reference to the date of breach only where no time was fixed for acceptance, because there is then no other measure possible. (*Maung Kin and Pratt, JJ.*) HUNT HUAT & Co. *v.* SIN GEE MOH & Co. **66 I. C 510 : 11 L. B. R. 182.**

———S. 73—*Measure of damages.*

On a breach of contract to sell, the buyer is entitled to the difference between contract rate and the market rate on the day of breach. (*Maung Kin, J.*) ISMAIL SODAGAR *v.* EBRAHIM **42 I C. 893.**

———S 73—*Measure of damages.*

A written agreement was entered into between respondent and appellants in terms of which the former purchased the whole stock of old clothings lying in Karachi, the property of the appellants at stated prices, and also agreed to purchase 500 bales at ruling price in London, during the season. To this agreement was attached a schedule which contained a specification of the500 bales of second-hand clothing indented for and the rates at which they were to be supplied. Respondent claimed Rs. 8000 asdamages in respect of the breach to deliver the 500 bales (admittedly 5 5 and Rs. 4 0 0 as the loss of profit which he sustained by the failure of the appellants to supply second-hand clothing for the three seasons referred to in this agreement. *Held*, There was a complete contract between the parties and the contract rates were these specified in the schedule attached to the agreement. Agreeing with the lower Court the High Court allowed Rs. 4 000 at 5 per cent. on the value of 500 bales estimated as Rs. 80,000 for the season for which respondent was actually employed. (*Kennedy, J C. and Raymond, A.J.C.*) LANDAN & SONS *v.* AHMED AYUB. **15 S. L. R. 140 : 1922 Sind 25.**

———S. 73—*Measure of damages — Settlement between buyer and stranger--If can be taken advantage of.*

If a vendor of goods commits a breach of his contract to deliver goods at a future date he cannot take advantage of a settlement effected between his buyer and a stranger as regards the same goods which has the effect of reducing the damages which the buyer has sustained 17 Q B. D. 316 ; (1914) 2 A. C 510, (1920) 2 K. B 11 Foll. The measure of damages must be governed by the market rate at the due date. (*Kemp, A. J C.*) FIRM OF SANTDAS DEVKISHENDAS *v.* FIRM OF NIDHAN SINGH JAVAHARSINGH.

65 I.C. 967 : 15 S. L. R 214.

———S 73—*Measure of damages--Market rate —How determined.*

In a suit to recover damages for a breach of contract to sell immoveable property, the court's consideration for ascertaining the market value of the land for the quantum of damages will be to see what value would be fetched by it in the open market. In such a case earlier sales of the same

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property or comparison with other similar plots in the locality will also help for ascertaining the value. (*Kemp, A. J. C.*) NAROOSHANKAR RANSHANKAR *v.* RAJUMAL BHAGWANDAS.
15 S. L. R. 21.

——S. 73—*Measure of damages—Principles—Repudiation—Effect of.*

The principle by which Courts are guided in awarding damages is *restitutio in integrem* and the exact cost of effecting a complete *restitutio in integrem* is the difference between the original contract rate and that at which the vendor can sell to a fresh purchaser goods of the same quantity and quality and of the same shipment. The election to take advantage of the repudiation of a contract goes only to the question of breach. The damages must be estimated by the difference between the contract price and the market price at the day or days apppointed for performance, and not at the time of breach. (*Crouch and Hayward, A. J Cs.*) MESSRS. JAMES FINLAY & CO., LTD. *v.* MESSRS. DAVID SASOON & CO.
27 I. C. 102 : 8 S. L. R 95

——S. 73—*Measure of damages—Breach of contract.*

The law as to damages on forward contracts may be summed up as follows: (1) Damages to be assessed with reference to the date fixed for delivery. (2) If that date is in future, the Court must estimate the rate as best it can and it matters not that the estimate is to a great extent speculative. (3) If the plaintiff has rescinded the contract and the defendant proves that after rescission plaintiff has made a fresh contract at better rates or that acting reasonably and as a prudent man, he might have made such a contract, this will be considered a ground for abatement of damages. (4) If plaintiff after rescission makes a fresh contract, he does so at his own risk and if he get a worse rate he cannot make use of that for the purpose of enhancing his damages. (*Pratt, J. C.*) *In re* JIWANJI PIR BHOY. 19 I. C. 653 : 6 S. L. R. 187.

Plaintiff's duty to Minimise Damages.

——S. 73—*Plaintiff's duty to minimise damages.*

In a suit claiming damages for breach of contract the duty on the part of plaintiff to minimise damages arises only in a case where breach has occurred. (*Sanderson, C. J. and Richardson, J.*) BURN & CO. LTD. *v.* THAKUR SAHEB SHREE LUKHDIRJI. 28 C W. N, 104 : 1924 C. 427.

——S. 73—*Plaintiff's duty to minimise damages.*

A party is not entitled to damages for breach of contract if he might have avoided loss by the use of reasonable precautions. (*Mookerjee and Beacheroft, JJ.*) RAHIM BAKSH MANDAL *v.* SAJJAD AHMAD CHOUDHURY. 26 I. C. 466 19 C. W. N. 1311.

——S. 73—*Plaintiff's duty to minimise damages.*

In a suit for damages against a bailee for not taking proper care of goods, the plaintiff must show that they did every thing to minimise damages. If instead of taking delivery immediately and selling goods, they allow them to become unsaleable and thereby sustain greater loss, the defendant is not liable for such loss. (*Twomey, J.*) COMMISSIONERS FOR THE PORT OF RANGOON *v.* MOOLLA DAWOOD SONS & CO. 9 I C. 470 : 4 Bur. L T 26.

CONTRACT ACT (IX OF 1872), S. 73—Remote and indirect loss.

——S. 73—*Plaintiff's duty to minimise damages—Person breaking contract—Rights of.*

A person who has already put himself in the wrong, by breaking his contract has no right to impose new and extraordinary duties on the aggrieved party who can be expected only to use ordinary and reasonable diligence. The ordinary measure of damages in the case of breach of contract is the difference between the contract price of the goods and the market price on the day on which they ought to have been accepted. (*Fawcett, A.J.C.*) GIBBON & CO. *v.* KUNDAMAL RAMNATH. 28 I. C. 196.

Proof of Damages.

——S. 73—*Proof of damages—Extent of—Evidence—Indefiniteness of Evidence—Nominal damages only.*

In a suit for damages for not taking delivery of goods if the party whose duty it is to prove damages, does not give the best evidence, every presumption should be made against him; if there is any range, the range should be taken against him; but this does not relieve the Court altogether of the duty of assessing the damages as best it can, on evidence and materials actually before it. Nor is the Court empowered to give nominal damages merely. (*Lord Phillimore*) A. V. JOSEPH *v.* SHEW BUX. 36 M. L. J. 151 : 17 A. L J. 158 : 25 M. L. T. 235 : 29 C L. J. 348 : 23 C. W. N. 601 : 12 Bur. L. T 2 : 21 Bom. L. R. 615 : 49 I. C. 691 : 10 L. W. 21 (P. C.)

——Ss. 73 and 75—*Proof of damages—Onus.*

Ss. 73 and 75 of the Contract Act make it compulsory for the plaintiff to prove that he has suffered and the extent to which he has suffered before a Court can award him damages for breach of contract. (10 B. L. R. 1113 R.) (*Tudball, J.*) BANARSI DASS *v.* LULLA MAL. 29 I. C. 950.

Quantum Meruit.

——S. 73—*Quantum Meruit—Principle of.*

If a contract was to do work for a lump sum, the price could not be recovered until the work was completed, nor could anything be recovered by way of *quantum meruit* if part only of the work was done. (*Parlett, J.*) PETER VERTANNES *v.* MUTTIAH. 19 I. C. 48 : 6 Bur. L. T. 53.

Remote and Indirect loss.

——S. 73—*Remote and indirect loss—Damages—Liability for.*

The law cannot recognize any loss not naturally following from the breach of a contract. Where a vendor directed his vendee to pay a creditor within a fixed date (in order that the vendor might get a promised remission) but the vendee failed to do so, the vendor is not entitled to claim the amount as damages. (*Richards and Banerjee, JJ.*) NARAIN DAS *v.* BASANT LAL.
18 I. C. 449.

CONTRACT ACT (IX OF 1872), S. 73—Remote and indirect loss.

———Ss. 73 and 212, Ill. (a)—*Remote and indirect loss—Damages—Agreement to realise money and to pay certain debt out of it—Failure to pay—Suit by creditor—Costs of suit whether claimable.*

A person agreed to collect debts due and to pay out of collections a certain debt. He collected but failed to pay. *Held*, he was liable for the loss caused thereby. There is nothing in the Contract Act which renders the principles of English Law regarding the liability of party for the consequence of a breach inapplicable to India. Illustration (*a*) to Sec. 212 is traceable to the distinction between collateral damages arising from the retention of money and from failure to perform other contracts. As a consequence of the failure to pay the debt, plaintiff was sued upon and debt was recovered from him with costs. *Held*, defendant was not liable for the costs of the suit, as the law does not recognize consequential damage arising from delay in payment of money. (*Seshagiri Aiyar, J.*) RANGASWAMI AIYAR *v.* VENKATARAMA AIYAR.
17 M. L. T 253 : 2 L. W. 342 : 28 I. C. 635 : (1915) M W. N. 246

———S. 73—*Remote and Indirect loss—Sale of goods—Breach of Warranty—Vendee's previous contract with third person—No notice—Vendor's liability.*

The proper basis for calculating damages sustained by breach of warranty of quality of unascertained goods would be the difference between the value of the goods as supplied and the market value of the goods of the guaranteed quality on the date of breach and the vendor will not be liable beyond this for any special damages incurred by the vendee by a breach of his contract with a third person, of which the vendor had no notice. S. 73, Ill (*m*) does not apply where the sale is of unascertained goods and where the contract between A and B in the illustration (*m*) is not made on the same occasion as that betwen B and C and where the basis of damages in both is consequently different. (*Sadasiva Aiyar and Spencer, JJ.*) C. W. SIMSON *v.* KOKO JAGANATHA ROW NAIDU.
23 I. C. 949: 1 L. W. 268.

———S. 73—*Remote and indirect loss—Breach of covenant—Mortgage—Mortgagee failing to discharge prior incumbrances.*

Where a mortgagor left money in the hands of the mortgagee to pay off a prior incumbrance, which the mortgagee did not pay off, the mortgagor is entitled in law to recover damages from the mortgagee. (*Lindsay, J. C.*) MUHAMMAD RAZA *v.* KUBRA BIBI. 15 I. C. 526,

———S. 73—*Remote and indirect loss—Measure for damages—Profits, when recoverable.*

The proper measure of damages for a breach of contract is the difference between the contract price and market price at the time of the breach. Profits which the plaintiff would have made out of another contract if the defendant had fulfilled his contract, can be recovered only if the defendant knew about it at the time of making the contract. (*Parlett, J.*) BYAN NA *v.* MAUNG CHEIK
36 I. C. 264 : 10 Bur. L. T. 61.

———Ss. 73 and 107—*Remote and indirect loss.*

The seller's travelling charges to the place of breach for resale of goods under S. 107 are too remote and cannot be recovered as damages under S. 73. (*Hayward, A. J. C.*) KARACHI STEAM ROLLER FLOUR MILLS *v.* INDO CONTINENTAL AGENCY. 37 I. C. 7 : 10 S. L. R. 118.

CONTRACT ACT (IX OF 1872), S. 73—What is a breach.

Special Damages.

———S. 73—*Special damages—Notice.*

Where there is a breach of a contract by a Railway Company in carrying goods sent by train, special damages can only be claimed where the special object of the sending was either specially brought to the notice of the carrier or was within his knowledge or reasonable inference. (*Stuart and Kanhaiyalal, JJ.*) FAZI ILAHI *v.* E. I. Ry. Co.
43 All. 623 : 64 I. C. 868 : 19 A. L. J. 654.

———S. 73—*Special damages—Breach of contract—Notice of special circumstances.*

Where the party who has broken the contract, entered into it, in contemplation of special circumstances which would affect the consequences of a breach, and accepted those circumstances as condition under which the contract was to be performed, he is liable for any special loss which may have resulted. But such circumstances must be brought home to the party sought to be charged under the circumstances. (*Mookerji and Fletcher, JJ.*) INDIA GENERAL NAVIGATION AND RAILWAY CO., LTD *v.* EASTERN ASSAM CO., LTD.
47 Cal. 1027 : 61 I. C. 14 : 33 C. L. J. 72.

———S. 73—*Special damages—Sale by person having no title,*

If a person knowing he has no title to immoveable property agrees to sell it, he is liable for special damages which the purchaser suffers by reason of the vendor's failure to perform the contract. (*Fletcher and Chatterjee, JJ.*) JANKI NATH SINGHA ROY *v.* JAMINI KANTA SINGH ROY. 22 I. C. 612.

———S. 73—*Special damages—Measure of damages—Conversion of goods.*

The Court, in assessing damages in a case of conversion, is not limited to the value of the property at the time of conversion, but may find as damages the value at a subsequent time, even up to the date of trial. In such actions, the conduct of the defendant may be taken into account in assessing damages. (*Pratt. J. C. and Fawcett, A. J. C.*) MESSRS LOUIS DREYFUS & CO. *v.* FIRM OF GHANDAMAL &. CO.
52 I. C. 878 : 13 S. L. R. 128.

What is a Breach.

———S 73—*What is a breach—Sale of goods—breach of warranty—Sleepers—Railroad construction—'Passing' of goods by seller's agent final—Meaning of—Sleepers supplied unfit for the purpose—Right to damages.*

Plaintiff entered into a contract with the defendant for the supply of sleepers for railway and the contract contained the following clause. "The passing of sleepers by the sellers' agent is as usual final as regards measurement and quality." In an action for damages for breach of warranty. *Held*, on the true construction of the contract, the contractors could not supply anything they choose

CONTRACT ACT (IX OF 1872), S. 73—What is a breach.

but the supply should be according to the standard set up expressly or impliedly under the contract or at the least must be reasonably fit as sleepers of the dimensions prescribed for use by the railway company. The right conferred by the clause on the suppliers amounted merely to the right to determine by and through skilled experienced persons whom they should necessarily employ for the purpose, acting honestly and impartially according to the best of their judgments, whether the goods supplied were in conformity with the requirements of the contract under which they were so supplied. (*Lord Atkinson.*) BOMBAY-BURMA TRADING CORPORATION CO., LTD *v.* AGA MAHOMED. **34 Mad. 453 : 38 I. A, 169 : 15 C. W. N, 981 : (1911) 2 M. W. N. 111 : 10 M. L. T. 150 : 13 Bom. L. R. 813 : 14 C. L. J. 326 : 8 A. L. J. 1208 : 12 I.C. 44 : 21 M. L. J. 1110 (P. C.).**

——Ss. 73 and 112—*What is a breach—Mutual obligations—What plaintiff has to prove.*

In a contract for the sale of indigo, under which plaintiff agreed to pay a certain sum of money and the defendant a certain quantity of indigo as per sample given, if the plaintiff sues for damages for breach of contract he must first show that on the due date he was ready and willing to perform his part of the bargain. It may not be necessary to prove that he made an actual tender of the money, but it was incumbent on him to show he had made arrangements for the purchase money and was in a position to hand it over as soon as he was satisfied that the bulk of the goods agreed with the sample. (*Rafique and Lindsay, JJ.*) MAHOMED ISMAIL KHAN *v.* HASAN ALI KHAN. **4 U. P. L. R. 37 (A) : 67 I. C. 602 : 1923 All 220.**

——S. 73—*What is a breach—Sale of goods—Instalment delivery—Default—Breach--Damages—Right to sue for.*

Where there is a contract by the plff's to supply goods to the defendants from time to time as they required for their business, if the sellers clearly show their intention not to be bound by and to repudiate the contract, the buyers if they please may treat the notice of intention as inoperative and await the time when contract is to be executed and then hold the sellers responsible for all consequences of non-performance ; but in that case they keep the contract alive for the benefit of the sellers as well as their own the buyers remain subject to all their obligations and liabilities under the contract and enable the sellers not only to complete the contract if so advised not withstanding their previous repudiation of it but also to take advantage of any supervening circumstances which would justify them in declining to complete it. On the other hand the buyers may, if they think proper, treat the repudiation of the sellers as a wrongful putting an end to the contract and may at once bring their action as on a breach of it and in such action they will be entitled to such damages as would have arisen from non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded them the means of mitigating their damage *Frost* v. *Knight* (1872) L. R. 7 Ex. 111; 113; *Cost* v. *Ambetgalc, etc., Ry. Co.* (1851) 17 Q. B. 127 : *Braithwite* v. *Foreign Hardwood Co.* (1905) 2 K. B. 543 *Meal chrin v. Nickoll and Knight* (1920) 1 K. B. 693 Rel. (*Mulla, J.*) NAJAN AHMAD HAJI ALI *v.* SALE MAHOMED PEER MAHOMED. **24 Bom. L. R. 998 : 1923 nom. 113.**

CONTRACT ACT (IX OF 1872), S. 74.

——S. 73—*What is a breach*

Where defendant contracted to sell to plff. goods to arrive by the *City of Delhi* : the delivery to be made on the arrival of the vessel and on her arrival it was found that the goods were not on board, *Held*, that the deft was liable in damages to the plff as, in effect he gave a warranty that the goods that he sold were on the "*City of Delhi*". (*Macleod, C. J. and Shah, J.*) BHAI LAL CHATURBHAI PATEL *v* KALYANRAI VARAJZAI DESAI. **45 Bom. 1222 : 63 I. C. 952 : 23 Bom. L. R. 547.**

——S. 73—*What is a breach—Immoveable property.*

Though a person is liable in damages for breach of contract still if a vendor of immoveable property cannot, without fraud, make a good title the intending purchaser is not entitled to any compensation for the loss of his bargain (*Stephen, J.*) NABIN CHANDRA SAHA *v.* KRISHNA BANONE DASSEE. **38 Cal. 458 : 9 I. C. 525 : 15 C. W. N. 420.**

——S. 73—*What is a breach—Sale of goods—Consideration agreed to be paid at a future date—Damages.*

Where defendant sold goods to plaintiff receiving part of the consideration and agreed to receive the balance by instalments and deliver the goods on demand and the plaintiff brought a suit for damages as the defendant failed to deliver ; *Held*, that the defendant was liable. (*Chevis, J.*) NARSINGHDAS *v.* SHAMASDIN. **207 P. L. R. 1911 : 13 I. C. 992 : 244 P. W. R. 1911.**

——S. 73—*What is a breach—Contract of agency—Undertaking by agent not to work for other mills—Breach.*

Where an agent has undertaken not to work for other mills or merchants, *Held* the mere fact that he was buying and selling cloths from other mills and merchants, was not a violation of the contract. (*Oldfield and Ramesam, JJ.*) RAIPUR MANUFACTURING CO. *v.* VENKATA SUBBA RAO. **70 I. C. 284 : 14 L. W. 341.**

——S. 73—*What is a breach—Breach of contract—Failure to comply with terms.*

By a contract A agreed to give B, a reasonable time to fulfil the order placed with him, having regard to B's state of business. The order was however given too late. B was held not liable to pay damages for not carrying out the terms of the contract. (*Evans, J. C.*) THE CORONATION CYCLE CO., LUCKNOW *v.* THE DUNLOP PNEUMATIC TYRE CO., LTD., BOMBAY. **12 I. C. 839.**

——S. 74.

Applicability of.
Compound interest.
Compound Interest at increased rate.
Compromise Decree.
Contract of Service.
Enhanced Rate of Interest (Retrospective or from Default).

Exception.
Extent of damages.
Forfeiture of Deposit.
Forfeiture of Earnest Money.
High Rate of Interest.
Interest from Date of Bond.
Interest from Default.
Interpretation.
Lease.
Meaning of Penalty,
Measure of Damages.
Proof of Damages
Reduction for Punctual Payment.
Unconscionable Bargain

Applicability of.

——S. 74—*Applicability to decrees.*

See also (1) C. P. C., O. 23, R. 3.
(2) DECREE.

——S. 74—*Applicability of—Relief against penalty.*

A part of the purchase-money was paid by a purchaser to the vendor, the balance was payable by instalments, on failure to pay any instalments, contract was at an end. Time being the essence, provision was expressly made for forfeiture on default. *Held* that forfeiture of the amount paid was a penalty that could be relieved against. (*Viscount Haldane.*) STEEDMAN *v.* DRINKLE.
33 I. C. 323 : 85 L. J. P.C. 79 (P.C.).

——S. 74—*Applicability—Interest—Power to relieve against—Penalty.*

It is not open to the Court to make a new contract between the parties and therefore it cannot interfere with the rate of interest stipulated between the parties unless it is satisfied that the rate of interest charged is a penalty within S 74 of the Contract Act. (*Greaves and Ghose, JJ.*) SATYABHAMA SUNDARI *v.* MAHOMMED ESAHAK MEAH. 68 I. C. 497: 1923 Cal. 268.

——S. 74—*Applicability of—Grain bond—Damages—Undue influence.*

Where a grain bond provided that on failure to repay at a certain date the deft. would be liable to pay interest at 37½ p.c. per annum and the plff. waited for 6 years before enforcing the bond in which time the original claim for Rs.400 had risen to Rs. 1,700 *Held* that in such cases the prayer is not for the performance of the contract but for the compensation for breach, and in such cases the courts are entitled and in fact it is their duty to grant compensation, having regard to all the circumstances of the case. (*Le Rossignol and Harrison, JJ.*) TIKIYA RAM *v.* JIWAN. 1923 Lah. 452.

——S. 74—*Applicability of—Chit fund—Stipulations in bond executed by successful bidder—When a penalty - Instalment bond—Waiver of default for one or two instalments—Effect of.*

The defendant was a subscriber to a chit conducted by plff. and was the successful bidder at the second auction held in connection with the chit which was to run over 12 instalments. On taking the prize the deft. executed in favour of the plff the stake-holder, a bond providing *inter alia* that in case deft. failed to pay his subscriptions he was not only to forfeit the dividend, interest and

premium, but was also to pay the whole amount on demand with interest thereon at 1½ percent permensem from the date of the auction and that the deft. should within 15 days execute another document to the plff. for the due payment of the chit amounts of the subsequent instalments and for abiding by the terms of the bond. Deft. executed the other document above referred to and paid the third, fourth and fifth instalments duly and defaulted in the payment of the sixth. In a suit by plff. to recover the amount due under the bond, *Held* that the terms of the bond as regards (1) the defendant's liability for future instalments from the date of default (2) his deprivation of the dividend and interest and (3) the imposition on him of liability for interest on the amount due from him at 18 per cent from the date of his default did not either each taken by itself or altogether, amount to a penal stipulation. In cases like this the court has to decide whether the terms are unreasonable as a whole and whether they are so unreasonable that the parties never contemplated that they should receive effect. The waiver by the plff. of his right to enforce the terms of the bond in connection with fourth and fifth instalments did not affect his right to use the coercive measures provided by the bond in cases of future default. (*Oldfield and Ramesam, JJ.*) VAITHINATHA IYER *v.* GOVINDASWAMI ODAYAR 42 M L J. 551 : (1922) M. W. N. 203 : 67 I. C. 995 : 1922 Mad. 67.

——S. 74—*Applicability of.*

A penal provision under S. 74 as amended by S.4 of the amending Act (1899) includes a stipulation to convey a house on default of payment of the debt on the fixed date. (*Abdur Rahim and Srinivasa Aiyangar, J.*) RAJAH OF RAMNAD *v.* SELLACHAMI TEWAR. 4 L. W. 173: 34 I. C. 500 : (1916) 2 M. W. N. 247.

——S. 74—*Applicability of—Penalty—Reasonable compensation.*

S 74 is not restricted to money, increased interest or the like. It can include any other stipulation by way of penalty, for instance a stipulation to convey certain property on default of payment of a debt on a fixed date. Where a penalty is designed only to secure money, the Court can give by way of recompense all that can be reasonably expected or desired. 21 O. C. 180 and 34 I C. 599, Ref. (*Stuart and Pandit Kanhaiya Lal, JJ.*) MADHO BAKSH SINGH *v.* SANT BAKHSH SINGH. 23 O. C. 118: 57 I. C. 513 : 7 O. L. J. 856.

——Ss. 74 and 16—*Applicability of—Interest—Power of Courts to relieve against.*

The Courts in India are precluded from relieving a debtor with regard to the interest, unless he comes within S. 16 or 74 of the Contract Act, 42 C. 652: 21 C. W. N. 470: 29 Cal. 823, Dist. Where a bond provides for payment of interest at a certain rate with yearly rests and does not stipulate for payment of an increased rate from the date of default in payment or vary the rate of interest S. 74 has no application to the case. (*Mullick and Jwala Prasad, JJ.*) KAMALA PRASAD *v.* RAMCHANDRA PRASAD NURAIN SINGH.
4 Pat. L. J. 565: 51 I. C. 496: 1919 Pat. 365.

CONTRACT ACT (IX OF 1872), S. 74—Compound Interest.

Compound Interest.

——S. 74—*Compound interest.*

A stipulation that on default of due payment of interest at 9 per cent per annum on a bond, every half-year, interest at 24 per cent per annum was payable on the unpaid balance of interest, is not unconscionable and can be enforced. (*Tudball and Piggott, JJ.*) DEO KUAR *v.* GULAB KUAR. 20 I. C. 949.

——S. 74—*Compound interest — Relief against penalty.*

The Courts do not lean towards compound interest, they do not award where there is no stipulation but where there is a clear agreement to pay, it is in the absence of disentitling circumstances allowed. Under a mortgage deed, it was agreed that if any of the monthly instalments of interest was not paid on its due date, such unpaid instalment of interest should be capitalised and added to the amount of the principal loan and would henceforth carry interest at the rate of twelve annas per month leviable as simple interest. A provision is further made that all such additions by way of capitalised interest should be chargeable upon the mortgaged property.

Held, such a provision was not penal so as to bring the case under S. 74 of the Cont act Act (*Fawcett, J.*) NADERSHAW *v* SHIRINIBAI.

25 Bom. L. R. 839: 1924 B. 264.

——S. 74—*Compound Interest.*

To determine whether an agreement to pay compound interest is penal, the real question is whether the stipulation is in itself penal, independently of the results to which continued default on the debtor's part to pay interest as it falls due, will lead. 101 P. R. 1918 (P. C.) and 124 P. R. 1918 (P. C) Ref (*Walmsley and Greaves, JJ.*) SURENDRA NATH CHATTERJI *v.* JOGENDRA NATH ADHIKARI. 62 I. C. 717.

——S. 74—*Compound interest—Not penal—Mortgage.*

A stipulation in a mortgage bond for interest at the rate of one per cent per mensem, with a provision for the payment of compound interest, is not penal provision. (*Greaves and Newbould, JJ.*) KAILASH CHANDRA BANIK *v.* LATIFANNESSA KHATUN. 51 I. C. 556

——S. 74—*Compound interest—Penal provisions—24 per cent interest.*

A mortgage bond providing interest at 24 per cent per annum and after due date of payment for capitalization of interest on arrears is not necessarily penal. 23 C. W. N. 130 (P. C.) Rel. (*Fletcher and Walmsley, JJ.*) AJIMUDDIN *v.* RAFATULLA MANDAL. 50 I. C. 883.

——S. 74—*Compound interest—Penalty — Mortgage.*

An agreement to pay interest at the rate of Rs. 12-12-0 per cent per annum is not unconscionable nor can such an agreement become so merely because there is stipulation to pay compound interest at the same rate in the event of there being a default in the payment of the simple interest agreed upon. (*Shadi Lal and Broadway, JJ.*) RAM DAS *v.* ABBAS.

56 I. C. 74 : 2 Lah. L. J. 393.

CONTRACT ACT (IX OF 1872), S. 74.—Compound Interest.

——S. 74—*Compound interest—Penalty.*

Compound interest not at the enhanced rate is not penal. (*Johnstone and Shadi Lal, JJ.*) ABDUL ALI *v.* PURAN MAL. 82 P. R 1914: 25 I. C. 560: 277 P L. R, 1914.

——S. 74—*Compound interest—Penalty.*

A provision for compound interest on default of payment of interest on the due date is not penal. (*Robertson and Chevis, JJ.*) YAKUBKHAN *v*, RAGEBHAT RAI. 165 P, W R 1912: 17 I. C. 235: 192 P. L. R. 1912.

——S. 74—*Compound interest at original rate from date of default—Penalty.*

A stipulation to pay compound interest from the date of default, at the original rate is legal and not a penalty. (*Ayling and Oagers, JJ.*) MALLI CHETTY *v.* VEERANA. 41 M. L. J. 470: 69 I. C. 812: (1921) M. W. N. 717.

——S. 74—*Compound interest on default after certain date.*

The payment of compound interest at enhanced rate on default, after a certain term is a penalty and is not enforceable. (*Wallis, C. J, and Seshagiri Iyer. J.*) PANAGANTI RAMARAYANIM GAR *v.* MAHARAJA OF VENKATAGIRI.

44 Mad. 301: 12 L. W. 685: 28 M. L T. 234: 61 I. C. 612: 40 M. L. J. 236.

——S. 74—*Compound Interest.*

A stipulation the object of which is to secure the performance of the main contract between the parties, as a penalty and a stipulation for payment of compound interest may be, though it need not always be, by way of penalty. (*Abdur Rahim, O.C.J. and Seshagiri Aiyar, J.*) V. VENKATARAMIAH PILLAI *v.* P. V. SUBRAMANIA PILLAY. 37 I. C. 799.

——S. 74 *Compound interest—Six monthly rests.*

A provision for payment of compound interest from date of default with six months rest is not a penalty and is enforceable. Compound interest involves the idea of rest, whatever may be the interval. 34 C. 180. 22 M.L J. 85 Ref. (*Sundara Aiyar, J.*) VENKATACHELAM CHETTIAR *v.* VEERAPPAN AMBALAGARAN. 14 I. C. 283: (1912) M. W. N. 512.

——S. 74 — *Compound interest—Penalty — Legality.*

Compound interest in itself is perfectly legal and not penal. (*Drake-Brockman J C.*) GOPAL *v.* GOVIND. 19 I.C. 849: 9 N. L. R. 78.

——S. 74—*Compound interest—Penalty.*

A covenant to pay compound interest, in case of default, at the rate originally fixed is not penal. (*Stuart and Kanhaiya Lal, A. J. Cs.*) RAM SEWAK *v.* BALDEO BAKSH SINGH. 47 I. C. 649: 5 O. L. J. 442.

——S. 74—*Compound interest in default of payment of simple interest.*

A provision for payment of compound interest at the same rate as the simple interest on default of payment of the latter is not a penalty. (*Coutts and Ross JJ.*) RAMCHANDRA PRASAD *v.* MAHABIR PRASAD SINGH. 64 I. C. 247.

CONTRACT ACT (IX OF 1872), S. 74.—Compound Interest.

——S. 74—*Compound interest—12 per cent from due date on default—Whether unconscionable bargain.*

Where a mortgage bond provided that interest should be payable at 12 per cent simple interest but that if the money was not paid on the due date which was fixed at two years after the execution of the bond, the interest should thereafter be compound and the Subordinate Judge decreed interest at 12 per cent simple interest only. *Held* in appeal that the change from simple to compound interest when the interest was only 12 per cent would not amount to a penalty neither is the bargain unconscionable since the rate of interest is not unusually high. (*Chapman and Roe. JJ.*) LAKHI CHAND *v.* PEAR CHAND. 39 I.C 106 2 P. L. J. 283.

Compound Interest at Increased Rate.

——S. 74—*Compound Interest at increased rate.*

The terms of a mortgage deed were as follow. "The mortgagors having admitted a previous mortgage executed with regard to a debt due by them agreed to pay the amount by bi-annual instalments. They further agreed that in case of default of payment of any two instalments in succession the plaintiffs would be entitled to interest at one per cent per mensem with annual rests from the date of the bond. *Held*: the case is not affected by the change in S. 74 as it stands at present, but even if it could be brought within the change the interest at one per cent. per mensen compoundable annually is not penal or extortionate and the defendants are not entitled to resile from the contract into which they entered with open eyes. (1885) A W. N 65 Referred to. (*Gokul Prasad, J.*) BUDH SINGH *v.* BALDEO SAHAI. 69 I. C. 68 : (1) : 1922 All. 284.

——S. 74—*Compound interest at increased rate—Penalty.*

A mortgage deed provided interest at As. 14 Pies 6 per cent per mensem and, if interest was not paid at the end of every six months, the unpaid interest was to be added to principal with interest at Re. 1 per cent per mensem. The provision as to compound interest is not a penalty and the enhanced rate of Re. 1 per cent is penal. (*Richards, C. J. and Banerjee, J.*) JWALARAM *v.* BUCHI RAM. 38 I. C. 533.

——S. 74—*Compound interest at enhanced rate—Penalty—Addition of interest—In advance and interest stipluated at enhanced rate on default.*

Where a bond was executed and the actual money advanced was less than half the amount, while the balance was made up of interest calculated in advance at an enormous rate, and a provision was made in the bond for payment of enhanced rate of interest if default was made in the payment of instalments. *Held*, that the addition of interest in advance and the stipulation for enhanced rate of interest was penal and hence unenforceable. (*Scott, C. J. and Batchelor, J.*) VELCHAND *v.* FLAGG. 36 Bom 164 : 13 I. C. 853 : 14 Bom. L. R. 18.

CONTRACT ACT (IX OF 1872), S. 74.—Compromise decree.

——S. 74—*Compound interest at enhanced rate—Mortgage.*

A mortgage provided for simple interest at 6 per cent. but for 12 per cent. compound interest on default. *Held*, that the provisions as to compound interest at an enhanced rate was penal and simple interest at the enhanced rate would be reasonable compensation. (*Sadasiva Aiyar and Phillips, JJ.*) ZAMINDAR OF KARVETINAGAR *v.* SUBBARAYA PILLAI. (1918) M. W. N. 146 : 43 I. C. 871: 7 L. W. 36.

——S. 74—*Compound interest at increased rate—Mortgage.*

A provision for compound interest on default of payment is not penal by itself, but compound interest at a rate higher than the old rate may be penal. 34 C. 150 Foll. (*Sadasiva Aiyar and Seshagiri Aiyar, JJ.*) GHANTESLA SEETHARAMIAH *v.* TADIPALLI PITCHAYYA. 28 I. C. 860.

——S. 74—*Compound interest at increased rate—Bond—Further interest and 25 per cent more to be paid on default—Whether penal.*

Where in a bond it is provided that on default of payment of principal and interest on a particular date, 25 per cent shall be added to the total amount then due and further interest at 12½ per cent on the consolidated amount shall be charged, the provision is penal and therefore unenforceable. (*Sadasiva Aiyar and Spencer, JJ.*) CHELLAGALI CHINNIGADU *v.* KAPPALA VENKATARAYUDU. 23 I. C. 542.

——S. 74—*Compound interest at increased rate of 300 per cent—Penally.*

A stipulation for interest at 300 per cent compound interest in default of payment on the due date is one by way of penalty and the creditor can recover only reasonable compensation. (*Miller and Sankaran Nair, JJ.*) GANAPATHI PILLAI *v.* SUNDARA THEVAN. 14. I. C. 511 : 22 M. L. J. 354.

——S. 74—*Compound interest at increased rate—Mortgage—Penally.*

A stipulation in a mortgage deed to pay compound interest at 12 per cent per annum in default of the regular payment of simple interest at 8¼ per cent per annum is a penalty. 34 C. 150 P. C. Ref. to. (*Lindsay, A. J. C.*) SANT SAHAI *v.* CHHUTAE KURMI. 20 I. C. 667.

Compromise decree.

——S. 74—*Compromise decree—Stipulation to pay whole amount on default of one instalment and interest.*

The stipulation that the whole amount is payable at once on default of one instalment is no penalty. The clause that interest at 36 per cent per annum will be payable on the whole amount is a penalty clause. (*Holmwood and Imam, JJ.*) JAMUX KAFIE *v.* RAM LAL GHOSE. 32 I. C. 697.

——S. 74—*Compromise decree—Penalty—Interest at high rate from date of original obligation—Agreement in compromise decree.*

An agreement to pay enhanced rate of interest not from date of default but from the date of original obligation is in the nature of penalty which cannot be enforced. Such a penalty wil

CONTRACT ACT (IX OF 1872), S. 74.—Compromise decree.

be relieved against even though it is embodied in a decree passed by consent of parties. (*Oldfield and Krishnan, JJ.*) KANDULU PEDA LINGA REDDI *v.* KAKUMANU HANUMAYYA. 37 I. C. 764.

——S. 74—*Compromise decree.*

Courts in India have power to relieve against forfeiture or penalty even where a decree based upon a compromise provides for such forfeiture. (*Sadasiva Aiyar and Spencer, JJ.*) ANA SHEIKH MOHIDIN *v.* VEDIVALAGAIN AMBIA PILLAI.
22 I. C. 37 : (1914) M. W. N. 92.

——S. 74—*Compromise decree—Power to relieve—Interest—Waiver.*

The amount due under a compromise decree was to be paid up in instalments, and there was a stipulation that on failure to pay within the date fixed, the decree-holder was to get interest at 1 per cent. per mensem from the date of default and he was at liberty to execute the decree After the due date the judgment debtor made payments to the decree holder, who claimed appropriation first towards interest and then towards the decretal sum. *Held*, that the decree-holder was entitled to interest and the clause as to executing the decree was for the benefit of the decree-holder and the acceptance of part-payment did not amount to waiver of the right to interest. (*Jwala Prasad and Ross, JJ.*) BARCLAY *v.* MT. DHANDEI.
4 Pat. L. T. 112 : 71 I. C 937 : 1923 Pat. 194 : 1923 P. 322.

Contract of Service.

——S. 74—*Contract of service—Damages for absence.*

A stipulation in a contract of service that a servant should pay by way of damage double his daily wages for absence without leave is a penalty. (*Mitra, A. J. C.*) NARAYAN RAO *v.* FAIZ KHAN. 49 I. C. 261.

Enhanced Rate of Interest (Retrospective or from Default.)

——S. 74—*Enhanced rate of interest, with retrospective effect.*

A stipulation for enhanced interest having retrospective effect is penal and so not enforceable. (*Sundra Lal, J.*) SONAR SINGH *v.* RANDHI SINGH.
35 I. C. 624.

——S. 74—*Enhanced rate of Interest—Compensation.*

Where a bond provides for the payment of interest annually and on default further provides that interest should be charged at double the original rate from the date of the deed, the stipulation for enhancement of interest is a penalty and would be relieved against by the Court. At the same time a reasonable portion of the interest should be allowed by way of compensation to the creditor, 155 P. L. R. 1901 : 10 I. C. 572: 25 I C. 702 ref. (*Scott Smith, J.*) RAMCHAND *v.* JAGIRI MAL.
4 Lah. L. J. 270: 54 I. C. 897 : 73 P. W. R. 1921 : 1922 Lah. 268.

——S. 74—*Enhanced rate of interest.*

The fact that for certain reasons a person agreed to take a low rate of interest in the beginning, is no sufficient reason for holding that an

CONTRACT ACT (IX OF 1872), S. 74.—Enhanced rate of interest.

agreement to pay enhanced interest at a reasonable and a fair rate later on is penal. (*Chevis, and Jones, JJ.*) MAHOMED ALI *v* PARMANAND. 48 P. W. R. 1918 : 45 I. C. 232 : 125 P. L. R. 1918.

——S. 74—*Enhanced rate of interest—Penalty—Mortgage—Liquidation of more onerous debts.*

A mortgage bond provided for payment of the principal with interest at 9 per cent. on a particular date and on default, for interest at 12 per cent. It was found that the mortgagor had with the moneys raised by the mortgage discharged debts carrying interests at 12 per cent and more. *Held*, that the provision as to the payment of enhanced interest was not penal. (*Abdur Rahim and Oldfield, JJ.*) VENKATACHALLAPATHI AIYAR *v.* THAVASI SERVAI.
42 Mad. 465 : 51 I C. 67 : 36 M. L. J. 288.

——S 74—*Enhanced rate of interest—Stipulation—Penalty, how far.*

Per *Seshagiri Aiyar, J.* There may be cases where enhanced interest is secured in contemplation of a possible loss or damage; in that case it would not be penal, but where the object of the stipulation is to secure punctual payment, the provision would be regarded as penal. (*Abdul Rahim, O. C. J. and Seshagiri Aiyar, J.*) V. VENKATARAMIAH PILLAY *v.* P. V. SUBRAMANIA PILLAI. 37 I. C. 799.

——S. 74—*Enhanced rate of interest from date of bond, on default is penal.*

Where a bond provides Re. 1-4 per cent. interest per mensem and on default, Rs. 2 per cent. per mensem from date of bond, a Court is justified in holding that the clause is penal and in awarding 2 per cent. simple interest from date of default. (*Mitra, A. J. C.*) NARAYAN *v.* WAMAN.
59 I. C. 121.

——S. 74—*Enhanced rate of Interest—Usufructuary mortgage—Stipulation to pay additional interest if mortgage not registered—If enforceable.*

An agreement to pay additional interest in case the mortgagor failed to get the registered bond constituting a usufructuary mortgage is a stipulation by way of penalty and is unenforceable when possession was actually given to the mortgagee. (*Lyle, A. J. C.*) JHAN SINGH *v.* GAURI SHANKAR. 1922 Oudh 123.

——S. 74—*Enhanced rate of interest.*

It is not unconscionable to make a provision in the mortgage deed that if payment is not made as stipulated the interest remaining due shall carry interest thereon at one per cent per mensem. (*Kanhaiyalal, J. C.*) DULAM SINGH *v.* AJODHIA PRASAD. 9 O. and A. L. R. 366 : 70 I. C 919 : 1924 Oudh 103.

——S. 74—*Enhanced rate of interest.*

Interest charged at the enhanced rate of Re. 1 per cent per mensem is penal. (*Sabonadiere and Kanhaiya Lal, A. J. Cs.*) CHHOTE LAL *v.* BADRI SINGH. 22 I. C. 129.

——S. 74—*Enhanced rate of interest of penalty—Question, one of fact.*

CONTRACT ACT (IX OF 1872), S. 74.—Enhanced rate of interest.

Where a mortgage deed provided that on default of payment of interest at a certain rate, interest would be charged at double the rate. *Held*, that the enhanced rate was not a penalty, that it was intended by the parties to be enforced and was not unreasonable. 11 O C. 307 Foll 19 C. 392 ; 22 C 143 ; 29 C 43 ; 3 O. C. 15, Dist. The question whether an agreement to pay enhanced interest is a penalty or not is one of fact. (*Evans, J. C.*) MUNA *v.* MANSA RAM. **13 I. C. 624.**

——S. 74—*Enhanced rate of interest—Explanation—Penalty.*

A provision in a mortgage deed for the payment of interest at double rates on default of interest being paid on the due dates, is not a penalty, especially when nothing was paid for 22 years. 9 I. C. 406 ; 29 M 491 Foll. (*Evans, J. C.*) BANKE BEHARI LAL *v.* AHLAD. **13 I. C. 473.**

——S. 74—*Enhanced rate of interest on default—Penalty.*

Where a mortgage provided for payment of interest regularly at the rate of 21 per cent at the end of each month and on default the whole was to become due at once or to pay interest at 24 per cent *Held* the question whether the provision for enhanced interest is a penalty must be decided on the facts of each case. When the interest is only 3 per cent, held it was not a penalty. (*Robinson, C. J. and May Oung, J.*) P. C. PAL *v.* K.A. L. R. FIRM. **1 Rang. 460 : 76 I. C. 835 : 2 Bur. L. J. 158 : 1924 Rang. 46.**

——S. 74—*Enhanced rate of interest—Mortgage—Enhanced interest.*

Where there are valuable properties as security in a mortgage an increase of the rate of interest from 24 per cent to 36 per cent from the date of default is penal (*Robinson, C. J. and Macgregor, J.*) KO TAINE *v.* ISMAIL CASSIM MORAD. **11 L. B. R. 356 : 1 Bur. L. J. 117 : 68 I. C. 887 : 1923 Rang. 61.**

Exception.

——S. 74—*Exception—Administration Bond—Penalty—Relief against.*

In proceedings under the Probate and Administration Act a bond executed in favour of a District Delegate in respect of the grant of letters to the estate of a deceased person does not come within the Exception to S. 74 of the Contract Act. (*Sanderson, C. J. and Richardson J.*) CHANDRA MOHAN KARAR *v.* SRIMATI RAHINI DASI. **64 I. C. 366**

Extent of Damages.

——S. 74—*Extent of damages — Sale—Damages—No stipulation in contract—Effect of.*

Where the conditions of sale of land by a Town Improvement Trust were that 10 per cent of the purchase money was to be paid immediately and that on failure to pay the remainder in a fixed time, the property was to be re-sold. *Held*, that the trust was not entitled to the difference in price resultant on re-sale, but only to the 10 per cent deposit (*Banerjee and Rafique, JJ.*) ALLAHABAD IMPROVEMENT TRUST *v.* TIKANDRA JANG BAHADUR. **38 All. 52 : 30 I. C. 584 : 13 A. L. J. 1079.**

CONTRACT ACT (IX OF 1872), S. 74.—Extent of damages.

——S. 74—*Extent of damages—Actual loss not proved—What compensation to be awarded.*

Where no actual loss is proved, owing to breach of a contract which contained a penalty for breach of it, the Court will award such compensation as it considers reasonable in the circumstances of the case. (*Richards, C. J. and Banerjee, J.*) RAMNATH ZUTSHI *v.* THE SECRETARY OF STATE FOR INDIA. **13 I. C. 46.**

——S. 74—*Extent of damages—Penal interest.*

A penal rate of interest on a mortgage bond may be reduced but should not be wholly disallowed. (*Fletcher and Smither, JJ.*) HRISHIKESI SINGH *v.* NARAIN SINGH. **46 I. C. 384.**

——S. 74—*Extent of damages—Party not competent to set up reasonable terms after original terms found to be penal.*

A person when once the contract is deemed unenforceable, is entirely in the hands of the Court and he could not substitute a reasonable contract for the original contract. Case law discussed. (*Mookerjee and Chatterjee, JJ.*) CHALLAPHRO *v.* BANGA BEHARY SEN. **22 C L. J. 311 : 31 I. C. 394 : 20 C. W. N. 408.**

——S. 74—*Extent of damages—Interest—Enhanced rate—Compound interest.*

Where a penal rate is a common rate of interest in every day transactions, *e. g.*, a rise from 10½ per cent per mensem to twelve per cent per mensem compound interest in default, the Court would be justified in allowing it as compensation under S 74. 26 M., 111 ; 34 C. 150 P. C. Dist. (*Wallis, C. J. and Hannay, J.*) VADLAMANNATI SRINIVASA DIKSHITULU *v.* DAMERA RANGAYYA. **25 I. C. 702 : 1 L. W. 603.**

——S. 74—*Extent of damages—Penalty.*

If a debt payable by instalments carries no interest and on default, it is payable in a lump sum, the condition is not penal, and though penal technically, should be enforced. (*Skinner, A.J.C.*) SAMPAT *v.* CHANGO. **10 I. C. 738 : 7 N. L. R. 46.**

——S. 74—*Extent of damages—Penal clause—Compensation extent of.*

In contracts obtaining penal clauses the court should give the plaintiff reasonable compensation for the breach of contract not exceeding the amount of penal interest but should not reduce the interest from date of default below the rate originally allowed in the bond. (*Daniels, A. J. C.*) SHEO JIAWAN *v.* MT. MITHANA AND ANOTHER. **76 I. C. 500 : 1923 Oudh 162.**

——S. 74—*Extent of damages—Damages for breach of marriage—Promise.*

Per *Parlett, J.* In awarding compensations for the breach of promise of marriage, it is open to the Court under S. 74 to award such compensation, not exceeding the amount named in the agreement of the parties as appears to be reasonable. (*Per Fox, C. J.*) It is doubtful whether the full amount named in the agreement should not be given. (*Fox, C. J. and Parlett, J.*) MAUNG SEIN KYI *v.* MAE, **9 Bur. L. T. 179 : 34 I. C. 159 : 8 L. B. R. 399.**

CONTRACT ACT (IX OF 1872), S. 74—Forfeiture of deposit.

Forfeiture of Deposit.

———S. 74—*Forfeiture of deposit.*

A person guilty of a breach of contract cannot recover earnest money which he has paid nor can he recover damages 38 M 80 ; 33 A 166 ; 19 A. 489 Rel. (*Rafique and Linasay, JJ.*) MAHOMED HABIBUL LAH *v.* MAHOMED SHAFI.
50 I. C. 948 : 41 All. 324 : 17 A. L. J. 309.

———S. 74—*Forfeiture of deposit—Breach of contract—Duty to refund.*

Where a *Mutwalli* who takes a deposit of earnest money for getting a lease of wage property fails to do so, he is not entitled to retain the earnest money A party to a contract advancing money to the other party by way of a partial guarantee for performance cannot recover the money if there has been default on his part and no default on the part of the other. (*Holmwood and Mullick, JJ.*) GULAM MAHOMED *v.* AKHOY KUMAR LAHA. 32 I. C. 205.

———S. 74—*Forfeiture of deposit.*

There can be no forfeiture of the earnest money when the purchaser was not able to perform his part of the contract owing to the vendor's failure to carry out his covenants (*Mookerjee and Caspersz, JJ.*) RASIK LAL *v.* CHANDRA BHUSHAN.
10 I. C. 525 : 15 C. L. J. 410.

———S. 74—*Forfeiture of deposit—Contract of sale—Option of withdrawing from sale.*

Plaintiff is entitled to a return of the earnest money if the contract gave him the option of withdrawing if he was not satisfied as to the title of the defendant and he is within the rights in withdrawing from the contract. (*Kensington, C. J.*) BUA DITTA *v.* RATTAN DEVI. 156 P. W. R. 1915 : 28 I. C. 12 : 24 P L. R. 1915.

———S. 74—*Forfeiture of deposit—Breach.*

When there is an express contract stipulating that on breach of it, the amount deposited shall be forfeited, the contract must be given effect to without reference to the section There is no distinction between contracts of sale and contracts of lease stipulating for a forfeiture of deposit in case of breach. The section does not apply to cases where a sum of money is paid as a precautionary provision for the due performance of the contract. It applies only to terms which are included to provide a certain sum of money by way of damages to the party whose contract has been broken. The reasonableness of the deposit is one of the factors in determining whether there was deposit in reality, although it goes by that name in the contract. The question whether a sum of money paid is a deposit to be forfeited or a penalty, is a question of fact to be determined on the facts of each case. (*Seshagiri Aiyar, J.*) ON *v.* CHITA CHINNA. 28 I. C. 318 : 17 M. L T. 229 : (1915) M. W N. 249.

———S. 74—*Forfeiture of deposit—Actual loss—Suit for.*

Per *Sadasiva Aiyar, J.* In case of a contract providing a stipulation for the forfeiture of a deposit by the contractor, the person suing on actual loss instead of contenting himself with the forfeiture can obtain nothing more than the difference between the deposit and the actual loss

CONTRACT ACT (IX OF 1872), S. 74—Forfeiture of earnest money.

(Per *Spencer, J.*—Dissenting). A party suffering owing to the fault of the other, can recover the actual loss in addition to the deposit forfeited in accordance with an express stipulation in a contract. (*Sadasiva Aiyar and Spencer, JJ.*) VELLORE TALUQ BOARD *v.* GOPALSWAMI NAIDU.
21 I. C. 759 : 14 M. L T. 551 : (1913) M. W. N 1025.

———S. 74—*Forfeiture of deposit—Vendor and Purchaser.*

Where a contract of sale goes off owing to the default of the purchaser, the vendor is entitled to retain the deposit made by the purchaser. 38 M. 178 ; 19 All. 489 , 33 All. 166 rel (*Drake Brockman, J. C.*) MANGULAL *v.* MT. NANHI.
67 I. C. 806 : 5 N. L. J. 1 : 1922 Nag. 104.

———S. 74—*Forfeiture of deposit.*

To come within the principles applicable to earnest money, a deposit must be paid at the time of entering upon the bargain. Those principles cannot be applied to any future payment to be made under the contract An earnest money is something paid or given at the time of the bargain, to show that the negotiation had been changed into a binding contract, and as a pledge for its due performance by the depositor to be forfeited in case of non-performance by his default. 27 Ch. D. 89 ; 35 Ch. D. 584 ; 21 B. 827 ; 33 A 166 ; 23 B. 56 ; 16 M. 474 ; 29 M. 118 ; 39 M. 375 Foll. 19 A. 489 Diss. from (*Batten and Stanyon, A. J. C.*) BALLABHDAS *v.* PAIKAJI. 38 I. C. 915 : 12 N. L. R. 177.

——— S 74—*Forfeiture of deposit for breach of stipulation—Penalty.*

Neither S. 74 of the Contract Act, nor the principles of law laid down in decisions dealing with promises to pay specified sums in case of breach of contract, apply to cases of forfeiture of deposits for breach of stipulations. In such cases the rule is that where the instrument refers to a sum deposited as security for performance, the forfeiture will not be interfered with, if reasonable in amount. (*Duckworth, J.*) SINGER SEWING MACHINE CO. *v.* MAUNG TIN. 70 I. C. 96 : 11 L. B. R. 420 : 1 Bur. L. J. 158: 1923 Rang 47.

———S. 74—*Forfeiture of deposit—Damages.*

A deposit made to secure performance of a contract is not a penalty, and a party committing a breach of the contract has no right to recover it and the other party has a right to retain it, though no loss has been occasioned by the breach. 21 B. 827 ; 29 M. 118 ; 33 M. 375 Rel. But if the party retaining the deposit is not satisfied and seeks to recover more money as damages, he must give credit for such deposit and recover only such damages as are above the deposit. (*Pratt, J. C. and Hayward, A. J. C.*) FIRM OF TRIKAMJI JIVANDAS & CO. *v.* TRUSTEES OF PORT TRUST OF KARACHI. 36 I. C. 96 : 10 S. L. R. 4.

Forfeiture of Earnest Money.

———S. 74—*Forfeiture of earnest money — Effect of.*

In the absence of a written contract, the question as to what is and what is not earnest money, must be decided on the evidence on record. Where

CONTRACT ACT (IX OF 1872), S. 74—Forfeiture of earnest money.

——A person who has deposited earnest money is guilty of a breach of contract, he must forfeit the earnest money. (*Stuart and Sulaiman, JJ.*) MADHO DAS *v.* GOKUL DAS. **20 A. L. J. 742 : 68 I. C. 761 : 4 U. P L. R. (A) 208 : L. R 3 A. 488 : 1922 All. 478**

——S. 74—*Forfeiture of earnest money—Effect of—Default.*

The primary purpose of a deposit by way of earnest money being a guarantee for the performance of the contract, the plaintiff is not entitled to recover the money if he has been in default. 14 A. C. 429 at P. 435 : 50 C. L. J. 113 Ref. (*Chatterjee and Panton, JJ.*) ATUL CHANDRA KUNDU *v.* SARAT CHANDRA LAHA. **59 I C 215 : 24 C. W. N. 967.**

——S. 74—*Forfeiture of earnest money—Non-performance of contract.*

A deposit unless paid on any special terms, is not merely part payment but it is an earnest. If the contract be performed it is brought into account as part payment ; on the other hand if the purchaser makes default, it may be retained by the vendor. The deposit is thus a security for the performance of the purchaser's part of the contract. The test in each case is, did the parties mutually agree, expressly or by implication that the sum paid was to be treated not merely as part payment, but as guarantee for due performance of contract. Where the contract gives the lessor an express right of forfeiture for non-performance of the contract or non observance of its conditions, this right is not enlarged in its operation by an appeal to the general rule that where the contract goes off by default of the purchaser. the vendor is entitled to retain the deposit. The position is different where there is no express clause of forfeiture, but simply a payment by way of deposit which implies liability to forfeiture. (*Mookerjee and Panton, JJ.*) NAWAB KHAJAH HABIBULLAH *v.* ARMAN DEWAN. **24 C. W. N 40 ; 53 I. C. 875 : 30 C. L. J. 113.**

——S. 74—*Forfeiture of earnest money—Damages—Sale of goods—Resoission—Right to return of advance—Further damages.*

Where the plff. lawfully rescinds a contract, he is entitled to the return of his advance and to such further damages as were within the contemplation of both the parties at the time when the contract was made. (*Schwabe. C. J. and Krishnan, J.*) ADAM HAJI, PERA MAHOMED ISHAK *v.* HUSSAIN AKBARI. **43 M. L, J. 199 : (1922) M. W. N. 434: 31 M.L T. 40 (H. C.) : 70 I. C. 736 : 1923 Mad 103.**

——S. 74—*Forfeiture of earnest money.*

S. 73 provides for the right to damages for breach of contract, and parties are entitled to compensation arising from the breach in the absence of an express contract to the contrary under S. 74. S. 74 does not affect the forfeiture of a deposit on failure of the performance of a contract, but in arriving at an estimate of damages, the sum so forfeited may mitigate the damages claimed, 38 A. 52 Diss. (*Seshagiri Aiyar and Napier, JJ.*) SUBRAMANIAM CHETTIAR *v.* ARJUNA PERUMAL. **37 I. C 377.**

CONTRACT ACT (IX OF 1872), S. 74—High rate of interest.

——S. 74—*Forfeiture of earnest money.*

In a suit for damages upon a contract which provides for the forfeiture of the deposit money, where the plaintiff sues for more than the amount of deposit forfeited on the ground of insufficiency of the forfeited amount to cover the actual loss incurred the plaintiff is entitled to claim only the difference between the loss incurred by him and the deposit money. English cases on the subject reviewed. (*Wallis. Offg. C J., Ayling and Seshagiri Aiyar, JJ.*) VELLORE TALUQ BOARD *v.* GOPALASAMI NAIDU. **38 Mad. 801 (F. B) : 26 I. C. 226 : 17 M L. T 84.**

[On appeal from (1913 M. W. N. 1025 : 21 I. C. 759 : 14 M L. T. 551.]

——S. 74—*Forfeiture of earnest money—When promisee entitled to retain.*

A deposit is paid as a guarantee for the performance of the contract and when the contract goes off by default of the purchaser, the vendor is entitled to retain the deposit. But in order to enable the vendor so to act, there must be acts, on the part of the purchaser, which not only amount to delay sufficient to deprive him of the equitable remedy of specific performance, but which would make his conduct amount to a repudiation on his part of the contract (*Crouch, A. J. C.*) DOULAT RAM VALABDHARI *v.* ALI BHAI IBRAHIMJI. **33 I. C. 668 : 9 S. L. R 137.**

High Rate of Interest

——S. 74—*High rate of interest—12 per cent is a reasonable rate.*

Having regard to the local conditions in India 12 per cent. is very proper and reasonable rate to impose, though it may appear a very high rate of interest. (*Lord Buckmaster*). NARAIN DAS *v.* ABINASH CHANDAR **1 L. R. 3 (P C.) 129 : 31 M. L. T. 217 : 16 L. W 780 : (1922) M. W. N. 791 : 4 U. P. L. R. (P. C) 1 : 27 C. W. N. 299 : 21 A. L. J. 201 : 37 C. L. J. 457 : 44 M. L. J. 728 : 69 I. C. 273 : 1922 P. C. 347.**

——S. 74—*High rate of interest.*

Interest in a mortgage deed at 9½ per cent. per annum is not penal. (*Sir John Edge*) MATI LAL DAS *v.* THE EASTERN MORTGAGE AND AGENCY Co. **28 M. L. T. 351 : 47 I A. 265 : 2 U. P L. R. (P. C) 166 : 25 C. W. N. 265 : 61 I. C. 436 : (1920) M. W. N. 631 (P. C.).**

——S. 74—*High rate of interest—Penalty—Interest High rate—No undue influence pleaded—60 per cent per annum.*

In the absence of undue influence, a contractual rate of interest though high, should not be cut down. (*Chamier, J.*) GOUDAN LAL *v.* SHAHZADI. **18 I. C. 765 : 11 A. L. J. 155.**

——S. 74—*High rate of interest—Power to relieve against—Penalty.*

The court cannot interfere with the rate of interest stipulated between the parties unless it is satisfied that the rate of interest charged is a penalty within S. 74 of the Contract Act. In other cases, the court, if it interferes, would be

CONTRACT ACT (IX OF 1872), S. 74—High rate of interest.

making a new contract between the parties. (*Greaves and Ghose, JJ.*) SRIMATI SATYABHAMA SUNDARI *v.* MAHOMED ISHAK MEAH.
68 I. C. 497 : 1923 C. 268.

——S 74—*High rate of interest—Power of Court to reduce—Circumstances justifying.*

Where there is only one rate of interest and that rate is exorbitant, the Court has no power to reduce the rate in the absence of proof of fraud, undue influence or oppression. (*Maclean, C. J. and Geidt, J.*) NARENDRA NATH SARKAR *v.* MONIREDDI HOWLADHAR.
69 I. C. 109 : 35 C. L. J. 209.

——S. 74—*High rate of interest—Liability.*

A landlord is entitled to recover interest at the rate stipulated in the contract though the rate is penal, hard and unconscionable. (*Newbould and Abdul Majid, JJ.*) TARA PROSANNA BHATTACHARYA *v.* NAZIR MAMUD SARDAR.
61 I. C. 345.

——S. 74—*High rate of interest—Penalty.*

The holder of an instrument is entitled, in the absence of fraud or undue influence to recover interest at the rate stipulated in the instrument though it is as high as 25 per cent. per mensem. (*Walmsley and Greaves, JJ.*) MANUJENDRA DUTT *v* BISWAS NATH ROY. 59 I. C. 277.

——S. 74—*High rate of interest.*

Interest at 75 per cent. on arrears of rent is not penal in the absence of evidence that the landlord took undue advantage of his position as landlord. (*Teunon and Chaudhuri, JJ.*) BHUTH NATH CHATTERJEE *v.* MATHURA MOHAN NASKAR.
57 I. C. 1004 : 48 Cal. 93.

——S. 74—*High rate of interest—Power to reduce.*

The Court has no option to reduce the rate of interest stipulated in the bond which was 30 per cent, per annum. 23 C. W. N. 130 and 233 (P. C.) Foll. (*Walmsley and Huda, JJ.*) EKTAR SIKDAR *v.* WAJUDDITATI. 52 I. C. 722 : 23 C. W N. 980.

——S. 74—*High rate—Penalty—Interest—Mortgage.*

In the absence of proof of undue influence or coercion, interest on a mortgage must be calculated and allowed at the rate provided for by the contract between the parties in the mortgage-deed, even though the interest would run up to a large sum. (*Fletcher and Cuming, JJ.*) AMULYA CHARAN DAWN *v.* ASKARI KAZI. 51 I. C. 554.

——S. 74—*High rate of interest—If penalty*

A high rate of interest, *viz.*, 6½ per cent. per mensem is not penal in the absence of special circumstances. (*Chatterjee and Richardson, JJ.*) ABDUL RASHID KHAN *v.* SAFER ALI.
42 I. C. 614.

——S. 74—*High rate.*

A debtor deliberately contracting a high rate of interest, if the money is not repaid within a certain time, should not be relieved on the ground that it is a penal rate. (*Fletcher and Newbould, JJ.*) PADMA LOCHAN CHAKRAVARTI *v.* RUSTOM KHAN. 41 I. C 897.

CONTRACT ACT (IX OF 1872), S. 74—High rate of interest.

——S 74—*High rate of interest—Explanation—If exhaustive.*

The explanation to S. 74 is not exhaustive so that though a contract for payment of interest does not fall within the explanation, it may amount to a penalty. A stipulation in a *kabuliyat* to pay interest at a exorbitant rate if the rent be in arrear, may amount to a penalty under S 74, though a man of full age and ordinary understanding is free to make a contract to pay interest at an exorbitant rate whether interest stipulated is exorbitant, is a mixed question of law and fact. (*Fletcher and Smither, JJ.*) LAL GOPAL DUTT *v.* BISWANATH. 39 I. C. 647.

—— S. 74—*High rate of interest—75 per cent Interest*

Interest at the rate of 75 per cent. per annum, payable by mortgagors who were ignorant cultivators and who were in urgent need of money is penal where the properties hypothecated by them were simple security. 42 Cal. 652 : 31 I. C. 394 : 32 I. C. 37 Foll. A covenant for payment of interest on a mortgage debt at a high rate may be under certain circumstances a stipulation by way of penalty and a Court is competent to grant relief to the debtor although the provision in the mortgage bond for payment of interest mentions one rate only and not alternative rates in different contingencies (*Sanderson, C. J. and Mookerjee, J.*) KRISHNA CHARAN BARMAN *v.* SANAT KUMAR DAS. 44 Cal. 162 25 C. L. J. 24 : 34 I. C 609 : 21 C. W. N 740.

——S. 74—*High rate of interest—Exorbitant interest.*

The Court is competent to grant relief against an exorbitant rate interest 42 C. 652; 42 C 690 ; 20 C. W. N. 404 Foll. (*Mookerjee and Newbould, JJ.*) GOPESHWAR SHAH *v* JADAPCHANDRA.
43 Cal. 632 : 22 C. L. J. 352 : 32 I. C. 537 : 20 C. W N. 689.

——S. 74—*High rate of interest.*

Excessive rate of interest might by itself be sufficient to justify a finding that it was penal and unenforceable and the Court will grant relief whenever it appears to be penal. Case law discussed. (*Mookerjee and Chatterjee, JJ.*) CHALLAPHROO *v.* BANGA BEHARY SEN.
22 C. L. J. 311 : 31 I. C. 394 : 20 C, W. N 408.
[This is no longer law. See 48 I. C. 1 (P C.) and 48 I. C. 933 (P. C.)].

——S. 74—*Higher rate of interest by oral agreement not allowed.*

In order to avoid the consequences of S. 74 of the Contract Act, all that a mortgagee need to do is to reserve the higher rate as payable under the mortgage and to provide for its reduction in case of punctual payments. (*Broadway and Harrison, JJ.*) FITZHOLMS *v.* THE BANK OF UPPER INDIA. LTD, 4 Lah. 258 : 77 I C. 523 : 5 L. L. J. 438 : 1923 Lah. 548.

——S. 74—*High rate of interest.*

A high rate of interest does not constitute a penalty. (*Broadway and Abdul Raoof, JJ.*) TOHLU MAL *v.* BUTA. 67 I.C. 132 : 3 Lah. L. J. 184.

CONTRACT ACT (IX OF 1872), S. 74—High rate of interest

——— Ss. 74 and 16—*High rate of interest.*

In the absence of evidence to prove that the mortgagor did not understand the terms of the contract or that the mortgagee exercised undue influence over him or was guilty of fraud, he cannot be relieved of the results of his bargain of paying interest at the rate of Rs. 25 per cent. compound interest simply because the bargain was foolish on his part and has entailed hard consequences. (*Rattigan and Scott Smith, JJ.*) NIHAL CHAND *v.* GHULAM MAHOMED.
235 P. L. R. 1913 : 19 I. C. 856
146 P. W. R. 1913.

———S. 74—*High rate of interest—Penalty—Interest—Rate.*

Where the interest amounts in 5 years to a sum equal to the principal it is not excessive. (*Clark, C. J. and Reid, J.*) FATEH SINGH *v.* NANAK CHAND. 9 I. C. 927 · 20 P. W. R. 1911.

——— Ss. 74 and 16—*High rate of interest—If penalty.*

In the absence of proof of undue influence, a Court cannot give any relief merely on the ground that the rate of interest is excessive. A contract to pay a heavy rate of interest is not by itself a penalty ; it must be an amount to be paid in case of breach of an antecedent promise. 44 C. 162 Diss: 28 A. 570, P. C. Rel : 34 M. 736 : 36M. 533 : 12 C. 225 : 15 A. 352 P. C. Dist. (*Spencer and Srinivasa Aiyangar, JJ.*) PONNUSWAMI NAICKEN *v.* NADIMUTHU CHETTI. 33 M. L. J. 302 : 22 M L. T. 206: 6 L. W 421 : 42 I C. 231 : (1917) M. W. N. 670.

———S. 74—*High rate of interest—High rate of interest if penal.*

A stipulation for interest at 36 per cent per annum from the date of the bond may be unconscionable, but not penal. High rate of interest is penal where the bond provided for payment by instalments without interest but with the condition that if default is made in paying up the instalments, interest at 36 per cent. should be paid not only on the amount actually remaining due but also on the sum originally advanced. (*Tyabji, J.*) SUBRAMANIA AIYAR *v* SUBRAMANIA CHETTY.
22 I. C. 411 : (1914) M W. N. 154.

———S. 74—*High rate of interest—Penalty—Mortgage.*

The principal sum was payable within six months and on default interest at the rate of 37½ per cent. *Held*, the rate of interest was penal and compensation awarded at the rate of 12½ per cent. was reasonable. But being a mortgage, the rate should have been allowed up to the date fixed for payment and interest at 6 per cent after the date. (*Lyle, A. J. C.*) KALI PRASAD *v.* MUHAMAD YASIN KHAN. 54 I. C. 833 : 6 O. L. J. 666.

———S. 74—*High rate of interest—Power of court to reduce—Undue influence—Costs.*

In cases where there is no proof of undue influence, a court has no power to reduce the contract rate of interest merely on the ground that it is very high. 28 A. 570, P.C.; 20 O.C. 318 ; 8 O.L. J. 418; 24 O C. 313 foll. But the court disallowed costs on the ground that the interest decreed

CONTRACT ACT (IX OF 1872), S. 74—Interest from default.

was high. (*Daniels, A. J. C.*) SHEIKH FAZAL AZIM *v.* LALA GIRDHARI LAL. 69 I. C. 657 : 9 O. L. J. 442 : 1923 C. 8 (1).

——— S. 74—*High rate of interest—Mortgage—Security poor.*

If, in a mortgage by a Hindu father, the security offered is inadequate, the contractual rates of interest, although high will not be interfered with. Each case however should be considered on its merits. (*Lyle and Ashworth, A J. C.*) JAGATPAL SINGH *v.* CHANDRAPAL SINGH.
53 I. C. 757 : 6 O. L. J. 477.

———S. 74—*High rate of interest—Court's power to decrease.*

It is an error to say that the tendency in modern decisions is always to disallow high rate of interest on security bonds where a property is sufficient for payment of a loan advanced by the creditors. (*Das and Adami, JJ.*) CHOTA NAGPUR BANKING ASSOCIATION LTD, *v.* BHAGWAT BUX RAI. 1 Patna 268 : 69 I. C 697 : 1922 P. 491.

——— S. 74—*High rate of interest.*

Unless undue influence has been exercised or there has been an unconscionable bargain, the Court cannot give relief to the debtor. (*Das and Coutts, JJ.*) PREM SUKH DAS *v.* RAM BUGHAWAN MAHTO. 1 P. L. T. 34 : 52 I. C. 964 : 1919 Pat. 451.

———Ss. 74 and 16—*High rate.*

Unless a case is covered by S. 16, high rate is not penal since the English rules of equity permitting relief in cases of unduly high rates do not apply to India. (*Mullick and Atkinson, JJ.*) BALUNKI MAHAPATRA *v.* KARAPA SINDHU.
2 P. L. W 175 : 42 I. C. 680 : 1917 Pat. 135.

Interest from date of bond.

———S. 74—*Interest from date of bond.*

An agreement to pay enhanced rate of interest from the date of the deed, is penal but would not be wholly disallowed. A reasonable portion of it might be allowed by way of compensation. (*Karamat Hussain and Chamier, JJ.*) KHUNNI LAL *v.* KALIMUDDIN. 10 I. C. 572.

———S. 74—*Interest from date of bond—Usufructuary mortgage.*

Where a mortgage deed provides that the mortgagee should be in possession of the property in lieu of interest and the period fixed for redemption was four years, a provision that interest was to be paid in addition after the 4 years is no stipulation for increased interest and S. 74 of the Contract Act is not applicable to the case. (*Scott-Smith, J.*) LACHMAN *v.* SANTA.
64 I. C. 350 : 14 P. L. R. 1922.

Interest from Default.

———S. 74—*Interest from default— Penal Interest—Power of Court to relieve against.*

S. 74 after the amendment in 1899 is comprehensive enough to enable the Court to grant relief whenever the rate of interest appears to be penal. The test is whether the agreement to pay the damage for the breach of covenant or contract is unconscionable and extravagant such as

CONTRACT ACT (IX OF 1872), S. 74—Interest from default.

no Court ought to allow to be entered into. A stipulation that upon default of one or two instalments not only would the whole balance due become forthwith payable but would carry interest at 75 per cent. per annum is one by way of penalty. S. 16 also applied to this case. (*Mookerjee and Beachcroft, JJ.*) KHAGARAM DAS *v* RAM SANKER DAS. 42 Cal. 652 : 19 C W. N. 775 : 27 I. C 815 : 21 C. L. J. 79

———S. 74—*Interest from default—Bond—Further interest and 25 per cent. more to be paid in default—Whether penal.*

Where in a bond it is provided that, on default of payment of principal and interest on a particular date, 25 per cent. shall be added to the total amount then due and further interest at 12½ per cent. on the consolidated amount shall be charged, the provision is penal and therefore it is unenforceable. (*Sadasiva Iyer and Spencer, JJ.*) CHELLAGALI CHINNIGADU *v.* KAPPALA VENKATARAYUDU. 23 I. C. 542

——S. 74—*Interest from default—Interest—Default—Exorbitant rate—Penalty.*

Exorbitant interest from date of default may be a penalty within Section 74 even though no interest is payable until default. Act XXVIII of 1855 does not apply to secondary contracts providing for breaches of original contracts and does not intend to cut down equitable powers of Courts. 23 M. 343 : 26 M. 445: 14 M. L. J. 136: overruled. (*Wallis, Sundara Aiyar and Sadasiva Aiyar, JJ.*) MUTHUKRISHNIER *v.* SANKARALINGAM PILLAI. 36 Mad. 229 : 13 M L. T 20 : 18 I. C. 417 (F. B.) : 24 M L. J. 135.

———S. 74—*Interest from default—Intention default.*

A provision for payment of interest on default of payment of any instalment is not in the nature of a penalty. (*Wallis, J.*) SALEM TOWN BANK, LTD. *v.* VENKATACHAR. 9 M. L. T. 363 : 9 I. C. 197 : (1911) 1 M. W. N. 134.

——S. 74—*Interest from default—Penalty.*

A stipulation that future interest shall be paid in a lump sum on a default occurring in the payment of any instalment can be relieved against, under S. 74 but not when the amount of interest payable on default does not give more than moderate interest. (*Skinner, J C.*) SAMPAT *v.* CHANGO. 10 I. C. 738 : 7 N. L R. 46.

———S. 74—*Interest from default.*

A mortgage deed provided for the payment of interest at 8 annas per cent per mensem payable half yearly and that if a default was made in making such payment, the interest due was to be added to the principal and the whole sum was to bear interest thereon at 12 annas per cent per-mensem. *Held* that the contract is not penal An agreement to pay interest at an enhanced rate for the breach of a contract may not be extravagant or unconscionable if the original rate of interest is paid regularly at the stipulated time. A covenant to pay compound interest is by itself not penal. S. 74 does not enact that the stipulation for the payment of enhanced interest from the date of default ought always to be considered penal (*Kanhaiya Lal, J. C.*) KANDHI *v.* HUSSAIN BIBI AND OTHERS. 26 O. C 352 : 10 O. L. J. 611 : 1923 O. 158.

CONTRACT ACT (IX OF 1872), S. 74—Interpretation.

———S. 74—*Interest from default— Penalty—Default of instalment—Interest.*

The provision to pay interest from the date of default of payment of instalments up to the date of realization is a perfectly proper provision as to interest and is not at all penal. (*Coutts and Dass, JJ.*) BAIJ NATH GOENKA *v.* DALBEP SINGH. 1 Pat. L. T 582 : 58 I C 489 : 1920 Pat. 261.

———S. 74—*Interest from default—Mortgagor's default—Interest.*

The stipulation that, on failure of payment of one instalment in time, the whole sum might be realized with interest at 2 per cent from default till realization is not by way of penalty. (*Chapman and Atkinson, JJ.*) SAHDEO SINGH *v.* KARIMAN SINGH. 40 I. C. 770.

Interpretation.

——S. 74—*Interpretation — Discretion of Court—Whether penalty can be reduced.*

In spite of the exception to S. 74, the Court has discretion, according to the circumstances of the case, to reduce the amount of penalty entered in the bond executed between the parties. (*Macleod, C. J and Shah, J.*) SECRETARY OF STATE FOR INDIA *v* DILZISIAN. 23 Bom. L R. 495 : 62 I. C. 675 : 45 Bom. 1213.

——S 74 — *Interpretation — Liquidated damages.*

Where a certain sum is named as to be paid in case there is a breach of contract, the plff. in case of breach can get reasonable compensation to be assessed by the Court. Previous law on the point discussed (*Sanderson, C. J and Richardson, J.*) DHARENDRA KRISHNA DEB *v.* ALTAFUR RAHAMAN. 62 I. C. 759.

——S. 74— *Interpretation — Penalty and liquidated damages*

Distinction between penalty and liquidated damages is abolished by S. 74 even in case of contracts before 1899. (*Chatterjee and Newbould, JJ.*) SYAM PEARY DASYA *v.* EASTERN MORTGAGE AND AGENCY CO., LTD. 40 I. C. 865.

— — S 74—*Interpretation—Explanation.*

The explanation to S. 74 is not exhaustive so that though a contract for payment of interest does not fall within the explanation, it may amount to a penalty (*Fletcher and Smither, JJ.*) LAL GOPAL DUTT *v* BISWANATH. 39 I. C. 647.

——S. 74—*Interpretation—Penal provisions—Strict rules.*

What stipulation for payment of interest on a debt may be decreed should not be defined by judicial decisions. (*Sanderson, C. J. and Mookerjee, J.*) KRISHNA CHARAN BARMAN *v* SANAT KUMAR DAS. 44 C 162 : 25 C. L. J. 24 : 34 I. C. 609 : 21 C. W. N. 740.

———S. 74—*Interpretation—Penalty—Interest—Power of Court to relieve— Primary and Secondary Contract,*

CONTRACT ACT (IX OF 1872, S. 74—Interpretation.

An agreement by a borrower, in return for a smaller sum to repay a larger one on a given day representing the original principal and interest, is not contrary to law and the Court cannot award relief under S. 74 as the transaction is not penal. The word 'penal' in S 74 implies that there is a main contract and a subsidiary contract providing for some more drastic consequences in the event of the breach of the original and main contract. It is totally inapplicable to a term of the original contract or consequence of the original contract not owing to breach but owing to fulfilment. (*Coutts-Trotter, J.*) SUKKUL SOWCAR *v.* TIRUMALA ROW. 51 I. C. 295 : 24 M L. T. 420

——S. 74—*Interpretation Duty of the Court —To relieve against penalties.*

The addition of the words "or if the contract contains any other stipulation by way of penalty" to Sec. 74 of the Indian Contract Act has enlarged the scope of that section and it has the effect of getting rid of all subtle technicalities in the application of the equitable principle regulating the duty of the Court to relieve against the penalties. (*Abdur Rahim, O. C J. and Seshagiri Aiyar, J.*) PILLAY *v.* PILLAI. 37 I.C. 799.

——S 74—*Interpretation.*

A mortgage for an amount due, found on settling accounts recited the conditions of repayment by instalments in kind, on failure of any of which, the mortgagor was bound to return the whole amount with interest at once. *Held Per Abdur Rahim, J.*—The proper reading of the document leads to the conclusion that the stipulation was for the repayment of the balance of the amount and not the payment in kind. *Per Ayling, J.*—Contra :—The salutary principle of the law is that the party breaking the primary terms of contract, should not be placed in a more favourable position than the party entitled to enforce it. Hence the mortgagors were liable to pay the unpaid balance of the kind on default The primary proviso of paying the consideration of the former dues in kind is enforceable under S. 37, Contract Act ; and the defendant cannot be relieved under S. 74 of the Act, treating the stipulation as a penalty. The proviso for payment of the total unpaid instalments on default of any one might be taken as penal ; and the proviso for the interest therein is penal. But the Court ought to allow the plaintiff that much, which he would have got in the absence of the stipulations in consequence of the breach. S 74 deals not with the primary terms, but with the stipulations in the contract. (*Abdur Rahim and Ayling, JJ.*) SURYADEVARA SEETARAMAYYA *v.* SURYADEVARA KOTAYYA. 35 I. C. 111.

——S. 74—*Interpretation—Penalty and liquidated damages—Distinction.*

(Per *Sadasiva Aiyar, J.*) The Act abolishes the distinction between penalty and liquidated damages. If the vendor rescinds the contract of sale, he should return the earnest money. (*White, C. J., Miller and Sadasiva Aiyar, JJ.*) NATESA AIYAR *v.* APPAVU PADAYACHI.
38 Mad. 178: (1913) M. W. N. 341 : 24 M. L. J. 488 : 19 I. C. 462: 13 M. L. T. 391

CONTRACT ACT (IX OF 1872), S. 74—Lease.

—— S. 74—*Interpretation —Penalty—Relief against.*

If the mortgagor pleads that the stipulation as to the payment of interest is penal, the question before the Court is not what the mortgagee has actually charged and whether that is penal or not It must decide for itself whether original stipulation as to interest was penal or not ; and if it was penal, what reasonable compensation the plaintiff is entitled to get. (*Drake Brockman J. C. and Kotwal, A.J C.*) BANSI *v.* SHEO SHANKAR PURI.
55 I. C. 66.

Lease.

——S. 74—*Lease—Rent—* Kabuliyat *fixing rent—Provision for enhancement on failure of tenant to take fresh settlement.*

There was a provision for Rs. 76 rent but an abatement of Rs 26 was allowed for the term of the *kabuliyat*. On the expiry of the term there would be no fresh settlement and so long as the fresh settlement was not made, the rent was to be Rs. 76 For some years after the expiry of the term of the kabuliyat, the landlord accepted Rs.50 as rent, and then sued to recover the balance. *Held*, that he was not entitled to do so, as the stipulation to pay a higher rate of rent was in its nature penal and unenforceable. (*N. R. Chatterjee and Duval, JJ.*) KALIKESH CHANDRA CHATTOPADHYA *v.* JAHARULLAH MANDAL SARKAR.
51 I. C 984.

——Ss. 74 and 16—*Lease—Rent—High rate —Coercion.*

In the absence of proof of coercion or undue influence, a tenant is liable to pay the rent with the interest provided in the kabuliyat. (*Fletcher, J.*) AMAR KRISHNA SEN *v.* CHANDRA KUMAR SEN.
51 I C. 793.

—— S. 74—*Lease—High rate of interest and damages in* Mokurari *lease.*

An agreement in a *Kabuliyat of Mokurari* lease to pay interest at 75 per cent. on arrears of rent and damages at 300 per cent is intended to secure punctual payment of rent than represent the loss of the landlord owing to the non-payment of the rent. Such a stipulation comes under S. 74 as it is a penalty and is also unconscionable. (*N. R. Chatterjee and Sheepshanks, JJ.*) UPENDRA LAL GUPTA *v.* ATAULLA. 36 I, C. 404 : 21 C, W. N. 108.

——S. 74—*Lease—Penalty—Landlord and tenant Double the rent for holding over.*

A clause in a lease that the tenant should give up the land on expiry of the term and if after he should claim a right of occupancy or hold over, he should pay double the original rent, is penal and not enforceable (*Mookerjee and Beachcroft, JJ.*) ABDUL AZIZ *v.* KARU. 21 I. C. 443 : 18 C. L. J. 95.

——S. 74—*Lease—Penalty—Landlord and tenant—Stipulation in Kabuliyat.*

A stipulation in a *Kabuliyat* executed by non-occupancy raiyats whereby the tenants were to give up possession at the end of the term, unless a fresh *Kabuliyat* for a higher rent was executed is not a stipulation by way of penalty. 22 C. 658

CONTRACT ACT (IX OF 1872), S. 74—Lease.

Foll. 19 C. 392 ; 17 B. 106 Dist. *Ghose and Rampini, JJ.)* GANPAT SINGH *v.* JOS DHUR SINGH. 20 I. C. 516 : 17 C. L. J. 580.

—— —— S. 74—*Lease—Enhanced rate—Condition to pay enhanced rent on default of regular payment.*

A condition to pay increased rent in default of regular payments is penal *(Shah Din and Beadon, JJ.)* NIADAR MAL *v.* BORROOAH & CO.
23 I. C. 358 : 5 P. W R. 1914 : 26 P. L R. 1914.

—— —— S. 74—*Lease Penalty—Forfeiture covenant against alienation.*

A covenant for re-entry on alienation by a lessee is not a penalty and Courts cannot relieve against it. *(Wallis, C. J., Napier and Kumaraswami Sastri, JJ.)* KRISHNA CHETTY *v.* GILBERT PINTO.
42 Mad. 654 : 36 M. L. J. 367 . 50 I C. 898: 9 L. W. 431

—— —— S. 74—*Lease—Penalty—Deposit — Forfeiture—Interest at 24 per cent.*

A rental agreement stipulated for a deposit of 6 months' rent in advance and its forfeiture in case of breach of its terms *Held*, that S 74 was not applicable to the forfeiture of deposit and that the clause for forfeiture was not a penalty. But claiming 24 per cent interest from date of suit was held to be penal. In determining whether a stipulation for forfeiture is a penalty, regard must be had to the reasonableness or unreasonableness of the amount. *(Ayling and Phillips JJ.)* N. VENKATACHARI *v.* RAMALINGA THEVAN.
7 L. W. 404 : 46 I. C. 417 : (1918) M. W. N 197

—— —— S. 74—*Lease.*

The provision for the payment by the tenant of any damages that may be fixed by the landlord for cutting trees on the holding or their value is a penal provision. The Court may assess damages and may refuse to enforce such provision. *(Wallis, C. J., Abdur Rahim, Oldfield, Srinivasa Aiyangar and Phillips, JJ.)* RAJA OF COCHIN *v.* KIZHAYIL KOTHANATH. 40 Mad. 603 : 32 M. L. J 295 : 5 L W. 500 : 21 M L. T. 282 38 I. C. 503 : (1917) M W. N. 249 (F. B.)

—— —— S. 74—*Lease—Stipulation to pay heavy rent—Penalty.*

The contract was that at the end of 4 years when the lease terminated, the defendants should pay to their landlord half the amount of the produce of land. In the event of their objection to do so or preventing the landlords from having the produce assessed, then the stipulation in the *kabuliyat* was that they should pay at Rs 10 per bigha, *held* that the stipulation is purely a penalty as understood in law and being a much higher rate of rent than is usual in such cases is purely a penalty and not meant to be a substantive part of the contract binding on the parties *(Dawson Miller, C J. and Adami, J.)* PITHU MANJI *v.* JHUKSAR SINGH. 1922 P. 240.

—— —— S. 74—*Lease—Provision for penal mesne profits on failure to surrender*

Where a lease stipulates that the lessee shall pay *mesne* profits at an unduly high rate on failure to give up the lands which form the subject matter of the lease, on the expiry of the period for which it is granted, the Court has power to alter the rate agreed upon. *(Adami and Das, JJ.)* MORGAN *v.* BADU RAMJEE RAM.
5 Pat. L. J 302 : 1 Pat. L T. 310 : 56 I. C, 366 : 1920 Pat. 168.

CONTRACT ACT (IX OF 1872), S. 74—Meaning of penalty

—— S. 74—*Lease—Enhanced rent after expiration of term.*

A provision in a lease for enhanced rate of rent if the tenant holds over after the expiry of the term is valid and enforceable. *(Thornhill, J.)* RAMDHIN CHAUDHURY *v.* KUMODINI DASSI.
45 I. C. 901.

Meaning of Penalty.

—— —— S. 74—*Meaning of penalty—Compromise to pay per month.*

Under a compromise, the defendant agreed to pay Rs. 10 per month to the plaintiff and he would be liable to pay Rs. 15 per month, if he failed to pay Rs. 10 for four consecutive months. *Held*, that the clause to pay Rs. 15 was by way of penalty and was inserted to enforce regular payment of Rs. 10 per month. *(N. R. Chatterjee and Panton, JJ.)* HEMANTA KUMAR *v.* SUDHANGSU GOBIND. 62 I. C. 436 : 25 C. W. N 262.

—— —— S. 74—*Meaning of penalty.*

The idea is very common that what is called a "penalty clause" in a contract is a mere *brutum fulmen*, an agreement that neither party has any intention of enforcing at all to any extent. Such an agreement would certainly not be mentioned in the Contract Act, and in fact would not be agreement at all A penalty clause merely fixes a maximum for damages which would be difficult to state in terms of money, and anyhow does not deprive the aggrieved party of his right to damages that can be so estimated. 12 N. L. R. 177 Ref. *(Halifax, A. J. C.)* BALAJI *v.* SUKAMIYA. 68 I C. 605 : 1923 Nag. 98.

—— —— S. 74—*Meaning of penalty Interest and principal consolidated together and made payable in instalments—Default—Provision for payment of whole—Power of Court to relieve against.*

If in an instrument in which the principal and interest have been consolidated and the total amount is payable by instalments, there is a default clause that on failure to pay an instalment, the whole sum will become at once due, such a provision is a penalty. Even where no interest is payable until default but an exorbitant rate is payable on default, it is open to the court to treat the stipulation as a penalty. 42 C 652 ; 36 M. 229 foll. *(Batten, J. C.)* BHAGWANSA *v* AMIN.
65 I. C. 963 : 1922 Nag. 49.

—— —— S. 74—*Meaning of penalty—Right of resale of goods—Power to sell on breach of conditions.*

Where in a contract for the sale of goods a right of resale is reserved to the vendor on breach of certain conditions the vendor can avail himself of the right of resale on the breach and the power to resell is not a stipulation by way of penalty. *(Kanhaiya Lal, J. C.)* NAZIRKHAN *v.* MIRZA MAHOMED ABID. 10 O. L. J. 33 : 25 O C. 186 : 1922 Oudh 265.

CONTRACT ACT (IX OF 1872), S. 74—Measure of damages.

Measure of Damages.

——S. 74—*Measure of damages—Breach of Contract—Damages— Liquidated damages or penalty.*

Whatever expression may be used in a contract to describe the payment to be made in case of a breach, the question must always be whether the construction contended for renders the agreement unconscionable and extravagant and one which no Court ought to allow to be enforced. No abstract rule can be laid down as to what may or may not be extravagant or unconscionable without reference to the particular facts and circumstances which are established in each particular case. Where at the time of making a contract it was not possible to foresee the extent of the injury which might be sustained in case of a breach, and the damages though very real, were difficult of proof and likely to entail considerable expense in ascertaining and the parties agreed that on breach of the contract, £500 which was a reasonable amount, should be paid as liquidated damages and not as a penalty, *Held*, that, the party, who suffered the injury by the breach could recover that sum as liquidated damages without proof of the actual damage suffered by him. (*Lord Mersey.*) ROWLAND VALENTINE WELSHER *v.* WILLIAM DAVID BOSANQUET.

16 C. W. N. 697 : 16 I. C. 147 .
23 M. L. J. 177 (P. C.)

——S. 74—*Measure of damages—Liquidated damages.*

Where the parties have themselves fixed the value of their rights, that amount is a proper measure of damages sustained. (*Tudball, J.*) KUER SEN *v.* SUKHKHO. 27 I. C 503 : 13 A. L J. 6.

Proof of Damages.

——S. 74—*Proof of damages—Damages—Quantum—Proof lies entirely on plaintiff—Defendant* ex parte.

In an undefended action for unliquidated damages based on a breach of contract, the plaintiff should not only offer proof of the material avertments in the plaint which go to form his cause of action but also the actual *quantum* of damages he has sustained apart from the inflated statement as to damages usually contained in the plaint. (*Sanderson, C. J., Woodroffe and Mookerjee, JJ.*) J B. ROSS *v* C R. SCRIVEN.

43 Cal. 1001: 34 I. C. 235 : 20 C. W. N. 1192.

Reduction for Punctual Payment.

——S. 74—*Reduction for punctual payment.*

Where a deed provides for a rate of interest but also contains a covenant to accept interest at a reduced rate if paid punctually, the covenant does not make the original rate a penalty within S. 74 of the Act. (*Mookerjee and Buckland, JJ.*) BAIKUNTA NATH *v.* RAMANAND. 33 C L. J. 414 : 61 I C. 923: 25 C. W. N. 776.

——S. 74—*Reduction for punctual payment—Higher rate of interest or interest.*

A stipulation to pay higher rate of interest on default of payment of interest is a penalty but a stipulation to accept the lower rate in lieu of higher rate if paid in time is not a penalty. (*Chatterjee and Newbould, JJ.*) SYAM PEARY DASSYA *v.* EASTERN MORTGAGE AND AGENCY CO., LTD. 40 I. C 865.

CONTRACT ACT (IX OF 1872), S. 74—Unconscionable bargain.

——S. 74—*Reduction for punctual payment—Stipulation to pay interest at a certain rate—Period for lower rate for punctual payment.*

Where a contract provides for payment of interest at 24 per cent but if no default is made, interest at a lower rate shall be payable. The provision as to the payment of the higher rate of interest is not a penalty. (*White, C. J. and Oldfield, J.*) ABDUL RAHIMAN *v.* D. RANGIAH, GAUNDEN. 22 I. C. 597 : 1 L. W 181.

——S. 74—*Reduction for punctual payment—* Where the deed recited "I will claim a remission of annas 4 per cent. per month from the interest, if I pay the amount as stipulated. I will not claim remission if I do not pay the amount as stipulated". *Held*, the reduction in the rate of interest contemplated on punctual payment of instalments does not amount to a penalty. (*Prideaux, A. J. C.*) KESHAV RAO *v.* KRISHNA RAO. 70 I. C. 31: 1922 Nag 263.

Unconscionable Bargain.

——S 74—*Unconscionable bargain—Penalty—Relief against—Improvident transaction, not a ground for.*

However improvident a transaction may be, it is difficult for a Court of justice to give relief on grounds of simple hardship in the absence of any evidence to show that the money lender had unduly taken advantage of his position. (*Mr. Amer Ali.*) AZIZ KHAN *v* DINICHAND.

101 P. R 1918: 165 P W R 1918:
48 I. C. 933: 23 C W N 130 (P C.).

See ALSO 48 I C. 1 (P C.).

——S. 74—*Unconscionable bargain—The sum demanded enormously greater than the sum advanced.*

By making short term loans and insisting on capitalizing the interest immediately it falls due, a money lender may pile up compound interest at an oppressive and unconscionable rate But there is nothing inherently wrong or oppressive in his securing interest upon interest after the interest has been due and unpaid for a considerable time. In money lending transactions the mere fact that the sum ultimately claimed exceeds enormously the amount originally advanced is no ground for holding the transaction to be unconscionable, either in the original dealings or in the subsequent stages of the transaction. Questions as to undue influence, unconscionable bargains and dealings with expectant heirs must be decided on the provisions of the Contract Act, 1872, as amended by the Indian Contract Amendment Act, 1899, and these alone. The principles on which English Courts of Equity deal with similar questions are entirely applicable to India. (*Lord Atkinson.*) BALA MAL *v.* AHAD SHAH.

35 M. L. J. 614: 16 A. L. J. 905: 124 P. R 1918:
23 C. W. N 233: 25 M. L. T. 55: 180 P. W.R. 1918:
29 C L. J. 165: 1 U P. L. R (P. C.) 25 :
48 I. C. 1 : 21 Bom L. R. 558 (P. C.).

CONTRACT ACT (IX OF 1872), S. 74—Unconscionable bargain.

——S. 74—*Unconscionable bargain—Penalty—Fixation of price of paddy due under contract—No undue influence—Power of Court to reduce price.*

The plaintiffs advanced a sum of Rs. 500—and for this the defendant undertook to repay 172 maunds of paddy in the next year and the same amount in the following year. In default of delivering paddy the price was to be charged at Rs. 3—per maund. There was no suggestion that the defendant acted under any undue influence It was found that the defendant had to pay under this agreement nearly double the amount advanced, *Held* that there was no ground for holding that the stipulation was a penalty and the Court had no power to reduce the price. It was in the interests of the party that a definite rate should be fixed for the paddy and it might have been to the advantage of the defendant if the paddy at the time of payment was selling at a higher rate to be able to pay cash instead of paddy itself. (*Newbould and Panton, JJ.* ASHRAF ALI *v* MAKBUL AHMED. **49 C. 1040: 70 I. C 931: 1923 C. 166**

——S 74—*Unconscionable bargain—High interest on default of payment contained in a permanent lease—Penalty—Power of Court.*

N R. Chatterjee, J.—A Court has power to give relief in a case of stipulation for payment of interest at 75 per cent. and full damages in default of kists specified in a permanent lease. *Richardson J.* contra. Stipulations in permanent leases and other contracts distinguished. (*Chatterjee and Richardson, JJ.*) NABA KUMAR CHAKRABURTTY *v.* ABDUL JABBAR MIYAV.
36 I. C. 721: 21 C. W. N. 112.

——S. 74—*Unconscionable bargain—Power of Court.*

A bargain is unconscionable when it is such as no man in his senses and not under delusion would make on the one hand and no honest and fair man would accept on the other. This definition is not satisfied by a case where long delay in payment brings about a position in which the discharge of the debt is impossible, the debtor being a man of sufficient intelligence to foresee the result of his inaction. Whether a particular bargain is unconscionable or not and whether a particular stipulation constitutes a penalty or not are questions of fact rather than of law. (*Drake-Brockman, J. C.*) DEORAO *v.* AMBADAS.
43 I. C. 952: 14 N. L. R. 21.

——Ss. 74 and 16—*Unconscionable bargain—Interest—Excessive rate—Security.*

The only power of courts to interfere with contracts as 'hard and unconscionable' is given by S. 16 of the Contract Act. The mere fact that the borrower is already indebted to the lender is no proof of undue influence. Where a person agreed to pay interest at 21 per cent. interest and in case of default of payment at the simple rate, for payment of compound interest such a stipulation is not one by way of penalty. 42 C. 690 Dis. (*Lindsay, J. C.*) CHANNU LAL *v.* RAI KUAR.
43 I. C. 295: 20 O. C. 318.

CONTRACT ACT (IX OF 1872), S. 76.

——S. 74—*Unconscionable bargain—Penalty—Agreement to pay commission—Mortgagor's liability—Circumstances attending agreement.*

Where a mortgagor, voluntarily and in pursuance of a deliberate bargain enters into an agreement to pay commission to the mortgagee and pays the amount, the parties are completely on equal terms and in a suit subsequently brought by the mortgagee, the mortgagor cannot avoid his liability for the commission paid. 34 C. 150 Ref. (*Stuart and Kanhaiya Lal, A. J. C.*) NARENDRA BAHADUR SINGH *v.* OUDH COMMERCIAL BANK, LTD. **30 I. C. 323: 2 O. L. J. 402.**

——Ss. 76 and 121—*Shares in a company—Contract for sale and delivery—Rights of transferee—Pledge.*

Plaintiffs sold some shares to the 1st defendant who sold 25 of them to a third party and pledged 104 along with other similar shares to the second defendant Defendant 2 put forward defendant 3 as a party who was willing to advance money. In fact defendant 3 was a mere nominee of 2nd defendant and defendant 2 got possession of 305 shares fraudulently. The fraud was that he deceived defendant 1 by false pretences that he would use these shares for the purpose of raising a loan for the benefit of defendant which he did not do and which he did not intend to do, his real object being to secure himself from loss as regards the moneys due to him from 1st defendant The plaintiffs sued to recover the shares and damages from defendants 2 and 3.

Held that the plaintiff's suit was unsustainable and the remedy of the plaintiffs was to sue the 1st defendant for the purchase money. The shares were moveables or 'goods' within S. 76 of the Contract Act and the case therefore fell within S. 121 of the same Act. The plaintiffs had delivered all they had and they could not, therefore rescind the contract on the buyer's failing to pay the price unless it was stipulated by the contract that they should be so entitled. The plaintiffs as vendors agreed to sell and deliver transfers and certificates with the interests and rights which they conveyed. Such delivery passed not the property in the shares but a title legal and equitable which would enable the holder to vest himself with the shares. On delivery of the documents there was no interest left in the plaintiffs on which any equity can be founded. As between them and 1st defendant there was no fraud or misrepresentation which could vitiate the transaction. (*Macleod, C. J. and Crump, J.*) VADILAL *v.* MANEKJI. **25 Bom L. R. 414: 1923 Bom. 372.**

——Ss. 76 and 108—*Share certificates are 'goods.'*

Share certificates are moveable property within the meaning of S. 76 and are therefore 'goods.' (*Kanga, J.*) FAZAL *v.* MANGALDAS.
23 Bom. L. R. 1144: 66 I. C. 726: 46 Bom. 489: 1922 Bom. 303.

——Ss. 76 and 178—*Meaning of 'goods' under S. 76 and S. 178—Not the same.*

The term 'goods' in S. 178 of the Act is not governed by the definition thereof in S. 76. (*Sanderson C. J. and Woodroffe, J.*) LALIT MOHUN NUNDY *v.* HARIDAS MUKHERJEE.
37 I. C. 707: 24 C. L. J. 335.

CONTRACT ACT (IX OF 1872), S. 76.

———S. 76—*Sale of goods—Goods ordered, despatched to buyer—Refusal to take delivery—Suit to recover price.*

Where ascertained goods are sold and despatched to the buyer, but the buyer refuses to take delivery, the seller can sue him for their price. (*Broadway, J.*) SURJAIN MAL KISHEN CHAND *v.* GIAN CHAND CHIRANJI LAL.

59 I. C. 877 : 3 Lah. L. J. 239.

———S. 78—*Hire purchase agreement.*

See also (1) CONTRACT—HIRE PURCHASE.
(2) CONTRACT ACT, S. 178.

———S 78—*Sale of goods—Property passes as soon as contract is made.*

On a sale of ascertained goods the property in the goods passes to the purchaser as soon as the contract of sale is made even though the delivery of the goods is postponed at his request and to suit his own convenience. (*Gokul Prasad and Stuart, JJ.*) DWARKA DAS AJODHYA PRASAD *v.* RAM RATAN. **20 A L. J. 579 : L. R. 3 A 424 : 68 I. C. 239 : 1922 All. 458.**

———Ss. 78 and 7—*Payment of price by instalments—Property passes as per intention of parties.*

If S. 78 were construed as laying down an inflexible rule as to the passing of property not only would there be a serious limitation on the freedom of contract but there would also be an inconsistency with other sections of the Indian Contract Act *e. g.*, S. 7. No doubt it is curious that S. 78 should not be expressed as subject to a contrary intention but the Act is a notoriously badly drafted Act and it does not purport to be exhaustive, where the intention of the parties as expressed in the conditions of the contract was that the property in the car in dispute should not pass until full price had been paid. *Held*, that intention would prevail in spite of S. 78. (*Pratt, J.*) HURBUT JOHN AMIES *v* JAL P. VIRJI.

25 Bom. L. R. 778 : 77 I. C. 150 : 1924 Bom. 41

——— S. 78—*C. I. F. Contract—Property when passes.*

In a C. I. F. contract the property in the goods passes as soon as the goods are shipped, but when the first buyer sells to another party the property in the goods does not pass until the bills of lading are endorsed to the purchaser. (*Macleod, C. J.*) RUSTOMJI A. DUBART *v.* HAJI HUSSAIN LARI. **59 I. C. 515 : 22 Bom. L. R 1165.**

——— S. 78—*Sale in one's own favour—Effect.*

An exercise of the power of sale by the donee of that power in his own favour, does not affect the substance of the transaction. (*Scott, C. J. and Batchelor, J.*) ANDREW YULE & Co. *v.* ARDESHIR BOMENJI DUBASH. **24 I. C. 758 : 16 Bom. L. R. 178.**

——— S. 78—*Contract—Variation in terms.*

The fact that the performance of a contract falls on a holiday does not alter the rights of parties by suspending their private business if there is contrary provision of statute or trade custom or local usage The mercantile usage in spite of statutory exemptions of any requirements such as antiquity, etc., must be well-known and

CONTRACT ACT (IX OF 1872), S. 78.

acquiesced in giving rise to a reasonable presumption of its incorporation in the contract by the parties. The evidence adduced in its support must not be repugnant to or inconsistent with the contract. In order to make a material incident sought to be annexed fall in the exception of repugnancy, it must be such that if introduced in a written contract, it would make it meaningless or inconsistent or thoroughly unreasonable. To claim the benefit of performance of a contract on the next day following a holiday, the party must not only prove the existence of a trade usage but also that when read with a written contract it would not be meaningless or inconsistent. (*Mookerjee, A. C. J. and Fletcher, J.*) KASIRAM PANIA *v.* HARNANDROY FULCHAND.

58 I. C. 396 : 32 C.L. J 140.

———S. 78—*Property sold on credit—Vendor's lien.*

A vendor having no lien on the property sold on credit when the possession is delivered to the purchaser, cannot proceed directly against a third person dispossessing the purchaser of the property in question. (*Mookerjee and Beachcroft, JJ.*) ERA APENA *v.* ERA SWAMI.

17 I. C. 963 : 16 C. L. J. 575.

———S. 78—*Sale of goods—Strangers in possession—If can be made parties and decree passed against them.*

The plff. vendor can recover the price of goods sold only from the vendee and so third persons found in possession of the goods cannot be made liable for the price in a suit against them all but the goods can be attached after a decree has been obtained against the vendee. (*Sundara Iyer and Spencer, JJ.*) MADDANIAH *v.* BHIMAPPA

13 I. C. 469 : (1912) M. W. N. 72.

———S. 78—*Sale of specific goods—Position of buyer—Claim for price—Wholesale delivery.*

Where specific goods are sold and agreed to be delivered wholesale to a certain person at a certain rate, it is for the buyer to get goods weighed and delivered to him. The weighment is only for the consideration of the buyer and the latter cannot by delay in weighing the goods prevent the transfer of the ownership to him. Where the contract was for the sale of the entire heap of bark stored in the godown amounting approximately to 446 maunds it was practically a sale of specific or ascertained goods and it was the duty of the purchaser to get the goods weighed and delivered on the due date. (*Kanhaiya Lal, J. C.*) ANNAN *v.* SHEIKH DUBAR **26 O. C. 39 : 68 I. C. 969 : 9 O. L. J. 339 : 1923 Oudh 15.**

———Ss. 78, 83, 107 and 118—*Ascertained goods—Warrant.*

Where goods were purchased on condition that they would be undamaged, and subject to inspection and approval, there is an implied warranty that they are such as fall under the denomination of undamaged goods. The goods cannot be said to be ascertained until they are inspected and approved. (*Jwala Prasad and Ross, JJ.*) FIRM OF RAMDAYAL RAM NARAIN *v.* FIRM OF BHAIRO BUX GOURIDUTTA. **1 Pat. L. R. 398 : 79 I. C. 183 : 5 Pat. L, T. 558 : 1924 P. 240.**

CONTRACT ACT (IX OF 1872), S. 78.

——— **S. 78**—*Delivery order—Documents of title.*

Where goods are in existence and ascertained a delivery order in respect of them to a certain person or bearer, is a document of title to the goods and pa-ses from hand to band in the trade and represents the goods. *Gilbertson & Co* v *Anderson and Coltman*, 18 T. L. R. 224, Ref. (*Ormond J.*) KADER EBRAHIM ROWTHER *v.* S. S. A. H CHETTY FIRM. **36 I. C. 593 : 10 Bur. L. T. 248.**

——— **S. 78**—*Rice trade—What is delivery.*

In the rice tracts the delivery of a milling notice is equivalent to the delivery of the actual rice. (*Young, J.*) DHUNJI DEOSI *v.* POKERMALL ANANDROY. **24 I. C. 441 : 7 Bur. L. T. 54.**

——— **S. 78**—*Hire purchase agreement—Instalments— Option to return or become owner.*

In a hire purchase agreement, the hirer has an option to return the article hired or to become its owner on full payment. It is not a sale within S. 78 of the Act, the hirer being merely a bailee. (*Hartnoll Offg, C J. and Twomey, J.*) MAUNG MYA GYI *v.* MG. POSHWE. **15 Cr. L J. 425 : 7 Bur. L. T. 222 : 24 I. C. 161 : 7 L. B. R. 298.**

——— **Ss. 80 and 90**—*Sale of rice—Cost of gunny bags.*

On the sale of rice, the vendor is liable for the cost of gunny bags supplied by the buyer at the mill for taking delivery of the rice (*Maung Kin, J.*) DHARSEE NANJEE AND CO. *v.* OOMERSE RAISI AND CO. **50 I. C. 549 : 11 Bur. L. T. 214.**

——— **S. 81**—*Sale of goods—Passing of ownership*

Even under S. 81 the intention of the parties determines whether property in the goods sold has passed to the buyer. Ascertainment of price may precede or follow the ascertainment of goods by weighing or measurement. Local trade usage may help to interpret the ambiguous terms of an agreement. (*Chatterjee and Richardson, JJ.*) ABDUL AZIZ *v.* KRISHNA ROY. **44 Cal. 98 : 36 I. C. 119 : 20 C. W. N. 1224.**

——— **Ss. 81 and 83**—*Sale of goods—Passing of property.*

Under a contract of sale, property in goods does not pass to the purchaser until it is ascertained, as by weighment by the vendor, unless there are other terms of the agreement or some particular local or trade usage to the contrary. 24 I. C. 883, Ref. to and 32 I. C. 720, Diss from, (*Hayward, A. J. C.*) FIRM OF TARACHAND GHANSHANDAS *v.* MESSRS. LOUIS DREYFUS & CO. **35 I. C. 449 : 10 S. L. R 14.**

——— **Ss. 83 and 91**— *Appropriation— What constitutes Delivery—Bill of lading—Discounting draft.*

The commonest form of appropriating goods, to a contract for the sale of unascertained goods is by delivering them to a carrier. A very common mode of doing business is for one merchant to give an order to another to send him certain goods Here it becomes the seller's duty to appropriate the goods to the contract. The seller is by the express or implied terms of the contract authorised to select and appropriate the goods, the buyer having given a previous implied assent to the seller's appropriating. The difficulty in such cases is to determine what constitutes the appropriation. The question is one of intention but there are certain well-established rules :—(1) In the case of a contract for the sale of unascertained goods the delivery by the seller to a common carrier or, unless the effect of the shipment is restricted by the terms of the bill of lading shipment on board a ship of, or chartered for, the purchaser is an appropriation sufficient to pass the property. (2) If however the vendor when shipping the articles which he intends to deliver under the contract takes the bill of lading to his own order and does so not as agent or on behalf of the purchaser, but on his own behalf, it is held that he thereby reserves to himself a power of disposingof the property and consequently there is no final appropriation and the proper y does not on shipment pass to the purchaser. (3) If the vendor deals with or claims to retain the bill of lading in order to secure the co tract price as when he sends forward the bill of lading with a bill of excha ge attached with directions that the b ll of lading is not to be delivered to the purchaser till acceptance or payment of the bill of exchange, the appropriation is not absolute, but until acceptance of the draft or payment or tender of the price, is conditional only, and until such acceptance or payment or tender the property in the goods does not pass to the purchaser. (4) If the seller discounts a draft upon the buyer with a bank and authorises the bank to hand to the buyer a bill of lading to the order of the seller and endorsed in blank by him upon his acceptance of the draft, the intention to be inferred according to general mercantile understanding is that the seller intends to transfer the ownership when the draft is accepted but intends also to remain the owner until this has been done. S. 83 of the Contract Act applies to cases where the seller is authorised to make the apropriation and the buyer has given a previous implied assent to the appropriation where in pursuance of the contract the seller delivers the goods to a carrier forthe purpose of transmission to the buyers but retains a *jus disponendi* until certain conditions are fulfilled. (5) The property in the goods does not pass to the buyer until the conditions imposed by him are fulfilled This rule applies not only to delivery of goods to carriers by sea but to delivery to carriers by land (*Mulla, J.*) THE FORD AUTOMOBILES (INDIA), LTD *v.* THE DELHI MOTOR AND ENGINEERING CO. **24 Bom L R 1140 : 70 I. C. 138 : 1923 B. 125.**

——— **Ss. 83 and 88**—*Sale of goods—'Ready goods', meaning of—Damages.*

A seller under a contract for sale of 'ready goods sued the buyer to recover damages for not taking delivery. It was contended that the seller had not the goods in his possession at the date of the contract and the buyer, therefore, was not bound to take delivery :- *Held*, that if at the time of entering into the contract and during the period intervening between that date and the due date the seller could at any moment if called upon by his buyer, deliver the goods he had sufficiently complied with the terms of the contract, Further the

seller cannot recover damages on the basis of resale but on the basis of difference in the market price and contract price. (*Buckland, J.*) MULCHAND CHANDOLIA *v.* KUNDANMULL,
57 I C. 140 : 47 Cal. 458.

——Ss. 83 and 91—*Ascertained goods.*

Where the deft. instructed plff. to send him rice on board a ship and deft. sent it on board a ship without any further conditions the property in the rice passes to purchaser where the rice is shipped. (*Spencer and Coutts Trotter, JJ.*) MARJI JETA *v.* HONNOVAR PUTHU HARI PAI. 31 I. C 334 : 18 M. L. T. 457.

——S. 83—*Appropriation—Passing of property.*

The question whether there has been appropriation of goods is one of fact. Any particular mode of appropriation is not required by the Law. Once there has been appropriation the consignor if he is still in possession holds as trustee for the consignee. (*Benson and Abdur Rahim JJ.*) MARADUGULA VENKATA RATAN *v.* KOTALA RAMANNA
9 M. L. T. 276 : 9 I. C. 255 : 21 M. L. J. 413

——S. 83—*Sale of goods—Property passing of—Suit for price of goods sold.*

A suit for the recovery of price of goods sold does not lie unless the property in the goods has passed to the purchaser. (*Chamier, C. J and Sharfuddin, J.*) MAHADEO AGARWALLA *v.* GANESH LAL. 2 P. L. W. 123 : 42 I. C. 582 : 1917 Pat. 47.

——S. 85—*Moveable and immoveable property*

All agreements for the sale of property partly moveable and partly immoveable fall under S. 85 The section cannot be read as if worded "for the sale of connected moveable and immoveable property." (*Parlett, J.*) MAUNG PAW *v.* MAUNG SAN U. 12 I. C. 805 : 4 Bur. L. T. 127.

——S. 86—*C. I. F. contract—When property passes.*

S. 86 does not preclude a buyer from agreeing to take the risk of loss or damage before the property in the goods passes to him. In a C. I. F. contract on tender of the effective shipping documents the property in the goods passes to the buyer but in spite of it a contract implying that the goods are at the buyer's risk from the time of the shipment is not invalid. (*Twomey, C. J. and Robinson, J.*) AHCHOY *v.* TRADING CO.
56 I. C. 978.

——S. 87—*Goods not in existence—Passing of property.*

In the case of goods not in existence at the time of contract the ownership passes as soon as they actually come into existence 16 Mad. 429 ; 31 Cal 667 Foll. (*Benson and Abdur Rahim, JJ.*) MARADUGULA VENKATA RATAN *v.* KOTALA RAMANNA.
9 M. L. T. 276 : 9 I C 355 : 21 M. L. J. 413

——S. 90—*Delivery order handing of it gives possession—Constructive delivery—What amounts to.*

The handing of a delivery order is not sufficient to give possession ; a constructive delivery must

have the clear effect of putting the goods in the possession of the person entitled. (*Robinson, J.*) A. T. K. P L. CHETTY FIRM *v.* S. K R. S. S. T. CHETTY FIRM. 22 I. C. 952 : 7 Bur. L. T. 93.

——S. 91—*Scope—English law.*

S 91 does not provide for cases where the seller delivers the goods to a carrier and reserves the right of disposal. Therefore the Courts of British India resort to the rules of English common law so far as they are not inconsistent with the text of the Contract Act One of those rules is that where in pursuance of the contract, the seller delivers the goods to a carrier for the purpose of transmission to the buyer, but retains a *jus disponendi* until certain conditions are fulfilled, the property in the goods does not pass to the buyer until the conditions imposed by him are not fulfilled. This rule applies not only to delivery of goods to be carried by sea but to delivery to carriers by land and to canal boat companies. (*Mulla, J.*) THE FORD AUTOMOBILES *v.* THE DELHI MOTOR AND ENGINEERING CO. 24 Bom. L. R 1140 : 70 I C. 138 : 1923 Bom. 125.

——S. 91—*Consignment of goods to Ry. Co.—Property if passes—Who can sue for loss.*

Where goods are consigned to a Railway company property passes to the consignee under S. 91, Contract Act and he alone can thereafter sue the Railway Company for loss arising out of the contract of freight. (*Phillips, J.*) M. AND S. M, RY. CO *v.* RANGASWAMY CHETTI.
73 I. C. 537 : 1924 M. 517.

——Ss 91 and 93—*Goods consigned to buyer by Railway—Delivery to Company—Effect.*

Delivery to the Railway Company has the same effect as delivery to the buyer and passes title. Where the buyer and the seller reside in different jurisdictions, the cause of action for a suit by the seller for balance of accounts due from the buyer arises at the place of consignment of the goods to the Railway: 1 M. H. C. R. 200 Dist. (*Ayling, J.*) GOGI RYDMARAJUPPA *v.* MADDUR VENKATASUBBIAH. 24 I. C. 423 : (1914) M. W. N. 803.

——S. 91—*Damages—Goods not received.*

If the purchaser does not receive the goods sold to him he can claim only interest on the purchase money by way of damages. (*Stuart, A. J. C.*) ABDUL RAZZAQ *v.* AGENT B. N. W. RAILWAY. 38 I. C. 404 : 3 O. L. J. 737.

——S. 99—*Stoppage in-transit—Commission agent.*

Commission agent bringing goods for another, can stop goods in transit if the purchaser does not pay for them. He need not prove purchaser's insolvency but only he should show that he was unable to pay or refused to pay. (*Macleod, J.*) THE BOMBAY STEAM NAVIGATION CO., LTD. *v.* RAMDAS VITHALDAS. 16 I C. 61 : 14 Bom. L. R. 532.

——Ss. 99 and 107—*Stoppage in transit—Nature of right—Assignment of document of title—Effect—Burden of proof.*

Per *Sanderson, C. J. Quaere* whether the right of a seller of goods to stop the goods in transit is a mere equitable right.

CONTRACT ACT (IX OF 1872), S. 99.

Per *Richardson, J.* It is too late in the day to argue that the right of stoppage is a merely equitable right. Where the buyer of certain goods while they were in transit became an insolvent but had meanwhile assigned the document of title to a third party and the vendor exercises his right of stoppage in transit, it is for the assignee to show under S. 102 that he acted in good faith and paid valuable consideration. Origin and nature of the vendor's right of stoppage considered. (*Sanderson, C. J. and Richardson, J.*) RASH BEHARI KARURI *v.* NARAIN DAS DORILAL.
50 Cal. 399 : 27 C. W. N 231 : 1923 Cal. 182.

———Ss. 99 and 102—*Sale of goods—Broker contracting as principal—Right of stoppage in transit—Assignment by buyer—Effect of.*

The term 'vendor' in S. 102 of the Contract Act is to be given a liberal meaning as including a person standing in the position of a vendor. A broker who contracts as principal with a buyer of goods has a right to enforce the contract and is entitled to sue in respect thereof. His position by virtue of his personal liability to his sellers for the price is that of an unpaid vendor with a right of stoppage in transit conferred by S. 99 of the Contract Act. Such right would be defeated if the buyer obtained the documents of title and delivered them to a second buyer who acted in good faith and gave valuable consideration for them, as such delivery would amount to an assignment under S. 102 of the Contract Act. (*Sanderson, C. J. and Woodroffe, J.*) RAMENDRA NATH ROY *v.* BROJENDRA NATH DAS.
53 I. C. 986 : 46 Cal. 831.

[O. A. from 41 I. C. 944 : 45 Cal. 111.]

———S. 99—*Commission agent buying on his own credit for another*—Quasi-*Vendor—Right of stoppage in transit.*

A commission agent buying on his own credit for another is a *quasi* vendor and has the right of stoppage in transit. (1802) 3 East 93 ; 16 I. C. 61, Rel. The right of stoppage exists against a sub-buyer with the exceptions given in Ss. 102 and 103 (*i, e.*, a sub-buyer for consideration who has got a document of title and also the case of a pledgee.) (1877) 5 Ch D. 35; (1800) 13 Ch. D. 628, Rel. (*Boyd, A. J. C.*) FIRM OF KALURAM *v.* FIRM OF BUDHURAM. 24 I C. 798 : 7 S. L. R. 163.

———Ss. 102, 108 and 178—*Railway receipt—Assignment—Mode of—Rights of transferee and consignee—T. P. Act, S.* 137

Railway receipts are not negotiable by law and are not rendered negotiable by S. 137 of the T. P. Act. Nor was there anything to show that such receipts were negotiable by the mercantile custom of Rangoon. S. 137 of the T. P. Act merely provides that the methods of assignment in ch. 8 of the Act shall not apply to the case of certain specified documents which are for the time being by law or custom negotiable. It merely deals with the manner in which the documents to which it relates can be transferred, but it does not affect the result of the transfer when made. In order that such transfer should have in the case of railway receipts the effect of transferring the ownership of the goods, it must be established that they are not negotiable. (*Robinson, C. J. and Macgregor, J.*) S. R. N. S. ARUNACHELAM CHETTY FIRM *v.* KO PO YAN. 1 Bur L. J 90 : 11 L. B. R. 341 : 68 I. C. 694 : 1923 Bur. 1.

CONTRACT ACT (IX OF 1872), S. 104.

———S. 102—*Document of title—Railway receipt—Exceptions—If exhaustive.*

Obiter.—The exceptions mentioned in S. 102 are exhaustive. A railway receipt is not a document of title but a bill of lading is. 38 Bom. 255, Dist. 14 Bom 57, Foll. (*Boyd, A. J. C.*) FIRM OF KALURAM *v.* FIRM OF BUDHURAM.
24 I. C. 798 : 7 S. L. R. 163.

———S. 103—*'Instrument of title'—Railway receipt—Indorsement by way of pledge—Stoppage in transit.*

Railway receipts issued to the consignors of goods provided that they should be given up at the destination by the consignee or indorsee to a person with a request for delivery of the goods to the endorsee. The railway receipts were created in the Bombay cotton market as proof of the possession and control of the goods therein referred to or as authorising the holder to receive or transfer the goods: *Held*, that where a Railway receipt was assigned by way of pledge to secure an advance made specifically upon it in good faith for the consignee, the seller is not entitled to stop the goods in transit except on payment or tender to the pledgees of the advances made by them. The expression 'instruments of title' in S. 103 means the same thing as 'documents showing title' in Ss. 102 and 108 and 'documents of title' in S. 108 of the Contract Act, the variety of expression 'being due to inartistic drafting.' (*Lord Parker*) RAMDAS VITHALDAS DARBAR *v.* AMERCHAND & CO. 40 Bom. 630 : 20 C. W. N. 1182 : 18 Bom. L. R. 670 : 20 M. L. T. 194 : 31 M. L. J. 541 : 4 L. W. 342 : 14 A. L. J. 1045 : 85 L. J. P. C. 214 : 24 C L. J. 320 : 43 I. A. 164 : 32 T. L. R. 594 : 35 I. C. 954 : (1916) 2 M. W. N. 110. (P. C.)

———S. 103—*Railway receipt—Assignment of—Whether document of title.*

A Railway receipt being assignable, by endorsement is an instrument of title to the goods under S. 103. (*Scott, C. J. and Chandavarkar, J.*) AMERCHAND & CO. *v* RAMDAS DARBAR.
38 Bom. 255 : 21 I. C. 343 : 15 Bom. L. R. 890.
But *see contra*. (*Boyd, A. J. C.*) FIRM OF KALURAM *v.* FIRM OF BUDHURAM.
24 I. C. 798 : 7 S. L. R. 163.

———S. 103—*T. P. Act, S.* 137—*Instrument of title.*

Railway receipt providing for delivery of goods only to the consignee or his endorsee is not an instrument of title within S. 103, Contract Act or S. 137, T. P. Act. (*Macleod, J.*) THE BOMBAY STEAM NAVIGATION CO., LTD. *v.* RAMDAS VITHALDAS. 16 I. C. 61 : 14 Bom L. R. 532.

———S. 104—*Stoppage in transit—Telegram whether sufficient notice.*

A telegram sent by an unpaid vendor of goods on his becoming insolvent to a Railway Company not to deliver the goods is sufficient notice to

CONTRACT ACT (IX OF 1872), S. 107.

effect a stoppage *in transitu* under S. 104 as no particular form of notice is required. (*Hayward, J. C. and Boyd, A. J. C.*) RAJHUMAL *v.* MICHUMAL. 26 I. C. 424 : 8 S. L. R. 65.

——S. 107—*Measure of—Sale of goods—Buyer's default.*

The measure of damages for breach of a contract to sell, is the difference between the contract rate and the rate at the date of breach. The buyer who has defaulted is not entitled to the benefit of the subsequent rise in prices in assessment of damages. It is no concern of the buyer that the vendor waits and sells. The extent of the duty to mitigate damages considered. (*Lord Wrenbury.*) JAMAL *v.* MOOLA DAWOOD SONS & Co. 43 Cal. 493 : 43 I. A. 6 : 20 C. W. N. 105 : 30 M. L. J. 73 : 14 A. L. J 89 : 19 M. L. T. 80 : 3 L. W 181 : 23 C L. J. 137 : 18 Bom L. R. 3.5 : 9 Bur. L. T. 8 : 31 I. C. 949 (P. C.) : (1916) 1 M W. N. 70.

—— S 107—*Sale of ascertained goods — Property when passes—Failure to pay purchase price—Effect of—Resale—Profits—Right to*

Where the subject matter of a contract of sale consists of ascertained goods, the property in the goods passes to the purchaser on the conclusion of the contract of sale Thereafter though the goods remain with the seller, the purchaser has a right to demand delivery The non-payment of the price or a portion thereof does not put an end to the contract but if there is a clause in the contract to that effect the sellers might insist on the purchaser forfeiting the balance of the deposit he can avail himself of it and he can sell the remainder of the goods on account of the purchaser. S. 107 of the Contract Act applies only where notice has been given by the seller to the buyer of his intention to resell after the lapse of a reasonable time (*Sanderson, C. J. and Richardson, J.*) SHIB NARAIN PAL *v.* RAM BILASH MARWARI. 65 I. C. 263.

——S. 107—*Sale of goods—Failure to take delivery—Re-sale—Damages.*

Where defendants agreed to purchase chillies from plaintiffs at a certain rate and the plaintiffs shipped them but defendants refused delivery on notice.

Held, S. 107, Contract Act applied and there was no difficulty of ascertainment when the quantity required by defendants was set apart and appropriated to the defendant's use. (*Holmwood and Chapman, JJ.*) ARABAR RAHMAN *v.* ISMAIL EBRAHIM. 27 I. C. 373.

——S. 107—*Measure of damages—Appropriation of the goods*

Defendant had to take the delivery of certain goods but he only took delivery of a part but failed to take delivery of the balance which was resold by the plaintiff. *Held*, that the measure of plaintiff's compensation was the difference between the contract price and the price of the goods on the date of the breach and not the difference between the price that the plaintiff realized and the contract price as no appropriation had been made by the plaintiff with respect to the goods. (*Harrington, J.*) E. D. SASOON & Co. *v.* M. S. E. ANGULLAI & Co. 10 I. C. 895.

CONTRACT ACT (IX OF 1872), S. 107.

——S. 107—*Mercantile contracts—Time is essence of contract.*

The general rule is that time is the essence of mercantile contracts and particularly when a party agreed to make payment and take delivery as soon as the goods arrived. Provisions in the contract regarding payment of interest and liability for godown rent do not take the case out of the general rule where no evidence had been offered that the plaintiffs in fact took money to the Hindustan Mercantile Association when it was their duty to make an unconditional offer of cash to the defendants and wrote asking to be told where to make payment, several days after receipt of the defendants' warning.

Held plaintiffs failed to make out any breach of contract by the defendants which would entitle them to damages (*Martineau and Campbell, JJ.*) THE FIRM DURGA DAT JAGAN NATH OF DELHI *v.* THE FIRM RAM PARTAB SUKH DAYAL OF DELHI. 1923 Lah 138.

——S. 107—*Sale of goods—Rights of vendor—Reasonable time for re-sale of goods.*

Where a right of re-sale is given by the contract between the parties, it is not necessary that the property in the goods should pass to the purchaser to enable the seller to re-sell the goods and claim the difference between the price of the goods as originally contracted for and the price fetched at the re-sale. If the goods have been resold by the vendor within a reasonable time after the breach of contract by the purchaser, the measure of the damages will be the difference between the price agreed to be given and the price realized on the re-sale, with the costs and expenses of the re-sale, but if the re-sale has been unreasonably delayed until the market has fallen, the price realized on such re-sale will not afford a true criterion of the damage. If the seller elects to re-sell, he must do so within a reasonable time from the date on which the contract was finally repudiated by the buyer. Any other conclusion might cause undue hardship to the buyer, for it will then be open to the seller with the deliberate intention of causing loss to the buyer, to delay the re-sale until the market has fallen and then re-sell the property, and thereby cause to the buyer a loss which he might not have sustained had the re-sale taken place within a reasonable time from the date of the breach of contract. (*Abdul Raoof, J.*) FIRM OF ABDUL HAKIM MAHOMED ADIK *v.* JOHO JAUTZEN. 72 I. C. 772: 1924 Lah. 319.

——S. 107—*Rights of unpaid seller to resell goods at purchaser's risk—Rescission of contract—English and Indian law.*

So far as the English Law is concerned, when an unpaid seller of goods resells them under an expressed power reserved by him, he thereby rescinds the contract. Under the Contract Act, there is no reason why an unpaid vendor should not resell the goods "on account and risk of the purchaser" as specified in the contract, and enforce at the same time all other rights given to him by the contract in so far as those rights are not affected by the re-sale. (*Shadi Lal, C.J. and Campbell, J.*) JAI NARAIN BALU LAL *v.* NARAIN DAS JAINIMAL. 3 Lah. 296: 67 I. C. 228: 1922 L. 369

CONTRACT ACT (IX OF 1872), S. 107.

———S. 107—*Contract for sale of goods—Damages on re-sale—Measure.*

In an action for damages for breach of a contract to buy goods, the plaintiff can only recover the difference between the contract price and the market price at the date of the breach and not between the contract price and the actual price fetched at the re-sale which took place much later. If there is no complete sale, S. 107 does not apply. (*Kanhaiya Lal, A. J. C.*) SHAMBU DAYAL *v.* DURGA PRASAD. **56 I. C. 647: 23 O. C. 67.**

———S. 107—*Re-sale—Vendee is liable for loss.*

Where the vendee neither pays the price nor accepts delivery of the goods contracted for and the vendor is obliged to sell them at a lower price after due notice to the vendee, the vendor is entitled to damages in accordance with S. 107 of the Contract Act (*Coutts and Adami, JJ.*) BHAGWANDAS *v.* KESHWARLAL. **70 I. C. 843: 1923 P. 36**

———S. 107—*Seller's right of re-sale when arises.*

Before the sellers can exercise the right of re-sale under S. 107 Contract Act, and claim damages on that footing the property in the goods must have passed to the buyers. (*Maung Kin and Pratt, JJ.*) HUNT HUAT AND CO. *v.* SIN GEE MOH AND CO. **66 I. C. 510 : 11 L. B. R. 182.**

———S. 107—*Sale of goods—Breach of contract—Re-sale after notice—Effect of invalid sale—Damages, measure of.*

If the seller exercises his right of re-sale he rescinds the contract of sale, the property revests in himself and he sells it as owner. A seller of goods who gives notice of re-sale and makes an invalid re-sale can recover damages for breach of contract from the defaulting buyer. The measure of damages in such a case is the market value on the date of the breach minus the value obtained on re-sale. The seller can revoke his notice of re sale. But if the buyer pays the contract price and re-sale expenses before the re sale is effected, or within a reasonable time after revocation of the notice the seller must deliver the goods to the buyer. After the re-sale the defaulting purchaser has no rights under the original contract, and he cannot claim the goods upon payment of the contract price. 15 B. L R. 276: 24 Cal. 124; 24 Cal. 172 : 39 Cal. 568, Foll. The re-sale must be fairly conducted otherwise the purchaser can recover damages as would put him in the same position as if the re sale had been properly held and proper price obtained, (*Ormond and Twomey, JJ.*) MAUNG GYI MAUNG *v.* MOOSAJI AHMED & Co. **9 Bur. L. T. 209: 36 I. C. 252: 8 L. B. R. 367.**

——S. 107—*Re-sale of property contracted to be sold—Damages.*

Where a seller putting up the property for sale on the refusal of the contracting party to purchase it, does not advertise such sale in the locality in which the property is situate and the advertisement is inadequate in consequence thereof the buyer is not responsible for the difference between the contract price and the inadequate price realised at such sale. (*Fox. C. J. and Twomey, J.*) MAUNG PO TE *v.* MAUNG SHWE KO. **35 I. C. 373: 10 Bur. L. T. 35.**

CONTRACT ACT (IX OF 1872), S. 108.

———S. 107—*Notice—Seller, if bound by procedure of section—Seller obtaining higher price by selling later than date of breach.*

The words of S. 107 are permissive and not compulsory. An unpaid vendor who gives notice of his intention to pursue the course set out in S. 107 is not bound to carry out such intention and can change his mind if he likes. The original vendee in such cases is entitled to the benefit of the higher prices realized by the vendor in mitigation of the sum payable by him as damages. (*Hartnoll, C. J. and Young, J.*) JAMAL A. K. A. S. *v.* MOOLA DAWOOD SONS & CO. **25 I. C. 799: 7 L. B. R. 252.**

———Ss. 107 and 74—*Right of re-sale—Agreement to pay re-sale commission and brokerage.*

The right of re-sale after the breach of contract to purchase may be allowed as a means of ascertaining damages subject to the rule of reasonable compensation contained in S. 74 and is not limited to cases where property has passed to the buyer, 25 Cal. 505 Foll. Where the property in the goods re-sold, has not passed to the buyer, a re-selling commission cannot be allowed. Re-selling brokerage and commission for goods not actually re-sold cannot be allowed as they are unreasonable and not justified by S. 74, being imaginary and fictitious. (*Pratt, J C.*) FORBES, FORBES, CAMPBELL & CO. *v.* OFFICIAL RECEIVER. **29 I. C. 933: 9 S. L. R. 20.**

———Ss. 108 and 178—*Document of title to goods—Railway receipt.*

A Railway receipt for goods consigned is a document of title to goods. A pledge or assignment of the receipt passed the right to the goods if the assignee acts *bona fide*. (*Lord Parker.*) RAM DAS VITHAL DAS DARBAR *v.* AMER CHAND & Co. **40 Bom. 630: 20 C. W. N 1182: 18 Bom. L. R. 670: 20 M. L. T. 194: 31 M. L. J. 541: 4 L. W. 342: 14 A. L. J. 1045: 85 L. J. P. C. 214: 24 C. L. J. 320: 43 I. A. 164: 32 T. L. R. 594: 35 I. C. 954 : (1916) 2 M W. N. 110, (P. C.)**

———S. 108—*Document of title to goods—Mate's receipt—Negotiability.*

A consignor of goods delivered them to a shipping company for transit and received a document called mate's receipt. The company was to deliver the goods to the shipper or his nominee at the place of delivery. There was a circular of the Company to the effect that the goods would not be delivered without production of the so-called mate's receipts. The shipper pledged the receipt with a money lender but obtained delivery of the goods without production of the receipt. In a suit by the money-lender for damages against the shipping Co., *held*, that the mate's receipt as it was called could not be regarded to be a negotiable security nor a bill of lading, nor a document of title, and that no practice of general application among merchants existed by which such a receipt was regarded as negotiable in the ordinary course of business. The document

being a simple ordinary receipt for goods and the shipowner was not liable to the assignee in the absence of notice to him. The circular was only intended to afford protection to the Company which the company could give up if satisfied of the identity and solvency of the owner and it did not give the assignee a cause of action against the shipping Company. (*Lord Shaw*). T. S. NATCHIAPPA CHETTY *v.* THE IRRAWADY FLOTILLA CO. **22 I. C. 311 : 41 Cal 670 : 18 C. W. N 457 : 12 A L. J. 211 : 15 M. L T 193 : 7 Bur. L. T. 40 : 19 C. L J. 265 : 16 Bom. L. R. 298 : (1914) M. W. N. 163. (P. C.)**

———**S. 108**—*Share certificate allowed to be with broker—Transfer by latter—Estoppel.*

Where the owner of shares either signs the transfer forms and delivers the same with the share certificate to a broker, or where he allows them to be in the broker's possession, knowing that they are in such a condition that a broker can deal, with them, and thereby enables him to part with them to another who takes them *bona fide* for value without notice, then the true owner is estopped from questioning the title of the purchaser, who has taken them upon the faith of the apparent authority of the broker to deal with them. Such a *bona fide* purchaser gets a legal and equitable title under his purchase and can register himself as owner. (*Kanga, J.*) FAZAL *v.* MANGALDAS. **66 I C. 726 : 23 Bom L.R. 1144: 46 Bom. 489 : 1922 Bom. 303.**

———**S. 108**—*Railway receipt — Mercantile document of title—Endorsee.*

A Railway receipt is a mercantile document of title and an endorsee thereof can maintain a suit for the loss of the goods covered by it (*Beaman and Hayward, JJ.*) DOLAT RAM *v.* B. B. AND C. I. RY. CO., **25 I. C. 380 : 16 Bom. L. R. 525 : 38 Bom. 659.**

———**Ss. 108 and 178**—*Shares—Transfer by pledgee*—Bona fide *purchaser for value—Negotiability.*

"Possession" in Excep. 1 to S. 108 does not apply in the case of qualified possession such as that of hire of goods or where the possession is different from mere possession for specific purpose. A pledgee's possession is not such as to entitles him to deal with the goods in fraud of the rights of the owner. The deft. Bank bought 25 jute shares for one of their constituents consisting of a share certificate and a blank transfer deed signed by the registered holder and put them in the custody of their Head Clerk in the usual course. The clerk fraudulently disposed of them to a certain person who again sold them to other persons. *Held* that the Head Clerk was not in possession of the shares within the meaning of S 108 and that the purchasers acquired no title in them. Share certificate with blank transfer deeds signed by the registered holder were not negotiable instruments. (*Chaudhury, J.*) ROOP CHAND *v.* THE NATIONAL BANK OF INDIA, LTD. **48 I. C. 975: 46 Cal. 342 : 22 C. W. N. 1042.**

———**Ss. 108 and 109**—*Shares—Transfer by person in possession—Possession obtained fraudulently—Share certificate with negotiable transfers—Goods—Meaning of.*

Share certificates accompanied by transfer deeds endorsed in blank by the registered holder are not negotiable. With reference to such blank transfers duly signed by the registered holder of the shares the rule is each prior holder confers upon the *bona fide* holder for value of the certificate for the time being an authority to fill in the name of the transferee and is estopped from denying such authority, and to this extent, and in this manner but no further he is estopped from denying the title of such holder for the time being. plff. claimed to be the owner of 25 jute shares which they purchased from the deft. L on 7—5—1917 and got their names registered in the books of the Company. At the time of the sale the plff. obtained possession of the certificate for the said shares and a blank transfer deed signed by the registered holder. The deft. L. bought the said shares from one U. who fraudulently obtained possession of them from the deft S. who was the owner of the said shares. It was not clear what was the nature of the transaction between the defts. L and U. The purchase by the plff. was *bona fide* and for value. *Held*, that the plff. did not acquire any title to the said shares and were entitled to the value they paid for them from the deft. L. with interest, the expression 'goods' in S. 108 of the Contract Act includes all moveable property. (*Chaudhuri, J.*) HOZARIMUL SHOHANLAL *v.* SATISH CHANDRA GHOSH. **48 I. C 966 46 Cal. 331 : 22 C. W. N. 1036.**

———**S. 108**—*Sale of goods—Delivery order—Transfer of Property Act, (IV of 1882), S. 137.*

Under Contract Act, S. 108 and T. P. Act. S. 137 there is now a statutory recognition of a delivery order as a document of title and under it the transferee acquires a title to the goods. (*Jenkins, C. J. and Woodroffe, J.*) ANGLO INDIA JUTE MILLS CO. *v.* OMADAMULL. **10 I. C. 859: 38 Cal, 127.**

———**Ss. 108 and 178**—Bona fide *purchaser from gratuitous bailee for a specific purpose—Rights of.*

Where a gratuitous bailment of jewels for a specific purpose is made and the pledgee sells them to a *bona fide* purchaser for value without notice, *held* that the latter does not acquire a good title to the jewels as against the real owner either under the Trusts Act or under Ss. 108 and 178 of the Contract Act. The word 'possession' in S. 178 is used in the same sense as in S. 108 and neither of the sections applies where the possession is qualified or for a specific purpose. (*Ayling, O C. J. and Odgers, J.*) KATTA RAMASAMI *v.* KAMALAMMAL. **14 L. W 599 : 70 I. C 448 : (1921) M. W. N. 801 : 42 M L J. 32 : 30 M. L T. 156 : 45 M. 173 : 1922 M. 44.**

———**S. 108**—*Moveables—Mortgage of purchaser from mortgagor — Moveables*, bona fide *purchaser from mortgagor.*

CONTRACT ACT (IX OF 1872), S. 108.

A *bona fide* purchaser of hypothecated goods from the hypothecator without notice of the encumbrance, takes the goods free of it. (*Phillips and Kumaraswami Sastri, JJ.*) SREERAM *v.* BOMMIREDDI VENKATA RAMAIAH.
42 Mad. 59 : 47 I. C. 976 : 35 M. L. J. 450 : 24 M. L. T. 454 : 8 L. W. 517 : (1918) M. W. N. 718.

——— Ss. 108 and 178—*Applicability of—Intermediate possessor—T.P. Act, S. 41—Right of bona fide purchaser.*

Ss. 108 and 178 of the Act apply only where the intermediate possessor is entitled to a legal dominion over the property and not where he has the custody thereof. 12 B L. R. 42; 24 Bom. 458 ; 27 Mad. 424. Foll. *Prima facie*, the rights of a legal owner should be protected, unless he has induced innocent purchasers or pledgees into the belief that the intermediate possessor is the true owner. Mere *bona fides* of the purchaser or pledgee is not enough ; he will have to prove that by some act or omission the true owner has forfeited his right to recover back his possession. (*Seshagiri Aiyer, J.*) SESHAPPIER *v.* SUBRAMANIA CHETTIAR. 38 Mad 783 : 23 I. C. 174 : 15 M. L. T. 221 : (1914) M. W. N. 319 :

——— S. 108—*T. P. Act, S. 53.*

B made over his buffaloes to *S.* in settlement of a debt, and then hired them from him. Later he sold or rather made them over in settlement of a debt to *K. Held* that *S* was entitled to recover his buffaloes. (*Duckworth, J.*) SHAUNG NYAN *v.* KO MAUNG. 1 Bur. L. J. 164 : 1923 Rang. 98 (1).

——— Ss. 108 and 178—*Document showing title—Law governing, transferability of.*

A document showing title to goods represents the goods to which it relates and the Law governing its transferability is the same as that for the goods themselves and is contained in Ss. 108 and 178. The test whether a document is a 'Document of title' or a 'document showing title' is whether the document is used in the ordinary course of business as proof of possession or control of the goods or as authorising by endorsement or delivery, the possessor of the document to transfer or receive the goods. A delivery order is a document of title and property passes to the transferee of it but it has no value when the delivery of goods has been made to the person entitled. 40 Bom. 630 (P. C.) Foll. (*Fox, C. J. and Ormond, J.*) KHOO GO KHWET *v.* NANIGRAM JAGANATH FIRM. 40 I. C. 86 : 10 Bur. L. T. 92 : 9 L. B R. 143.

——— Ss. 108 and 109—*Delivery order.*

Delivery orders given by a Bank to their godown keeper to deliver a certain number of unspecified cases is not a document of title under S. 108 and by the order, the lien of leave for their dues is not lost. They were mercantile documents of title and the endorsee cannot claim higher rights than the endorser. What is a mercantile document of title is a question of fact. The essential object of a document of title is that it should be used as evidence of title. Endorser of delivery order gives an implied warranty of title. (*Pratt, J. C. and Crouch, A. J. C.*) RUPCHAND RAMCHAND *v.* HUKUMATRAI. 42 I. C. 829 : 11 S. L. R 56.

CONTRACT ACT (IX OF 1872), S. 108.

——— S. 108, Excep. (1)—*Applicability—Hire purchase.*

S. 108, Excep. 1 does not apply to cases of qualified possession *e. g.*, an owner under a hire purchase agreement. (20 W. R. 467 Foll.) (*Rattigan, C. J.*) SINGER MANUFACTURING COMPANY OF LAHORE *v.* NAIZA ALI. 46 I. C. 888 : 144 P. W. R. 1918 : 54 P. R. 1919.

——— S. 108, Excep. I—*Hiring a sewing machine with option of purchase—Sale by hirer before exercising option—Rights of purchaser.*

A purchaser from the hirer of a sewing machine with an option to purchase it, who has not exercised the option of purchasing the machine cannot invoke the provisions of Exception 1 to S. 108 of the Contract Act, and is liable in trover to the owner although he acted in perfect good faith. 12 B L R. 42 : 51 P. R. 1919 : *Helly* v. *Mathews* (1895) A. C. 475 referred to. 27 P. R. 1 02, doubted. (*Shadi Lal, C. J.*) AHMAD JAN *v.* THE SINGER SEWING MACHINE COMPANY OF RAWALPINDI. 67 I. C. 638 : 3 Lah. L. J. 249.

——— S. 108, Excep. (1)—*Hire purchase agreement—Transfer—Rights of purchaser.*

A person who obtains an article under the hire purchase system does not become the owner thereof till full payment is made. Until then he is only entitled to the use of the article subject to the control of the owner. The possession of the hirer is mere custody and possession for a specific or limited purpose and not a judicial possession under a right as contemplated in S. 108, Excep. (1). A transferee from the hirer gets no title to the property 20 W. R 467 : 11 Bom. 704 : 24 Bom. 468 : 2 L. W. 339 : 11 Bom. L. R. 926 ; 12 Bom. L. R. 416, Rel. (*Kanhaiya Lal, J. C.*) ALBERT *v.* SINGER SEWING MACHINE CO. 53 I. C. 60 : 1 U P. L. R. (J. C.) 43.

——— S. 108, Excep. (1)—*Applicability—Sale of goods—Title—Good faith.*

Expl 1 to S. 108 of the Act applies to any sale of a moveable property by any person in any kind of possession, so long as the possession was by consent of the owner and the vendee acts in good faith. (*Heald, A. J. C.*) DULAB DAS *v.* MA WIN. 59 I. C. 965 : (1920) 3 U. B. R. 217.

——— S. 108, Excep. (1)—*Paddy entrusted to Miller for grinding—Sale of—Document of title—Mate's receipt.*

Where paddy is entrusted to a miller for milling, his possession being a qualified one is not protected by the Excep. (1) to S. 108. A mate's receipt is not a document showing title to goods with Excep. (1) to S. 108 of the Contract Act. 44 Cal. 670 : 40 Bom, 630, Rel. (*Twomey, C. J. and Maung Kin, J.*) ELLERMAN RICE MILLS, LTD *v.* PE GYI. 55 I. C. 239 : 12 Bur. L. T. 184.

——— S 108, Excep. (1)—*Sale in good faith—Passing of title.*

An honest purchase made carelessly without making proper enquiries is not made in good faith and does not convey any title. (*Parlett, J.*) MAUNG AUNG PA *v.* MAUNG NI MAUNG. 12 I. C. 809 : 4 Bur. L. T. 128.

CONTRACT ACT (IX OF 1872), S. 109.

———S. 109—*Warranty -Waiver.*

A warranty b the seller that the horse sold is sound is not waived by the fact of the purchaser obtaining a Veterinary Doctor's certificate as to the soundness of the horse *Richards, C. J. and Banerjee, J.)* O'GRADY *v.* HERBERT WINN.
14 I. C. 135 : 9 A L. J. 985.

———Ss. 112 and 113—*Warranty of quality—Re-sale.*

To recover special damages for a breach of warranty in a re-sale it is necessary that the buyer should not have been negligent in failing to detect the inferiority of the goods before he re sells or deals with them. (*Broadway, J.*) THE FIRM OF KOTUMAL MALCHARAN DAS *v.* THE FIRM OF BEHARI LAL JAGGAMAL. 22 P L. R 1921 : 59 I. C. 424 : 16 P. W. R. 1921.

———Ss. 113 and 114—*Sale of goods--Implied warranty of fitness -Railway sleepers—Goods to be passed by vendor's agent—Damages—Right of buyer.*

Plff. entered into a contract with the deft. for the supply of sleepers for Railway and the contract contained the following clause :—"The passing by our friends, the B B. T. Co., Ltd. is as usual final as regards both measurement and quality." In an action for damages for breach of warranty, *held*, on the true construction of the contract the contractors could not supply anything they choose but the supply should be according to the standard set up expressly or impliedly under the contract or at the least must be reasonably fit as sleepers of the dimensions prescribed for use by the Railway Company. The right conferred by the clause on the suppliers amounted merely to the right to determine by and through the skilled and experienced persons whom they should necessarily employ for the purpose, acting honestly and impartially, whether the goods supplied, were in conformity with the requirements of the contract under which they were so supplied. *Held*, further, that the men employed to "pass", the sleeper never approached the real question they had to determine, *viz.*, the conformity of the goods supplied with the contract under which they were supplied ; and if they never applied their minds to that but merely determined that the sleepers were fit to be sent on as manufacturers of their employers there cannot be any "passing" of the sleepers under the contract. (*Lord Atkinson.*) BOMBAY BURMA TRADING CORPORATION CO., LTD. *v* AGA MAHOMED.
34 Mad. 453 : 38 I. A. 169 : 15 C. W. N. 981 : (1911) 2 M. W. N. 111 : 10 M. L. T. 150 : 13 Bom. L. R. 813 : 14 C. L. J. 326 : 8 A. L. J. 1208 : 12 I. C. 44: 21 M. L. J. 1110 (P.C.).

———Ss. 113 and 118—*Sale of goods—Goods not answering—Description—Remedy.*

A buyer can refuse to take delivery of goods when they do not correspond to the description in the contract and is not liable for damages to the vendor arising from the breach. (*Broadway, J.*) FIRM OF PRABHU DIAL KISHAN CHAND *v.* HARICHAND. 55 I. C. 209.

———S. 113—*Merchantability of goods—Test of—Damages to major portion of goods—Effect of.*

CONTRACT ACT (IX OF 1872). S. 113.

The effect of S. 113 of the Contract Act is that when there is no express warranty in the sale of goods, there is an implied warranty of merchantability. The question whether goods are "merchantable" in law is a question of mixed fact and law. A bale of a thousand pieces of piecegoods of which nine-tenths are damaged, however slightly, is radically unmerchantable and a seller cannot force such goods on an unwilling buyer. In such cases there is no room for the application of the principle of *de minimis*. 8 L. W. 192 : (1910) 2 K. B. 937 : 1 10, 2 K B. 831 Ref. (*Coutts Trotter and Ramesam, JJ.*) MESSRS NALLI & CO. *v.* V. A. A. R. FIRM. 43 M L. J. 208 16 L W 145 : (1922) M. W. N. 468 : 32 M. L. T. 158 : 69 I. C. 396 : 1923 M 252.

———Ss. 113 and 116—*Sale of goods by description—Warranty—Inspection or goods—Effect.*

Under S.113 of the Contract Act which follows the English Law, where goods are sold by description there is an implied warranty that the goods shall be of merchantable quality This is so even when the purchase is after inspection, but if the buyer has examined the goods there is no implied warranty with regards defects which such examination would have revealed (*Wallis, C. J. and Spencer, J.*) PEER MAHOMED ROWTHER *v.* DALLORAM JAYANARAYAN.
39 M L J. 180 : 24 M. L. T. 227 : (1918) M. W. N. 658 : 47 I. C. 555 : 8 L. W. 192.

———S. 113—*Sale of goods not answering description—Remedy of purchaser.*

Where goods offered for sale in execution of a decree are described as of a particular denomination, and every circumstance points to the buyer having contracted for the specific goods produced as described and the goods tendered do not answer that description the purchaser is entitled to reject them and if he has paid for them, to recover the price as money had and received for his use. (*Mitra, A. J. C.*) TUKARAM *v.* DEOJI.
54 I C. 315.

———S. 113—*Sale of goods—Warranty.*

S. 113 does not apply to a sale of specific goods which were before the parties at the time of the negotiations because such a sale is not one of goods as being of a certain denomination, as to give rise to the warranty referred to in the section, that the goods were such as are "commercially known by that denomination." (*Lindsay, J. C.*) FATEH CHAND *v* LACHMI NARAIN. 57 I. C. 481 : 7 O. L. J. 312.

———S. 113—*Commission Agent—Implied—Warranty.*

A Commission agent, buying goods for his employer, differs from the ordinary seller in what he stands to gain by the transaction ; instead of getting a profit on the price he gets a payment by way of commission. But in other respects they are on the same footing as regards the buyer, S. 113 applies and there is an implied warranty that the goods supplied are of a certain denomination. (*Hartnoll, C. J. and Twomey, J.*) GOVINDASWAMI PILLAI *v.* KOOLAYAPPA KOWTHER. 25 I. C. 927 : 7 L. B. R. 110.

CONTRACT ACT (IX OF 1872), S. 114

——S. 114 —*Implied contract as to warranty exists—Caveat-emptor.*

In England the common law rule depends upon whether the buyer relied on his own judgment or the sellers. (3 Q B. 197 Ref.) But distinction is not made in the Indian Contract Act the construction that the words have been ordered in S. 114 imply that the buyer is relying on the sellers judgment is a strained construction of the section and there is no reason why the sellers should be excused from the performence of his contract because of what may or may not be passing in the buyer's mind, A seller of a motor car impliedly contracts to sell a car that is reasonably fit for use as a motor car. (*Pratt, J.*) HURBUT JOHN AMIES *v.* JAL P. VIRJI. **25 Bom L. R 778: 77 I. C. 150 : 1924 Bom. 41.**

——S. 118—*Refusal of goods by buyer—Place of delivery—Costs of carriage.*

It is not the duty of the purchaser who refuses to take delivery to return the goods to the seller from the place of delivery at his cost. (*Griffin and Chamier, JJ.*) PHAGGUMALL *v.* BABU LAL.
35 All. 325: 19 I. C. 254 : 11 A. L. J. 315.

——S. 118—*Scope of—Acceptance.*

The question of acceptance does not arise when the property in the goods has passed to the buyer. The provisions of S 118 do not apply where the property in goods has passed to the buyer ; for where the property in goods passes by appropriation on the part of the seller and assent on the part of the buyer, since the appropriation can only be of goods of the contract description, the conditions of the contract are *ex hypothesi* complied with. The case contemplated by S. 118 is one where there has been a contract with a condition and the condition is broken. In such a case the buyer may waive that right of rejection and accept the goods. The property in the goods then passes by the buyer's acceptance and if the buyer thereafter refuses to pay for and take delivery of the goods, the seller is entitled to sue the buyer for the price. (*Mulla, J.*) N. BUCH & Co. *v.* GORDHANDAS MAVJI. **70 I C. 877 : 24 Bom. L. R. 991 : 1923 Bom. 92.**

——S. 118—*Period of seller's liability.*

The liability of the seller ceases with the transmission of the delivery order, on receipt of which the buyer should, under the terms of the contract for sale, clear the goods, and from that date the seller can claim interest and godown rent. The seller's holding of the goods for the buyer is as effective as physical delivery to the buyer. (*Scott C. J. and Heaton, J.*) RATUNSEY ROWJI *v* BOMBAY UNITED SPINNING AND MANUFACTURING, COMPANY, LTD. **41 Bom 518 : 37 I. C. 271 : 18 Bom. L. R. 532.**

——S. 118—*Exchange—Time as of the essence of contract—Consent decree*

Under a consent decree the plff.'s house was to be exchanged for a house of the deft. after the plff. had constructed on his premises a well and a tank The exchange took place in June 1912 before the well and tank were built. The plff. did not make the additions within the stipulated time; but two years later he applied for execution. The deft. resisted on the ground that time being of the essence of the contract, so much of the consent decree was voidable at his option *Held*, that time was not of the essence of the contract, for at the time the consent decree was made, the deft did not regard the additions which were to be made to the plff.'s house as important as he did not insist on the completion of the well and tank before the 30th June 1912 (*Beaman and Heaton, JJ.*) BHAGWANT GOPAL *v.* APPAJI.
36 I. C. 598 : 18 Bom. L. R. 803.

CONTRACT ACT (IX OF 1872), S. 118.

——S. 118—*Goods not in accordance with contract—When to be rejected —Onus to prove rejection in reasonable time.*

When the goods are delivered to the vendees the onus is upon them to prove that they had in fact rejected them as of inferior quality within a reasonable time. (*Sanderson, C. J. Woodroffe and Mookerjee, JJ.*) KISSEN DOYAL JITSERIA *v.* ASKARAN CHOWTHMULL. **34 I C. 290 : 23 C. L. J. 415.**

——S 118—*Sale of goods— Retention by buyer—Return of goods—Warranty - Reasonable time.*

Where the goods are sold and delivered to a buyer it is open to the buyer to have the goods in his custody for a reasonable time in order that he may examine them and see whether they comply with the warranty. At the same time, the buyer loses his rights to reject the goods by any act amounting to acceptance. Mere receipt of goods is no acceptance but such a receipt will become an acceptance if the goods are not rejected within a reasonable time. 23 C. L J. 415. What is reasonable time is purely a question of fact and has to be decided on the circumstances of each case. A period of 18 days was held not to be a reasonable time in the case of cotton goods. (*Broadway and Martineau JJ.*). FIRM OF PROBHU DIAL BANWARI LAL OF DELHI *v.* DIN NATH KAPUR. **65 I. C 464 : 4 U. P. L. R. (L.) 26 : 1922 Lah. 127.**

——S. 118—*Sale of goods—Sample—Warranty—Breach.*

Where the purchasers complain that all purchase is not of the stipulated quality, they have no right to ask for sample before taking delivery but they should take delivery and then make them claim. (*White, C. J. and Tyabji, J.*) A. K. SRIRANGAM CHETTY & SON *v.* M. SABAPATHY CHETTY & CO. **21 I. C. 573 : (1913) M. W. N. 895.**

——S. 118—*Delivery of goods—Breach of warranty—Acceptance—Notice.*

A buyer who discovers a breach of warranty on delivery of goods can claim compensation for breach of contract under S. 118 of the Act only after giving notice of it to the seller if he accepts the goods. Taking delivery of goods for sale to avoid further loss does not affect the question of acceptance. (*Sankaran Nair, J.*) PALANIAPPA CHETTY *v.* BULLOCK BROTHERS & CO., LTD.
14 I. C. 248.

——S. 118—*Sale of goods—Breach of warranty—Surveyor's report—Binding on seller—Trade usage.*

CONTRACT ACT (IX OF 1872), S. 119.

In Karachi there is a trade usage by which if an Indian buyer of cotton from an European firm wishes to claim an allowance the surveyor's reports must be brought to the firm's Manager before delivery is taken, and the Manager has then the option of accepting the award or refusing to do so and tendering other cotton in place of that for which an allowance has been awarded, provided that is done within the time allowed for the delivery This usage is legal and consistent with S 118 of the Contract Act. If the buyer fails to show a survey report to the Manager before taking delivery the allowance awarded by it cannot be claimed under S. 118 of the Contract Act or the terms of the contract. (*Fawcett, A J. C.*) THE FIRM OF KUSHIRAM MILKIRAM *v.* THE FIRM OF MESSRS RALLI BROTHERS.
49 I. C. 449 : 12 S. L. R, 78.

——S. 119—*Larger consignment of goods than ordered.*

When a larger supply of goods than was actually ordered is consigned, the person who has ordered the goods cannot refuse the consignment *in toto* when the goods actually ordered is severable from the rest without risk or trouble. (*Seshagiri Aiyar and Phillips, JJ.*) PERALAL KRISHNAYYAN CHETTI *v.* PADMANATHAN CHETTIAR.
5 L. W. 149 : 37 I. C 792 : (1917) M. W. N. 91.

——S. 119—*Sending more goods than was ordered—Consignee has right of rejection.*

A consignee of goods has got the right to reject the goods when more than what was ordered is sent The fact that the consignor's agent subsequently offered to reduce the consignment cannot affect the legal position of the parties. (*Foster, J.*) JUGAL KESHWAR BHOLANATH *v.* KISHORI LAL BEHARI LAL.
74 I. C. 923 : 1924 A. 53.

——S. 120—*Breach—Wrongful refusal.*

Wrongful refusal by the purchaser to accept the goods sold to him amounts to a breach of contract of sale. (*Reid, C. J. and Chevis, J.*) DELHI CLOTH AND GENERAL MILLS CO., LTD. *v.* KANHAIYA.
144 P. L. R. 1913 : 111 P. W. R. 1913 : 19 I. C 93 : 80 P. R. 1913.

——S. 123—*Sale, when voidable.*

A sale is voidable at the instance of the buyer under S. 123 Contract Act by reason of puffers being employed to raise the price by fictitious bids. (*Chevis and Le Rossignol, JJ.*) SRI RAM *v.* CHHABBU LAL.
3 P. W. R. 1916 : 31 I. C. 689 : 40 P. L. R 1916.

——Ss. 124 and 125—*Covenant against loss—Breach—Suit for damages when person indemnified had not paid money.*

The mortgagors paid the mortgage money to a person claiming as the heir of the mortgagee on obtaining an indemnity from a third person. Subsequently another person claiming as heir of the mortgagee sued and obtained a decree against the mortgaged property. In a suit by the mortgagors, *Held*, that the suit was not premature, as the indemnified might call upon the indemnifier to pay the debt to him before having paid himself. (1915) 2 Ch. 476 Foll. (*Richards, C. J., and Banerjee, J.*) CHIRANJI LAL *v.* NARAINI.
41 All. 395 : 51 I. C. 158 : 17 A L. J. 394.

CONTRACT ACT (IX OF 1872), S. 124.

——S. 124—*Contract of indemnity—Decree against defendant—Third party notice—Claim should be confined only to amount decreed.*

If in a suit under a contract or right of indemnity the real sum due by the deft. for which the plff. has obtained a decree is less than the real loss incurred by the deft. the latter cannot ask for a decree, on a third party notice, for this latter sum, nor can he split up his claim partly for the amount decreed and partly for the difference between that amount and the total loss. (*Marten, J.*) WELD AND CO. *v.* SHER AHMAD EKBAL AHMAD.
59 I. C. 16.

——Ss. 124 and 125—*Indemnifying surety—Mortgage attachment.*

Where defts mortgaged certain property which was attached in execution of a decree against deft. and the mortgage deed contained an indemnity clause in case of loss and the property was sold in execution, whereupon the plff. sued to enforce the indemnity clause, *held*, that the plff.'s claim must succeed as the mortgage was lawful as between the plffs. and defts (*Leslie Jones and Wilberforce, JJ.*) NATHU MAL. *v.* GANGA RAM
63 I. C. 108.

——S. 124—*Vendor undertaking to indemnify the vendee against litigation—Vendee can claim pleader's fees.*

Where the vendor contracts to indemnify the vendee against the costs of litigation as to the title to the property, the vendee can claim pleader's fees unless they are unreasonable. (*Wallis, C. J. and Seshagiri Aiyar, J.*) VENKATA RANGAYYA APPA RAO *v.* BOMMADEVARA SATYANARAYANA VARAPRASAD RAO.
43 Mad. 898 : 39 M. L J. 316 : 28 M L. T. 188 : 60 I. C. 164 : 13 L. W. 297.

——Ss. 124 and 125—*Contract of indemnity—Loss—Compensation.*

Where an assignee of a debt, whom the assignor had agreed to indemnify against loss, sues on the debt and his suit is dismissed after a fair trial, he is entitled to be indemnified. The mere failure to examine a witness whose evidence was *bona fide* thought to be unnecessary will not bar his right of action against the assignor. (*Seshagiri Aiyar, J.*) RAMASWAMI SASTRI *v.* KALI RAGHAVA AIYANGAR.
43 I. C. 124 : (1917) M. W. N. 868.

——S 124—*Indemnity—Stipulation to discharge existing encumbrance in sale, whether.*

A stipulation in a contract of sale to discharge an existing encumbrance on the property sold, is in the nature of an indemnity. (*Abdur Rahim and Srinivasa Aiyangar, JJ.*) KALIYAMMAL *v.* KOLANDAVELU GOUNDAR
38 I. C. 188 : 5 L. W. 228.

——S. 124—*Indemnity—Absolute promise—Non-performance—Cause of action.*

Where the defendant's promise is an absolute one, an action can be brought the moment there is failure of performance and a plea for *non-damnificatus* would be bad. 2 B. and Ad, 772 ;

CONTRACT ACT (IX OF 1872), S. 124.

8 M. & W. 657; (1896 2 Ch. 315, Ref ; 14 M. L. J. 285. Dist. (*Wallis and Ayling JJ.*) RAMALINGATUDAYAN *v.* UNNAMALI ACHI.
24 I. C 873 : 38 Mad. 791

——S. 124—*Principal and surety—Forbearance to sue principal, whether consideration of surety's promse to pay.*

Forberance to sue principal at the surety's request, is sufficient consideration for promise by a surety to pay the amount himself. (*Wallis and Munro, JJ.*) VIRA SADASIVA *v.* RAMACHANDRA RAJA. **12 I C. 126 : (1911) 2 M. W. N. 145.**

——Ss. 124, 126 and 132—*Suretyship and indemnity—Distinction.*

To create a contract of suretyship there must be creditor, a principal debtor and a surety who is liable for the liability of the principal debtor. The relationship may be established by an agreement, between the principal debtor and the surety to which the creditor is or is not a party, that one of them shall be liable on the default of the other. But where the contract between the surety and the creditor is not a collateral undertaking but creates an original liability between them then it is contract of indemnity. (*Mullick and Thornhill, JJ.*) MAHABIR PRASAD *v.* SRI NARAIN. **4 Pat. L. W. 437 : 3 Pat. L. J 396: 46 I. C. 27 : 1918 Pat. 328**

——S. 125—*Sale of land—Vendee directed to pay off mortgagee of vendor—Default—Damages—Liability for.*

A vendor directed the vendee to pay off certain mortgages created by the vendor, out of the sale price. The vendee defaulted. The mortgagee sued the vendor and obtained a decree. In a suit for damages by the vendor against the vendee without paying the decree amount, *Held*, that the cause of action for the breach of covenant arose on the date of the sale and the suit having been brought six years after, was barred by limitation. (*Karamat Husain and Tudball, JJ.*) RAGHUBAR RAI *v.* JAIJ RAI. **34 All. 429 : 14 I. C 244 : 9 A. L. J. 534**

——Ss. 125 and 73—*Sale of land—Vendee covenanting to pay debts of vendor—Breach—Suit by vendor to recover amount—No proof of loss.*

Where on a sale of land a portion of the purchase money is left with the vendee on the understanding that he was to pay certain debts of the vendor and the vendee also agreed to compensate the vendor in case of his default in paying the amounts, the vendor can sue the vendee on a breach of the covenant without proof of actual loss sustained by him (vendor) by such breach. The covenant is an absolute one to pay the purchase money in the way agreed upon and not a covenant by way of indemnity. It was open to the vendor to sue the vendee as soon as the latter made default in paying the debts, as they became due. 36 Mad. 348, 5 L W. 228 Foll ; 31 All. 583, Dist. (*Abdur Rahim and Seshagiri Aiyar, JJ.*) KONU KUTTI *v.* KUMAR MENON.
35 M. L. J. 692 : 49 I C, 313 : 24 M. L. T. 260.

CONTRACT ACT (IX OF 1872), S. 126.

——S. 125—*Indemnity contract—Right to damages—Sale of land.*

Suit for damages lies for breach of contract of indemnity for loss of possession when the title is impaired and not necessarily when possession is actually lost. (*Oldfield and Sadasiva Iyer, JJ.*) BHAWANI *v.* ANANTHA KAMTHI.
20 M. L. T. 263 : 31 M. L. J. 556 : 4 L. W. 357 : 35 I. C. 789 : (1916) 2 M. W N. 244.

——S. 125—*Suit by surety—Damages—Measure.*

Suit by surety on a contract of indemnity before he has paid the money is premature. Payment means payment in money or its equivalent and not by the execution of a fresh bond. The amount recoverable is the amount which has been paid, whether under a contested decree or under a *bona fide* compromise. (*Mitra, A. J. C.*) ANWARKHAN *v.* GULAM KASAM.
50 I. C 611 : 15 N. L. R. 78.

——Ss. 126, 140 and 141—*Principal and surety—Oral contract—Surety paying off debt—Rights of.*

S. 126 of the Contract Act makes no difference between an oral and written guarantee, the former being as equally binding as the latter. Where a surety has paid off the whole debt, he is entitled to stand in the place of the creditor who has been so paid off and is entitled to the benefit of every security which the creditor against the debtor had at the time when the suretyship contract was entered into. (*Stuart and Ryves, JJ.*) BARKAT-UN-NISSA *v.* MAHBOOB ALI MIAN.
42 All. 70 : 1 U. P. L R. (H. C.) 187 : 52 I. C. 684 : 17 A. L. J. 1068.

——Ss. 126 and 128—*Liability, meaning of—Contract of guarantee*

"Liability' under Ss. 126 and 128 means a liability enforceable at law and if such liability does not exist there cannot be a contract of guarantee. (*Batchelor, C. J. and Kemp, J.*) MANJU MAHADEV SHETTU *v.* SHIVAPPA MANJU.
42 Bom. 444 : 46 I. C. 122 : 20 Bom. L. R. 447.

——Ss. 126 and 128—*Limitation Act, Ss. 18 20 and 21 and Arts. 75, 65 and 115.*

A promissory note being payable on demand creates a present debt payable without demand. Endorsement by person on it "re-payment guaranteed by me" renders that person liable as a surety from that moment and his liability is co-extensive which the debtor as regards the *quantum* of liability but not so as to save limitation. A payment by principal is not binding on the surety. A payment of interest creates a fresh starting point for limitation against the principal who pays it but not against the surety even though it was paid with the knowledge and consent of the surety and even at his request unless the payment is proved to have been made on behalf of the surety as well. S. 128 Contract Act which is in the nature of an interpretation clause and is directed to defining the liability of a surety upon the terms of guarantee, was not intended to affect the statute of limitation. In this case it

CONTRACT ACT (IX OF 1872), S. 126.

was held that payment by principal did not bind the surety as the suit against the surety was held barred by limitation. (*Sanderson, C. J. and Mookerjee, J.*) BROJENDRA KISHORE *v.* HINDUSTHAN CO-OPERATIVE INSURANCE SOCIETY.
44 Cal 978 : 25 C. L J. 238 : 39 I. C. 705 : 21 C. W. N. 482.

——S. 126—*Applicability Surety under S. 145, C P. C.*

Where on the arrest of A by a decree-holder for realising his decree-debt, B. a relation of A. gives Government promissory notes as security for the fulfilment of the obligation under the decree, there is neither a contract of guarantee as contemplated by S. 126. Contract Act, nor any personal liability as surety under S. 145, C. P. C., (1908). This creates only an equitable charge on the G. P. notes in favour of the decree-holder to secure the amount due under the decree This liability can only be enforced in a regular suit for the purpose and not by way of an application under S. 145, C. P. C., (1908). (*Fletcher and Teunon, JJ.*) BROJENDRO LALL DASS *v.* LAKSHMI NARAIN KHANNA. **29 I. C. 149 : 19 C. W. N. 961**

——S. 126—*Relation of principal debtor and surety.*

Per *Ramesam, J.*—There need not be privity between a principal debtor and a surety. All debtors whose debt the surety promises to pay are his principal debtors though they are not the objects of his benevolent intention. (*Spencer and Ramesam, JJ.*) THIRUMALAI SAVURI NAICKER *v.* ROYAR. **13 L W. 559 : 40 M. L. J. 529 : 62 I. C. 706 : (1921) M W. N. 334.**

——Ss. 127, 128 and 133—*Surety—Sale of principal debtor's interest in subject of contract if discharges him on surety—Forbearance of creditor to sue principal debtor.*

Anything done or any promise made for the benefit of the principal, may be a sufficient consideration to a surety for giving a guarantee. Where a person has become surety for the performance by a lessee of the conditions of the lease, the fact that the lessee's interest was sold in execution and purchased by a stranger does not have the effect of releasing the debtor or his sureties from liability to perform the covenants and conditions of the lease as agreed upon by them. Mere forbearance on the part of a creditor to sue the principal debtor or to enforce any other remedy, against him, does not, in the absence of any provision in the guarantee to the contrary, discharge the surety. (*Sir John Edge.*) KALICHARAN *v.* ABDUL RAHAMAN.
23 C. W. N. 545 : 10 L. W 35 : 50 I. C. 651 (P. C.) : 1 U. P. L. R (P C.) 53.

——S. 127—*Contract of suretyship—Mere recommendation—Consideration.*

A mere recommendation by one person to another to lend money to a third person does not render the first person, a surety or liable for the loan, if given. 20 Bom. 755. Foll. 24 W. R. 445. Dist (*Sadasiva Aiyar and Napier, JJ.*) MUTHUKARUPPA MUDALI *v.* P C. MU. KATHAPPA UDAYAN. **16 M L. T. 194 : 27 M L. J. 249 : 25 I. C. 726 : (1914) M. W. N. 706.**

CONTRACT ACT (IX OF 1872), S. 128.

—— S. 127—*Contract of guarantee—Consideration necessary*

A contract of guarantee cannot be enforced unless there was some consideration for the guarantee (*Chamier, J. C.*) RAM GOPAL *v* SAHEB JAN KHAN. **33 I. C. 732.**

—— S 128—*Principal and surety—Liability of—Limitation for suit against surety—Starting point.*

The liabilities of a principal and his surety though arising under the same transaction are distinct, because the liability of the surety does not necessarily in all cases arise simultaneously with that of the principal and it may happen that the remedy agsinst the principal is barred when the liability of the surety arises The question depends upon the terms of the contract of a guarantee by which the surety had bound himself S. 128 of the Contract Act has no reference to extinction of the liability by the operation of the statute of limitation (*Walmsley and Huda, JJ.*) CHARU CHANDRA BENDOPADHAYA *v.* FAITHFUL. **53 I. C. 999.**

——S. 128—*Scope of—Principal and surety—Liability of surety.*

S. 128 of the Act does not refer to the nature of the principal's obligation but only to the extent of the surety's liability where a person stands surety for attendance of another person before a Court and the latter fails to attend before that Court the surety is liable under the bond. (*Martineau, J.*) CHHAJJU SINGH *v.* EMPEROR
2 Lah. 204 : 22 Cr. L. J. 662 : 63 I C. 454 : 3 U. P. L. R. (L.) 77.

——Ss. 128 and 130—*Liability of surety—Insolvency of debtor.*

A creditor may sue the surety though he does not the insolvent principal debtor. The cause of action arises in favour of the creditor when the principal debtor files his application to be declared insolvent In a suit by the creditor against the surety principal debtor need not be a party. (*Scott Smith, J.*) GURDIT SINGH *v* GUJAR SINGH.
50 I. C. 312

——S. 128—*Suit against surety only*

A suit may be maintained against the surety though the principal has not been sued (*Rattigan, C. J and Shahdin, J.*) PANNALAL *v.* MARWAR BANK. LTD. **48 I. C. 424 : 91 P. R. 1918.**

—— S. 128—*Decree against principal and surety—Appeal by principal only—Effect.*

When, on an appeal by the principal debtor only, against a decree both against him and the surety, the decree against the principal is reversed, the surety is not thereby discharged from his liability. 5 Bom. 647 and 12 Cal. 330. Foll. (*Shah Din, J.*) SHAM LAL *v* SOHNU SHAH
14 P. W. R. 1911 : 9 I. C. 742 : 98 P L. R 1912.

——Ss. 128 to 135—*Liability of surety—Debt extinguished by merger—Effect.*

The liability of a surety is co extensive with that of the principal debtor and the liability ceases when the principal's debt has been extinguished by the merger of the estate of the creditor and

CONTRACT ACT (IX OF 1872), S. 128.

the debtor. (*Spencer, J.*) JEKUNNU SAMI AIYAR *v.* MUTHU KUMARA RAMA SWAMI CHETTIAR.
44 M. L. J. 171 : 72 I. C 194 : 17 L. W 473 : (1923) M. W N. 253 : 1923 M. 340.

——— S. 128—*Cause of action.*

Where the cause of action is separate, the liability of the surety is also separate with respect to each of the promissory notes, although he became surety for the consolidated amount. (*Abdur Rahim and Srinivasa Iyengar, JJ.*) GHULAMASA RAVUTHAR *v* VISHVA NATH CHETTIAR.
(1917) M. W. N. 344 : 40 I. C. 347 : 5 L. W. 721.

——— Ss. 128, 137 and 140—*Surety can be proceeded against before principal debtor.*

A creditor can proceed against the surety and compel him to pay, before exhausting his remedies against the principal debtor. 19 Bom. 578 Dist. (*Ayling and Seshagiri Iyer, JJ.*) PARTHASARATHY CHETTY *v.* YELCHOORI NARAYANA CHETTY. 37 I. C, 401 : 5 L. W. 161

——— S. 128—*Surety promising to make good 'discrepancies.''—Subsequent letter to entrust principal debtor with further business—Liability of surety.*

Where a surety promised to make good any discrepancies of the principal debtor in his dealings with A to the extent of Rs. 1,000 and wrote a letter subsequently to entrust the principal debtor with further business referring to the guarantee already given, his liability does not thereby become unlimited. (*White, C J. and Tyabji, J.*) P. N. K SURYAPRAKASARAYA MUDALIAR *v.* MATHESON'S COFFEE WORKS.
21 I. C. 322 : 14 M. L. T. 249.

——— S. 128—*Liability of surety*

A surety becomes liable only on the contract of suretyship and not by the mere fact of the loan. He is liable for each loan as soon as it is made. (*Krishnaswami Aiyar and Ayling, JJ.*) DWARKADASS *v.* CHIVAKA LAL KRISHNAIYA.
(1911) 1 M. W. N 41: 9 M. L. T. 215: 9 I. C. 204 : 21 M. L. J. 457.

——— S. 128—*Death of principal debtor does not discharge surety*

Under S. 128 of the Contract Act the death of the principal debtor does not discharge the surety from his obligation. (*Kotwal, A. J. C.*) LAXMAN *v.* GORAKHJI. 69 I. C. 557 : 1923 Lah. 145.

——— Ss. 128 to 145—*Surety--Rights and liabilities of.*

A contract of guarantee is a contract *stirictissimi juris*. The surety is entitled to insist on a rigid adherence to the terms of his obligation by the creditor. He is liable only to refund any loss which arose in the ordinary and natural course of things. A guarantee-broker is not liable if seller suffers loss on account of his own unreasonable delay in reselling the goods. (*Crouch, A J. C.*) THE MERCANTILE BANK *v.* TAHILRAM PESSUMAL.
27 I. C, 309: 8 S. L. R. 112.

——— Ss. 129, 130 and 131—*Guarantor's death—Effect--Continuing guarantee--Fidelity guarantee.*

The guarantee of fidelity in a place of trust, *e.g.*, the post of *khazanchee* of a bank for a fixed or

CONTRACT ACT (IX OF 1872), S. 133.

determinable period and of a permanent character, is not a continuing guarantee as defined by S. 129 as a "guarantee which extends to a series of transactions" and is therefore not revoked by the death of the guarantor. A *khazanchee* of a bank by the express terms of the contract of his employment was required to report upon the "credit, solvency and circumstances" of the customers. He did not report his own fraudulent dealings with the bank *Held*, that it was a misfeasance of the duties of a *khazanchee* within the terms of the agreement. (*Lord Phillimore,*) S. N SEN *v.* BANK OF BENGAL. 32 C L J. 223 28 M L T. 124 : 10 L. B. R. 167: 58 I. C. 1 : 2 U.P L.R. (P.C.) 133: 15 Bur. L.T. 94 : 47 I. A. 164 (P C.).

——— S 130—*Comparative effects of a continuing guarantee and a guarantee covering a definite case.*

A continuing guarantee enables a surety to withdraw as to future transactions, but a guarantee covering a definite case does not enable a surety to nullify the security by withdrawal by means of a mere notice to creditor. (*Fletcher and Richardson, JJ.*) ABDUL BARY *v.* BELAYAT ALI.
37 I. C. 919

——— S 130—*Continuing guarantee.*

A suretyship under O. 41, R. 6 of the C. P. Code is not a continuing guarantee within S. 130 of the Contract Act. (*Beachcroft and Mullick, JJ.*) JAGADAMBA KOMARI *v.* NILKANTH NARAIN SINGH.
32 I. C. 807.

——— S. 130 - *Death of surety.*

Where the surety deposited certain securities as security for faithful discharge of duty by his son, his death does not determine the guarantee. (*Ormond Offg C. J. and Pariett, J.*) BANK OF BENGAL *v.* S. N. SEN 42 I.C. 900.

——— S. 130—*Application—Suretyship.*

S 130 does not apply to special contract of suretyship by surety to administration bond, irrespective of the grant of Letters of Administration. (*For C. J. and Twomey, J.*) MAUNG BA OH *v.* MA PWA. 36 I. C. 1000 : 10 Bur. L. T. 237.

——— S 131—*Continuing guarantee—Does not terminate on death of guarantor.*

Where no notice is given as contemplated by the bond by the guarantor during his life or by his legal representatives after his death, the estate must be held liable under the contract of guarantee. (*Gokul Prasad and Ryves, JJ.*) MUHAMMAD UBED ULLAH *v.* MUHAMMAD IRSHA ALLAKHAN.
43 All. 132 : 61 I. C. 138: 18 A. L J. 976.

——— Ss. 133 and 139—*Discharge of surety—Rescission of contract*

The plffs. agreed to buy from a firm a quantity of cotton at certain rate and time. The defendant as surety guaranteed the performance of the contract. The plffs. subsequently agreed to sell to the firm the same cotton for the same delivery at a higher rate. The plff. sued the def. to recover the difference between the rates of the two contracts or the difference between the rate of the first contract and the rate on the due date of delivery. The defendant contended that he was discharged from his suretyship by reason of

the second contract between the plff. and the firm. *Held*, that each of the contracts was capable of performance on the due date and there was no rescission of the original contract by a new agreement and therefore the deft. was not discharged from suretyship. (*Crump, J.*) UDHRAM *v* SHIVBHAJAN. 58 I. C. 272 : 22 Bom L. R 711.

———S 133—*Principal and surety—Variation in contract with principal.*

The plffs appointed deft No. 1 as their Sub-agent to sell goods on commission and the latter was to get all the office expenses Deft. No. 2 stood surety for deft. No. 1 and expressly waived all or any of the rights as surety which may at any time be inconsistent herewith and which he might be otherwise entitled to claim and enforce, and further agreed that the guarantee shall not be revocable at any time, but shall continue during the employment of the sub-agent ; subsequently, the plffs. varied, without the knowledge or consent of deft. No. 2, their contract with deft. No. 1 whereby the latter was to receive commission, at a higher rate. A question having arisen whether the variation has the effect of discharging the surety. *Held*, that by the variation, the surety was discharged as to transactions subsequent to the variation. (*Shah and Hayward, J.*) K. R. CHITGUPHI & Co *v.* VINAYAK KASHINATH KHADILKAR. 45 Bom. 157: 58 I.C. 184: 22 bom. L.R. 659.

———S. 133—*Surety—Duty of creditor.*

So long as an account with the Bank is unbroken, a surety should not, without his consent, express or implied, be prejudiced by any departure from the rule of appropriation of items in order of date (*Claytons Case and Cony Brothers & Co v Mecca.* Approved. (*Sanderson, C J. Woodroffe and Mookerjee JJ.*) GHUZNAVE *v* NATIONAL BANK OF INDIA, LTD. 23 C L.J. 256: 33 I. C. 34 : 20 C.W.N. 562.

———S. 133—*Variation in terms.*

Deft. was, under a compromise decree, directed to pay decretal money in instalments and the attachment order against his property was to remain in force till the debt was paid. A certain person stood surety for the performance of the terms. The court subsequently without the knowledge or consent of the surety allowed the attached properties to be sold. *Held*, this did not discharge the surety as the court did only what the attachment order implied and hence there was no variation in the terms of the contract (*Shadi Lal, C. J and Fforde, J.*) FIRM OF DARSHAN RAM GANESH DAS *v.* FIRM KHAIR DIN ALLAH BAKHSH. 73 I: C. 353: 1924 Lah. 211.

[ON APPEAL FROM 71 I. C. 783 (2)]

——Ss. 133 and 134— *Surety— Debtor not exercising right of avoidance.*

A surety cannot escape liability on the ground that the circumstances where such that the principal debtor was entitled to avoid the contract, when in fact the contract was not avoided (*Sadasiva Aiyar and Napier, JJ.*) SOUTH INDIAN EXPORT CO., LTD. *v.* CONDIAH CHETTY. 29 I. C 712.

———S. 133—*Slight alteration in course of business—Discharge of surety.*

A slight alteration in the course of business does not amount to an alteration in the main contract such as would affect the liability of the surety. (*White, C. J and Tyabji, J.*) P N. K. SURYAPRAKASARAYA MUDALIAR *v.* MATHESON'S COFFEE WORKS. 21 I. C. 322: 14 M. L T. 249

———S. 133 — *Surety — Attachment before judgment - Arbitration—Award.*

A surety giving security under O. 38, R. 5, C.P.C., for the value of property sought to be attached before judgment continues to be liable though the suit is decreed not by the Court but by an award of arbitrators. Reference to arbitration was an ordinary incident of the suit. (*Pratt, J. C and Hayward, A. J. C.*) UMERMAL JANIMAL *v.* FIRM OF BHOJRAJ HASSOMAL. 45 I. C. 429: 11 S. L. R. 122.

——Ss. 134 and 137—*Principal and surety—Omission to proceed against principal owing to difficulty in service—Striking of his name—Rights of surety.*

In a suit against the principal debtor and surety the mere omission of the plaintiff to pursue his claim against the principal debtor with the result that his name is struck off and his suit dismissed against him under O. 9, R. 5., C. P. C. does not discharge the surety provided the suit be still in time against the principal. (*Beaman and Heaton, JJ.*) NATHABHAI TRICAMLAL *v.* RANCHODLAL RAMJI. 39 Bom 52: 27 I. C. 165: 16 Bom. L R. 696.

———S. 134—*Principal and surety—Decree against surety—Appeal—Cross appeal by creditor —Principal not made party—Appeal.*

A creditor sued the principal debtors and the surety and obtained a decree against the latter alone. The surety appealed and the creditor also made a cross appeal which was dismissed and the apoeal allowed and the decree of the lower Court reversed. The creditor appealed to the High Court joining the surety and the principal debtors, as respondents. *Held*, the creditor's omission to join the principal debtor as respondents in the first cross appeal precluded the appellate and the High Court from reviewing original decree in their favour, and consequently no decree can be passed against the surety. (*Mookerjee and Beachcroft, JJ.*) MALHEWAN *v.* RAM KANAI SINGH. 16 I. C 387 (2).

———S. 134—*Change in relationship between debtor and creditor.*

Certain decree-holders attached the entire property of the judgment-debtor and a person stood surety undertaking the liability to pay Subsequently the judgment-debtors with the consent of the decree holders obtained permission from Court to effect private mortgages or sales.

Held that there was a change in the position of the debtor and the creditor by the release of the attachment and that the surety was discharged from his liability. (*Abdul Raoof, J.*) DARSHAN RAM GANESH DAS *v.* KHAIR DIN ALLAH BAKSH. 71 I. C 783 (2) : 1924 Lah. 194.

———S 134—*Withdrawal of claim.*

Plff. having withdrawn his suit against the principal debtor, his suit against the surety must also be dismissed. (*Shah Din, C. J.*) MUNSHI RAM *v.* MALVA RAM. 40 I.C 400.

CONTRACT ACT (IX OF 1872), S. 134.

——— S. 134 - *Surety for a void agreement.*

The surety of an agreement originally void is not discharged if the creditor withdraws his claim against the principal or his legal representatives and he impliedly assents to it. (*Kattigan, J.*) SOHAN LAL *v.* PURAN SINGH

54 P. R. 1916: 159 P L. R 1916: 35 I. C. 537: 158 P. W. R. 1916.

———S 134—*Two sureties for a pro-note—Discharge by one of the sureties—Execution of fresh pro-note by one of the sureties—Effect of.*

Where one of two co-sureties discharges the principal debt without the knowledge of the other by the execution of a fresh promissory note to the original creditor's transferee he is not entitled to contribution as against the co-surety on his discharging the latter note. (*Phillips and Odgers, JJ.*) KONDAPALLI LAKSHMINARASAYYA *v.* KONDAPALLI VENKATAKRISHNAYYA. **15 L W 143: 70 I. C. 355 : 1922 Mad. 119 (1).**

———Ss. 134 and 139—*Promissory note—Suit against maker and sureties—Withdrawal of claim against maker—Right against sureties.*

Ss 134 and 139 of the Contract Act are applicable to negotiable instruments. On a promissory note suit against the maker and two sureties, plaintiff withdrew his claim against the maker, the principal debtor. *Held*, that there was a reservation of plaintiff's right to proceed against the sureties and that the release of the principal debtor during the trial of the suit did not destroy plaintiff's right to proceed against the sureties. The principle of the English Law that the discharge of the principal debtor will not affect the right of suit against the sureties where there is a reservation to proceed against them is applicable in India. (*Seshagiri Iyer and Moore, JJ.*) MURUGAPPA MUDALIAR *v* MUNUSWAMI MUDALY.

38 M. L J. 131: 11 L. W. 243: 54 I. C. 758: (1920) M. W. N. 178.

———S 134—*Discharge of surety.*

That the creditor cannot proceed with his suit against principal debtor owing to disappearance of the latter, and demands relief against surety only, does not amount to discharge of the surety. (*Stanyon, A. J. C.*) BALAJI *v.* NASTIMAL.

17 I. C 893: 8 N. L. R. 188.

———Ss. 134 and 137—*Contract with principal debtor void—Liability of surety.*

If the contract entered into by the principal debtor is found for any reason to be void or voidable the creditor can fall back on the contract of indemnity and enforce the liability of the surety (*Kanhaiya Lal, J. C.*) GANGA PRASAD *v.* HAYAT MAHAMMAD. **22 O. C. 109: 52 I. C. 88: 6 O. L. J. 605.**

———Ss. 134 and 137—*Suit dismissed as against principal—surety, if discharged.*

Where a suit against a principal debtor is dismissed under O. 9, R 5, C. P. C, on the plaintiff giving up his claim against him. The legal consequence of the act of the plaintiff is to discharge the principal debtor within S. 134 of the Contract Act, so that he had no further right of suit against the surety. (*Sanders, J. C.*) MAUNG PO U *v.* MAUNG KAW. **44 I. C 693 : 8 U B. R. (1917) 62.**

CONTRACT ACT (IX OF 1872), S. 137.

———Ss. 134 and 137—*Surety, discharge of—Waiver of claim against principal debtor—Waiver and forbearance — Distinction*—Locus penitentiae.

Where in a suit against *B*, the principal debtor, and *C*, the surety, the plaintiff definitely waives his claim against *B* and thereupon *C*, pleads discharge, the plaintiff has no *locus penitentiae* and could not get *B* added again, although the claim was waived at the suggestion of the Court, as he was not bound to follow the suggestion. The mere forbearance contemplated in S. 134 does not extend to actual waiver which has the effect of discharging the principal Forbearance is something short of waiver. 24 All. 504, Appr (*Hortnoll and Young, JJ.*) WILLIAMS F. G. *v.* KING T. **20 I. C. 189: 6 Bur. L. T. 62.**

———S. 134—*Suit against surety alone—Maintainable.*

A suit is maintainable against the surety although no suit is filed against the principal debtor 7 Bom. 146, Foll. (*Pratt, J. C. and Fawcett, A. J. C.*) BHAROOMAL *v.* MAZOR

52 I. C. 870: 13 S. L. R. 92.

———S. 135—*Principal and surety—Delay—Forbearance to sue.*

A mere forbearance or delay in suing the principal or pressing him for payment does not discharge the surety. (*Shadi Lal, and Martineau, JJ.*) RAM SINGH *v.* FIRM OF GULAB RAI.

2 L, L. J. 316: 55 I. C. 610: 1 Lah. 262.

——— S. 135—*Surety under O. 38, R. 3, C P. C. Liability of—Compromise.*

S. 135 of the Contract Act has no application to the case of a surety under O. 38, R. 3, and his obligation continues even though the parties to the suit entered into a compromise on the strength of which a decree was passed by the Court. (*Seshagiri Aiyar and Burn, JJ.*) ODAYAMANGALATH APPANNI NAIR *v.* ISACK MACKADAM.

37 M. L. J. 435 : 53 I. C. 367 : 10 L. W. 533.

———S. 135—*Surety—Time granted to debtor—Liability of surety.*

A surety's liability does not come to an end if the creditor gives time to the principal debtor in consideration of part payment of the debt by the latter. 22 All. 351 Dist. (*Tyabji, J.*) SUBRAMANIA PILLAI *v.* PARAMASIVAN PILLAI.

24 I. C. 864.

———S. 135—*Extension of time for paying debt, effect of—Surety discharged.*

Where a creditor extends time for the payment of debt, without surety's consent the surety is discharged. (*Ormond, J.*) MAUNG PO LU *v.* BEGLIE & Co. **30 I. C. 637 : 8 Bur. L. T. 114.**

———Ss. 137 and 139—*Abatement of appeal—Effect on surety.*

The abatement of an appeal as against the principal debtor does not necessarily imply that the debt payable by him is extinguished or discharged. The liability of the surety continues in spite of the abatement. (*Kanhaiya Lal, A. J. C.*) RAM SARAN *v.* BINDESHARI. **54 I. C. 105 : 6 O. L. J. 583.**

CONTRACT ACT (IX OF 1872), S. 139.

— S. 139—*Causes of action different against —Surety and principal debtor—Failure to sue surety in first instance—Second suit.*

Where, on an embezzlement, the creditor sued only the principal debtor in the first instance, he could bring a second suit against the surety The cause of action against the principal debtor and surety are different. (*Lyle, J.*) CLARENCE KIRKPATRIC *v.* CHET RAM. 21 I. C. 437 : 11 A. L. J. 689.

— S 139—*Opening second account.*

The opening of a second account in favour of the principal debtor, whose credit has been guaranteed in respect of a previous account by a surety without the consent and knowledge of that surety, does not discharge the guarantee as it (such opening of a second account) does not impair the eventual remedy of the guarantor against the assured. (*Sanderson, C J Woodroffe and Mookerjee, JJ.*) GOLZNAVI *v.* NATIONAL BANK OF INDIA, LTD. 23 C. L. J. 256 : 33 I. C. 34 : 20 C. W. N. 562.

— S 139—*Bank deposits—Security for—Liquidation Creditors applying for dividends is not inconsistent with rights of surety.*

Where a person stood surety for depositing money in a bank and the bank subsequently failed and the creditor after diligently registering himself as a creditor and obtaining his dividend in liquidation sued the surety for the balance : *Held*, he had not done anything inconsistent with the rights of the surety; on the other hand, if he had omitted to do what he actually did, his inaction might have been relied upon as an omission to do an act which his duty to the surety required him to do. The liability of the surety being co extensive with that of the principal debtor, the fact that the latter may not have sufficient means to pay interest is not an adequate ground for relieving the surety from liability. (*Shadi Lal, C.J. and Wilberforce J.*) MALAWA RAM *v.* SWAMI DAS. 4 Lah L. J 183 : 1922 Lah. 89.

——— S 139—*Surety for debtor—Discharge—Remedy against principal debtor*

The creditor committed acts inconsistent with the rights of his surety and had also omitted certain acts which his duty to the surety required him to perform *Held*, that according to S. 139 of the Contract Act the surety was discharged from liability to the extent that he was deprived from recovering from the principal debtor the amount claimed by the creditor. The surety was allowed his costs, as it was found that the plff. was not justified in suing him. (*Rattigan and Shah Din. JJ.*) TULSA SINGH *v.* NATHA SINGH. 58 P L. R. 1912 : 15 I. C 469 : 246 P. W. R. 1912.

——— S. 139—*Surety for several defendants—Plff. proceeding against one deft. only—Surety is discharged*

Where a person stands surety for several defts but the plff. proceeds against one deft. only, the exoneration of the remaining defts. discharges the surety. *Ayling and Odgers, JJ* SISTLA SITA RAMASWAMY SASTRI *v.* BOUTHU BASAVAYYA. 60 I. C 114 : 12 L. W. 536

CCONTRACT ACT (IX OF 1872), S. 145.

——— S. 139—*Discharge of surety—Conduct of creditor—Negligence.*

A surety who has bound himself for a person's doing certain things, is not discharged from his liability unless it is shown that the creditor has by his conduct either prevented the things from being done or connived at the omission or enabled the person to do what he ought not to have done, and that but for such conduct the omission would not have happened The negligence must be so gross as to amount to connivance. (*Abdur Rahim and Ayling, JJ.*) SUBRAMANIA AIYAR *v.* SHAW WALLACE & CO., 28 M. L T. 107 : 38 M. L. J. 402 : 58 I. C. 648: 12 L. W. 117.

——— Ss. 139 and 144—*Pledgee of pro-note—Rights of.*

The pledgee with possessions of a pro-note can sue on it and recover money thereunder. His liability is similar to that of creditor towards surety. He is liable for any damages caused by laches on his part *Sadasiva Iyer, J.*—The pledgee cannot sue on the note and recover money thereunder. S. 134 of T. P. Act does not empower to sue on it. (*Sundara Iyer, and Sadasiva Iyer, JJ.*) MUTHUKRISHNA IYER *v.* VEERARAGHAVA AIYAR. 12 M. L. T. 315 : (1912) M W. N. 919 : 16 I. C. 601 : 23 M. L J. 430.

——— S. 140—*Rights and liability of surety.*

A surety's right stands on a higher footing than a right for contribution, he is bound to discharge the liability of the person for whom he stands surety but he is not liable jointly and severally to pay the decree debt along with all the judgment-debtors. (*Spencer and Ramesam, JJ.*) THIRUMALAI SAVURI NAICKER *v* ROYAR. 13 L. W. 559 : 40 M. L. J. 529 : 62 I. C. 706 : (1921) M. W N. 334.

—— S. 140—*Principal and surety—Surety paying off debt—Right to recover from principal.*

When a surety has paid off a debt, he can recover this amount from his principal. It matters not whether he discharged it by incurring a fresh obligation to the same creditor or not. Neither does it matter that the amount was actually handed over to the surety and paid by him to the creditor. 26 Mad. 322 14 W.R. 458 R (*Ormond, J.*) SHWE ZAN U. *v.* SHWE PRU. 39 I, C 432 : 11 Bur. L. T. 193.

——— S. 145—*Principal debtor — Liability — When arises.*

Per *Napier, J.*—The liability of the principal debtor to pay the surety cannot arise from a mere implied promise to indemnify contained in S. 145, but must be the result of a contract between the surety and the creditor to which the debtor is a party The implied rights possessed by a surety are available when the suretyship has been undertaken at the request, actual or constructive of the principal debtor but not otherwise since no one can make himself the creditor of another by volunteering to discharge his obligations. (*Ayling and Napier, JJ.*) MUTHU RAMAN CHETTY *v.* CHINNA VELLAYAN CHETTY. 39 Mad. 965 : 30 M. L. J. 369 : 19 M. L. T. 278 : 3 L. W. 393 : 33 I. C 508 : (1916) 1 M. W. N. 290.

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——S. 145—*Principal debtor and surety.*

Execution of mortgage by a surety for the satisfaction of the decree passed against him and principal is payment and suit would lie to recover it from the debtor. (*Macnair, A. J. C.*) MATHURA *v.* CHOTU. 58 I. C. 123.

——S. 145—*Payment, meaning of.*

Payment means payment in money of property as money equivalent and not merely in the shape of a bond or pro-note or acknowledgment of liability. The fact that the principal debtor is released and liability of the surety is adjudged by a decree, does not amount to payment (*Mittra, A. J. C.*) ANWARKHAN *v.* GULAM KASAN.
50 I. C. 611 : 15 N. L R. 78.

——Ss. 148 and 160 - *Pawn or pledge—Assignee from pawnor cannot give directions as to disposal.*

It is the pawnor, and not an assignee from him that can give directions to the pawnee as regards the delivery or disposal of the pledged property. The directions must be definite and reasonable in order to be binding on the pledgee. (*Kotval, A J. C.*) TEK CHAND *v* MAHADEO.
65 I. C. 65 : 1922 Nag. 127.

——Ss. 148 and 151—*Liability of a goldsmith.*

Some precious stones and lumps of gold of special quality and three sovereigns were given to a goldsmith to convert into jewellery and were lost by theft, not caused by want of proper care. *Held* that as the intention was to convert the identical stones and lumps of gold into jewellery, the ownership did not pass to the goldsmith and the transaction being one of bailment, he was absolved from liability for the loss under Ss. 148 and 151, Contract Act, and as regards the three sovereigns as the identical sovereigns were not intended to be melted and turned into jewellery, the property had passed to the goldsmith and he was indebted to the owner thereof and was bound to make good the loss. (*Twomey, J.*) MAUNG SAN MAYALING *v.* MAUNG PO HMAN.
15 I. C. 431 : 5 Bur. L. T. 106.

——S. 149—*Delivery of goods—What constitutes—Filling up forwarding note is not sufficient.*

The mere fact that the loading clerk of a railway filled up what is called the serial number in the forwarding note without doing any further would not amount to the delivery of goods to the railway by the consignor. (*Rafique and Lindsay, JJ.*) LACHMI NARAIN *v.* B B. & C. I. RAILWAY COMPANY. 45 A. 235 : L. R. 4 A 97 : 21 A. L. J. 474 : 74 I. C. 248 : 1923 A. 449 (2).

——Ss. 149 and 151—*Duty of Ry. Co. is that of common carrier.*

By law the duty of a Railway Company is that of a common carrier and the Railway Co. cannot refuse carriage of goods. Liability of railway is that of bailee. Rules restricting liability imposed by Railway Act are invalid. (*Piggott Walsh and Gokul Prasad, JJ.*) SOHANPAL MUNNALAL *v.* THE E. I. RAILWAY. 20 A. L. J. 31 : 44 A 218 : L. R. 3 A. 33 : 65 I. C 109 : 1922 A. 9.

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—— Ss 151 and 152—*Bailment—Suit against bailee for damages—Negligence, proof of—Onus on plaintiff—Duty of defendant.*

In a suit against an ordinary bailee, as defined in Ss. 151 and 152, for not taking care of the goods and saving them from loss, *e. g.*, loss of fire, the bailee should call all the material witnesses who were on the spot at the time of the loss. But that does not discharge the plaintiff from proving want of due diligence, or negligence on the part of the bailee or his servants. Good sense and policy of the law impose some limit upon the amount of care and skill required of a person who was to encounter a sudden emergency. In a moment of peril and difficulty the Court should not expect perfect presence of mind, accurate judgment, and promptitude. If a man is suddenly put in an extremely difficult position and a wrong order is given by him, it ought not to be attributed to him as a thing done with such want of care and skill as to amount to negligence If in a sudden emergency a man does something which he might reasonably think proper, he is not to be held guilty of negligence, because upon review of the facts, it can be seen that the course he has adopted was not in fact the best. (*Sir Walter Phillimore*) DWARAKA NATH *v.* THE RIVER STEAM NAVIGATION CO., LTD.
20 Bom. L R 735 : 27 C. L. J 615 : 8 L. W. 4 : 23 M. L. T. 376 : 46 I. C. 319: (1918) M. W. N. 435 (P C.).

——S. 151— *Hotel-keeper—Loss of goods belonging to guest—Liability for.*

The liability of a hotel-keeper to his guests is governed by S. 151 of the Contract Act and his liability is that of a bailee. Where the hotel keeper fails to show that he took such care to ensure the safety of the property of the guests as a man of ordinary prudence would, under the circumstances, take of his own goods, he is liable for the loss of the goods. The English Common Law does not regulate the liability of hotel-keepers in this country (*Ryves and Gokul Prasad, JJ.*) MESSRS. JAN AND SON *v.* A. CAMERON. L. R. 3 A. 373 : 20 A. L. J. 728 : 4 U P. L. R. (A 214 : 44 A 735 : 68 I. C. 679 : 1922 All. 471.

——S. 151—*Railway Company—Liability.*

The position of a Railway Company is that of a bailee and is governed by S. 151 in case of goods consigned to it and it should take as much care as a person of ordinary prudence would take in respect of his own property Where four hens put in a crate were consigned to a Railway Company and were put in a closed van by the Railway Company on account of which they died *Held*, Railway Company was liable (*Banerji J.*) ARRATOON M. J. *v.* EAST INDIAN RAILWAY.
38 I. C. 143.

——Ss. 151, 152 and 154—*Deposited for safe custody in Bank—Failure of Bank—Liability of depositee—Amount of care*

The plff. deposited with the deft. a certain sum of money for safe custody which the latter deposited into the People's Bank in his own name. His own money was also in the same Bank and he had no doubt as to the solvency of the Bank

at the time of deposit. The Bank failed and thereupon the plff. sued deft. for the money. *Held*, that the deft. did not use nor intended to use the money for his own purpose, that he took the same care of the plff.'s money as he took of his own and that therefore he was not liable to make good the loss. (*Richards, C. J. and Rafique, J.*) SARASWATI KUNWAR *v.* BADRI PRASAD.

36 I. C. 31

——**Ss. 151 and 152** — *Railway Company Goods destroyed by fire—Liability.*

Where goods entrusted to a Railway Company are lost, damaged or destroyed while in its possession, the fact of loss or damage is enough to cast the onus on the Company of proving that it was not due to any negligence on its part. No general principles can be laid down as to the quantity and quality of the proof. The principles deducible from the leading cases however are (1) The bailee can show that the cause, while unknown, must have been external to himself and beyond his control. (2) He can prove that while unknown and in all probability attributable to himself the cause was such as could not be foreseen and prevented by all reasonable care. (*Beaman, J.*) HIRJI KHETSEY CO., LTD. *v.* B.R. & C.I. RY CO.

39 Bom. 191 : 25 I. C. 241 : 16 Bom. L. R. 467.

——**S. 151**—*Relation of bailor and bailee.*

The obligation of a bailee includes not only the duty of taking all reasonable precautions to obviate these risks, but the duty of taking all proper measures for the protection of the goods when such risks had already occurred. (*Scott, C. J. and Batchelor, J.*) LAKHI CHAND RAMCHAND *v.* GREAT INDIAN PENINSULA RAILWAY CO.

14 Bom. L. R. 165: 14 I. C. 793 (2) : 37 B. 1.

——**S. 151**—*Degree of care varies with the quality of goods.*

The degree of the care required of the carrier in dealing with the goods depends upon and varies with the nature and condition of the thing carried, a man of ordinary prudence would not send his own jute in a boat with 20 or 30 leaks of 1 or 1½ inches in length and keep the jute in the hold of the boat for thirty hours. (*Chatterjea and Cuming, JJ.*) LAKSHMI NARAYAN *v.* THE SECRETARY OF STATE FOR INDIA.

27 C. W. N. 1017 : 80 I. C. 279 : 1924 Cal. 92.

——**S. 151**—*Common carrier—Liability for goods for carriage—Demurrage charges—When leviable.*

The liability of a steamship company in respect of goods delivered for carriage is that of an insurer and if there is any shortage in weight during transit, the company is liable. A consignee of goods, delivered to steamship company for carriage, cannot compel the company to weigh before delivery. He can weigh them himself and sue, for compensation for loss. even though he may have granted a clear receipt of delivery, if it is proved that a portion of the goods was lost in transit or was in the custody of the company. A consignee is liable for demurrage charges and has no right to the price of the goods if he unjustifiably refuses to take

delivery of goods, But demurrage cannot be charged for the period subsequent to a notice to the consignee that the goods will be sold away at auction in case he fails to remove them. (*Chatterjee and Newbould, JJ.*) RAMJASH AGARWAL *v.* INDIAN GENERAL NAVIGATION AND RAILWAY COMPANY, LTD. **41 I C. 387: 22 C.W.N. 310.**

——**Ss. 151 and 152**—*Loss of goods consigned.*

The liability of a Railway Company for loss of goods consigned for carriage is governed by the tests laid in the sections. The Railway Company is not in the position of insurers as common carriers. (*Mookerjee and Cuming, JJ.*) SURENDRA LAL *v.* SECRETARY OF STATE

38 I. C. 702 : 25 C. L. J. 37.

——**S. 151**—*Railway Company—Liability—Receipt.*

A Railway Company is liable to compensate for loss of or damages to goods while in their custody though the claim is not put forward till after delivery has been taken and a 'clear' receipt is granted. A receipt is only a *prima facie* evidence of the fact and raises a presumption in favour of the receipt of the goods A bailor is not precluded from proving that the goods were really damaged or deficient in quantity when delivered to him. (*Mookerjee and Carnduff, JJ.*) EAST INDIAN RAILWAY *v.* SISHALAL.

39 Cal. 311 : 16 C W. N. 329 : 12 I. C. 596 : 14 C. L. J. 472.

——**S. 151**—*Bailee — Ordinary prudence—Point of law*

Whether it can be inferred from the facts found that ordinary prudence has been exercised, is a question of law and justifies an inference in second appeal. (*Seshagiri Aiyar, J.*) NAGALINGA CHETTIAR *v.* KAYAROHANA CHETTIAR.

25 I. C. 939.

——**Ss. 151, 152, and 161**—*Railway Act, Ss. 72, 80—Loss of goods bailed—Liability of Ry. Co.*

It is laid down definitely in S. 72 of the Indian Railways Act that the responsibility of the Railway Company for goods delivered for carriage is that of a bailee under Sections 151 152, and 161 of the Indian Contract Act. When a thing is injured or lost while in the charge of a bailee the burden of proving that he has exercised ordinary care must generally be in the first instance upon the Railway company. It is for the bailee to establish positively that they had discharged the statutory duty which is defined in Section 72 of the Railways Act read with Sections 151 and 152 of the Indian Contract Act. (*Lindsay, J.C.*) SECRETARY OF STATE FOR INDIA *v.* ABZAL HUSAIN.

7 O. L. J. 250 : 23 O. C. 96 : 56 I. C. 714 : 2 U. P. L. R (J. C.) 109.

——**Ss. 151 152 and 161**—*Railway—Liability of, as carrier - Exemption—Risk-note Form B.*

Under Ss. 151 and 152 of the Contract Act read with S. 72 of the Railways Act, the liability of the Railway Administration for the loss, destruction, or deterioration of goods delivered to the Administration to be carried on by railway is that of an ordinary bailee ; that is to say if the Railway Administration take as much care of the

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goods bailed to them as a man of ordinary prudence would under similar circumstances take of his own goods of the same bulk, quality and value as the goods bailed, they will not in the absence of special contract be respon ible for the loss, destruction or deterioration of the goods. The Railways Act of 1890 by repealing Ss. 7 and 10 of the Carriers Act and by also enacting in S. 72, Cl. (3) that nothing in the common law of England or in the Carriers Act of 1865 regarding the responsibility of common carriers with respect to the carriage of animals or goods shall affect the responsibility of a Railway Administration, leaves no room for doubt that the liability of the Railway Company must be measured and determined solely by the tests formulated in Ss. 151 and 152 of the Contract Act. The onus s therefore upon the bailee to show that he is exonerated from liability for loss to the bailor by means of a special risk note relieving him from such liability. (*Mullick and Bucknill, JJ.*) THE GREAT INDIAN PENINSULAR RY. CO. *v.* JITAN RAM NIRMAL RAM.
2 Pat 442 : 72 I. C. 440 :
4 Pat. L. T 173 : 1 Pat L R 169 :
1923 Pat 82 : 1923 P. 285.

——S. 151—*Reasonable care—Burden of proof.*

A bailee is responsible for proper care of goods entrusted to him. The burden of proof lies on him to show that such care as a man of ordinary prudence would have exercised, was duly exercised by him. (*Pratt, J.*) MAUNG PO THAIK *v.* MAUNG THA BYAW. 1 Bur. L. J. 132 :
74 I. C. 18 : 1923 R. 74 (2).

——S. 151—*Carrier—Negligence— Liability.*

A carrier by a sea cannot contract out of liability for the negligence of himself or of his servants. S. 151 of the Contract Act lays down an irreducible minimum of liability for common carriers as well as for other bailees. The English Common Law is applicable; the law as it stood before the Carriers Act 1830, must be applied. 18 Cal. 620; 91 M. I. A. 387 : 10 Cal 166 ; 32 Mad. 95 Rel. (*Twomey, C. J. and Ormond, J.*) ALLIBHAI MAHOMED *v.* THE BRITISH INDIA STEAM NAVIGATION COMPANY, LTD. 52 I. C. 296 :
12 Bur. L. T. 173.

——S. 151—*Carrier—Licensee of ferry.*

Licensee of a ferry is a common carrier. The responsibility of a common carrier is not within the Contract Act but regulated by the Carriers Act and the English Law. (*Sanders, J. C.*) MAUNG PO TAW *v.* HAJAMDI MISSAY.
50 I. C. 562 : 3 U. B. R. (1918) 120.

——S. 151—*Liability of bailee.*

A bailee is bound to take as much care of the goods as a man of ordinary prudence would take of his own goods of like kind under similar circumstances. So in case of highly perishable articles he should take special precautions (*Twomey, J.*) COMMISSIONERS FOR THE PORT OF RANGOON *v.* MOOLA DAWOOD SONS & CO.
9 I. C. 470 : 4 Bur. L. T. 26.

——S. 152—*Bailment for hire—Warranty—Bailee, duty of.*

CONTRACT ACT (IX OF 1872), S. 166.

A bailee for hire is bound to return the article hired at the end of the period for which it is hired. But there is an implied warranty that the thing is fit for the purpose for which it is hired and if there is a breach of this warranty, the bailee is not bound to pay the hire and return the article but can give notice of the same to the bailor. (*Macleod, C J and Fawcett, J.*) ISUFALLI HASSANALLY *v.* IBRAHIM DAJIBOY. 45 Bom 1017 :
61 I. C. 570 : 23 Bom L. R. 403.

——Ss. 152 and 151—*Want of care.*

The owners of a lighter carrying goods are liable for the loss of and damage to goods as bailees under S. 152 as in using the lighter they did not take the amount of care described in S. 151. (*Fawcett, A. J. C.*) TAYABJI *v.* SOUTH BRITISH INSURANCE CO 42 I. C. 636 : 11 S. L. R, 1.

——S. 160—*Bailee giving up possession of goods bailed with the consent of the bailor.*

A bailee who has given up possession of goods bailed with the consent of the bailor cannot thereafter maintain a suit for recovery of the goods bailed. (*Jwala Prasad, J.*) RAMCHANDRA MARHATIA *v.* RAM PERTAB. 19 Cr. L. J. 220 :
43 I. C. 796 : 4 Pat. L. W. 62.

——S. 160—*Bailment—Conversion of goods—Measure of damages.*

In an action for damages the full value of the chattels at the time of the conversion is the measure of damages. The executor of a deceased bailee is personally liable as being guilty of conversion when he fails to return goods and when the hirer has demanded it after due date. Bailor is not entitled to any damages for wrongful use, beyond getting the value of the goods, when after issuing notice of demand he makes delay in filing the suit. (*Fox, C. J. and Twomey, J.*) EBRAHIM AHAMAD *v.* SAMUEL BALTHAZAR.
34 I. C. 297 : 9 Bur. L T. 224.

——S. 161—*Railway—Carriage of goods—Risknote Form A, absence of—Delay in transit.*

In the absence of evidence as to the execution of risknote Form A, the railway is liable for delay in delivery. (*Banerjee J.*) EAST INDIAN RAILWAY *v.* FIRM OF INDERMAN KULSHI RAM.
L. R. 3 A. 101 : 65 I. C. 771 : 20 A. L. J. 114 :
1922 A. 63.

——S. 162—*Not exhaustive— Death of detository—Liability of heir.*

The Contract Act is not a complete Code with reference to the law of bailments. Bailments are of two kinds, voluntary and involuntary. Where a depository dies and the subject of the deposit passes into the hands of his heir, the latter becomes an involuntary bailee. A depositary is a bailee within chapter IX of the Contract Act. 33 M. 56 Ref. (*Ghose, J.*)) PROMOTHO NATH MULICK *v.* PRODYMNO KUMAR MULLICK.
69 I. C. 900 : 26 C. W. N. 772.

——Ss. 166 and 178—*Pledgee—Delivery of goods to or to order of depositor—No notice of true owner's title—Liability.*

To a suit by the real owner of goods for their delivery, the fact that the pledgee (defendant) has parted with the goods pledged to or to the

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order of the person by whom they were deposited without notice of any claim by any other person is a complete defence. The pledgee was not bound to suspect dishonesty in a pledgor of good credit and reputation, merely because the pledgor was a warehouseman (*mugaddam*) as well as a merchant and therefore had an opportunity of acting dishonestly. (*Lord Macnaughten.*) BANK OF BOMBAY *v.* NAND LAL THACKERSEYDAS. **37 Bom 122 : 40 I. A. 1 : 12 M. L. T. 646 · 15 Bom. L R. 1 : 24 M. L. J. 176 17 C. L. J. 146 : 17 C. W. N 358 : 17 I C 663 : (1913) M. W. N. 29 (P. C.).**

———S. 171—*'Banker'—Nattukottai Chetty.*

A Nattukottai Chetty is a 'banker' within S. 171 of the Act and is therefore entitled to banker's lien on goods bailed to him. (*Wallis, C. J and Moore, J.*) THE OFFICIAL ASSIGNEE OF MADRAS *v.* RAMASAMI CHETTY. **43 Mad. 747 : 12 L. W. 89 : (1920) M. W. N. 424 : 59 I. C, 475 · 39 M. L. J. 135.**

———S. 171—*Factor—Agent for sale of goods making advance against goods—Agreement to recoup advances from sale proceeds—Suit by agent for refund of advances before actual sale.*

A factor to whom goods had been consigned for sale and who had made advances as against them, is not entitled to sell without the consent of the owners. Such a factor is entitled to maintain a suit for refund of advances before an actual sale of the goods, if he had waited a reasonable time for the sale to take place in the ordinary course of business even though the agreement between the parties was that the advances were to be repayable from the sale proceeds. 17 B. R. 520 Foll. (*Wallis, C. J. and Sadasiva Aiyar, J.*) SHEIK MAHOMED MARACAYAR *v.* OAKLEY BOWDEN AND Co. **55 I. C. 671 : 11 L. W. 1.**

———S. 171—*Factor—Who is.*

A factor is an agent entrusted with the possession of goods for sale. (*Sadasiva Aiyar, Bakewell and Napier, JJ.*) BABU SAHIB YOUSUFF SAHIB *v.* ISAC ISMAIL & Co. **29 I. C. 462 : (1915) M. W. N. 519.**

———Ss. 171, 217 and 221—*Equitable lien of Barrister—Money paid into Court.*

A Barrister on behalf of his client paid into Court a large sum in satisfaction of a decree under protest, stating that owing to a mistake in the decree more money was deposited. In execution of another decree, this sum was attached while being a deposit in Court. The Barrister claimed a lien over a portion of the sum deposited. *Held*, that the Barrister had no lien against the sum under Ss. 171, 217 and 221. The rule of solicitor's equitable lien in England did not apply to the case, the Barrister having obtained no decree in favour of his client and there being no fruits to obtain a lien on. As the Barrister had parted with the possession of the money without making any reference to his lien for fees the amount of fees could not be regarded as having been paid in under protest. (*Hartnoll and Twomey, JJ.*) ROBERTSON *v.* KO CHEIK. **29 I. C. 870 : 8 L. B. R. 70.**

CONTRACT ACT (IX OF 1872), S. 174.

———S. 172—*Hypothecation of chattels—No possession.*

The method provided by S. 172 of the Contract Act for the hypothecation of loose chattels is not the only method for creating security thereon. They may be hypothecated without transferring their possession. In such cases the only question that arises is whether there was an intention to create a security and if there was an intention to create security, equity gives effect to it. (*Fletcher and Huda, JJ.*) HARIPADA SADHUKHAN *v.* ANANTH NATH DEY. **44 I. C. 211 : 22 C.W.N. 758.**

———S. 172—*Pledge—Delivery, necessity of—'Goods'—Title deeds—Whether goods.*

In a pledge the property should be actually or constructively delivered to the pawnee. Title deeds of property are not goods that may be pledged within the meaning of S. 172. A pledge or pawn according to S. 172 lies midway between a loan and a mortgage which wholly passes the property in the thing conveyed. (*Chaudhury and Newoould. JJ.*) JOYTI PROKASH NANDE *v.* MUTI PROKASH NANDE. **33 I. C. 891 : 22 C.W.N. 297.**

———S. 172—*Hypothecation of animals—Enforceability against third parties—Offspring of animals—Accession.*

A purchased number of goats for himself and *B*, and these animals were to be joint property of *A* and *B* in equal shares but those belonging to the latter were to be hypothecated to *A* as security for repayment of the money advanced by *A* for the purchase. The offspring of the animals was to be the joint property of the parties, but no provision was made for the hypothecation for such offspring. *Held*, that it was doubtful whether a contract of hypothecation could be recognised at all in India as valid against the claims of a third party who had knowledge of that contract or whose claim was anterior in point of time to the contract. The hypothecation could not be extended to include the offspring of the animals as an accession to the hypothecated property. (*Rattigan, J.*) JOT SINGH *v* AMIR CHAND. **10 P. R. 1915 : 28 I. C. 230 : 16 P. L. R. 1916.**

———S. 172—*Hypothecation of moveables—Mortgage—Pledge—Law applicable to*

Neither the T. P. Act nor the Contract Act recognize the non-possessory hypothecation of moveables. And the rights and remedies of the parties must be regulated by the Courts according to general law of contract. (*Stanyon, A. J. C.*) NANKUJI *v.* CHINNA. **10 I. C. 869 : 7 N.L.R. 72.**

———Ss. 172 and 173—*Hypothecation—Moveables—Subsequent incumbrancer.*

A *bona fide* incumbrancer without notice in possession of moveable property, will be preferred to the prior incumbrancer. A person alleging notice must prove it. (*Hartnoll, O C. J. and Twomey, J.*) MANACKJEE PALLANJEE *v.* MAYAPPA CHETTY. **28 I. C. 462 : 7 L. B. R. 336.**

———S. 174—*Pledge—Unlawful withholding of goods—Refusal to deliver—Action.*

Where goods are bailed or pledged it is an implied contract that they will be returned on demand. When such a demand is made without

compliance by the bailee or pledgee there is a breach of contract as well as the unlawful withholding of goods and the owner may sue in contract or torts, the cause of action for which arises on refusal to deliver the goods. (*Walsh and Stuart, JJ.*) KALYANMAL *v.* KISHENCHAND.
41 All. 643 : 17 A. L. J. 888 ; 55 I. C. 45 : 1 U. P. L. R. (H.C.) 95.

——S. 174 — *Equitable mortgage — After acquired property.*

When there was a mortgage of certain shop goods then lying on the premises and the mortgagor undertook to keep on the premises stock to the extent of the debt replacing sold goods by new goods, it is not a mere license but an equitable mortgage of the substituted goods and there is complete assignment of after-acquired property. It is not necessary that an equitable assignment should be enforced by a suit for specific performance. The only condition is that the goods on coming into existence should be capable of identification as the things assigned (*Pratt, J. C.*) REWYSE EX PARTE CHOWKSEY.
17 I. C. 31 : 6 S. L. R 97.

——S. 176—*Notice of sale—Reasonableness of.*

S 176 does not contemplate that the pawnee should give the pawner information of the actual date, time and place. A notice by the pawnee to the pawner that the jewels would be sold in a fortnight if the amount is not paid is a reasonable notice under the section. The pawner's right to sell is analogous to the seller's right of re-sale under S. 107. (*Tudball and Abdul Raoof, JJ.*) KUNJ BEHARI LAL *v.* BHARGAVA COMMERCIAL BANK. 40 All. 522 : 45 I. C. 462 : 16 A. L. J. 390

——S. 176—*Pledgee's rights.*

The rights of a pledgee under S. 176 either to sue on the debt or sell the property pledged are concurrent rights (*Chaudhuri and Newbould, JJ.*) JOYTI PROKASH NANDE *v.* MUTI PROKASH NANDE. 33 I. C. 891 : 22 C. W. N. 297.

——S. 176—*When pledgee can sell goods.*

A pledgee is not entitled to sell the goods before the amount of the loan becomes due and before effecting a sale he must give reasonable notice to the pledgor, 6 W. R. 81, Ref. (*Shah Din and Leslie Jones, JJ.*) ALLAHABAD BANK, DELHI *v.* FIRM OF MADAN MOHAN KISHAN LAL.
2 P.W.R. 1917 : 39 I. C. 169 : 14 P.L. R. 1917.

——S. 176—*Pledge—Notice of suit for money.*

S. 176 of the Contract Act requires a notice only when the pawnee wishes to exercise his option of selling the pledged goods. If he chooses to bring a suit upon the debt no notice is apparently required by that section. (*Kotwal, A. J. C.*) JWALA PRASAD *v.* PUNDLIK PANDURANG.
48 I. C. 970

——S. 178—*Railway receipt—'Document of title to goods'—Pledge of, by person in possession—*Bona fide *lender.*

A Railway receipt for goods consigned is a document of title to goods and as against a pledgee thereof the seller is not entitled to stop in transit except on payment of advance to pledgee,

if the pledgee acts in good faith. (*Lord Parker,*) RAMDAS VITHAL DAS DABBAR *v.* AMICHAND & CO. 40 Bom. 630 : 20 C. W. N. 1182 : (1916) 2 M. W. N. 110 : 18 Bom. L. R. 670 : 20 M. L. T. 194 : 31 M. L. J. 54 : 4 L. W. 342 : 35 I. C. 954 : 43 I. A. 164 : 14 A. L. J. 1045 : 32 T. L. R. 594 : 85 L. J. (P.C.) 214 : 24 C. L. J. 320 (P.C.).

——S. 178—*Pledge—Conversion.*

A pledgee of goods who without notice of the title of the real owner delivers goods to or to the order of depositor is not guilty of a conversion. (*Lord Macnaghten.*) BANK OF BOMBAY *v.* NAND LAL THACKERSEYDAS. 37 Bom. 122 : 40 I. A 1 : 12 M. L. T 646 : (1913) M. W. N. 29 : 15 Bom. L. R. 1 : 24 M. L. J. 176 : 17 C. L. J. 146 : 17 I. C. 663 : 17 C. W N. 358 (P. C.).

——Ss. 178 and 179 — *Scope —Pledge of goods by another.*

S. 179 of the Contract Act does not limit the scope of S. 178 but saves a pledge at least to the extent of the pledgor's own interest notwithstanding the presence of invalidating conditions falling under one of the provisos to S. 178. A party is bound by pledge of his goods by another who is in possession of them, where he not only approves, the other's conduct but urges the other to pledge them. (*Scott, C. J. and Heaton, J.*) LAKHAMSEY LADHA & CO. *v.* LAKMICHAND PADAMSEY.
42 Bom. 205 : 40 I. C. 148 : 19 Bom. L. R. 335.

——S. 178—*Consignment of goods—Pledging receipt—Pledgee, if acquires title—Fraud.*

A consignor of goods made over the Railway receipt to defendant No 2 for obtaining delivery. Deft. No. 2 fraudulently and without authority indorsed the receipt to plaintiff as a pledge. *Held*, that defendant No. 2 had "possession" within S. 178 of the Contract Act of the Railway receipt and of the goods it represented. The plaintiff had acted in good faith and defendant No. 2 had not obtained the goods by means of an offence or fraud so that plaintiff had good title in the property. It is unsafe to employ as a separate and independent ground of decision the principle that one of two innocent persons must suffer through the fraud of a third. The loss should fall on him who enables the third party to commit the fraud. (*Richardson and Huda, JJ.*) PROFULLA KUMAR BOSE *v.* KAMINI KUMAR ROY.
54 I. C. 224: 23 C. W. N. 907.

——Ss. 178 and 108—*Possession, meaning of —Hire purchase agreement.*

Possession under S. 178 and S 108 excep. 1, means juridical possession as distinguished from custody. Possession of person holding goods under hire purchase agreement is not possession within S. 178. Hence a pledgee from a hire purchaser acquires no good title to the goods pledged. 12 B. L. R. 42. Foll. 34 P. R. 1902, Dist. (*Greaves, J.*) LEON SAUBOLLE *v.* SEYNE BROSA.
50 I. C. 476 : 23 C W. N. 352.

——S. 178—*Government securities—Whether endorsement by owner necessary.*

CONTRACT ACT (IX OF 1872), S. 178.

Government securities which are not specially mentioned in S. 178 cannot be pledged except by endorsement by the owner. (*Chaudhuri and Newbould, JJ.*) JOYTI PROKASH NANDE *v.* MURTI PROKASH NANDE. **33 I. C. 891: 22 C.W.N 297.**

———Ss 178 and 76—*Certificates of shares.*

S 178 of the Act does not include certincates of shares under 'goods' documents of title to goods. 8 I. C 183. Not foll. (*Sanderson, C J. and Woodroffee, J.*) LALIT MOHUN NUNDY *v.* HARIDAS MUKHERJEE. **37 I. C. 707: 24 C. L. J 535.**

But *see* **8 I. C. 183 : 12 Bom. L. R. 870.**

———Ss. 178 and 108. (Excep. 1)—*Requirements of the section—Juridical possession--Pledge in possession—Suit by rightful owner—Limitation Act, Art.* 48.

S. 178 and S. 108 (Excep 1) of the Act refer to cases where the pledgor has other han a limited interest and has lawful juridical possession unconnected and independent of any interest therein such a juridical possession as a factor or agent has in other words such possession as that of an agent entrusted as such, and ordinarily having as such agent, the power of sale or pledge. 8 Bom. 501 and 27 Mad. 424 Foll Three things are required by S. 128 (1) Juridical possession on the part of the pawner as distinguished from mere custody. 2 Good faith on the part of the pawnee. (3) Lawful acquisition on the part of the pawner. 5 All. 361 and 29 All. 579. Foll. Where a plaintiff claims from defendant goods wrongly pledged to the latter, by an agent of the former, with whom the goods were left for sale on commission, he is not entitled to a decree until payment of the amount due to the pledgee defendant with interest accrued due thereon, under S. 178 of the Contract Act. The suit is governed by Art. 48 of Sch. 1 of the Limitation Act, time running from the date of plaintiff's knowledge of the pawnee's possession. (*Sadasiva Aiyar and Moore, JJ.*) SESHAPPIER *v.* SUBRAMANIA CHETTIAR. **40 Mad. 678 : 30 M. L. J. 587 : 34 I. C. 751: 19 M L. T. 386.**

———S. 178—*Railway receipt — Document of title*

A Railway receipt is a mercantile document of title to goods. Lawful possession as pledgees of a Railway receipt entitles the holders to get possession of the goods from the carrier and to obtain and retain the goods, as security for moneys advanced on the pledge of the railway receipt. 38 Bom. 255 Foll. (*Sadasiva Aiyar and Spencer, JJ.*) FAKIRAPPA *v.* THIPPANNAH. **30 I. C. 950: 38 Mad. 664**

———Ss. 178 and 108—'*Possession*' *means juridical possession.*

It has been often held that possession required in S. 178 is similar to the possession required by S. 108 of the Contract Act in regard to sales that is to say, the possession must be juridical possession of the goods and not mere custody. Where P was given possession of the sewing machines by the owner in order that he might sell them for and on behalf of the owner and he pawned the machines with a pawn broker. *Held*: his possession is not a mere custody for safe keeping, but for the definite purpose of sale. He would have such a possession of them as is contemplated by S 178. The fact that he disposed of the goods contrary to the instructions of the owner makes no difference to the character of the possession which vested in him. If, therefore, the pawnee acted in good faith and had no ground for doubting the authority of P to pledge the goods he would be entitled to the protection granted by S. 178. (*Robinson, C J and May Oung, J.*) EMPEROR *v.* NGO PO CHIT. **1 Rang. 199; 2 Bur. L. J. 241: 24 Cr. L. J. 858: 74 I. C. 1050: 1923 Rang. 227.**

CONTRACT ACT (IX OF 1872), S. 182.

———S. 178—*Agent disposing of sewing machine—Assistance of Criminal Court.*

The company having given the sewing machine to a person whose position is that of an agent or factor to be disposed of for money the company is not entitled to the assistance of a criminal court in recovering it from a person to whom it was disposed of. (*Macgregor, J.*) SINGER SEWING MACHINE COY *v.* YEN KUN **1 Bur. L. J. 45: 1923 R. 68 (1).**

———S. 178—*Possession may be lawful and yet appropriation may be dishonest—Proviso still applies.*

It is not necessary before the proviso to section 178 can be made applicable that the goods or documents should be obtained dishonestly in the first instance, and a subsequent misappropriation of them or any offence connected with them after they had been lawfully acquired prevents the possessor from making a valid pledge of them. To create a valid pledge the pledgor must be in juridical possession of the goods as distinguished from a bare custody. 12 Bom. L. R. 870 dist. (*Kennedy, J. C. and Raymond, A. J. C.*) THE KARACHI BANK *v.* KODUMAL KALUMAL. **1923 Sindh 54.**

———S. 178—'*Possession*'—*Gratuitous bailee—Pledge by.*

The word 'possession' as used in S. 178 does not include the possession by a gratuitous bailee and so a pledge by him of the thing is invalid. The pledgee must return the thing so pledged, to the original depositor. (*Kennedy and Raymond, A. J. C.*) RAMKISHEN DAS *v.* JASUMAL. **61 I.C. 305: 14 S. L. R. 175.**

———S. 180—*Action against wrong doer.*

Under S. 180 Contract Act either a bailor or bailee of a chattel may maintain an action in respect of it against a wrong doer the latter by virtue of possession, the former by virtue of his property. (*Mookerjee and Roe, JJ.*) RAM NATH GAGOI *v.* SITAMBER DEB. **43 Cal. 733: 22 C. L. J. 339: 31 I. C. 430 : 21 C. W. N. 632.**

———S. 182—*Principal and agent—Relationship of.*

B contracted to sell to *A* a certain quantity of sugar, but as he was not the producer himself he entered into a contract with *J* for purchase and delivery of the sugar in instalments. In the contract with *A* stipulated for payment of a commission, *held* in a suit for breach of contract by *A* against *B*, that *B* was not an agent of either *A* or

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J that the contract between *A* and *B* was as between principals and that the mere mention of the commission is not inconsistent with the relation being between principal and principal. (*Lord Dunedin.*) BALTHAZAR *v.* ABOWATH.
63 I. C. 521: 13 L. W. 537 (P. C.).

———S. 182—*Principal and Agent* — Pakka adatia—*Incidents of—Speculative agent.*

A *pakka adatia* is a speculative transaction and not a wager. The rights and liabilities of *pakka adatia* are well settled and he has a right to be indemnified by the seller. (*Sir Lawrence Jenkins*). BHAGWAN DAS *v.* BARFORJEE RETTONJEE BOMANJEE. 42 Bom. 373: 23 M. L. T. 203: 34 M. L. J. 305: 4 P. L. W. 229: 16 A. L. J. 241: 27 C. L. J. 358: 22 C. W. N. 625: 20 Bom. L. R. 561: 7 L.W. 577: 11 Bur L. T. 211: 45 I. A. 29: 44 I. C. 284: (1918) M W.N. 315 (P.C.).

———S. 182—*Broker, relation of — Commission, suit for—Lim. Act, Arts.* 115 *and* 102.

A broker is the agent of the person for whom he acts. Unlike the factor he is not entrusted with the custody and the apparent ownership of the goods, but he is merely to effect business on commission on the sales resulting from his efforts. Where the contract is not in writing terms are to be inferred from the conduct of the parties. Therefore the suit by a broker for money due for commission is governed by Art. 115 of the Lim. Act and not by Art. 102. (*Walsh and Sunderlal, JJ.*) SUSHIL CHANDAR DAS *v.* GAURI SHANKAR. 39 All 81 : 36 I. C. 371 : 14 A. L. J. 873.

———S. 182—*Agent—Treasurer of a Committee for subscriptions—If liable for negligence.*

An Honorary Treasurer of a Subscription Committee is not its agent and not liable therefore for gross negligence in not cashing a cheque passed by a donor. (*Richards, C. J, and Banerjee, J.*) ABDUL AZIZ *v.* MASUM ALI. 36 All. 268 : 23 I. C. 600 : 12 A. L J. 351.

——S. 182—*Sub-broker receiving money from constituent and misappropriating— Payment to broker for other transactions—Suit for money.*

Where a sub-broker took part in a business transaction with the plaintiff on behalf of the defts., the brokers and received a large sum of money as advance and misappropriated the same, using a major portion of it in settlement of his own private accounts with the defendants, who never knew of the source of the money or the business transaction entered into with the plaintiff, a suit by the plaintiff against the defendant to recover the amount advanced does not lie. 13 Ch. D. 696. (1893) A. C, 282 and 44 Bom 139 foll. (*Fawcett and Coyasjee, JJ.*) MORARJI PREMJI GOKULDAS *v.* MULJI RANCHHOD VED & CO.
25 Bom. L. R. 1014 : 77 I. C. 266 : 48 Bom 20 : 1924 Bom 232.

——S. 182—*Broker—Commission—Right to —Completion of transaction—Failure of one of the parties to complete the contract—Effect of.*

In order to entitle a broker to his commission, he must prove either that the transaction has been completed, or that, if it is not, the non-completion was due to default on the part of the principal. *Lott* v. *Outhwite.* (1893) 10 P. L. R. 76, 77, Ref. A mortgagee in Bombay is not bound to deliver possession of the title deeds or to produce them for the inspection of the mortgagor until actual tender or payment of the principal with interest and costs. Consequently where the vendor-mortgagor is unable to complete a contract of sale on account of the non-production of the title deeds by his mortgagee and the contract of sale falls through, it is the default of the vendor that is responsible for the result. The broker who arranged for the sale will nevertheless be entitled to his commission. (*Mulla, J.*) MEHTA *v.* CASSUMBHAI KESHAVJI. 24 Bom. L. R 847 : 1922 B. 433.

———S.182—Del credre *agents—Certified brokers of the Bombay Native Stock and Share Brokers' Association are such.*

The certified brokers of the Bombay Native Stock and Share Brokers' Association are *del credre* agents of their constituents. Their duties are strictly to adhere to the position of agents, diligently act for the principals and to make *enforceable* bargains for them and keep them open. (*Kanga, J.*) FAZAL *v.* MANGALDAS. 23 Bom. L. R. 1144 : 46 Bom. 489 : 66 I. C. 726 : 1922 Bom. 303.

——S. 182—Pakka Adatia—*Position of.*

A *Pakka Adatia* can at will become a principal to enforce any contract entrusted to him as agent by his original principal, against that principal, and, when he sues relying upon the character as principal, his claim differs in no respect from that upon an ordinary contract between two principals and he is entitled to demand interest upon the amount which he claims as ordinary damages for breach of contract. (*Beaman, J.*) HUKAMCHAND SARUPCHAND *v.* ABRAHAM E. J EBRAHIM. 52 I. C. 519 : 21 Bom. L. R. 783.

——S. 182—*Principal and Agent*—Pakka-adatia—*Nature of agency.*

A *pakka adatia* is something more than a commission agent and very like an ordinary *del credre* agent, receiving orders from constituents and placing them in open market; but he can allocate his principal's contracts to himself when it suits him to do so. (*Beaman, J.*) BHAGWANDAS PARASARAM *v.* BARJORJI RUTTONJI.
19 I. C. 29 : 15 Bom. L. R. 85.

——S. 182—*Agency*—Pakka adatia—*Relation with constituents.*

A *pakka adatia* enters into contracts under instructions from his employer, the principal. But the constituent is not concerned with the method in which his instructions are carried out. So it is open to the constituents to set up the plea of wagering contracts. (*Macleod, J.*) BHAGWANDAS *v.* BURJARJI. 37 Bom. 347 : 17 I. C. 152 : 14 Bom L. R. 807.

———S. 182—*Broker—Liability of, in principal contracts—Calcutta jute market—Custom of.*

There is a difference between a broker and an agent for sale. Under the custom of the Calcutta Jute Market, brokers are liable to both buyers and sellers in the case of what are called 'principal

contracts." as distinguished from "direct contracts." Under the custom of the market there is a liability for the performance of the contract resting upon the brokers and a right in them to enforce the contract. It makes no difference whether at the time of the making of the contract buyers are informed of the name of the sellers and sellers of the name of the buyers. In the case of such contracts the only person to whom the sellers can really be giving credit—the only person mentioned in the contract—is the broker. Either the sellers do not know the name of the other party, or if they do and still prefer a "principal contract" they prefer the broker's credit. Consequently in the case of a breach of contract by the seller, the broker is entitled to go to arbitration on an arbitration clause of the contract. (*Rankin, J.*) JITMULL GIRDHARI *v.* RAM GOPAL BOHITRAM. 50 Cal. 12 : 1923 Cal. 419 : 74 I. C. 273.

———S. 182—*Termination of agency.*

Where the term of an agency for sale has expired, a subsequent execution thereof by the agent is invalid unless the term has been extended. (*Sanderson, C. J. Woodroffe and Mookerjee, JJ.*) LALJI MAHOMED *v.* DADABAI JIVANJI GUSDAR. 43 Cal, 833 : 34 I. C. 807 : 23 C. L. J. 190.

———S. 182—*Broker—Position of.*

Per *Woodroffe, J*:—A broker is the agent of both parties and his contract is one of employment so long as he adheres strictly to his position as a broker by confining himself to the business of negotiation. But if he departs from the business of negotiation and by the terms of the contract, makes himself the agent of his principal to sell or buy, he makes a contract of sale or purchase and is liable on it. (*Jenkins, C. J. and Woodroffe, J.*) PATIRAM BANERJEE *v.* KANKINARAM CO., LTD. 42 Cal. 1050: 31 I. C. 607: 19 C. W. N. 623.

———S. 182—*Principal and Agent—Authority of agent.*

Every act of an agent in the course of his employment on behalf of the principal and within the apparent scope of his authority, binds the principal unless the agent is in fact unauthorised to do that act and the person dealing with him has notice of the same. (*Mookerjee and Beachcroft, JJ.*) KHULNA LOAN CO., LTD *v.* JAHIR GOLDAR. 24 I. C. 209.

———Ss. 182 and 222—*Contract of agency—Limitation Act, Art.* 83.

Where evidence of witnesses showed that the contract was not simply for the purchase of grain by the plffs. for the defendant but a contract to purchase the goods, hold them for the deft. and sell them upon his instructions at such times and in such lots as he might think fit. *Held*, the transactions may be properly regarded as a contract of agency carrying with it the rights to indemnity conferred upon the agent by S. 222 of the Indian Contract Act. That being so art. 83 of the Limitation Act was applicable to the case. (*Scott Smith and Fforde, JJ.*) THE FIRM DEVI SAHAI RAMJI DAS *v.* TIRATH RAM. 73 I. C. 143 : 1923 Lah. 473.

———S. 182—*Broker—Commission—When can claim.*

A broker can claim commission if he brings about a sale, but he can also claim it if he brings about the transaction to the stage of an agreement to sell and then the transaction fails because the purchaser draws back. (*Chevis, J.*) KISHEN CHAND *v.* KHUDA BUKSH. 60 I. C. 727

———S. 182—*Agency and partnership.*

A partner who does an act for the firm is an agent for the firm but he is not an agent for the partner and the law applicable to a suit by one against another for purchasership properties is the law of partnership and not that of agency. (*Kensington and Johnstone, JJ.*) BERAGI RAM *v.* BAJA RAM. 10 I. C. 250 : 214 P. W. R. 1911 : 153 P. L. R. 1911.

———S. 182—*'Agent.'*

A person contracting to purchase property and promising damages on default is not an agent of the promisee. (*Wallis, C. J. and Spencer, J.*) LAKSHMANAN CHETTY *v.* SUBRAMANIAN CHETTY. 50 I. C. 69 : 9 L. W. 312 : 25 M. L. T. 221 : (1919) M. W. N. 431.

———S. 182—*Principal and Agent—Proof of relationship.*

The use of the word 'agent' in a general way, loosely without specifying, the purpose of the agency does not help to determine as a matter of fact, whether a person is an agent. Whether goods were consigned to another as agent and after the goods were consigned, that other person was charged with interest, the relationship between the two was one of vendor and purchaser though the word 'agent' might have been used. (*White, C. J. and Tyabji, J.*) P. N. K. SURYAPRAKASARAYA MUDALIAR *v.* MATHESON'S COFFEE WORKS. 21 I. C. 322 : 14 M. L. T. 249.

———S. 182—*Broker — Contract falling through owing to default of principal—Right to brokerage.*

Where a broker, employed to negotiate the sale of a house, finds a purchaser at the stipulated price and arranges for his brokerage to be paid by him but the transaction is not completed owing to the owner failing to convey, the broker can claim damages on the basis of the brokerage which he would have received, had the sale been completed. 30 Cal, 202 : 5 W. R. 117. Foll. (*Pratt J. C.*) GUR LUN HPAW *v.* CAMILLO CAMILATOS. 12 Bur. L. T. 68 : 51 I. C. 582 : 10 L. B. R. 15.

———S. 182—*Agency—Fixing of—Terms of remuneration—Commission agent.*

Unless authority to act is conferred and accepted, mere settlement of the terms of remuneration does not constitute a contract of agency. A commission agent is not in law, the agent of all persons and firms, whose business, he occasionally transacts. The agency is only with reference to specific sales or purchases made under the directions of the principal. (*Crouch, A. J. C.*) FIRM OF VISHINJI GOVERDHAN DAS *v.* FIRM OF JASRAJ GIRDHARI LAL. 50 I. C. 146 : 12 S. L. R. 93.

CONTRACT ACT (IX OF 1872), S. 184.

——Ss. 184 and 248—*Minor partner—Acts of, binding on firm.*

Under S. 184 of the Act a minor can act as an agent of a firm and any contracts entered into by such a minor as an agent are binding on the firm. And they are equally binding on the minor if he did not give notice of the repudiation within a reasonable time after attaining majority. (*Scott Smith and Shadi Lal, JJ.*) GOPIMAL DURGADAS *v.* JAIN BANK OF INDIA. 45 I. C. 17 : 38 P. W. R. 1918 : 17 P. L. R. 1918.

——S. 184—*Minor—Negligence—Tort arising out of contract—Liability.*

A minor agent is not responsible for loss arising from the negligence of his guardian. An infant cannot be made liable for a tort arising out of a contract where the contract is not binding upon him and where the so-called tort consists merely in negligence on the part of his guardian. (*Mittra, A. J. C.*) GOPAL RAO WAMAN RAO *v.* DINKAR RAO. 43 I. C. 923.

——Ss. 186 and 196—*Extent of authority to agent—Conduct of principal.*

If an agent endowed with very wide powers and authorised to buy and sell property, to deal with Government and to pay revenue, contracts a loan on behalf of his principal, which the latter did not repudiate when it came to his knowledge, the principal is bound by the debt and must pay it off. (*Mullick and Atkinson, JJ.*) ROMESH CHANDRA *v.* BHUJAN BHASKAR. 39 I. C. 225 : 1 Pat. L. W. 346.

——S. 186—*Husband and wife—Living together—Dealing with joint property by husband—Presumption of agency.*

If a married couple live together and the husband acts alone in dealing with joint property, he is held to act as the wife's agent in respect of her interest as well as his own. But the presumption is rebuttable. 3 L. B. R. 66 Rel. (*Parlett, J.*) MA LON MA *v.* MG SHWE BYU. 10 I. C. 919: 4 Bur. L. T. 115

——Ss. 187 and 188—*Principal and agent—Power of Attorney—Construction—Money-lending business—Guarantee by agent—Liability of principal—Benefit.*

Where an act purporting to be done under a power of attorney is challenged as being in excess of the authority conferred by the power, it must be shown on a fair construction of the whole instrument, that the authority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication. (1893) A. C. 170. Foll. If it is established that the transaction in question is within the authority conferred by the power, the mere fact that the principal did not receive the benefit of the transaction does not rid him of liability. In the case of a Natukottai Chetty money lending business, an agent who has authority to borrow and to lend to others, has an implied authority to pledge the credit of the firm for the purpose of obtaining or securing advances from others to the customers of the firm. (*Mr. Ameer Ali*). BANK

CONTRACT ACT (IX OF 1872), S. 188—Authority of agent.

OF BENGAL *v.* RAMANATHAN CHETTY.
43 Cal. 527 : 32 I. C. 419 : 43 I. A. 48 : 30 M. L. J. 232 : 20 C. W. N. 329 : 3 L. W. 210 : (1916) M. W. N. 150 : 14 A. L. J. 217 : 23 C. L J. 348 : 18 Bom. L. R. 337 : 9 Bur. L. T. 1 : 8 L. B. R. 536: 19 M. L. T. 176(P. C.).

——S. 188—

Authority of Agent.
Co-agents.
Connected acts.
Insurance.
Landlord and Agent.
Post Office.
Power of Attorney.
Void Contract.

Authority of Agent.

——S. 188—*Authority of Agent—Construction.*

Where an agent was authorised by power of attorney to direct, superintend, manage and control the business of the defendants and there was a stipulation to the effect that the agent was not to enter into speculations in "gunnies, opium, shares or exchange." *Held*, that a contract for purchase of sugar was outside the scope of the prohibition, that the words "as carried on by defendants in Singapore and elsewhere" were merely descriptive and not limiting the articles of the agent's business and that mere imprudence of the act did not render the act unauthorised. (*Jenkins, C. J. and Woodroffe, J.*) ANGULIA & CO. *v.* SASSOON & CO. 39 Cal. 568 : 13 I. C. 705 : 16 C. W. N. 593. [On appeal from 10 I. C. 895.]

——S. 188—*Authority of Agent—Principal and Agent—Agent compromising without authority—If principal bound.*

An agent not authorised to compromise cannot bind his principal by any compromise effected by him. (*Ratligan and Shadi Lal, JJ.*) MUHAMMAD RASHID *v.* RAHMATULLAH 134 P. W. R. 1914 : 96 P. R. 1914 : 24 I. C. 630 : 212 P. L. R. 1914.

——S. 188—*Authority of agent—Collection of debts.*

An agent authorised by a power of attorney only to collect debts has no authority to realise their value, or, any part of it by selling them. (*Oldfield and Sadasiva Iyer, JJ.*) RAMASWAMI NAIDU *v.* MUTHUSAMI PILLAI. 35 M L. J. 581 : 48 I. C. 756 : 41 Mad. 923: (1918) M. W. N. 796.

——S. 188—*Authority of agent.*

If the power of attorney does not authorize the agent to carry on a business except with limitations, any act done by him in excess of such power will not bind the principal. (*Ayling and Sadasiva Iyer, JJ.*) MALAYAPERUMAL CHETTIAR *v.* ARUNACHALA CHETTIAR. 41 I. C 224 : 6 L. W 417.

——S. 188—*Authority of Agent—Agent borrowing without authority.*

The plaintiff from whom money was borrowed by the defendant's agent without authority, is

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entitled to receive his amount to the extent of the benefit received by the principal. (*Sadasiva Iyer and Napier, JJ.*) SUPPAYYA PATTAR *v.* DAWOOD HAJI AHMAD. **32 I. C. 763 : (1915) M. W. N. 761.**

——**S. 188**—*Authority of Agent—Contract to pay reasonable interest by Agent—Whether principal bound.*

An agreement by an agent to pay reasonable interest for goods purchased on credit is binding on principal. 1 C. L. J 199, Foll. (*Kumaraswami Sastri, J.*) EDAYAGIRI GOPALARATNAM *v.* CHOCKALINGAM CHETTY. **26 I. C. 365.**

——**S. 188**—*Authority of agent—Extent of.*

An agent who has power to sign his name does not necessarily mean that he has full powers, necessary for a disposition of property. (*White, C. J. and Spencer, J.*) MARMAVULA *v.* ANNAPURNI. **10 M. L. T. 304 : 12 I C. 393 : (1911) 2 M. W. N. 330.**

——**S. 188**—*Authority of Agent—Power of attorney—Construction of—Limitation of authority.*

The question whether the knowledge or acts of an agent can be attributed to his principal, depends upon the terms of the authority that the agent has received. The authority conferred by a power of attorney must be strictly adhered to. A third party dealing with an agent will be unable to make the principal liable, if the authority is exercised in excess of and outside the reasonable scope of the special powers conferred upon the agent. (*Chapman and Atkinson, JJ.*) STOCKING B *v.* TATA IRON AND STEEL COMPANY. **2 Pat. L. W. 133 : 2 P. L. J. 600 : 41 I. C. 175 : 1917 Pat. 273.**

——**S. 188**—*Authority of agent—Limitations of.*

Unless expressly empowered, an agent cannot make his principal a surety for another's loan nor borrow money in his name for another, nor thrust a partner upon him, nor sign a promissory note for him jointly with another. Powers of attorney must be construed strictly and in the absence of express power to enter into contracts of guarantee or execute negotiable instruments jointly with others on behalf of the principal, the onus of proving such power rests on the person alleging the same. (*Ormand and Parlett, JJ.*) RAMANATHAN CHETTY *v.* BANK OF BENGAL. **7 Bur. L. T. 126 : 23 I. C. 516 : [Overruled 32 I. C. 419 : O. A. 43 Cal. 527 (P. C.).]**

——**Ss. 188 and 227**—*Authority of Agent—Principal and agent—Acts of agent beyond scope—When principal liable—Third parties.*

A power to purchase, sell or mortgage does not imply power to borrow or give simple money bond. Where a contract is entered into fraudulently in furtherance of the agent's interests and contrary to the interests of principal, the latter is bound by the contract only if the person dealing with agent, acts in good faith. The burden of proving good faith lies on the person claiming against principal. (*Farrell, A. J. C.*) BHAGWANJI *v.* GANGA. **36 I. C. 968 : 10 S. L. R. 72.**

CONTRACT ACT (IX OF 1872), S. 188—Power of Attorney.

Connected Acts.

——**S. 188**—*Connected acts.*

An agent authorised to receive money for the principal may be presumed to be also authorised to do every lawful and necessary thing connected with it. 43 Cal. 527 (P. C.) Ref. to. (*Stuart and Kanhaiya Lal, A. J. C.*) MANOHAR LAL *v.* SAKINA BEGAM. **37 I. C. 442 : 3 O. L. J. 623.**

Insurance.

——**S. 188**—*Insurance—Agent's interest.*

A Commission agent purchasing goods for a merchant and consigning them by a ship and insuring them under instruction from the merchant, has an insurable interest in the goods and can recover the money under the policy of insurance in case of the loss of goods. (*Davar, J.*) KANJI DWARAKADAS *v.* HARI DAS PURUSHOTAM. **36 Bom. 484 : 12 I. C 897 : 13 Rom. L. R 1211.**

Landlord and Agent.

——**S. 188**—*Landlord and agent—Agent's authority.*

Where the agent of a landlord has no authority to create pecuniary liability on his behalf, no personal decree could be passed against the landlord. (*Kanhaiya Lal, A. J. C.*) DURGA PRASAD *v.* JAGANNATH. **16 I C. 999.**

——**S. 188**—*Landlord and agent—Agent's authority.*

The question of the authority of an agent to bind his landlord has to be decided on the facts of each case. The landlord must show that the agent has done anything beyond his authority if he wants to repudiate the action of the agent. (*Kingsford, J.*) MOTHARI CONCERN *v.* LACHMI PROSAD SHAH. **35 I. C. 81.**

Post Office.

——**S. 188**—*Post Office—Payment demandable at a particular place.*

Where payment is demandable at a particular place from a person, but the person entitled to the payment, requests the payment done by means of a money order, the Post Office is the agent of the latter and not of the former individual. (Cf. Postal rules which allow the sender of an M O. or other article, to recall it before actual delivery.) (*Tudball, J.*) PARMER *v.* COWASJEE. **33 I. C. 723 : 14 A. L. J. 236.**

Power of Attorney.

——**S. 188**—*Power of Attorney to collect outstandings—Whether includes decretal debts.*

A Power of Attorney given to an agent to collect outstandings includes also a power to collect debts due under decrees, even of such as were obtained before the date of the power of the Attorney. (*Seshagiri Aiyar, J.*) SRINIVASA *v.* TIRUMALAI. **15 M. L. T. 337 : 23 I. C. 99 : 1914 M. W. N. 372.**

——**S. 188**—*Power of Attorney to Agent—Assignment of decree—absence of provision for.*

According to S 188 a Power-of-Attorney should be construed strictly. Such a construction does not disable an attorney from exercising all powers incidental to the execution of powers expressly

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conferred on him from exercising powers necessarily implied, and termed 'mendium' powers. (*Sundara Iyer and Sadasiva Iver, JJ.*) PALANIAPPA CHETTIAR *v.* ARUNACHELLAM CHETTIAR.
23 M. L. J. 595 : 12 M. L. T. 528 : 17 I. C. 139 : (1912) M. W. N. 1204.

———S. 188—*Power of Attorney—Construction—Agent.*

A power enabling an agent to carry on the business of a firm does not entitle him to sue for dissolution of the firm. A suit so instituted should not be dismissed but should be allowed to be amended by requiring the principal himself to sign the plaint. (*Twomey and Robinson, JJ.*) P. L. K. PALANIAPPA CHETTY *v.* ARUNACHELLAM CHETTY. **25 I. C. 140 : 7 Bur. L. T. 202.**

Void Contract.

———S. 188—*Void contract—Agent receiving money under—Liability to account.*

Agent receiving money on principal's behalf under illegal or void contract is liable to account to the principal, also an agent making a profit without making full disclosure to his principal is liable to account to him for the same. (*Woodroffe and Carnduff, JJ.*) NATHU KHAN *v.* SEWAK KOERI. **9 I C. 161 : 15 C. W. N. 408.**

———S. 189—*Power to enter into forward contracts.*

By a Power-of-Attorney, the deft, empowered his manager to contract, superintend and carry on the business of general merchants in Singapore. The manager entered into forward contracts with the plff. in respect of sugar. The deft's firm was accustomed in Calcutta to enter into forward contracts in the sugar trade. *Held*, that the manager bad sufficient authority to enter into the contract sued upon (*Harrington, J.*) SASSOON & Co. *v.* ANGULIA & Co. **10 I. C. 895.**
[On appeal 13 I. C. 705 : 39 Cal. 568.]

———S. 190—*Sub-agent—Appointment.*

From the nature of the agency it was manifest that, in order that agents might sell wolfram in time of War, they would have to appoint a sub-agent in England. Apart from this, purchasers at that time would have been chary of entering into contracts with a Foreign principal, because of the difficulty of suit and other matters. *Held*, there was authority to appoint a sub-agent to sell the ore, and the agent did not contract to sell the ore personally. (*Pratt and Duckworth, JJ.*) THE LEIBOAK SYNDICATE *v.* FINLAY FLEMING & Co **1 Bur. L. J. 219 : 11 L. B. R. 326 : 1923 R. 84**

———Ss. 192 and 238—*Sub-agent—Agent liable to the principal for the Sub-agent's fraud.*

An agent who is paid commission by his principal for sale of goods and who properly employs a sub-agent for the purpose, is liable to the principal for sub agent's fraudulent disposition of the goods within the course of his employment (*Scott, C. J. and Batchelor, J.*) NENSUKDAS *v* BIRDI CHAND. **43 I. C. 699 : 19 Bom. L. R. 948.**

CONTRACT ACT (IX OF 1872), S. 196.

———S. 192—*Principal and agent—Sub-agent—Privity of contract.*

There is no privity of contract between the principal and the sub-agent under S. 192 of the Act. (*Wallis, O. C. J. and Seshagiri Iyer, J.*) SOUTH INDIAN INDUSTRIALS *v.* MINDI RAMAJOGI.
26 I. C. 822 : 27 M. L. J. 501.

———S. 196—*Ratification validates act.*

A mortgage executed by a general agent holding a power-of-attorney, which did not authorize him to execute mortgages is operative if acted upon, and ratified by the principal and cannot be treated as being void *ab initio*. (*Mears, C. J. and Banerji, J.*) MUHAMMAD HANIF *v.* ISRI PRASAD.
19 A. L. J. 827 : 64 I. C. 769 : 44 A. 77.

———Ss. 196 and 197—*Contracts made by agents of corporations—How far binding on it—Doctrine of part performance when applies.*

Where a Corporation is acting within the scope of the legitimate purposes of its institution, even parol contracts made by its authorised agents raise implied promises, for the enforcement of which an action may well lie (especially where there is no express statutory requirement of a contract under seal and the benefit of the contract has been enjoyed by the Corporation.) The exception based upon the doctrine of part performance does not apply where the contract is, by statute positively required to be under seal or is *ultra vires* in the sense that it is beyond the scope of the authority of the Corporation under any circumstances. (*Mookerjee and Chatterjee, JJ.*) MATHURA MOHAN SAHA *v.* RAM KUMAR SAHA.
23 C. L. J. 26 : 20 C. W. N. 370 : 35 I. C. 305 : 43 Cal. 790.

———S. 196—*Principal and agent—Agent's acts—Principal bound—Ratification—Knowledge.*

The agent's acts in the course of employment on behalf of the principal and within the apparent scope of his authority bind the principal, unless in fact the particular act was unauthorised to the knowledge of the person dealing with the agent. A principal cannot ratify a transaction in part and repudiate it in part. Before a principal is bound by ratification, he must be proved to have knowledge of all essential facts of the transaction. (*Mookerjee and Beachcroft, JJ.*) KATYAYANI DEBI. *v.* PORT CANNING AND LAND IMPROVEMENT CO.
25 I. C 274 : 19 C. W. N. 56.

———Ss. 196 and 197—*Accepting rents from transferee—Landlord, if bound by receipts—Extent of authority of gumastah.*

The question of the gumastah's power to bind his landlord is one which must be decided on the particular facts of each case. Where, a gumastah of the landlords accepted rent from a transferee of a *jote* and the landlord failed to show that the gumastah acted beyond the scope of his authority, *Held*, that the facts constituted sufficient recognition of the transferee by the landlord (*Mookerjee and Teunon, JJ.*) SUDAMAN JAMADAR *v.* BEHARI MAHTON. **10 I. C. 456 : 15 C. W. N. 953.**

———Ss. 196 and 197—*Ratifications.*

Agreement of promoters of company with third party before incorporation is not binding on

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company. Affixing of such agreement to Articles of Association does not amount to a new contract by the company. (*Chevis, J.*) SURENDRA AND CO. *v.* PUNJAB TENANCY CO. LTD.
68 I. C. 787 : 1923 Lah. 100.

——Ss. 196 and 197—*Ratification—Acts in excess of authority—Liability.*

Where an agent's authority to mortgage his principal's property is not established but it is proved that the principal well knew of the mortgage and the money raised by the mortgage was received by the principal, the mortgagee would be entitled in equity to recover the mortgage-debt from the principal. 18 All. 295, Rel. (*Reid, C. J. and Rattigan, J.*) NANAK CHAND *v.* MUHAMMAD AFZAL. **33 P. R. 1913 : 11 P. L. R. 1913 : 16 I. C. 950 : 279 P. W. R. 1912.**

—— S. 196—*Ratification—Effect.*

The right of a principal to ratify an unauthorised act of his agent under S. 196 is confined to cases where the agent purports to act on the principal's behalf and not where the agent acts on his own behalf without authority, or contrary to principal's directions and on behalf of the principal. 35 Mad. 177 ; (1910) A. C. 240, Foll. (*Sadasiva Iyer and Moore JJ.*) RAGHAVACHARI *v.* PAKKIRI MAHOMED ROWTHER.
30 M. L. J. 497 : 19 M. L. T. 381 : 34 I. C. 760 : (1916) 2 M. W. N. 73.

——Ss. 196 and 197—*Principal and Agent—Transactions by agent beyond scope of authority—Acquiescence.*

An agent advanced certain loans and the principal not only did not object but did not tell him that he (the agent) would be responsible for any loss. The principal even interfered with the collection of the debts, dictated his own terms and allowed, with full knowledge of the circumstances, the agent's successor to take the debts at a certain valuation after which it was not possible for the original agent to collect the debts. *Held.* the principal was precluded by his acquiescence from questioning the validity of these transactions and could not hold the agent liable. (*Sankaran Nair and Spencer, JJ.*) RAMASWAMI CHETTY *v.* ALAGAPPA CHETTY. **28 I. C. 135 : 28 M. L. J. 199**

——S. 197—*Ratification—Implied.*

Ratification cannot be inferred from a mere omission to repudiate in terms an unauthorised transaction. (*Ayling and Krishnan, JJ.*) SIIRI RAJAH KANDANA *v.* ACHANTA VENKATA SUBBARAYADU. **52 I. C. 414 : 10 L. W. 33.**

——S. 197—*Acts of agent in excess of authority—Ratification—Nattukottai Chetties.*

Where the agent exceeds his authorities and embarks on unauthorized transactions, it is the duty of the agent under his contract of agency, to fully and frankly disclose to the principal what he has done. If the latter takes no objection or abstains from pressing his objection after hearing the agent's explanation, but waits to see how the transaction turns out, ratification of the agent's act may be presumed. *Prince* v. *Clark* 1 B. and C. 187, Foll. Per *Wallis, C. J.*—Where an agent contrary to instructions makes advances against security the principal may realise the security and hold the agent liable for the balance and such intermeddling does not amount to ratification. *Seshagiri Aiyar, J.*—The application of principles governing the relationship of English agent to their principal should not be extended to Chetty's agents in India whose position approximates to that of a trustee. (*Wallis, C. J. and Seshagiri Aiyar, J.*) LAKSHMANAN CHETTY *v.* CHIDAMBARAM CHETTY. **9 L. W. 251 : 49 I. C. 758 : 25 M. L. T. 286 : (1919) M. W. N. 72.**

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——S. 197—*Ratification—Acts in excess of authority.*

Ratification of an act in excess of authority on the agent's part by principal may be inferred from his mere silence or acquiescence. 28 M. L. J. 199, Foll. (*Wallis, C. J. and Srinivasa Iyengar, J.*) RAMASWAMY CHETTY *v.* KARUPPAN CHETTY. **31 I. C. 216 : 29 M. L J. 551.**

——S, 197—*Ratification—When complete.*

Ratification of an unauthorised act of an agent is complete only when the fact is communicated to the other party to the contract. Till then the principal has an option to withdraw. Per *Sadasiva Iyer, J.*—Ratification is complete the moment the principal elects to adopt the acts of the agent as his own ; no communication is needed to complete it. Ratification once made is irrevocable. (*Ayling and Sadasiva Iyer, JJ.*) KANDALAM RAJAGOPALA CHARLU *v.* SECRETARY OF STATE.
14 M. L. T. 464 : (1913) M W. N. 937 : 22 I. C. 107 : 38 Mad. 997.

——S. 197—*Ratification—Acts relied on inconsistent with denial of liability.*

S. 197 of the Contract Act lays down that a ratification may be express or implied from the conduct of the person on whose behalf the act is done. The acts relied upon as proving ratification however, must be clearly inconsistent with a denial of liability. (*Mittra, A. J. C.*) NARAYAN DAS *v.* CHANDRABHAN. **48 I. C. 959.**

——S. 197—*Ratification—What is.*

A mere *ex post facto* submission to what has taken place, is no ratification of it. (*Kanhaiya Lal and Lyle, A. J, C.*) SUKHPAL KUAR *v.* DASU.
7 O. L. J 429 : 58 I. C. 165 : 2 U. P. L. R. (J. C.) 129.

——Ss. 198 and 178—*Mortgage of moveables—Object of the sections and the effect of parole mortgage.*

A parole mortgage of moveables is as valid as a mortgage of same by writing and has the immediate effect of passing property without actual possession ; and the object of Ss. 108 and 178 of the Contract Act which are based on estoppel rules is to protect the interest of *bona fide* purchasers and pledgees so that a *bona fide* purchaser from one who is held out by the true owner as able to confer good title is protected against the objections of the true owner. (*Beaman, J.*) TEHIL RAM GIRDHARIDAS *v.* LONGIN D'MELLO.
37 I. C. 231. 18 Bom. L. R. 587.

——Ss. 199 and 213—*Ratification—Accounts.*

In spite of an agent's liability to render all the accounts of all his transactions to the principal,

the principal cannot sue him on one of his several transactions without adjusting all the rights and liabilities of the parties in others. A principal in adopting a contract entered into by his agent, must adopt *cumonera* or not at all ; because the law does not allow him to reap the fruit of it without bearing its burden. He must either adopt with all the representations and statements inducing it or repudiate it wholly. (*Mookerjee and Holmwood, JJ.*) GODHAN RAM BHAKAT *v.* JAHARMALL.
40 Cal. 335 : 17 C. W. N. 67 :
16 I. C. 583 : 17 C. L. J. 636.

——S. 200—*Ratification—Joint Receivers.*

A notice to quit given by one of two joint Receivers on behalf of both without the authority of the other is not valid and cannot be rendered so by subsequent ratification by the other Receiver. (*Sanderson, C. J., Woodroffe and Mookerjee, JJ.*) CASIM AHMAD MOLLA *v.* ESUF HAQI AJAM PERPARCH. 34 I. C. 221 : 23 C. L. J. 453.

——S. 200—*Ratification*—Melcharth *by person without authority.*

Where the only objection to the grant of a *melcharth* is that it was granted without proper authority it can be subsequently ratified by the person who has power to grant it. (*Oldfield and Ramesam, JJ.*) KOZHIKOT PATHINHARE KOVILAGATH *v.* SANKARA MENON. 73 I. C. 376 :
1924 Mad. 245.

——S. 201—*Termination of agency—Under-broker—Dependent contract.*

In the case of an employment of an under-broker by broker for a fixed term, if the services of broker are dispensed with in the interval, the dependent contract of under-brokerage is also dissolved and the under-broker is not entitled to sue the broker for damages for wrongful dismissal unless the broker had brought about the termination of the head-agency purposely. (*Lord Buck Master*) LACHMANDAS *v.* RAGHUMULL.
47 Cal. 290: 46 I. A. 314:
24 C. W. N. 577 : 2 U. P. L. R. (P. C.) 68 :
58 I C. 851 : 11 L. W. 551 (P. C).

——Ss. 201 and 209—*Death of Principal—Agency terminates.*

There is termination of agency after the death of the principal and a suit against agent for accounts must be brought within 3 years under art. 89, Limitation Act. (*Chatterjee and Panton, JJ.*) SARASHIBALA *v.* CHOONI LAL.
26 C. W. N. 320 : 35 I. C. 219: 1922 C. 53.

——S. 201—*Principal and Agent—Agent of joint co-parceners—Effect of, death of one.*

Per *Mookerjee, J*:—It is not an inflexible rule of law that whenever two principals appoint an Agent to take charge of some matter in which they are jointly interested, the death of one of them terminates the authority of the Agent not merely as regards the deceased but also as regards the surviving principal. The true intention of the parties to the contract must be determined from the terms thereof and from the surrounding circumstances. When the most important object of a power of attorney executed by three out of four brothers living jointly in a *Mitakshara* family in favour of the fourth was to facilitate the raising

of joint loans by the latter on mortgages, of the estate for their joint benefit, the death of one of the principals does not terminate the power, so long as the object of the power could be realised. (*Sanderson, C. J. and Mookerjee, J.*) *In Re* SITAL PRASAD 41 I. C. 288 : 21 C. W. N. 620.

——S. 201—*Joint agency— Death of one agent—Effect.*

Where one of two joint agents dies, upon his death, the agency terminates, only so far as he is concerned but continues as regards the surviving Agent. 17 C. L. J. 201 Ref. (*Sanderson, C. J. Woodroffe and Mookerjee, JJ.*) RAGHUMULL *v.* LACHUMANDAS. 38 I. C. 278 : 20 C. W. N. 708.

——S. 201—*Joint agents—Death of one.*

The death of one of two joint agents does not put an end to the agency as regards the other, for the presumption is that the agency is joint and several. (*Mookerjee and Beachcroft, JJ.*) BHAGIRATH SAMANTA *v.* PREM CHAND PAL.
16 I. C. 852 : 17 C. L. J. 201.

——S. 201—*Agency terminated by fulfilment of instructions.*

A bank authorised to collect moneys on behalf of another and to send drafts for it to the latter, another bank ceased to be an agent under S. 201, Contract Act, as soon as it had despatched the drafts according to instructions in spite of the collecting banker's insolvency after which the bank which sent the bills will rank *pari passu* with other creditors. (*Rattigan and Shadilal, JJ.*) ALLIANCE BANK, LTD. *v.* AMRITSAR BANK.
79 P. R. 1915 : 31 I. C. 215 : 171 P. W. R. 1915.

——S. 201—*Principal and Agent—Termination of agency—Question of fact.*

Question of termination of agency is one of fact. The usage among money-lending Nattukottai Chetties and the terms of the contract between the parties can be admitted to decide the question. (*Ayling and Srinivasa Aiyangar, JJ.*) NAGAPPA CHETTIAR *v.* CHIDAMBARAM CHETTIAR.
31 M L. J. 687 : 36 I C. 812 :
4 L W. 455 : (1916) 2 M. W. N. 301.

——S. 201—*Contract between principal and agent for a term—Continuance on expiry*

An agency will not terminate on the expiry of the period contracted for between the principal and agent, if the agent is allowed to continue as agent. No fresh agency is created but the old agency is continued. (*Ayling and Srinivasa Aiyangar, JJ.*) RAMANATHAN CHETTY *v.* KASI.
31 M. L J. 685 : 4 L. W. 452 : 36 I. C. 804 :
(1916) 2 M. W. N. 360.

——S. 201—*Bankruptcy of principal—Effect.*

Where the agent's power of attorney empowers him to do other acts besides carrying on the trade and dealing with his property, his agency is not terminated retrospectively from the presentation of the petition but remains to stave off bankruptcy orders against the firm. (*Spencer and Phillips, JJ.*) KALIANJI SINGI BHAI *v.* BANK OF MADRAS. 34 Mad. 693 : 29 M. L. J. 788 :
3 L. W. 13 : 31 I. C. 583 : (1916) M. W. N. 12.

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——Ss. 201, 209 and 218 —*Termination—Agency—Time.*

An agency terminates when the agent hands over charge to another in obedience to a telegram sent by his principal revoking his authority but his liability in respect of acts done as agent continues. Case-law discussed. Per *Seshagiri Iyer, J.* The fixing of a date in an agent's contract for rendering accounts cannot stop the termination of the agency. (*Wallis, C. J. and Seshagiri Iyer, J.*) VENKATACHALAM CHETTY *v.* NARAYANAN CHETTY. **39 Mad 376 : 26 I. C. 740 : 28 M. L. J. 140.**

——Ss. 201 and 207—*Imperfect partition of village—Lambardar's powers whether affected.*

Power of lambardar acting as agent for the proprietary body to execute a decree obtained against defaulting tenant, are unaffected notwithstanding an imperfect partition of the village immediately after decree, as the agency did not terminate under S. 201 nor was it revoked under S. 207. (*Batchelor and Roe, JJ.*) RAMCHANDRA *v.* TATYA. **19 I. C. 549 : 9 N. L. R. 46.**

——S. 202—*Mortgagee put into possession so as to appropriate profits towards interest—Power to resume possession.*

Where a mortgagee under a mortgage by a deposit of title deeds, is put in possession so as to appropriate the profits in lieu of interest, the mortgagee might be regarded as having received authority from the mortgagor to manage the lands and to receive the rents and profits in lieu of interest. Such authority being given in consideration of the loan to the mortgagor. it could not be terminated under S. 202 of the Contract Act until the loan was repaid. (*Twomey, C. J. and Ormond, J.*) SHWE LON *v.* HLA GYWE. **12 Bur. L. T. 46 : 47 I. C. 133 : 9 L B. R. 172.**

——Ss. 203, 204 and 208—*Principal and agent—Authority conferred by two or more persons jointly—Revocation by one—Legality.*

In a case where authority is conferred on an agent by two or more principals jointly, any one may revoke the authority, and notice of revocation given by one of the principals is sufficient. Express or actual notice is unnecessary in the case of a third person; it is sufficient to establish that the person had knowledge of the revocation of the agent's authority. (*Mookerjee and Beachcroft, JJ.*) DASARATH PATEL *v.* BROJO MOHAN GAONTA. **22 I. C. 90 : 18 C. L. J. 621.**

——S. 205—*Revocation of agency by Principal—Damages.*

An agreement provided that the respondent was to be the agent of the appellants for a period of one season certain, with an option to continue for two seasons more, and that said agent shall not during the continuance of this agreement purchase second-hand clothing from any other dealer except from the principals; nor shall be during the continuance of this agreement act as agent for any other rival trader or traders. *Held* there was a clear contract between the parties that the respondent was to be employed as the agent for the appellant and if the latter were at liberty during the period, the contract was in force to or not to supply goods to the respondent, the whole contract becomes meaningless and it is futile to describe the respondent as the agent of the appellants, per *Kennedy, J.C.*--Where A agrees to employ B on commission, there is not necessarily an implied agreement that A will provide B with any employment. Whether there is such an agreement, is a question of fact in each case. The probability of existence of such an agreement will depend on the custom of the trade and the general circumstances of the business. (*Kennedy, J. C, and, Raymond, A. J C.*) LANDAN AND SONS *v.* AHMED AYUB. **15 S L. R. 140 : 1922 Sindh 25.**

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——S. 205—*Rescission of agency—Agent's liability.*

An agreement to serve as an agent may be rescinded like any other agreement and an agent is liable for compensation if he renounces the agency without sufficient cause, within the specified period when the agency is to last for any particular period. (*Pratt, J. C. and Boyd, A. J. C.*) RAJARAM NANDLAL *v.* ABDUR RAHIM. **31 I. C. 450 : 9 S. L. R. 77.**

——S. 207—*Principal and Agent—Appeal—Principal withdrawing from contest.*

Where a plff. sues as an agent and the principal is allowed by the Court on application on that behalf by him, to come on the record as deft. and the suit is decided, the agent alone cannot carry the matter to the Appellate Court when the principal had withdrawn from the contest. (*Rattigan and Le Rossignol, JJ.*) ABDUL SAMAD *v.* MUNICIPAL COMMITTEE, DELHI. **26 P. R. 1916 : 34 I. C. 866 : 153 P. W. R. 1916.**

——S. 209—*Death of principal—Powers of agent, in case of.*

Even after the death of the principal, the agent can enter into transactions, necessary to protect the interest of the heirs of the deceased and such authority continues till it is revoked by the heirs. (*Broadway and Abdul Raoof, JJ.*) MUSAJI AHMED & Co. *v.* ADMINISTRATOR-GENERAL OF BENGAL. **60 I. C. 739 : 3 Lah. L. J. 265.**

——S. 211—*Principal and Agent — Negligence—Claim of principal barred by limitation—Liability of agent.*

A Tahsildar appointed by a landlord though not empowered to institute suits for arrears of rent, is bound to give information to the landlord in proper time that unless suits are brought in respect of certain arrears of rent, they would become barred by limitation. The omission to do so would make him liable for damages in respect of the arrears of rent thus becoming barred by limitation, the cause of action for damages arising when the arrears of rent become barred. In a suit for accounts against an agent, a claim for damages on account of loss caused by his laches can be included. (*Richardson and Huda, JJ.*) RAMESH CHANDRA ACHARJEE *v.* EASIN SARKAR. **52 I. C. 71.**

——S 211—*Payment to broker.*

In the absence of custom of trade or express or implied authority of the principal payment, to a

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broker is no payment to the principal. (*Sanderson, C.J. and Mookerjee, J.*) HARIBANGSA SHIBDAS RAKSHIT *v.* NALINI MOHAN SAHA. 40 I. C. 799.

——— Ss. 211 and 212—*Principal and Agent—Joint property of brothers—Some managing property—Relationship—Duty of manager.*

Under an agreement two of the five brothers agreed to manage the joint property for a period of 5 years for the improvement and up keep of the estate. *Held*, that the relationship of principal and agent was created by the agreement and that the managers were under a legal duty to exercise reasonable care and diligence in the management of the estate. (*Richardson and Mullick, JJ.*) AMBIKA CHARAN DAS *v.* HARINATH DAS. 29 I. C. 905.

———S. 211—*Suit by principal against agent's representatives for account—Liability for loss.*

Where an agent has caused loss to the principal by not carrying out his directions and by supplying goods contrary to his directions, the agent or his legal representatives are liable for the value of the goods so supplied. (*Abdul Raoof and Campbell, JJ.*) FRAMJEE SHAPURJEE GANDHI *v.* MT. KARAM DEVI. 66 I. C. 446.

———Ss. 211, 215 and 216—*Commission Agent transacting with himself under fictitious name—English and Indian law compared.*

A Commission agent with instructions to sell and purchase for the principal having transacted business with himself under a fictitious name without the principal's knowledge it was held that the principal was entitled to repudiate the transactions under Ss. 211 and 215. There being a clear conflict between the agent's interests and his duty to the principal, agents should avoid positions of possible incompatibility between their personal interests and their duty to their principals. When a Commission agent's transaction with himself involves no opposition between his own interests and his duty to the principal, the transaction becomes binding on the principal, though the agent cannot claim commission in such a case. *Obiter*—Under the Indian Contract Act, a permission to an agent to transact for himself without the principal's consent, may be valid as a trade usage, though opposed to the provisions of the Act, but, under the corresponding English Law, the usage is illegal and cannot bind the principal unless there is proof of knowledge and consent of the principal to be bound. Even under the Indian Law the usage to be binding requires specific pleading and strict proof of its existence. 18 Cal. 620 (P. C.). Ref. to. (*Fawcett, A. J. C.*) JANKIDAS BANARSIDAS *v.* DHUMANMAL. 37 I. C. 241: 10 S. L. R. 86.

———S. 213—*Principal and Agent— Latter entitled to final account—Agent entitled to rely upon casual accounts settled between them.*

A principal is entitled to a final account between himself and the agent on the termination of the agency and the agent can rely upon casual accounts settled between themselves as being *prima facie* correct. (*Richards, C. J. and Banerji, J.*) ABHAICHARAN *v.* KESHODAS. 13 I. C. 642.

CONTRACT ACT (IX OF 1872), S. 213.

———Ss. 213 and 214—*Accounts, suit for—Legal representatives of agent—Liability to account—Onus.*

The death of an agent during the pendency of a suit against him for accounts does not exonerate his legal representatives from all liability to the principal. The statement of claim put in by plaintiff should be investigated preferably by a Commissioner in the presence of the representatives of the deceased agent. The onus would be on the plaintiff to prove such items in the sum which he claims, *e.g.*, to prove that each item was actually realised by the agent and further it was not paid to his credit. The representatives of the deceased agent would be at liberty to adduce such evidence as they please to show either that the money was not realised by agent or that after realisation it was paid to the plaintiff. The amount actually due being thus ascertained, the Court would pass a decree against the assets of the deceased agent in the hands of the representatives. 16 C. L. J. 282 Foll. (*Walmsley and Panton, JJ.*) SASI SEKHARESWAR ROY *v.* HAJIRAN NESSA BIBI. 47 I. C. 371: 28 C. L. J. 492.

———S. 213—*Agent, obligation of, to render accounts and pay balance.*

Rendering an account of his agency and account for money received by him, is not confined merely by rendering of accounts of what has been done with the money, but includes also the payment of any balance which might be found due upon taking accounts. (1868) 11 W. R. 76 Ref. (*Mookerjee and Richardson, JJ.*) KESHO PRASAD SINGH *v.* SARWAN LAL. 21 C. W. N. 591: 40 I. C. 359: 25 C. L. J. 335.

———S. 213—*Agent—Liability to render accounts.*

The obligation of an agent towards his principal does not terminate merely in submission of account papers. He is bound to explain those papers and if on accounts taken, it is found that he has in his hands money which belongs to his principal, he is bound to pay that sum. (*Mookerjee and Roe, JJ.*) MADHUSUDAN SEN *v.* RAKHA CHANDRA DAS BASAK. 43 Cal. 248: 19 C. W. N. 1070: 30 I. C. 697 : 22 C. L. J. 552.

———S. 213—*Accounts—Liability of agent—Liability of heirs—Burden of proof.*

The liability to render an account cannot be enforced against the legal representatives of an agent. The liability is personal, and the legal representatives need not render accounts in the same sense in which the agent himself might have been called upon to do 22 All. 332; A. W. N. (1882) 6; 9 I. C. 591 Rel The remedy of the principal, after the death of his agent, is to sue the representatives for any loss he may have suffered by the negligence, misconduct, misfeasance or malfeasance of his agent ; the suit is not one for accounts strictly so-called, but a suit for money payable to the principal by the representatives of the agent, out of the assets in their hands If the agent, had misappropriated any money, the representative must indemnify the principal to the extent of the estate that has come into his hands. 2 N. W. P. H. C. R. 103 Ref.

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Mookerjee and Holmwood, JJ.) KUMEDA CHARAN BALA *v.* ASUTOSH CHATTOPADHYA.
17 C. W. N. 5: 16 I. C. 742: 16 C. L. J 282.

——S. 213—*Agent's heirs— Liability to account.*

The legal representative of an agent is bound to furnish accounts and must make good the money found due on the account, which came to his hands. In the present case the plffs. do sue not only for an account, but also for the account papers for the money found due on the account, and finally, in the event of accounts not being furnished, for a lump sum. 14 C. W. N. 122; 12 Cal. 357 Rel. *(Sharfuddin and Coxe, JJ.)* JHAPAJHANESSA BIBI *v.* BAMA SUNDARI CHAUDHURANI. 16 C. W. N. 1042: 16 I. C. 414: 16 C. L. J. 288.

——S. 213—*Suit for accounts by principal—Mere production of account if amounts to proof.*

In a suit for accounts against the agent, the mere production by the agent of his accounts would not amount to proof of same. *(Chitty and N. Chatterjee, JJ.)* CHANDRA KUMAR *v.* PRAMATHA NATH ROY. 11 I. C. 161: 15 C. W. N. 930.

——S. 213—*Audit—Effect of—Company, if can ask the agent for rendition.*

The audit of a Company's accounts does not preclude it from calling upon the agents for rendition, though it closes the accounts between the shareholders and the directorate in the absence of fraud or mistake in connection with the audit. *(Shadi Lal and Le Rossignol, JJ.)* RAMCHAND *v.* IMPERIAL OIL SOAP & GENERAL MILLS CO., LTD.
153 P.W.R. 1917: 9 P. L. R. 1918
42 I. C 375: 86 P. L. R. 1917

——S. 213—*Rendition of accounts Meaning of.*

Rendition of accounts means not merely sending the accounts to the principal but also submiting and explaining them and paying any balance that may be found due from the agent upon taking accounts. *(Johnstone and Shah Din, JJ.)* FATIMA *v.* IMTIAZI JAN. 1 P. R. 1912
33 P. W. R. 1912: 13 I. C. 930: 59 P. L. R. 1912

——S. 213—*Money advanced to agent for work to be done—Must be accounted for by agent.*

Where money is advanced to an agent for work to be done on the understanding that a bill is to be sent subsequently, the agent must account for the money. *(Wallis, C. J. and Kamesam, J.)* TAR MAHOMED *v.* WALKER & Co. 62 I. C. 503: 13 L. W. 366.

——S. 213—*Suit by principal against agent for monies unaccounted for is maintainable.*

In a suit by a principal against his agent and after his death against his representatives the principal is entitled not only to the sums actually received but not accounted for, but also to the sums which the agent has failed to collect, when it was his duty to do so. *(Spencer and Odgers, JJ.)* VENKATA CHARYULU *v.* MOHAN PANDA.
44 Mad. 214: 12 L. W. 390: 39 M. L. J. 586; 61 I. C. 530: (1920) M. W. N. 650.

CONTRACT ACT (IX OF 1872), S. 215.

——S. 213—*Agent—Retaining money—Liability to interest—Demand—Secretary to a Fund—Position of.*

An agent is bound to pay interest on the sum of money retained by him and due to the principal from the date of demand therefor by the principal. An agent by retaining money due to the principal cannot be held to have committed a fraud. A Secretary of a Fund is only an agent and not a trustee though he is himself a Director and recovers money from subscribers. *(Spencer and Seshagiri Aiyar, JJ.)* GANESA SETHURAM *v.* RAMASWAMI SERVAI. 33 M. L J. 468: 6 L. W. 520: 33 M. L. J. 468: 42 I. C. 219: (1918) M. W. N. 1.

——S. 214—*Duty to communicate.*

An agent authorised to buy and sell at the best rates cannot defer carrying out the order, till communicating the rate of the day to the principal. *(Crouch, A.J.C.)* FIRM OF VISHNUJI GOVERDHAN DAS *v.* FIRM OF JASRAJ GIRDHARI LAL.
50 I. C. 146: 12 S. L. R. 93.

——S. 215—*Agent—Liability to account.*

When an agent uses his debt due to his principal to obtain property for himself, he realises that debt on the principal's behalf and is liable to account for the same. *(Rafique and Piggott, JJ.)* BIRBAL *v.* KISHORE LAL. 25 I. C. 88: 12 A. L. J. 463.

—— Ss. 215 and 19—*Principal and agent:—Dealing by agent in the business of the agency without the knowledge of the principal—Contract is voidable at the option of principal—English and Indian law.*

Plaintiff entered into a running contract with defendants for the supply, at a fixed price of a large quantity of tiles of a certain manufacture for the sale of which defendants had been appointed sole agents. It was found as a fact that the plff. was acting for and a mere alias of the dubash and local agent of the defendants who had entered into the contract without any knowledge of the fact. The defendants on becoming aware of their own agent's interest in the contract repudiated it and refused to perform it further. In an action for damages by the plaintiff. *Held*, that the defendants were entitled to avoid the contract both under S. 19 and under S. 215 of the Contract Act and that the plaintiff's suit was unsustainable. The concealment by the dubash and local agents of the defendants of the fact that he was dealing with them through the plaintiff was dishonest and his procuring a running contract for the supply of tiles on a large scale with the object of competing with his principals in the market which it was his duty to exploit for their benefit was prejudicial to the defendants. The case therefore satisfied S. 215 of the Contract Act. Even apart from S. 215 the dishonest concealment by the plaintiff of the identity of the contracting party constituted fraud and entitled the defendants to avoid the contract. *(Schwabe, C.J. and Wallace, J.)* ACHUTHA NAIDU *v.* MESSRS. OAKLEY BOWDEN & Co. 43 M. L. J. 444: 16 L. W. 345: (1922) M. W. N. 576: 45 M. 1005: 69 I. C. 927: 31 M. L. T. 487: 1922 Mad. 497.

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———Ss. 215 and 236—*Agent dealing on his own account—Rights of principal.*

S 236 will apply only to cases where one person enters into a transaction with another on the basis that that other is an agent for a third person; and will not apply to a case where an agent deals on his own account. In such a case, the principal may repudiate the transaction under S. 215. 34 Bom 292 Rel.; 34 Cal. 628; 39 Cal. 802 Dist. (*Abdur Rahim and Napier, JJ.*) KOTA CHINNA LAKSHMIAH *v.* NALAN VISVANATHAN

42 I C. 357

———S. 215—*Principal and Agent—One Limited Company acting as agent for another—Whether can make profits.*

Where the plff. company were managing agents of the deft's. company to which the former supplied goods, the plff. company was held not entitled to make any profit on the goods supplied to their principal, the deft's. Company. (*Fox, C J. and Hartnoll, J.*) TWINZAS OIL Co. *v.* MOWER & Co.

26 I. C. 478 : 8 L. B. R. 102.

——— S 216—*Principal and Agent—Duty.*

It is the duty of an agent not merely to do nothing to injure the interests of his principal, but to do all in his power to further them. He should not place himself in a position in which his interests might be adverse to that of the principal. (*Walsh and Stuart, JJ.*) PURAN MAL *v.* FORD AND MACDONALD & Co., LTD. 41 All. 635 : 52 I. C. 373 : 17 A. L J. 805.

——— S. 216—*Execution of mortgage decree.*

A principal can have a decree for an account of profits of property outside British India purchased by an agent in execution of a mortgage decree passed in favour of the principal; but a principal is not entitled to a mandatory injunction directing the agent to execute a re-conveyance to the principal. (*Wallis, C. J. and Srinivasa Iyengar, J.*) RAMASWAMY CHETTY *v.* KARUPPAN CHETTY. 31 I. C. 216 : 29 M. L J. 551.

———Ss. 216 and 220—*Principal and Agent—Agent's duty to carry out a sale for a particular sum—Acceptance by agent of secret commission from vendor—Failure to communicate with principal.*

Where an agent is employed for a single purpose of procuring the sale to his principal of certain property for a specified sum and be withholds from his principal, the fact that on the date of his employment, the vendor was willing to part with the property for that sum and accepts from the vendor a secret commission for bringing about the sale, he commits a gross breach of duty towards his principal and therefore any remuneration for his services. (*White, C. J. and Oldfield, J.*) ABDUL RAHMAN *v.* RANGIAH GOUNDEN. 22 I. C. 597 : 1 L. W. 181.

———S. 217—*Principal and Agent—Agency for sale of sugar—Agent depositing moneys with principal—Insolvency of principal—Right of agent to set-off.*

The respondents were the agents of Arbuthnot & Co., which carried on a large business *inter alia* as sugar manufacturers. The appellant was

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the Official Trustee of Madras representing a company called Mysore Sugar Refining Company. The relation between the Arbuthnot and the Mysore Sugar Refining Company was this. The Mysore Sugar Refining Company was incorporated by Arbuthnot & Co. in 1905. It consisted entirely of representatives of the Arbuthnot & Co. or persons under their control. The whole of its capital came from Arbuthnot & Co. The respondents were appointed by Arbuthnot & Co. in 1901 as agents for sale of sugar in Mysore and they had also made deposits of money with Arbuthnot & Co. The respondents knew nothing whatever of the Mysore Sugar Refining Company. The Arbuthnot & Co. became insolvents in 1906. The appellant claimed to recover the proceeds of sugar manufactured by their company and sold by the respondents and claimed to do this without reference to the deposits which the respondents had made with the Arbuthnot and Company and with respect to which the respondents alleged a case of counter claim or set off. *Held*, that the Mysore Sugar Refining Company could not claim to recover the proceeds of sugar unless the cross claims or set off of respondent are settled and that the appellants can claim the benefit of the sums representing the sale proceeds of their sugar only subject to every equity which affects those sums in the hands of Arbuthnot & Co. themselves. (*Viscount Haldane*). OFFICIAL TRUSTEE OF MADRAS *v.* A. SUNDARAMURTHI MUDALIAR. 15 L W. 201 (P.C.).

———Ss. 217 and 218—*Claims and cross claims—Business of principal Company transferred to another Company—Business conducted as before—Set off.*

A & Co. were entitled to receive from the respondents the price of sugur purporting to have been sold by the latter on their behalf. Respondents had a larger sum of money in deposit with A & Co., as bankers. A & Co., had incorporated another Company called the Mysore Company which as to *personnel* and otherwise was closely identified with A & Co., and completely controlled by them. Though this was technically done, the factory continued to be run and maintained in the same way as before and the respondents had no knowledge of what had happened. The Mysore Company having sued respondents for the price of sugar sold out of the factory without reference to the cross-claim and set off by the Respondents against A & Co. *Held*, that if the Mysore Company could bring actions for sums due from the Respondents in respect of the sales of sugar, they could bring them only as principals. In this sense they could take the benefit of these sums in the hands of A & Co. (*Viscount Haldane*). THE OFFICIAL TRUSTEE OF MADRAS *v.* SUNDARAMURTHY MUDALIAR. 24 C. W. N. 1004 (P. C.)

———Ss. 217 and 221—*Implementing—Lien—Limitation.*

Implementing of contracts is a part of the general law, and the agent is entitled to a lien or retainer upon monies of his principal which are in his hands, for all expenses properly incurred. In cases of exercise of lien or retainer, no question of time limit arises at all. 39 Mad. 365 Foll.

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(*Pratt and Duckworth, JJ.*) THE LEIBOAK SYNDICATE *v.* FINLAY, FLEMING & CO.
1 Bur. L. J. 219 : 11 L. B. R. 326 : 1923 R. 84.

——Ss. 217 and 221—*Pleader's lien—Entrustment of shares for sale in private capacity—Appropriation for fees.*

A pleader was entrusted with certain shares in his private capacity for being sold but appropriated the sale proceeds to the fees due to himself. *Held*, that he had no right to pay himself for his fees out of the sale proceeds of the shares irrespective of his client's wishes. He had no lien or right of retainer under S. 221 or S. 217 of the Contract Act, for that would only attach in respect of services rendered in the matter of sale. He could have no general lien as a factor for sale in respect of a general balance due to him as to pleader. He had not even a right to set off, for the shares were given to him in his private capacity. He stood in his fiduciary relation to his client and it was for him to show that she consented to the appropriation without undue influence on his part. 32 Bom. 37 at pp. 44, 45 Ref. (*Pratt, J. C. and Fawcett, A. J. C.*) VARANBAI *v.* M. A. PLEADER. 5 S. L. R. 222 : 15 I. C. 785 : 13 Cr. L. J. 513.

——S. 219—*Commission agent—Agency to sell at given price.*

When an agent is employed for commission to sell certain property at a certain price and the agent succeeds in finding a purchaser at that price but the principal declines to sell, the agent is entitled to reasonable remuneration for his work and labour. (*Sale, J.*) MORTYROSE *v.* GOURJON. 14 I. C. 981 : 15 C. L. J. 312.

——S. 219—*Broker — Contract to procure loan—Loan procured but on conditions--Agent, if entitled to commission.*

Where a contract is merely to procure a loan by the agent for the principal, and the latter procures the same, but only on certain conditions which the principal does not assent to, the agent will not be entitled to any commission, the terms of the contract being simply to procure a loan without any conditions whatever. (*Mookerjee and Carnduff, JJ.*) KRISHNA PROSAD SINHA *v.* PURNENDU SINHA. 11 I. C. 820 : 15 C. L. J. 40 : 16 C. W. N. 753.

——S. 220—*Document executed by Agent—No mention of principal in document--Agents not signing as agents—Conveyance, if valid.*

A conveyance purporting to have been executed by two persons as agents of a woman whose name nowhere appears in the document and where the agents themselves have not signed it as such, is not one which would bind the woman. (*Twomey, J.*) MG. RYE *v.* MY AUNG THA.
12 I. C. 206 : 4 Bur. L. T. 255.

——Ss. 222 and 213—*Principal and Agent—Agent paid by commission on orders—No stipulation to pay hotel bills—Liability of principal for such expenses.*

In the absence of a stipulation, money spent by a commission agent during a business trip on board and lodging cannot be considered to be

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incidental to carrying on the business of the principal who is not bound to pay the bill though he could recover things kept by the agent at the hotel. (*Shah Din and Scott-Smith, JJ.*) RAMJI DAS & Co. *v.* MUHAMMAD RAMZAN. 19 I. C. 248 : 206 P. L. R. 1913 : 222 P. W. R. 1913.

——S. 222—*Contract C. I. F.—Contract to ship goods on account and risk of buyer—Outbreak of war—Right of Commission Agent.*

Where goods are purchased from a Commission Agent under a c. i. f. contract whereby the latter agrees to supply goods "on account and risk of the buyer", the agent is not liable. If the outbreak of the war, while the goods are in transit on board an enemy ship, dissolving the contract of afreightment between the shipper and the ship owner, makes it impossible for the Commission Agent to do what a vendor under an ordinary c. i. f. contract, is bound to do, namely, to tender among the shipping documents-bills of lading, which are still valid contracts. In such a case, a special contract throwing the risk on the buyer can be inferred from the fact that the goods were to be purchased and shipped on account of the buyer. (*Wallis, C. J. and Spencer, J.*) H. ELLIOT & Co., LTD., BIRMINGHAM *v.* ABDUL SAHIB.
49 I. C. 196 : 8 L. W. 565 : 35 M. L. J. 184 : 41 Mad. 1060.

——Ss. 222 and 223—*Agreement to pay single sum for remuneration—Remuneration, if can be split up.*

When there is an agreement to pay a single sum as remuneration for a specified work, the remuneration cannot be divided so as to be apportioned between the part found to be legal and that found to be illegal. Whereby an agent has retained in his hands a sum of money as interest on the principal money subsequently found to be not due from the principal, the principal should be credited with the amount of the interest thus retained by the agent and also interest on the same at the contract rate. (*White, C. J. and Oldfield, J.*) ABDUL RAHIM *v.* D. RANGIAH GOUNDEN.
22 I. C. 597 : 1 L. W. 181.

——S. 223—*Reimbursement—Right of agent to, when arises.*

An agent, on general grounds is entitled to reimbursement and indemnity by his principal but only on the condition that he has acted within the scope of his directions. (*Le Rossignol and Wilberforce, JJ.*) SHAMAS DIN MEHAR BAKSH *v.* MUHAMMAD KHALEEL. 59 I. C. 971 : 3 Lah. L. J. 141.

——S. 223—*Principal and Agent—Money spent by agent for principal—Right of agent—Limitation Act, Art.* 83.

An agent sustaining losses in his agency has a right as a direct consequence of the agency contract to be recouped by his principal in respect of such losses and a suit to enforce that right is governed by Art. 83 of the Limitation Act. (*Rattigan and Rossignol, JJ.*) MANGHI RAM *v.* RAM SARAN DA MAMAN CHAND. 100 P.L.R. 1915 : 26 I. C. 145 : 35 P. W. R 1915 : 23 P.R. 1915.

CONTRACT ACT (IX OF 1872), S. 223.

———S. 223—*Agent—Liability — Error of judgment.*

If an agent exercises reasonable skill and diligence, he is not responsible to the principal for an error of judgment which causes loss to the principal. (*Pratt, J. C. and Boyd, A. J. C.*) RAJARAM NANDALAL *v.* ABDUR RAHIM.. **31 I. C. 450 : 9 S. L. R. 77.**

———S. 226—*Agent acting beyond scope of authority—Principal, liability of.*

Where a Station Master at a consigning station accepted goods for conveyance at concession rates which did not apply to that station, in a suit against the Railway Company for damages for non-delivery of the goods at the destination till difference between the ordinary rates be paid, it was held, that the Station Master, acted beyond the scope of his ordinary authority and that the Company was not liable for breach of the contract entered into by the agent. (*Banerjee, J.*) GOBIND RAM *v.* G. I. P. RAILWAY. **35 I. C. 208 : 14 A. L. J. 601.**

———S. 226—*Principal and Agent--Fraud of agent—Principal when bound.*

If an agent is acting in collusion with a third party without the principal's consent and the act is detrimental to the interests of the principal, the latter is not bound. (*Shadi Lal and Broadway, JJ.*) MUSSAMMAT RAM KAUR *v.* RAGHUBIR SINGH. **56 I. C. 631 : 2 Lah. L. J. 516.**

———S. 226—*Principal and Agent—Payment to agent—If payment to principal.*

Payment to an agent is payment to the principal. (*Chevis, J.*) TULSIRAM *v.* KARMCHAND. **13 I. C. 955 : 25 P. W. R. 1912 : 36 P. L. R. 1912.**

———S. 226—*Agent's liability to sue or be sued.*

An agent cannot sue or be sued in respect of a sale to him on behalf of the principal. (*Sundara Aiyar and Sadasiva Iyer, JJ.*) MOTHEY ATCHAYYA GARU *v.* VENNA VALLI SESHAGIRI RAO. **20 I. C. 844 : 25 M. L. J. 32.**

———Ss. 226 and 228—*Agent's powers—Notice of—Constructive notice.*

Where an agent signs a pro-note *per pro* for a business belonging to a minor, the holder must be fixed with notice of the contents of the power of attorney under which the agent acts and of the extent of his authority and of the fact that the business belonged to a minor. (*Wallis and Munro, JJ.*) SANKA KRISHNAMURTHI *v.* BANK OF BURMA, LTD. **14 I. C. 389 : 21 M. L. J. 620 : 11 M. L. T. 56 : 11 I. C. 79 : 35 Mad. 692 : (1911) 1 M. W. N. 385.**

———Ss. 226 and 227—*Fraud of agent—Liability of principal for fraud of agent.*

A principal is liable for the fraud of his agent acting within the scope of his authority whether the fraud is for the benefit of the principal or that of the agent. Where a Railway Station Master gave a Railway receipt purporting to show that some goods were consigned from his station to another, which was simply false, it was held that his act did not constitute an act within the scope of his employment as Station Master, and the Railway Company was held not liable for the fraud of the Station Master. (*Drake Brockman, J. C.*) HUKUM CHAND *v.* BENGAL-NAGPUR RAILWAY COMPANY. **45 I. C. 856.**

CONTRACT ACT (IX OF 1872), S. 227.

———S. 226—*Agent—Power to sell properly—Recital of authority unnecessary.*

The omission on the part of a general agent to mention either in the body of the document or in the signature, his capacity as agent, could not affect the substance of the transaction entered into by him on behalf of his principal. The question whether an agent is to be taken to have contracted personally or on behalf of his principal, depends on the intention of the parties to be deduced from the terms of the particular contract and the surrounding circumstances. (*Wazir Hassan, A. J. C.*) JAGRUPSINGH *v.* RAMA KRISHNA DAS. **23 O. C. 353 : 59 I. C. 596 : 7 O. L. J. 705,**

———S. 226—*One debtor, if can be agent of creditor.*

One of several joint-debtors, cannot be an agent of their creditor so far as joint-debtors are concerned and a payment to that debtor is not a payment to the creditor. (*Hartnoll, Offg. C. J.*) SHWE AUNG *v.* ARUNACHELLAM CHETTY. **11 I. C. 864 : 4 Bur. L. T. 197.**

———S. 226—*Fraudulent acts of agent—Liability of principal—Burden of proof.*

Where an agent fraudulently, in furtherance of his own interests, and contrary to instruction enters into a contract, the principal will be bound only if third persons dealing with the agent have acted in good faith. (1904) 2 K. B. 10, Ref. The onus of proving good faith lies on such third persons claiming against the principal. 9 Bom. L. R. 388, Ref. As a general rule, the agent has no authority to borrow money on account of his principal so as to render the latter liable to the lender unless the principal has given express authority or previously sanctioned such a course of dealing on the agent's part or has subsequently adopted and ratified the loan. (*Fawcett, A. J. C.*) BHAGWANJI *v.* GANGA. **36 I. C. 968 : 10 S. L. R. 72.**

———Ss. 227 and 237—*Agent acting beyond scope of authority—Third party—Damages.*

A parcels-office clerk of a Railway Company received for despatch a consignment of fireworks as a 'parcel' instead of as 'goods' according to rules. The Railway Company made delay and ultimately sent it by goods train and claimed extra freight charges which the consignor refused to pay. The company sold the goods. The consignor then brought a suit for damages, *held*, that in accepting the goods for despatch as 'parcel' the clerk was undoubtedly acting in the course of his employment, though outside the scope of his authority and led the plaintiff into an honest belief of his authority. The company could not therefore repudiate the contract or escape liability for any damages incurred by the plaintiff in their not carrying out the contract within reasonable time. (*Stuart and Kanhaiya Lal, JJ.*) FAZAL ILAHI *v.* E. I. RY. CO. **43 All. 623 : 19 A. L. J. 654 : 1922 All. 324,**

CONTRACT ACT (IX OF 1872), S. 229.

———S. 229—*Constructive notice—Knowledge of agent, when implied to principal.*

Constructive notice of a fact which the agent knows cannot be imputed to the principal when it was not to the interest of the agent to disclose the fact to the principal and which the agent did not in fact disclose. (*Lord Buckmaster.*) TEXAS Co. *v.* BOMBAY BANKING Co. **46 I A. 250 : 26 M. L. T. 370 : 30 C. L. J. 446 : 2 U. P. L. R. (P. C.) 21 : 11 L W. 320 : 24 C. W. N. 469 : 54 I. C. 121 : 44 Bom. 139 : 22 Bom L. R 429 : (1920) M. W N. 70. (P. C).**

———S. 229—*Knowledge of agent — Agent acting fraudulently — Knowledge imputed to principal.*

If the agent, acting on his principal's behalf in some transaction in which his knowledge would otherwise be imputed to his principal, takes part in any fraud or misfeasance against the principal, the principal is not bound by the agent's knowledge of fraud. (*Davar, J.*) SHIVALAL *v.* TRICHUMDAS MILLS CO., LTD. **36 Bom 564 : 14 I. C, 353 : 14 Bom. L. R. 45.**

———S, 229—*Contract of sale—Notice to take delivery to agent.*

In a suit for return of earnest money and damages for breach of contract, defendant alleged that notice to take delivery was given to the agent of plaintiff. *Held*, that notice to agent was sufficient and defendant was not liable. (*Johnstone and Shah Din, JJ.*) NIAMAT RAI *v.* KALU RAM. **70 P W. R. 1915 : 28 I. C. 488 : 159 P. L. R. 1915.**

———S. 230—*Principal and Agent—Non-disclosure of principal's name—Agent's personal liability.*

Where the deft. as manager of the Banaili Raj got some work done by the plff. and the name of the Raja was not disclosed. *held*, there was no personal liability against the deft. for the work done by him for the Raj. (*Richards, C. J. and Tudball, J.*) GULZAR AHMED *v.* SHIVA SHANKAR SAHAI. **24 I. C. 415**

———Ss. 230 and 236—*Evidence of custom or usage incidental to contract.*

An award made by the Bengal Chamber of Commerce was impeached by defts. in the Court on the ground that the Chamber acted beyond its powers in making the award in favour of the plffs. disregarding the fact that the contract in question was made by the plffs. who had no principals and the contract was not therefore enforceable. The plaintiff pleaded a custom in the market in respect of gunny, by which brokers are held liable upon such contracts. The custom was well-known to the Chamber, *held*, the award was properly made. The Court allowed evidence of custom and usage to be given and held that there was such a custom and the defts. knew of it, and that Ss. 230 and 236 did not apply to the case. (*Chaudhury, J.*) JOY LALL & CO. *v.* MANMOTHA NATH MULLICK. **35 I. C. 3 : 20 C. W. N. 365.**

———S. 230—*Broker's contract—Whether an agent is intermediary.*

CONTRACT ACT (IX OF 1872), S. 230.

A broker who gives to the buyer, a note in the form "bought by your order and for your account from our principals", is no more than an intermediary, and was not an agent of the undisclosed principal for sale, to make him liable under S. 230, Contract Act. (*Jenkins, C. J. a d Woodroffe, J.*) PATIRAM BANERJI *v.* KANKINARA CO., LTD. **19 C. W. N. 623 : 31 I. C. 607 : 42 Cal. 1050.**

———S. 230—*Contract to the contrary. presumed where contract is made for merchant abroad.*

An agent is not personally bound by a contract entered into by him on behalf of his principal in the absence of any contract to that effect. Such a contract, however, has to be presumed to exist where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad. (*Broadway and Zafar Ali, JJ.*) THE FIRM DEOKI NANDAN *v.* RAM LAL QULAK. **73 I. C. 885 : 1923 Lah. 296.**

———S. 230—*Acting for foreign principal—Liability of agent.*

The presumption in S. 230 (1) of the Contract Act is a rebutable presumption which can be rebutted. But the mere fact that the principal is abroad does not absolve the personal liability of the agent if the other contracting party looked to him alone for performance. (*Scott-Smith and Abdul Qadir, JJ.*) FAZAL ILAHI *v.* THE IMPERIAL CHEMICAL CO., DELHI. **67 I, C. 157.**

———S. 230—*Contract by agent — Personal liability.*

In order to make an agent personally liable under a contract entered into by him it must be clearly established that the agent had not disclosed the name of his principal. If, however, the name of the principal is already known to the other party to the contract who also knows that he is dealing with the agent as an agent a mere formal disclosure is clearly necessary to make the principal liable on the contract. (*Broadway and Abdul Qadir, JJ.*) LYALLPUR SUGAR COMPANY *v.* MUL RAJ. **65 I. C. 473.**

———S. 230—*Contract by agent—No personal liability.*

A man who is an agent and describes himself as such, may still be contracting in his personal capacity but the mere fact that he fails to specify his capacity, as an agent in signing a contract, does not raise any such presumption when the terms of the contract itself are clearly to the contrary. (*Chevis, A. J. C. and Wilberforce, J.*) MESSRS. G. S. BHARGAVA & CO. *v.* B. KOBAYASHI. **65 I. C. 468 : 2 Lah. L. J. 374.**

———S. 230—*Contract—Agent personally interested—Suit.*

When an agent enters into a contract he may sue thereon in his own name, if he has an interest in the contract 24 Mad. 130, Foll. (*Martineau, J.*) MALLU *v.* MEGH RAJ. **55 I. C. 992 : 2 U. P. L. R. (Lah.) 76.**

———S. 230—*Agent receiving goods on behalf of principal—Agent's liability for price.*

CONTRACT ACT (IX OF 1872), S. 230.

Plaintiffs purchased cotton seeds at request of a certain Ludhiana firm and sent them to defendants who accepted the goods and also wrote to plaintiffs complaining of some short weight and promising to pay price within a certain time. Meanwhile the Ludhiana firm became insolvent. In a suit by plaintiffs to recover the price from the defendants, *Held*, (1) that the letter of defendants did not contain an unconditional undertaking to pay for the cotton seeds; (2) that the defendants did not admit any personal liability and in the absence of proof to the contrary they must be taken to have written the letter merely as agents of the Ludhiana firm and were not therefore personally liable. (*Smith and Broadway, JJ.*) FIRM OF KHUSHI RAM BEHARI LAL *v.* MATHRA DAS. **70 P. W. R. 1917 : 39 I. C. 793 : 143 P. L. R. 1917.**

——S. 230—*Contract in principal's name—Agent's liability.*

An agent, entering into a contract in his principal's name is not liable to the contract. 27 Mad. 315 Foll. (*Sadasiva Iyer, J.*) ARUNACHALLAM CHETTIAR *v.* KASI NAVENDA PILLAI. **24 I. C. 1007.**

——S. 230—*Rights of agent on contract made for principal.*

An agent is not entitled to personally enforce a contract entered into by him on behalf of his principal, nor is he personally bound by such contract. (*Das, J.*) MOULVI HASAN KHAN *v.* SHAHAZAD KHAN. **52 I. C. 177.**

——Ss. 230 and 231—*Agent acting for undisclosed principal—Both can be sued.*

A person contracting with an agent for an undisclosed principal can sue either the agent or the principal or both and the fact that the agent further claimed to be an agent of another undisclosed principal makes no difference. (*Heald, A. J. C.*) DULAB DAS *v.* MAWIN. **59 I. C. 965 : (1920) 3 U. B. R. 217.**

——S. 230 (1)—*Contract by agent—Personal liability.*

Where a man is by profession an agent of some particular firm and describes himself as such, he may still be contracting in his personal capacity, but the mere fact that he fails to specify his capacity as an agent in signing a contract raises no such presumption when the terms of the contract itself are clearly to the contrary. *Gadd* v. *Houghton*, (1876) 1 Ex. D. 35 Rel. (*Chevis, A. C. J. and Wilberforce, J.*) BHARGAVA & Co. *v.* KOBAYASHI. **2 L. L. J. 374 : 65 I. C. 468.**

——S. 230 (2) — *Principal undisclosed—Agent's right.*

An agent whose principal is undisclosed can sue under this section. (*Jenkins, C. J. and Woodroffe, J.*) RAMJI DAS *v.* JANKI DAS. **39 Cal. 802 : 17 I. C. 973 : 18 C. W. N. 263.**

——S. 231—*Principal and Agent—Agent's liability.*

CONTRACT ACT (IX OF 1872), S. 236.

Under S. 231 a principal can, as against the agent claim the full benefit of the contract entered by the agent in his own name and as against the party contracting with the agent, the principal is bound by the equities arising between the agent and the contracting party. 3 I. C. 801 Ref. to. An agent contracting in his own name without mentioning the agency can sue and be sued upon the contract. (*Wallis, Offg. C. J. and Seshagiri Iyer, J.*) SOUTH INDIAN INDUSTRIALS *v.* MINDI RAMAJOGI. **26 I. C. 822 : 27 M. L. J. 501.**

——S. 231—*Principal and Agent—Agent's signature to promissory note* per pro—*Presumption.*

Where an agent in whose favour the guardian of a minor has executed a power of attorney signs a promissory note *per pro* the holder is deemed to have notice of the contents of the power and extent of the agent's authority in dealing with the minor's property. (*Wallis and Munro, JJ.*) SANKA KRISHNAMURTHI *v.* THE BANK OF BURMA, LTD. **35 Mad. 692 : 21 M. L. J. 620 : 11 M. L. T. 56 : 11 I. C. 79 : (1911) 1 M. W. N. 385.**

——S. 233—*Principal and Agent—Liability.*

S. 233 of the Contract Act gives the party who is dealing with an agent who is personally liable to double form of election. He can sue both the principal and agent jointly or sue one of them. In any case, if he sues one, a suit against the other will be barred. S. 233 enacts substantive law and not adjective law defining procedure by which the liability may be enforced. (*Macleod, J.*) SHIVLAL MOTILAL *v.* BIRDICHAND JIVRAJ. **40 I. C. 194 : 19 Bom L. R. 370.**

——S. 235—*Agent untruly representing his authority—Acting beyond his scope—Liability of.*

Where a person acting as agent and entering into a contract commits a breach thereof, he is liable whether or not he is aware that he is acting beyond the scope of his authority. The section applies to cases where the agent untruly represents the extent of the authority given to him by his principal. (*Karamat Hussain and Chamier, JJ.*) GANPAT PRASAD *v.* SARJU. **9 A. L. J. 8 : 13 I. C. 94 : 34 All. 168.**

——S. 235—*Purchase by pretended agent—Liability.*

The Court below found that the purchases in question had been made by the deft. on behalf of a Rani by representing himself as her agent; but as the Rani had repudiated her liability in a letter by her to the Court of Wards, which had assumed the superintendence of her estate in 1920, the plff. (vendor) was entitled to recover the amount due from the deft. under S. 235 of the Indian Contract Act (IX of 1872). *Held*, that the decision was correct. (*Kanhaiya Lal, J. C.*) RATAN SINGH *v.* HAFIZULLAH. **9 O. & A. L. R. 820 : 1924 Oudh 184.**

——S. 236—*Wrong person as Agent.*

A person with whom a contract is made as an agent when he is not so, cannot sue under S. 236. (*Jenkins, C. J. and Woodroffe, J.*) RAMJI DAS *v.* JANKI DAS. **39 Cal. 802 : 17 I. C. 973 : 18 C. W. N. 263.**

CONTRACT ACT (IX OF 1872), S. 237.

———S. 237—*Principal and Agent—Liability of principal.*

Where the shareholders of a limited company induced the people to believe that a certain firm were their agents and allowed the manager of the firm to sign hundis on behalf of the Company, *held*, that the Company was liable, for the sum due under the hundis, though the firm was not legally authorised to execute hundis. (*Rafique and Piggolt, JJ.*) KUNJ KISHORE *v.* PORTER.
36 All. 416 : 24 I. C. 29 : 12 A. L. J. 763.

——S. 238—*Liability of principal for fraud of agent—Misappropriation of goods.*

There is nothing in S. 238 of the Contract Act to show that in order to render the principal liable, the fraud must be committed for the benefit of the principal. It is enough if the fraud is committed by the agent in the course of his business for his principal, *i. e.*, in matters falling within the scope of his authority. (*Chatterjee and Pearson, JJ.*) DINA BANDHU SAHA *v.* ABDUL LATIF MOLLA.
39 C. L. J. 290 : 50 Cal. 258 : 27 C. W. N. 18 : 1923 Cal 157.

——S. 238—*Principal and Agent—Criminal liability.*

The condition of the mind of the agent cannot be imputed to the principal who is not criminally liable therefor; but where a particular intent or state of mind is not the essence of the offence, the agent's act or omission makes the principal criminally liable though he was not aware of it or even when the act is done against his orders. (*Woodroffe, Beachcroft and Greaves, JJ.*) INDAR CHAND *v.* EMPEROR.
17 Cr. L. J. 113 : 42 Cal. 1094 : 33 I. C. 289 : 19 C. W. N. 1239.

——S. 238—*Forgery and fraud by agent—Principal not bound.*

A sharebroker on being instructed by plaintiff purchased two war bonds each payable to order and immediately pledged them with other bonds with a forged endorsement in his favour with the Bank. *Held*, that the forged endorsement was null and hence could not convey a title to the Bank who could not hold them against the plaintiffs. (*Kemp, A. J. C.*) MESSRS. KODUMAL KALUMAL *v.* THE KARACHI BANK, LTD.
15 S. L. R. 93.

——Ss. 239 and 266.

See also PARTNERSHIP.

———Ss. 239 and 253 (8)—*Divided members of Hindu family running business are partners.*

Where the divided members of a Hindu family run a business, they are partners within S. 239 of the Act and where one member puts an end to such partnership S. 253 (8) of the Act will apply. (*Tudball and Sulaiman, JJ.*) BHAGAWATI PERSHAD *v.* BABU LAL.
63 I. C. 548 : 19 A. L. J. 525.

———S. 239—*One partner having option to send another or take fresh partners—Nature of relation is that of partnership.*

A husband having made an agreement took his wife in partnership in his business, fixed her share at X but he reserved liberty to take in fresh partners as he liked and to determine her share. On his death, she was to be at liberty to admit new partners. *Held*, the agreement evidenced a partnership within the meaning of S. 239 of the Act. (*Shah, A. C. J. and Crump, J.*) AMBALAL SARABHAI, *In re.*
25 Bom. L. R. 1225 : 1924 Bom. 182.

CONTRACT ACT (IX OF 1872), S. 239.

———S. 239—*One firm cannot be partner in another.*

A firm as such cannot be a member of a partnership. A partnership under S. 239 is a relationship which subsists between persons ; but a firm is not a person ; it is not an entity ; it is merely a collective name for the individuals who are members of the partnership. It is neither a legal entity, nor is it a person. (*Page, J.*) SLODOYAL KHEMKA *v.* JOHARMULL MANMULL.
50 Cal. 549 : 1924 Cal. 74.

——S. 239—*Firm—Nature.*

Partnership is a relationship between persons recognised by law. The law does not recognise partnership as being an entity at all. It is a mere guise or cloak or name by which the individual persons, joint owners are concealed or pointed out. (*Rankin, J.*) LOUIS DREYFUS & CO. *v.* PURUSHOTHAM DAS NARAYAN DAS.
56 I. C. 325 : 47 Cal. 29.

———S. 239—*Definition—Partner purchasing property of firm.*

A partnership is established when the parties agree to carry on a business or to share the profits in the same way in common. A partner is entitled to purchase partnership property, provided he makes a fair and full disclosure of the nature of the transaction to the other partners. (*Mookerjee and Roe, JJ.*) RAMNATH GAGOI *v.* PITAMAR DEB.
43 Cal. 733 : 22 C. L. J. 339 : 31 I. C. 430 : 21 C. W. N. 632.

———Ss. 239 and 242 — *Partner — Agent sharing profits and losses.*

A *gumasta* sharing in the profits as well as in the lesses in a business is a partner. (*Chevis and Shadi Lal, JJ.*) CHALA RAM-SANT *v.* KISAN CHAND.
3 P. W. R. 1918 : 44 I. C. 283 : 155 P. L. R. 1917.

———Ss. 239, 240 and 182 — *Lender and borrower—Partnership—Suit for recovery of debt—Partner agent of firm and not of other partners—Partnership suit—Right of deft. to get what is due to him.*

By a contract between the plff. and deft. opium was to be procured from Jubal State, near Simla and was to be exported for sale to the plains. The terms were : (1) that profits and losses alike were to be shared equally, (2) that the expenses of the venture were to be borne in equal shares, and (3) that the opium become the joint property of the parties though the responsibility for it should rest with plff., so long as it was in his custody, and upon deft. when it was entrusted to his care. *Held*, (1) that the contract indicated a partnership between the parties, and the case fell under S. 239 and not under S. 182 or S. 240 of the Contract Act, (2) that if the suit for price of opium was for accounts of a dissolved partnership it was not in proper form and should be dismissed on that

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ground. (*Kensington and Johnstone, JJ.*) BERAGI RAM *v.* RAJA RAM. 163 P. L. R. 1911 : 10 I. C. 250 : 214 P. W. R. 1911.

——— S. 239—*Ship—Freight and other earnings—Relationship of partners.*

Co-owners of a ship are not, as such partners but only tenants-in-common. But if they employ their ship in earning freight or otherwise as money making machine, they become partners and their earnings are subject to the ordinary law of partnership. (*Ayling and Coutts Trotter, JJ.*) VANAMATTI SATTIRAJU *v.* BALLAPRAGADA. 41 Mad. 939 : 35 M. L. J, 87 : 47 I. C. 640 : 8 L. W. 583.

———Ss. 239, 264 and 265—*Hindu joint family—Manager— Partnership with stranger—Position of members.*

A partnership between the manager of a joint Hindu family and a stranger does not make every member of the family a partner so as to clothe him with all the rights and all obligations of a partner. The effect of a partition in the family is to confer on the co-parcener a right to call on the manager to get in the assets of the firm due to him as partner by proper proceedings against his co-parceners. 36 Mad. 185. Dist. (*Wallis, C. J. Bakewell and Kumaraswami Sastri, JJ.*) GANGAYYA *v.* VENKATARAMIAH. 6 L. W. 708 : 22 M. L. T. 527 : 34 M. L. J. 271 : 41 Mad. 454 : 43 I. C. 9 : (1917) M. W. N 805.

———S. 239— *Sub partnership — Rights of Assignee—Partnership Act, S.* 31.

Indian Contract Act does not deal with sub-partnership but the provisions of S. 31 of the English Partnership Act may be adopted in India. The assignee of a share in a partnership has no independent rights : (1) he is entitled to the share of the profits to which the assigning partner would be otherwise entitled ; (2) the assignee must accept the account of profits agreed to by the partners ; and (3) in case of a dissolution, he is entitled to receive the share of the partnership assets to which his assignor would have been otherwise entitled, and for the purpose of ascertaining that share to an account as from the date of the dissolution. 28 L. T. 292 foll ; 4 All. 437, Dist. (*Oldfield and Srinivasa Iyengar, JJ.*) CHIDAMBARAM CHETTY *v.* KARUTHAN CHETTY. 4 L. W. 10 : 20 M. L T. 134 : 34 I. C. 543 : (1916) 2 M. W. N. 18.

———S. 239 — *Remuneration varying with profits—Relationship.*

A servant whose remuneration varies with the profits may be partner in popular sense, but is not legally so. (*Hallifax, A. J. C.*) MOULA BUX *v.* MUHAMMAD AFZAL. 69 I. C. 781 : 1922 Nag. 96.

——— S. 239—*Partnership—Joint advance of loan does not constitute.*

Creditors jointly advancing money to another do not necessarily become partners in a firm even though they possess a right to a share of the profits. There is no relation of partnership *inter se* between such creditors and as such there is no partnership. (*Dhoble, A. J. C.*) MOHAMAD JUSUF *v.* PIRMOHAMAD. 65 I. C. 368 : 1922 Nag. 67.

CONTRACT ACT (IX OF 1872), S. 241.

———Ss. 239 and 240 —*Partnership—Agreement to share profits and losses.*

An agreement to contribute money towards an undertaking and to share the profits and losses therefrom, is a partnership. 4 All. 74; Not foll. (*Saunders, J. C.*) MANIK CHAND *v.* GIRIDHARI LAL. 46 I. C. 342 : 3 U. B. R. (1918) 69.

———Ss. 239, 240 and 254—*Partnership—Agreement defining rights of parties—Dissolution.*

Held, that no absolute transfer of one-third share in the lands was created by the deeds in question but there was created a partnership whereby the lands and the *karia* became partnership properties ; consequently the suit as framed could not stand. The suit should have been one for dissolution of partnership and for accounts of a dissolved partnership as the partnership not being for any definite term, either party could put an end to it. (*Pratt, J. C. and Crouch, A. J. C.*) BILAWAL *v.* GIAN MAL. 35 I. C. 652 : 10 S. L. R. 58.

———S. 240—*Partnership—Evidence of debtor and creditor.*

In determining whether a person is a creditor or a partner of a firm, the absence of ledger page and payment of interest, non-inclusion in the schedule of unsecured creditors and his description as *ejaman* are all evidence of partnership. (*White, C. J. and Oldfield, J.*) ABDUL RAHIMAN SAHIB *v.* THE OFFICIAL ASSIGNEE OF MADRAS. 22 I. C. 14.

———S. 241—*Assets of deceased partner.*

The assets of the deceased partner are a loan to the firm if they are retained in the business after his death, and the arrangement he makes at the time of death binds his estate. (*Scott, C. J. and Chandavarkar, J.*) JAMESETJI NASSARWANJI *v.* HIRJI BHAI NAOROJI. 37 Bom. 158 : 19 I. C. 406 : 15 Bom. L. R. 192.

———Ss. 241 and 263—*Release of debts by partner—Right of other partners to question.*

The right of some of the partners of firm to avoid a fraudulent release of a debt by the other partner or partners and to recover their share of the released debt is personal to them and their legal representatives are not entitled to it. (*Ayling and Seshagiri Aiyar, JJ.*) PALANIAPPA CHETTIAR *v.* VEERAPPA CHETTIAR. 41 Mad. 446 : 44 I. C. 466 : 34 M. L. J. 41.

———S. 241—*Minor son, whether entitled to claim profits after father's death.*

Seshagiri Iyer, J.—A minor who is entitled to claim the assets of his deceased father in a partnership cannot claim as of right a share in the profits of the concern. There is no fiduciary relation between the surviving partners and the legal representatives of the deceased partner. The amount due to the deceased is a loan and nothing more. It is very difficult to find out, to what exactly the profits earned in the trade are due, whether to the capital left by the deceased, or to the capital brought in by the other partners or to other things. Therefore there are innumerable difficulties in the way of an account being taken. Discretion must be left in the Court in

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such matters to act on behalf of the minor. (*Abdur Rahim, Offg. C J. and Seshagiri Iyer, J.*) HAJEE SIDDICK HAJEE *v.* MAHOMED HUSHUM SAIT.
4 L. W. 521 : 37 I. C. 728 : (1916) 2 M. W. N. 341.

——Ss. 247 and 239—*Minor — Partner—Rights and liabilities of.*

A person under the age of majority cannot become a partner by contract. 30 C. 539. If he is admitted to the benefits of the partnership under S. 247 of the Contract Act his right is no more than a right to participate in the property of the firm after its obligations have been satisfied. The question whether a minor has been admitted to the benefit of a partnership is one of fact to be pleaded and proved at the trial and cannot be allowed to be raised for the first time on appeal. (*Sir Lawrence Jenkins.*) SANYASI CHARAN MANDAL *v.* KRISHNADHAN BANERJEE.
49 Cal. 560 : 43 M. L. J. 41 : 16 L. W. 536 : 26 C. W. N. 954 : 35 C L. J. 498 : L. R. 3 P. C. 133 : 20 A L. J. 409 : 24 Bom. L. R. 700 : 49 I. A. 108 : 30 M. L. T. 228 : 67 I. C. 124 : (1922) M. W. N. 364 : 1922 P. C. 237 (P. C.).

——S. 247—*Minor partner—Adjudication as insolvent.*

A minor partner of a firm cannot individually be adjudged an insolvent. But an application for an adjudication may be directed against the firm and the minor's interest therein. 42 Cal. 225, Appr. (*Tudball and Sulaiman, JJ.*) JAGMOHAN *v.* GRISH BABU.
42 All. 515 : 18 A. L. J. 611 : 58 I. C. 557 : 2 U P. L. R. (A.) 144.

——Ss. 247, 248 and 251—*Debts contracted by partner for the firm—Liability of the firm—Hindu Law—Minor member.*

Each partner is an agent for the others, and it is not necessary that the name of the firm should be so used in order to make it a partnership debt, provided it shows that the debt, was taken for and appropriated to the firm. A Hindu minor is liable to the extent of his share of the assets for debts due from the joint family firm. He is not, however, personally liable. The mere fact that there was a partition of the partnership properties does not absolve the properties received by the partners from liability of the debts of the firm. (*N. R. Chatterjee and Newbould, JJ.*) KRISHNADHAN BANNERJI *v.* SANYASI CHARAN MANDAL.
23 C. W. N. 500 : 51 I. C. 597 : 29 C. L. J. 280.

——S. 247—*Infant partner—Liability of to be adjudged insolvent.*

An infant partner though he may be admitted to the benefits of the partnership cannot as such be adjudged an insolvent and there is practically no difference in principle between the nature of the liability of an infant admitted into partnership and that of another on whose behalf an ancestral business is carried on by his guardian. A Hindu minor is not personally liable for debts incurred in family trade but his share therein is alone liable. (*Mookerjee and Beachcroft, JJ.*) SANYASI CHARAN MANDAL *v.* ASUTOSH GHOSH.
26 I. C. 836 : 42 Cal. 225.

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——Ss. 247 and 11—*Partnership—Minor—Admission to the benefits of partnership.*

Though S. 247 of the Contract Act provides that a minor may be admitted to the benefits of a partnership, it does not cancel or revoke S. 11 of the Contract Act and make it possible for a minor simultaneously to create a partnership and to admit himself to the benefits of the same. 3 C. W. N. 134 ; 10 B. L. R. 312 ; 20 M. L. T. 565 Ref. (*Abdul Raoof and Harrison, JJ.*) MAHOMED RAFIQ *v.* KHAWAJA QAMAR DIN.
4 U. P. L. R. (L.) 63 : 67 I. C. 95 : 1922 Lah. 441.

——S. 247—*Partnership—Manager of Hindu family partner—Death of manager—Effect—Liability of minor sons for debts of firm.*

Where a father as manager of a joint Hindu family is partner in a firm, his death will not dissolve the partnership as the family, as a *personae* continues to be a partner. The minor members are liable only to the extent of their share in the firm, for its debts. 3 Cal. 738, Foll. (*Shadi Lal and Le Rossignol, JJ.*) NARAIN DAS *v.* RALLI BROS.
61 P. R. 1915 : 31 I. C. 45 : 136 P. W. R. 1915.

——S. 247—*Infant as partner—No personal liability.*

Where a business is carried on by guardians, the infants do not become partners therein and therefore are not subject to the rights and liabilities of the partnership. Though a minor is admitted to the benefits of a partnership, he never becomes personally liable for the partnership debts. (*Abdur Rahim and Sadasiva Iyer, JJ.*) KAKUMANU VENKATA SURYANARAYANA *v.* AKUTHOTA RAMAYYA.
29 M. L.T. 114 : 13 L. W. 551 : 40 M. L. J. 153 : 62 I. C. 802 : (1921) M. W. N. 100.

——Ss. 247 and 248—*Hindu joint family—Trade—Minor members—Extent of liability.*

Ss. 247 and 248 do not apply to the case of minor members of a joint family trade started by the manager of the family or descending ancestrally in the family. The interest of the minor depends on his belonging to the family and is not acquired by agreement or admission to the partnership. The minor is not personally liable for debts contracted for the purposes of the trade during his minority. Per *Sadasiva Aiyar, J* :—Both under the Hindu Law and S. 248 of the Contract Act the minor member becomes liable equally with adults for trade debts incurred during his minority. Cases discussed. (*Wallis, C. J., Sadasiva Aiyar and Spencer, JJ.*) OFFICIAL ASSIGNEE OF MADRAS *v.* PALANIAPPA CHETTY.
41 Mad. 824 : 35 M. L. J. 473 : 24 M. L. T. 216 : 8 L. W. 530 : 49 I. C. 220 : (1918) M. W. N. 721.

——S. 247—*Joint Hindu family—Minor co-parcener—Liability for debts.*

Where the manager of a joint Hindu family carries on a trade in partnership with a stranger, the minor co-parceners are liable for his debts not merely to the extent of the partnership assets but to the extent of their share in the entire joint

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family property 6 L. W. 708 ; 35 Mad. 692 Dist. (*Seshagiri Aiyar and Napier, JJ.*) DHULIPALLA KAVAKAM *v.* NADIPALLI VENKATARAJU.
7 L. W. 218 : 43 I. C. 76 : (1918) M. W. N. 44.

———**Ss. 247 and 248**—*Scope of—Minor partner—Insolvency.*

The sections are quite independent of the principles of Hindu Law and are applicable to all members whether Hindu or not. What amounts to an admission of a minor to the partnership and his liabilities discussed. A minor on attaining majority cannot be adjudicated insolvent for the debts of the firm. (*Abdul Rahim, O. C. J. and Phillips, J.*) PALANIAPPA CHETTY *v.* OFFICIAL ASSIGNEE OF MADRAS. **20 M. L. T. 565 : 36 I. C. 787 : (1917) M. W. N. 150.**

———**S. 247**—*Provincial Insolvency Act (III of 1907), S. 42.*

Under S. 247 of the Contract Act a minor cannot be declared an insolvent. If a person is wrongly adjudged an insolvent, the adjudication may be annulled under S. 42 of the Porvincial Insolvency Act. (*Lindsay, J. C.*) MUHAMMAD MUMTAZ ALI KHAN *v.* UGRAJ SINGH.
58 I. C. 558 : 1 U. P. L. R. (J. C.) 5.

———**Ss. 247, 251 and 184**—*Minor partner—Power to bind others.*

A minor may become a member of a partnership and can bind his co-partners under Ss. 184, 247 and 251 as if he were their agent by making a pronote. (*Parlett, J.*) MAUNG AUNG GYAW *v.* HAJI DADA SHARIFF & CO. **42 I. C. 98.**

———**S. 248**—*Partnership—Minor member—Repudiation of liability.*

S. 248 undoubtedly is directed primarily to the protection of creditors of the firm. Where, however, one set of partners is indebted to another for the provision of capital, it must be clearly open for a minor liable under the deed of partnership, to repudiate his membership if he is to escape liability to the other partners. (*Pipon, J.C.*) MIR AHMAD SHAH *v.* MUSHARRIF SHAH.
72 I. C 996.

———**Ss. 249 and 252**—*Joint adventure—Dealings of one adventurer—Bills of exchange—Liability of partners.*

Where two persons from a partnership for the purpose of a trading adventure, and goods are purchased or moneys raised, ostensibly by an individual adventurer but truly and substantially, for the purpose of the joint adventure the adventurers are liable as partners. But there is no such responsibility for goods purchased upon the credit of an individual adventurer though they are afterwards brought into stock as his contribution to the joint adventure. The test to be applied to each case, to find out whether the transaction is or is not a partnership transaction, is laid down in *Gouthwait* v. *Duckworth*, (1810) 12 East 421, Ref. (*Lord Dunedin.*) KARMALI ABDULLA ALLARKHIA *v.* BORA KARIMJI. **39 Bom. 261 : 42 I. A. 48 : 17 M. L. T. 35 : 2 L. W. 133 : 17 Bom. L. R. 108 : 19 C. W. N. 337 : 13 A. L. J. 121 : 21 C. L. J. 122 : 28 M. L. J. 515 : 26 I. C. 915 : (1915) M. W. N. 606 (P. C.)**

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———**S. 249**—*Retirement—No liability for subsequent transactions*

When a firm ceases to exist, but some of the partners carry on the business under the same name, the retiring partners cannot be made liable for any transaction entered into after the dissolution. (*Scott-Smith and Abdul Raoof, JJ.*) BICHHIA LAL *v.* MUNSHI RAM. **68 I. C. 932: 1922 Lah. 466.**

———**Ss. 249, 251, 261 and 265**—*Death of partner—Surviving partner—Borrowing—Suit by creditor against surviving partner—Partnership assets—Liability.*

The estate of the deceased partner is not liable for the debt contracted by the surviving partner to enable him to perform a contract entered into during the life-time of the former. The suit debt being binding on the partnership assets, the surviving partner has power to pledge the partnership assets in discharge of it. As regards that amount a personal decree against the surviving partner and a decree against the partnership assets in his hands can be passed. (*Wallis, C. J. and Seshagiri Aiyar, J.*) SESHI AMMAL *v* VAIRAVAN CHETTIAR. **42 Mad. 15 : 35 M. L. J. 669 : 24 M. L. T. 392 : 8 L. W. 503 : 47 I. C. 958 : (1918) M W. N. 806.**

———**Ss. 249 and 262**—*Partnership—Contribution—Suit for, when maintainable.*

Except on dissolution of the partnership, no suit could be maintained by a partner or his assignee for contribution against the other partner in respect of a partnership debt. 18 Mad. 134; 28 Mad. 344, Dist. (*Sadasiva Aiyar, J.*) DAMODARA SHAVABHAGA RAO *v.* SUBRAYA SAI
33 M. L. J. 509 : 43 I. C. 217 : 6 L. W. 742.

———**S. 249**—*Promissory note for a partnership debt by one partner.*

A partner is always liable for the partnership debt unless there is a restriction expressed or implied on the liability to be incurred by one partner on a bill or promissory note which may be executed by another partner for partnership purposes. 17 M. L. J. 126 ; 21 I. C. 864 Dist. 26 I.C. 915 Foll. (*Abdur Rahim and Srinivasa Iyengar, JJ.*) SHANMUGANATHA CHETTIAR *v.* SRINIVASA IYER. **40 Mad. 727 : 31 M.L. J. 138 : 4 L. W. 27 : 20 M. L. T. 172 : 35 I. C. 219 : (1916) 2 M. W. N. 14.**

———**S. 250**—*Partnership rescinded on the ground of fraud—Liability for loss.*

Where a partnership is rescinded on the ground of fraud, the partners at fault, cannot ask the other partners to contribute to the loss which may have resulted in the partnership. (*Scott-Smith and Leslie Jones, JJ.*) GOLA SINGH *v.* HAKAN RAI. **3 Lah. L. J. 106 : 3 U. P. L. R (Lah.) 26 : 60 I. C. 709 : 23 P. W. R. 1921.**

———**S. 251**—*Trading firm—What is—Liability of partners for money borrowed by another partner.*

Any partner in a trading firm has an implied authority to borrow money for the purposes of the business on the credit of the firm. A firm would be a trading firm if its business consists in

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buying and selling. In such a case there is no duty cast on the person who advances the money to make any further inquiries and the other partners are responsible though the borrowing partner may misappropriate the money. (*Mulla, J.*) SAREMAL PUNAMCHAND *v.* KAPURCHAND PUNAMCHAND. **25 Bom. L. R. 1093 : 48 Bom. 176 : 77 I. C. 548 : 1924 Bom. 260.**

——— S. 251—*Partner—Powers—Acknowledgment of debt—Vahivatdar appointed by Court.*

A partner can on behalf of himself and other partners apply the assets in paying outstanding debts which would prevent them from being barred by limitation and upon the same principle he can pass acknowledgments to stave off the claims of creditors and to save the claims from being barred by limitation. A *vahivatdar* appointed by Court to do *vahivat* on behalf of all parties has the same powers as an ordinary partner. (*Scott, C. J. and Heaton, J.*) ABDULALLI BADRUDDIN *v.* RANCHODLAL TRIKAMLAL. **38 I. C. 873: 19 Bom. L. R. 86.**

——— S. 251—*Right of a partner to set off private debt against firm debt.*

Though payment to a partner of a firm debt, is a valid discharge of the debt, an agreement to set off a debt due to the firm against a private debt due from one partner must be presumed to be in fraud of the partnership and does not amount to a valid discharge of the debt due to the firm (19 M. L. J. 221, F.) if, however, the partner has been made liable by the other partners for the sum so set off, the original debtor must be given credit to that extent. (*Mookerjee and Coxe, JJ.*) BAIKUNTA NATH *v.* HARA LAL. **9 I. C. 116 : 13 C. L. J. 234.**

——— S. 251—*Partnership—Terms unascertained—No relation of principal and agent.*

A partnership when apparently contemplated does not constitute the relationship of principal and agent between the parties if the terms of the partnership cannot be unascertained. (*Shadi Lal and Jones, JJ.*) BARCAT RAM *v.* ANANT RAM. **31 I. C. 632: 185 P. W. R. 1915.**

——— S. 251—*Partnership—Money deposited—Receipt signed by Manager—Proprietor, liability of.*

A receipt signed by the then manager of a partnership firm for a deposit made in the firm by the plaintiffs and not shown to have been received by the manager in the course of business is not enforceable against the proprietor and that the proprietor was in no way estopped by merely describing himself as a part-proprietor from showing the true nature of the transaction. (*Kensington, C. J. and Shah Din, J.*) DAYA KISHEN KAUL *v.* FRANK BE POOL. **247 P. L R. 1914 : 27 I. C. 252 : 159 P. W. R. 1914.**

——— S. 251—*Partner—Power to acknowledge debts so as to bind the firm.*

In the absence of direct evidence that one partner has authorised another to make acknowledgments or payment saving limitation on his behalf, such authority can be inferred from other circumstances, such as the position of the other co-contractors or partners in the business. 37 Mad. 146

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Foll. 32 Mad. 421 ; 35 Mad, 142, Overruled. (*Ayling, Coutts Trotter and Seshagiri Aiyar, JJ.*) PANDIRI VEERANNA *v.* GRANDHI VEERABHADRASWAMI. **34 M. L. J. 373 : 23 M L. T. 261: 7 L. W. 552: 41 Mad. 427: 45 I C. 18: (1918) M. W. N. 285 (F. B.).**

——— S. 251—*Co-partners— Authority of — Partner, if can bind firm, by submission to arbitration.*

The general authority of a partner to represent his co-partners in the business of the firm is not sufficient to bind them by submission to arbitration by him. Special authority is needed for this ; the special authority need not be express but may be implied from conduct, It is also competent for one partner to ratify a submission by another and be will then become bound by it. (*Spencer and Krishnan, JJ.*) PUNNAYYA *v.* SREE VENUGOPALA RICE FACTORY CO., LTD. **22 M. L. T. 520: 7 L. W. 114: 43 I. C. 508: (1918) M. W. N. 51.**

——— S. 251— *Partner — Acknowledgment—Part-payment.*

Authority to act on behalf of the other partners so as to bind them by an acknowledgment or part payment under Ss. 19 and 20 of the Lim. Act. cannot be presumed but must be proved. (*Wallis, J.*) K. R. V. FIRM *v.* SATHIYAWADA SITHARAMASWAMY. **37 Mad. 146: 21 I. C. 634: 25 M. L. J. 501.**

——— S. 251—*Partner, power to borrow money or mortgage firm's assets or to acknowledge debt --Lim. Act, S. 19—Acknowledment by partner after winding up.*

If a money lending business is a going concern every partner can borrow money on behalf of the firm for business and mortgage the firm's assets for that purpose. When, however, such firm has decayed and is being wound up, one partner cannot borrow money and mortgage the firm's assets except perhaps in the case of necessity, and cannot give an acknowledgment of a subsisting debt which would bind the firm. *Butchart v. Dresar*, 4 De. G. M. and G. 542; 43 E. R. 619 ; 10 Hare 453 ; 1 W. R. 178 ; (1885) 31 Ch. D. 324 ; (1906) 2 Ch D. 427 ; 75 L. J. Ch. 779 ; 95 L. T. 131 ; 54 W. R. 559. Dist. (*Ormond and Twomey, JJ.*) MALAYANDI CHETTY *v.* NARAIN CHETTY. **8 L. B. R. 363 : 36 I. C. 225 : 9 Bur. L. T. 239.**

——— S. 251—*Lease—Partner.*

A lease taken by two partners without the concurrence of third, cannot bind the latter when such concurrence is a necessary condition of the partnership. (*Parlett, J.*) J. D. PAPPADEMSTRION *v.* ROSE HALLIDAY. **6 Bur. L. T. 164 : 21 I. C. 3 : 7 L. B. R. 42.**

——— S. 251—*Partnership— Business — Authority to mortgage.*

In a partnership whose business it is to buy and deal in land, a partner can mortgage the partnership land. (*Fox, J. C. and Twomey, J.*) ANA PENA NATHER SHA *v.* ANNAMALAI CHETTY. **10 I. C. 776 : 4 Bur. L. T. 71.**

——— S. 251—*When act of partner binds the firm.*

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The act of a partner binds the firm if it is authorised by the firm or ratified subsequently or done in the course of partnership business. Where the business of the partnership is buying grain from Zemindars for resale through commission, the acceptance of a hundi for guaranteeing a loan to the Zemindar, by a partner is an act not incidental to the partnership business and such an act would not bind the firm. 13 W R. (P. C.) 29, Rel. on. (*Pratt, J.C. and Fawcett, A.J C.*) SOBHOMAL v POHUMAL. **13 I. C. 255 : 5 S. L. R. 168.**

——Ss. 253 and 257—*Partnership—Duration—Dissolution—What constitutes—Business carried on after dissolution—Liability to account.*

In the absence of any term agreed upon by the parties any partner may determine the partnership at any time on giving notice of intention to do so. The dissolution takes place as from the date of the communication of the notice. If persons intending to retire from the partnership business continue to take things from the business and to associate otherwise with its work a presumption may be drawn in favour of the continuance of the partnership. The accounts on a dissolution of partnership have to be taken for the benefit of all the partners concerned and there must be a full enquiry into them irrespective of the relief sought for in the plaint. If a partner without the permission of the other partner carries on a competing business with the firm, he must account for and pay over to the firm all profits made by him in such business and also make compensation to the firm for any loss occasioned thereby. The rule is not however applicable to a different business though the same knowledge and information may be useful in both. (*Mookerjee and Panton, JJ.*) PULIN BEHARI ROY *v.* MAHENDRA CHANDRA GHOSAL. **67 I. C. 10 : 34 C. L. J. 405.**

——S. 253—*Partnership—Whether one partner can charge his co-partner with any sums.*

Generally one partner cannot charge his co-partners with any sums in the shape of salary or commission but where a *pardanashin* lady is a partner and the responsibility is thrown upon other partners, allowance should be made in favour of other partners. (*Mookerjee and Teunon, JJ.*) GOKUL KRISHNA DAS *v.* SHASHI MUKHI DASI. **16 C. W. N. 299 : 13 I. C. 23 : 15 C. L. J. 204.**

——S. 253—*Death of one partner—Dissolution.*

A partnership is dissolved by operation of law by the death of one of the partners. (*Shadi Lal and Wilberforce, JJ.*) SUNDAR SINGH *v.* DALIP SINGH. **46 I. C. 467 : 118 P. W. R. 1918.**

——S. 253 — *Property bought with firm money.*

If lands or houses are bought in the name of one partner and paid for by the firm, the profits of the partnership business are *prima facie* partnership property, unless it be proved that from time to time portions of the partnership assets were by mutual agreement, withdrawn from the partnership and converted into land or house to be owned by the partners as co-owners (*Shadi Lal, J.*) AMIR CHAND *v.* JAWAHIR MAL. **32 I. C. 853 : 49 P. W. R. 1916.**

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——S. 253—*Parties—Liability of — Illegal contract.*

The illegality of the partnership is no answer to a demand against it arising out of a transaction to which it is a party if the other person was not aware of it. If a business is carried on by two partners and is legal only so far as one is concerned, the presumption is that he has benefited by one half of the loan and a decree should be given against that partner only for half the amount, borrowed by the partnership. (*Seshagiri Aiyar and Moore, JJ.*) GANPATI BRAHMAYYA *v.* KURALLA RAMIAH. **43 Mad. 141 : 38 M. L. J. 123 : 54 I. C. 45 : 10 L. W. 476.**

——S. 253—*Good-will—Right of every partner*—Ejman—*Working partner—Rights of.*

In case of ordinary partnerships, where the terms are embodied in documents which purport to follow the ordinary laws governing the relation between the partners every partner is *prima facie* entitled to an interest in the goodwill. But in the peculiar kind of partnership, well known in this presidency where the *Ejman* or proprietor of the firm takes in what are called working partners, who ordinarily begin by putting in no capital but who as the business goes on, put in the profits earned in the business itself, as part of the capital, the presumption to be made is that the working partner has no interest in the good-will until the contrary is shown. (*Kumaraswami Sastri, J.*) RAMACHANDRA NAIDU *v.* BATCHA SAHIB. **43 I. C. 661 : 22 M. L. T. 225.**

——S. 253—*Partnership—Retirement of one partner—Dissolution—Date—Statement in pleadings—Effect.*

A partnership-at-will is dissolved from the date on which one partner retires, and no notice of the retirement is necessary. (*White, C. J. and Oldfield, J.*) KULLAPPA CHETTY *v.* SUBBARAYA CHETTY. **25 I. C. 22.**

——S. 253—*Loan by partner to the firm.*

Where a partner advances a loan he has a right to interest on the loan. Suit by the partner for recovery of the amount, can be maintained. (*Halifax, A. J. C.*) GOVIND *v.* GAJRAJ SINGH. **64 I. C. 183.**

——S. 253—*Acquisitions—Land purchased with partnership funds—Ownership.*

Land purchased by partners in a trading concern out of partnership fund does not of necessity become partnership property. Whether they hold such land as co-owners or as partners depends upon the purpose for which it is purchased. Therefore when land is purchased out of partnership funds and not used for its business the question is an open one to be determined on general evidence. (*Pratt, J.C. and Crouch, A.J. C.*) GHUMANNAL *v.* PAPURBAI. **30 I. C. 24 : 9 S. L. R. 11.**

——S. 253—*Partnership—Death of a partner—Dissolution — Whether legal representatives obliged to continue.*

On the death of a partner, the partnership is at an end and there is no obligation on his legal representatives to continue the partnership : if

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however, it is continued it is a new partnership. (*Pratt, J C. and Kemp, A J.C.*) RAMDAS *v.* PARTAB RAI. 23 I. C. 771 : 7 S. L. R. 85.

——S. 253 (4)— *Liability of partners for negligence.*

If a partner fall into an error in the management from want of a larger measure of prudence and skill than he is master of, he is not liable for the consequences. In the absence of any specific agreement to the contrary, the rule of diligence among partners is not that they should employ the middle kind of diligence which prudent men employ in their affairs, but that they are safe if they show they acted in the partnership affairs as they would have acted in their own. Good faith is required in a partner as well as diligence and if a partner is guilty of gross negligence, unskillfulness, fraud, or wanton misconduct in the course of the partnership business, he is ordinarily responsible to the other partners for the losses and damages sustained hereby. *Law v. Law.* (1905) 1 Ch. 140 Foll. (*Mullick and Jwala Prasad, JJ.*) SASTHI KENKAR BANDOPADHYA *v.* MAN GOVINDA CHANDRA. 53 I.C. 2: 1919 Pat. 419.

——S. 253 (7) and (10)—*Construction—Dissolution—Infant—Liability.*

S. 253 (7) and (10) are subject to the qualification, *viz*; "in the absence of a contract to the contrary" which may be made expressly or by conduct. The stoppage of business or refusal to supply capital by a partner cannot be treated as a dissolution of the firm. The question whether there has been an abandonment depends upon the facts of each case. An infant inheriting his father's share in the partnership is liable for his father's personal liabilities only to the extent of the assets inherited by him and as regards the liabilities of the firm since the death of the father the minor is not personally liable but his share only is liable (*Mookerjee and Walmsley, JJ.*) HARAMOHAN PODDAR *v.* SUDARSON. 66 I. C. 811 : 25 C. W. N. 847.

——S. 253 (7)—*Sale of business by some of the partners without knowledge of others—Dissolution.*

When some of the partners sell the partnership business without the knowledge or consent of the other partners, the partnership is thereby dissolved. (*Hayward, J. C. and Crouch, A. J. C.*) GULRAJMAL *v.* PAMANMAL. 27 I. C. 344 : 8 S L. R. 69.

——S 253 (9)—*Partnership—Fixed term—Dissolution before expiry of term—Rights and liabilities of partners* inter se.

Where plff. and defendant entered into partnership for a fixed term but plff. failed to carry out his part of the partnership work, it was held that the plaintiff was not entitled to compensation for certain work done by him (not according to terms of partnership) since he had not carried out his part of the contract, that the defendants could not be expected to wait indefinitely for plff. to do his share of work but that he was entitled to the nett share of the profits as the partnership could not legally be put an end to, by the defendants. (*Shah Din and Scott Smith, JJ.*) MUHAMMAD ALI *v.* SHAM LAL. 6 P. L. R. 1915 : 27 I. C 650 : 44 P. W. R. 1915.

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——S. 253 (10)—*Family partnership—Death does not dissolve.*

Where a partnership consists of members of a joint Hindu family, it is not dissolved by the death of any of the partners, as a stipulation to that effect is ordinarily to be inferred. (*Piggott and Walsh, JJ.*) FAKIR CHAND *v.* NANUG RAM. 74 I. C. 721 : 1924 All. 277.

——S. 253 (10)—*Joint Hindu family.*

The section does not apply to partnership business of a joint Hindu family and the death of one co-parcener does not dissolve the family partnership. The section does not apply where the partners have by their conduct continued the partnership notwithstanding the death of a partner in which case a contract to the contrary may be inferred. (*Sanderson, C. J. Woodroffe and Mookerjee, JJ.*) RAGHUMAL *v.* LUCHMANDAS. 38 I.C. 278 : 20 C. W. N. 708.

——S. 253 (10)—*Death of one partner—Continuation of partnership.*

A partnership must be deemed to continue even after the death of one partner who is re-placed by his wife, if it can be presumed that the contract between the parties was that the partnership should continue even after the death of one of them. (*Mookerjee and Teunon, JJ.*) GOKUL KRISHNA DAS *v.* SHASHI MUKHI DASI. 16 C. W. N. 299 : 13 I. C. 23 : 15 C. L. J. 204.

——S. 253 (10)—*Scope of.*

The principle underlying the section is that where the partners agree to continue the partnership even after the death of the original partner, the suit for accounts with the widow is not barred under Limitation Act, Art. 106. (*Abdul Raoof and Abdul Qadir, JJ.*) HARI CHAND *v.* JUGAL KISHORE 68 I. C. 722 : 1922 Lah. 349.

——S. 253 (10)—*Interpretation of.*

S. 253 clause (10) of the Contract Act which provides for the dissolution of a partnership on the death of a partner must be read as qualified by the interlocutory words "in the absence of any contract to the contrary." (*Abdul Raoof and Abdul Qadir, JJ.*) HARICHAND *v.* JUGAL KISHORE. 68 I. C. 722 : 1922 Lah. 349.

——S. 253 (10)—*Scope of—Joint Hindu family—Partnership with stranger.*

A partnership between certain persons and a joint Hindu family is not dissolved by the death of a member of that family. The principle of law embodied in S. 253 (10) of the Contract Act (*i. e.*) that partners cannot be expected to acquiesce in new partners being forced upon them but one of the existing partners becomes by operation of law entitled on the death of his co-parcener to a larger share in the partnership than he previously possessed, in his individual capacity. (*Johnstone and Ratligan, JJ.*) MAHARAJ KISHEN *v.* HAR GOBIND. 101 P. R. 1914 : 27 I. C. 69 : 218 P L. R. 1915.

——S. 253 (10)—*Partnership—Dissolution on death of partner—Liability of legal representative when arises.*

A partnership is necessarily dissolved *ipso facto* on the death of one pratner and until a

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new partnership is formed, the legal representative of the deceased partner cannot be made jointly liable with the surviving partners. (*Shah Din, J.*) NATHU *v.* SHEO NARAIN. 11 I. C. 403 : 60 P W. R. 1911.

——S. 253 (10)—*Joint family—Power of Attorney—Death of one.*

A Power of Attorney executed by two members of a Hindu joint family is not terminated by the death of one of them when the interest of the deceased member passes to the surviving member. 21 C. W. N. 620, Foll. (*Spencer and Kumaraswamy Sastri, JJ.*) PONNUSAMI PILLAI *v.* CHIDAMBRAM CHETTIAR. 35 M. L. J. 294 : 23 M. L. T. 213 : (1918) M. W. N. 194 : 44 I. C. 849 : 7 L. W. 563.

——S. 253 (10)—*Limitation Act, S. 7—Suit for accounts.*

In a suit for accounts of the partnership on the death of a partner, all the representatives of the deceased partner should join. S. 7 of the Limitation Act applies to the case. (*Bakewell and Phillips, JJ.*) PUTHENPURAYIL BAVACHETTY *v.* PUTHENPURAYIL KUNHI. 33 I. C. 564.

——S. 254—*Partnership, suit for—Dissolution—Date of dissolution.*

If in a suit for dissolution of partnereship at will, the Court fixes a date from which the partnership is to be dissolved, the dissolution commences from that date and not from the date of institution of the suit. (*Scott, C. J. and Heaton, J.*) ABDULALLI BADRUDDIN *v.* RANCHODLAL TRIKAMLAL. 38 I. C. 873 : 19 Bom. L. R. 86.

——S. 254 (5)—*Partnership—Misconduct of partner—Remedy of aggrieved partner—Dissolution—Damages.*

If a partner is treated in such a way by other partners as to make it impossible for the former to continue to be a member of the partnership, his remedy is under sub-S. (5) of S. 254. He cannot leave the partnership if its term has been fixed by agreement under the Contract Act. (*Mookerjee, A. C. J. and Fletcher, J.*) ABDULLAH *v.* SAFIULLAH. 64 I.C. 204.

——S. 254 (5)—*Partnership— Dissolution—Misconduct.*

A partner guilty of misconduct cannot sue for dissolution of the partnership or for any other relief. The law is the same on this point as in England. Partner who either destroys the old account books of the firm, makes such interpolations in the account books which make them worthless and unreliable, falsely prepares the balance sheet or tries to deprive his firm of a valuable asset is guilty of misconduct. (*Kattigan, C J. and Abdul Raoof, J.*) RAM SINGH *v.* RAM CHAND. 1 Lah 6 : 19 P. L. R. 1920 : 57 I. C. 185 : 6 P. W. R. 1920.

——S. 254 (5) and (6)—*Suit for dissolution of partnership—Place of suit.*

The *forum* for a suit for dissolution of partnership and rendition of accounts cannot be determined by the place in which capital for the partnership is subscribed. (*Shadi Lal and Jones, JJ.*) ALLAH DITTA *v.* SHANKAR DAS. 42 P. R. 1916 : 33 I. C. 983 : 98 P. W. R. 1916.

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——Ss. 254 (6) and 252—*Partnership for a fixed term—Suit for dissolution—Discretion of Court to grant decree—Appellate Court if can interfere.*

A partner's claim to a decree for dissolution rests in its origin, not on contract, but on his inherent right to invoke the Court's protection on equitable grounds, in spite of the terms in which the rights and obligations of the partners may have been regulated and defined by the partnership contract. When it is established that the partnership business cannot be continued without a loss the Court has jurisdiction to order its dissolution though under the contract between the parties the partnership is not terminable at the date of suit. It is opposed to sound practice for an Appellate Court to substitute its discretion for that of the Court, from which an appeal has been preferred. (*Sir Lawrence Jenkins.*) REHMATUN NISSA BEGUM *v.* PRICE. 42 Bom. 380 : 20 Bom. L. R. 714 : 22 C. W. N. 601 : 16 A. L. J 513 : 27 C. L. J. 623 : 35 M. L. J. 262 : 23 M. L. T. 400 : 8 L. W. 53 : 5 Pat. L. W 25 : 45 I. A 61 : 45 I. C. 568 : 12 Bur. L. T. 91 (P. C.).

——S. 256—*Partnership—Death of a partner—Representatives, Rights of.*

In the absence of special circumstances to the contrary, the representatives of a deceased partner are entitled to a share in the profits made out of the business since the death of the partner and continued by the surviving partner (*Mookerjee and Buckland, JJ.*) MAHAMMAD KAMIL *v.* HAJI HEDAYATULLA. 33 C. L. J. 411 : 64 I. C. 861 : 48 Cal. 906 : 26 C W. N. 463 : 1922 Cal. 122.

——S. 258—*Firm and partner--Account—Commission on goods purchased for firm.*

A firm cannot claim commission on goods purchased on its own behalf. (*Richards, C J. and Rafiq, J.*) FATEH LAL *v.* CHARLES EDWARD GREY. 36 I. C. 210.

——S. 258—*Competition by partner— Share in profits.*

A person can recover profits or compensation from his partner who is carrying on a rival trade to the prejudice of the partnership. (*Banerji, J.*) MUMTAZ ALI *v.* KASIM ALI 19 I. C. 250 : 11 A. L. J. 423.

——S. 258—*Partnership—Contribution.*

All partners must be joined in a suit for contribution by one or more partners if partnership has come to an end and no adjustment has been made. Plaintiff in possession of accounts or property must give credit to the defendant for his profit even though the claim be barred by time. "He who seeks equity must do equity" must be acted upon. (*Broadway, J.*) KALAMAL *v.* SOHARA MAL. 113 P. W. R. 1916 : 35 I. C. 910 : 42 P. L. R. 1917.

——Ss 261 and 262—*Partnership—Death of partner—Liability of heirs.*

The personal representative of a deceased partner is bound to give an account of what has been received on behalf of the partnership, but he will be only liable for the person he represents to the extent of the assets he receives. The fact

that a minor representative is personally unable to give the accounts will not absolve him from the obligation of getting the accounts prepared by persons who were conversant with what took place and what money was received and spent and who were acting either for the deceased partner during his life or for the minor and the estate of the partner after his death. A suit by the surviving partner against the minor for excess amounts received by his father is maintainable. (*Richards, C. J. and Banerji, J.*) SHANKAR LAL *v.* RAM BABU. **40 All. 446: 45 I. C. 31: 16 A. L. J. 305.**

———S. 262—*Property of partnership—Right to dispose of—Rights of creditors.*

Although partnership property has annexed to it a paramount liability for partnership debts, yet there is nothing in law which prevents partners from disposing of it as they like or allowing it to be treated as the sole property of one partner and obliges them to preserve it as partnership property for the benefit of the creditors of the partnership. Any disposition of the property by the agreement of the partners is effective unless made with a view to defraud the creditor, and the creditor is not entitled to be consulted in the matter. (*Kotwal, A. J. C.*) JAMNADAS *v.* RAMADHAR. **64 I. C. 719: 18 N. L. R. 186: 1922 Nag. 70**

———S. 263—*Partnership— Dissolution— Accounts—Partner retaining and using assets—Liability to pay interest.*

It is well settled that, in certain cases, when on the dissolution of a firm one of the partners retains assets of the firm in his hands without any settlement of accounts and applies them in continuing the business for his benefit he may be ordered to account for these assets with interest thereon, even in the absence of fraud or misconduct in the nature of fraud. (*Lord Sumner,*) AHMED MUSAJI *v.* HASHIM EBRAHIM. **42 Cal. 914: 42 I. A. 91: 19 C. W. N. 449: 17 M. L T. 312: 2 L. W. 377: 21 C. L. J. 419: 13 A. L. J. 540: 17 Bom. L. R. 432: 29 M. L. J. 70: 28 I. C. 710: (1915) M. W. N. 485 (P. C.)**

———S. 263—*Partnership—Reference to arbitration—Legal representatives, when bound.*

The question whether the legal personal representatives of a deceased partner were bound by a reference to arbitration by the surviving partners in relation to a partnership contract is not a pure question of law to be decided without reference to the facts of the case. The High Court was in error in permitting the question to be raised for the first time in appeal. The partnership contract which was not in evidence, might have contained a submission binding on the representative; even if it did not, and the agreement to refer was not originally binding, it might have become binding on them by their acquiescence therein or their acceptance of benefits thereunder. (*Lord Parker.*) DWARKA NATH SARKAR *v.* MAHOMED AKBAR.
18 C. W N. 1025: 27 M. L. J. 192: 1 L. W. 697: 16 M. L. T 521: 21 C. L. J. 1: 17 Bom. L. R. 5: 24 I. C. 307: (1914) M. W. N. 876 (P. C.).

———S. 263—*Accounts—Suit by one partner against other partner for damages for use and occupation of partnership property—Maintainability of.*

One of the conditions of the partnership in respect of Mill business was that cash was to be supplied by one of the partners and the profits were to be distributed in certain proportions. A suit for dissolution of partnership was instituted. And while this was pending, the plaintiff purchased the right, title and interest of one of the partners who was originally the owner of the Mill and subsequently sued the members of the partnership firm for recovery of damages for use and occupation of the Mill. *Held* that whether the Mill became part of partnership assets by the deed of partnership or continued to be the private property, the plaintiff's suit was in either case not maintainable. (*Mookerjee and Beachcroft, JJ.*) MANIRUDDIN *v.* JNANENDRA NATH BASU. **31 I. C. 707: 19 C. W. N. 1115.**

———S. 263—*Partnership — Dissolution—Power to give discharge.*

A partner can give a valid discharge of a debt due to the partnership after its dissolution. 36 Mad. 544; 34 M. L. J. 41, Foll. (*Abdur Rahim and Spencer, JJ.*) ANNAMALAI CHETTY *v.* ANNAMALAI CHETTY. **52 I. C. 456 : 10 L. W. 67.**

———S. 263—*Dissolution—Death of one partner—Right of surviving partners to release debt.*

After dissolution by the death of one of the partners, the surviving partners have to release a debt to the firm. (*Ayling and Seshagiri Aiyar, JJ.*) PALANIAPPA CHETTIAR *v* VEERAPPA CHETTIAR. **41 Mad. 446: 44 I. C. 466: 34 M. L. J. 41.**

———S. 263—*Profits after dissolution of partnership is partnership property.*

Where the account books produced unmistakeably proved that the order for the purchase of goods was made on behalf of the firm and further that the payment of the price in two instalments was also made on behalf of the firm; but by mere accident, the goods were received after the dissolution of the partnership, *held* on principle of equity the plaintiff is entitled to his share of the profits made by the defendants in selling the goods in question. It may be that the terms of S. 263 of the Contract Act do not cover the case in its entirety. (*Wazir Hasan, A. J. C.*) JANKI PERSHAD *v.* PT. SAMESHAR PRASAD.
9 O. L. J. 599 : 74 I. C. 324 : 1923 Oudh 23.

———S. 263 — *Rights of co-partners after dissolution.*

Under S. 263 the rights and obligation of the firm continue after dissolution in all things necessary for the purpose of winding up. Some one of the partners can sign and verify a plaint on behalf of the firm after dissolution in a suit for such purpose (*Fox, C. J. and Parlett, J.*) U. AUNG MIN *v.* LATCHMANAN CHETTY.
9 I. C. 450. 4 Bur. L. T. 10.

———S. 264—*Dissolution of partnership—Its effect on "persons dealing with."*

Persons dealing with a firm unless they had actual notice are not affected by its dissolution if a public notice is not given. "Persons dealing

CONTRACT ACT (IX OF 1872), S. 264.

with a firm" in the section means person who have been in the habit of dealing with and who even at the time of dissolution intended to deal with a firm as if the firm remained the same as that in the beginning. (*Beaman, J.*) GEOVANI GORIO *v.* VALLABHADAS. **30 I. C. 864 : 17 Bom. L. R. 762.**

———**S. 264**—"*Persons dealing with a firm*" —*Meaning of Scope of—Estoppel.*

The expression "persons dealing with a firm" indicates only such persons who have been in the habit of dealing with the firm previously. The section does not contemplate such persons who deal with a firm for the first time after the retirement of some of the partners. S. 264 is an illustration of a particular form of estoppel by conduct and a person is not entitled to take advantage of it unless the facts raise a presumption that the absence of notice excited in him a belief which caused him to do something that he would not otherwise have done. The section must not be construed as an absolute proposition of law, but must be read with S. 115 of the Evidence Act. (*Scott-Smith and Abdul Raoof, JJ.*) BICHHIA LAL *v.* MUNSHI RAM. **68 I. C. 932: 1922 L. 466.**

———**S. 264**—*Dissolution of partnership— Notice—Publication.*

In the case of old customers of a firm the mere publication of notice of dissolution in the public press is not sufficient to relieve a retiring partner from liability. 8 C. 617 Followed. (*Heald, J.*) EZEKIEL *v.* THE RUSSA ENGINEERING WORKS. LTD. **1 Rang. 47 : 2 Bur. L. J. 46 : 74 I C. 16 : 1924 R. 133.**

———**S. 265**—*Dissolution—Intention—Suit for dissolution and accounts—Limitation.*

The intention to dissolve may be inferred in the case of partnership at-will from circumstances showing that a partner has in fact abandoned his interest in the concern. (*Shadi Lal, J.*) AMIRCHAND *v.* JAWAHIR MAL, **32 I. C. 853 : 49 P. W. R. 1916.**

———**S. 289**—*Partnership Intention of parties —Commission and not profits.*

The question whether there is a real partnership must depend on the real intention and contract of the parties. Where there was an agreement to the effect that a certain person was to get a fixed pay and 10 per cent as commission on the net proceeds of the firm and not any share of the profits that person is a partner as he, sole sharer in the profits. (*Sanderson, C. J. Mukerjee and Chatterjee, JJ.*) RAGHUMALL KHAN DELWAL *v* OFFICIAL ASSIGNEE OF CALCUTTA. **28 C. W. N. 34 : 1924 C. 424.**

CONTRIBUTION.

Basis of Claim.
Cause of Action.
Co-sharer.
Costs.
Joint Liability.
Joint Tort Feasers.
Partners.
Miscellaneous.

See also (1) CONTRACT ACT, SS. 69 AND 70.
(2) T. P. ACT, S. 82.
(3) T. P. ACT, S. 95.

CONTRIBUTION— Cause of action.

Basis of Claim.

———*Basis of claim—Suit for—Scope of enquiry.*

In a contribution suit the basis is payment in excess of the plff.'s liability. The plff.'s liability has to be ascertained, and to avoid multiplicity of suits the respective shares of the contributors must be ascertained. (*Mookerjee and Carnduff, JJ.*) MOTICHAND *v.* BAJRAN SAHAI. **17 I. C. 45 : 16 C. L. J. 148.**

Cause of Action.

———*Cause of action—Co-judgment-debtors— Payment.*

Where the party seeking contribution has voluntarily made payment or he is compelled to pay money by coercive process, *e. g.*, execution of decree, his right to contribution arises when the person has paid in excess of his share for the joint liability of all. (*Chatterjee and Panton, JJ.*) GOPI NATH MUNSHI *v.* CHANDRA NATH MUNSHI. **57 I. C. 884.**

———*Cause of action—Satisfaction of decree by one of several judgment-debtors—Liability of others.*

A decree for maintenance provided that certain defts. should pay off the decretal amount within four months and on their failure to do so the money should be realised by sale of the properties hypothecated. One of the defts. who had since the decree acquired four-fifths of the properties charged, paid off the decree amount and then sued the other defts. for contribution. *Held*, it was unnecessary for the plff. to pay off the decretal debt or any part of it and the claim for contribution could not succeed. (*Chitty and Walmsley, JJ.*) KANAILAL KANDU *v* NITYA SARAN MUKERJEE. **47 I. C. 938.**

———*Cause of action—Liability of purchase of items charged with maintenance.*

A suit will lie for contribution at the instance of a purchaser of the share of one of three brothers in one of his properties who was obliged to satisfy a decree for maintenance charged upon the properties as against the other brothers of his vendor who were liable to contribute (*Mookerjee and Beachcroft, JJ.*) SASHI SHEKARESWAR ROY *v.* SASHI BALA DEBI. **26 I. C. 480.**

———*Cause of action—Third party paying off joint decree against plff. and deft. and realising it from plaintiff—Liability of deft.*

Where a third party pays off a joint decree against the plaintiff and the defendant, and afterwards realises the whole amount from the plaintiff by the sale of his properties in execution of the decree obtained against him the defendant will be equitably bound to contribute his share of the original debt which had been discharged. (*Chatterjea and Walmsley, JJ.*) JANKI KOER *v.* DONI LAL. **20 I. C. 24 : 18 C. W. N. 480.**

———*Cause of action—Mortgagees—Prior and subsequent.*

The second mortgagee obtained a decree and purchased the property at the auction sale. The first mortgagee obtained a decree and tried to sell the property. The second mortgagee paid Rs. 215 to the first mortgagee the latter agreeing to release the property purchased by the second mortgagee

CONTRIBUTION—Cause of action.

from sale. But the first mortgagee could not do so and the second mortgagee brought a suit for the recovery of Rs. 215. *Held*, that the suit was good and it was not necessary to bring a contributory suit. (*Mookerjee and Teunon, JJ.*) GULAB RAI *v.* RAMRAJ. 10 I C. 570.

———*Cause of action—Joint debt—Decree against one of the co-debtors—Payment of decree amount.*

Though a suit is dismissed as time barred against one of two joint executants of the deed in suit and decreed in full against the other who satisfies the whole decree, the latter can claim contribution from the former for the amount he has paid above his due proportion. (*Stuart, J. C.*) MUHAMMAD RAMZAN ALIKHAN *v.* MUHAMMAD NAZIR KHAN. 3 O. L. J. 447 : 36 I. C. 774 : 19 O. C. 347.

———*Cause of action—Giving of new security.*

The giving of a new security does not amount to a payment which entitles a plff. to demand contribution. 106 E. R. 286 : 102 E. R. 562 Foll. (*Lindsay, J.C.*) JAGANNATH KUAR *v.* SHEO SINGH. 19 O. C. 44 : 35 I C. 439 : 3 O. L. J. 441.

Co-sharer.

———*Co-sharers.*

A joint decree was passed against *A* and *B* and properties belonging to both were sold. *B* applied under S. 410 *A* of the C. P. C. (1882) (O. 21, R. 89 of 1908) and got the sale set aside. *B* then brought a suit against *A* for contribution which included the 5 per cent. paid by him over and above the decretal amount. *Held*, that the 5 per cent additional amount was gratuitious and voluntary and that the sale price was binding. (*Banerjee, J.*) DORI LAL *v.* PATTI RAM. 10 I. C. 458 : 8 A. L. J. 622.

———*Co-sharers—Right to be re-imbursed in respect of money realised by creditor by coercive process—Basis of right.*

Co sharers have a right to be reimbursed in respect of money realised by creditor by coercive process. (*Chatterjee and Panton, JJ.*) GOPENATH MOONSHI *v.* CHANDRANATH MOONSHI. 26 C. W N. 340.

———*Co-sharers—Extent of liability of each sharer—Decree, form of.*

The right of contribution has its foundation in and is controlled by the principles of justice, equity and good conscience. It does not arise from the contract although it has sometimes been based on the theory of an implied contract for contribution supposed to exist between parties jointly liable *ex contractu*. Each co-obligor is liable to contribute only in proportion to his share of the common debt or obligation. If a sharer has paid more than his share of the common liability, he is not bound to contribute any thing more. In a suit for contribution the liabilities of the different parties *i. e.* plaintiffs and the defendants, must be separately ascertained and a joint decree cannot be made in favour of the plaintiffs against the defendants. (*Mookerjee and Beachcroft, JJ.*) MATUNGINI DEBI *v.* BROJESWAR BANERJEE. 27 I. C. 22 : 20 C. L. J. 205.

CONTRIBUTION—Costs.

———*Co-sharer in a residuary estate—Payment of Government revenue.*

A co-sharer who pays the Government revenue is entitled to contribution from his co-sharer (both of them being proprietors of residuary estate) to the extent of the assets of the land allotted to him and not to the extent of the assets as they stood at the time of default in paying revenue. (*Mookerjee and Carnduff, JJ.*) LAL MOHAN THAKUR *v.* NANDA LAL. 15 C. L. J. 191 : 14 I. C. 461 : 16 C. W. N. 590.

———*Co-sharers—Collection of rent—Payment of revenue.*

Plff. owned ¾ share, deft. ¼ share of the estate. Plaintiff paid the whole *peishkush* and sued the deft. for the ¼ share of the *peshkush* which he was bound to pay. Deft. claimed set off of ¼ share of the collections. Plff. contended that his collections did not exceed his share. *Held* where the collections were not made expressly as the plff's share from each tenant, they must be deemed to have been made on behalf of all owners and the deft. is entitled to a set-off. (*Oldfield and Sadasiva Iyer, JJ.*) SIVANARASA REDDI *v.* DORAISAWMI REDDI. 41 Mad. 861 : 8 L. W. 91 : 35 M. L J. 272 : (1918) M. W. N. 614 : 45 I. C. 463 : 24 M. L. T. 247.

Costs.

———*Costs — Co-defendants—Joint decree—Effect of.*

Where two or more persons join in an attack or in a common defence in an action, there is at least an implied contract that they will share the gain or the loss. At any rate equity will infer such a contract and there is a *prima facie* right of contribution among the litigants so joining in an attack or defence. But it may happen that the defendants to a suit may have different antagonistic and exclusive defences and in such a case in the absence of a contract or some equity between them there will be no contribution. Cases on the subject reviewed (*Ryves and Stuart, JJ.*) PARSOTTAM DAS KOLAPURI *v.* LACHMI NARAIN. 45 A. 99 : 69 I. C. 688 : 20 A. L. J. 890 : 1923 A. 67.

———*Costs — Co-plaintiffs—Contribution as between.*

The rules governing the question of contribution between co defendants do not necessarily apply to co-plaintiffs. Where persons under a *bona fide* claim of right, sued to substantiate that right, but the suit was ultimately dismissed for default and costs were awarded against the plaintiff, *Held* that a suit brought by one of them who paid the whole of the costs for contribution against his co-plaintiffs was maintainable. (*Sulaiman and Gokul Prasad, JJ.*) RAM SARUP *v.* BAIJ NATH. 43 All. 77 . 2 U. P. L. R. (All.) 299 : 58 I. C. 324 : 18 A. L J. 872.

———*Costs—Joint decree.*

If one of several judgment-debtors, against whom a joint decree for costs has been made, pays the entire decree amount, he is entitled to maintain a suit against his co-defts. for contribution. (*Lindsay, J.*) L. RAM SARANDAS *v.* SAGAR MAL. 54 I. C. 370.

CONTRIBUTION—Costs.

———*Costs—Joint decree against defts. claiming under separate titles.*

Where costs are awarded against several independent trespassers claiming under separate titles and one of them pays off the entire decree he cannot sue for contribution from the co defts, in the prior suit (*Tudball and Abdul Raoof, JJ.*) NANDLAL SINGH *v.* BENI MADHO SINGH.
40 All. 672 : 47 I. C. 980 : 16 A. L. J. 689.

——*Costs of litigation—Co-heir.*

A co-heir is not bound to bear his share of the expenses of litigation about common property. 21 Cal. 496 (P. C.), 30 Mad. 526, Rel. (*Chatterjea and Walmsely, JJ.*) RAMDHERI SINGH *v.* PARAMANAND SINGH. 21 I. C. 716 : 19 C. W. N. 1183.

———*Costs of litigation—Charge.*

If the parties to the suit agree to bear costs of litigation in equal shares, plff. cannot claim a charge on the deft's property, for the contribution of his share of the expenses, though the litigation was beneficial to the properties. (*Benson and Abdur Rahim, JJ.*) ARUNACHALAM PATTAR *v.* SESHAN PATTAR. 11 M. L. T. 305 : 22 M. L. J. 406 : 14 I. C. 189 : (1912) M. W. N. 492.

——*Costs.*

A suit for contribution in respect of costs is not maintainable. (*Stuart, A. J. C.*) JAMSHED ALI KHAN *v.* ZAHUR-UL-HASAN KHAN.
33 I. C. 357 : 18 O. C. 340.

——*Costs*—Bona fide *litigation.*

The rule of non-contribution among joint tort-feasors is not applicable where the parties were *bona fide* prosecuting their case and not doing an illegal or an unlawful act. In such a case all the parties must contribute equally to the costs-realised out of one of them. (*Coutts and Sultan Ahmad, JJ.*) RAMDEO RAM MARWARI *v.* RAI BAIJNATH GOENKA BAHADUR. 58 I. C. 31 : 1 P. L. T. 624.

——*Costs—False suit by plff.*

A co-plff. who conspired with the other plff. and brought a false suit on a mortgage bond, which was dismissed, and who was made to pay the entire costs, was not entitled to maintain a suit for contribution against the other plff. Institution of a false suit is doing an illegal or unlawful act, and the rule of non-contribution among joint tort-feasors is not limited to tortious acts only. (*Coutts and Sultan Ahmad, JJ.*) KALANATH CHAUDHURY *v.* JADUNANDAN KUMAR.
58 I. C. 28 : 1 Pat. L. T. 620.

Joint Liability.

———*Joint liability—Sale—Payment of money by one of person jointly benefited—Proportionate liability.*

The property of the minors was sold by their maternal grandmother, the minors succeeded in a suit to set aside the sale in which they were made to refund the money to the vendee. In a suit by the minors for contribution against the defts. who were also members of the same family and who had benefitted from money, the minors were held entitled to recover proportionate amount from the deft. (*Karamat Husain and Chamier, JJ.*) BHAKHT BAHADUR *v.* INDAR SAHAI.
12 I. C. 105 : 8 A. L. J. 886.

CONTRIBUTION—Joint tort feasors.

——*Joint liability—Two sisters co-heirs — Payment of revenue by one— Liability of the other.*

Two sisters held a *putni* jointly. One of them paid the whole sum into the Collectorate which was payable by both. The other sister died and her interest devolved upon the deft. by survivorship. In a suit by the sister who paid the whole sum, for contribution. *held*, the deft. was not liable as she did not take the estate subject to the charge of paying a share of the sum, that the liability to pay, was not joint and several, but was joint liability. (*Mookerjee, A. C. J. and Fletcher, J.*) GOSTA BEHARI PRAMANICK *v.* ATAR SUNDARI DASI. 62 I. C. 94.

——*Joint liability of representatives of original debtor.*

As between a purchaser and the representatives of his vendors the liability to contribute for the maintenance debt charged on the property should be determined on the basis of the value of the properties respectively in their hands at the time of the maintenance decree. (*Mookerjee and Beachcroft, JJ.*) SASHI SEKHARESWAR ROY *v.* SASHIBALA DEBI. 26 I. C. 480.

——*Joint liability.*

One of co-plffs. or co defts. from whom the costs awarded jointly against them were realized can sue for contribution from others. (*Daniels and Dalal, J. C.*) SIDH GOPAL *v.* AVADH BIHARI LAL. 26 O. C. 196 : 1924 Oudh 48.

——*Joint liability—Principal and surety—Payment of principal's debt.*

The Chairman of a Company under a highly advantageous agreement to himself financed the Company with money borrowed from a third person and some of the directors executed a pronote as sureties, whereby, along with the Chairman, they made themselves jointly liable for the payment of the loan. *Held*, that the sureties were not liable to contribute to the sum realised by the creditor from the principal. (*Ormond, O. C. J. and Parlett, J.*) ABDUL BARI CHOWDHURY *v.* JOAKIN. 44 I. C. 231.

Joint Tort Feasors.

——*Joint tort-feasors.*

The doctrine that there is "no contribution between joint tort-feasors" enunciated in *Merry Weather* v. *Nixon.* 16 R. R. 810 cannot safely be extended to India. (*Richards, C. J. and Rafique, J.*) NIHAL SINGH *v.* COLLECTOR OF BULANDSHAHR.
38 All. 237 : 33 I. C. 165 : 14 A. L. J. 275.

——*Joint Tort feasors—Decree for mesne profits.*

The principle that one of the joint tort-feasors is not entitled to contribution from the rest, is not applicable where all of them were not wilful tort-feasors. 31 Cal. 597 (P.C.) Ref. (*Jenkins and Ray, JJ.*) BISHNU CHARAN ROY *v.* BIPIN CHANDRA ROY. 25 I. C. 729 : 18 C. W. N. 622.

CONTRIBUTION—Joint tort feasors.

———*Joint tort-feasors.*

A plaintiff suing for contribution must show some equity in his favour if he was a joint tort-feasor with the deft. (*exempla gratia*) in the case of a trespass on deft.'s land, no right to compensation or contribution arises. (*Kumaraswami Sastri, J.*) KOPPANA CHELAMIAH *v.* DATLA SURYANARAYANA. **37 M. L. J. 346: 26 M. L. T. 368: 10 L. W. 261: 53 I. C. 77: (1920) M. W. N. 265.**

———*Joint-tort-feasors — No contribution — Scope of the rule.*

To defeat a claim for contribution among co-defts. it must be shown that the defts. in the former suit were wrong-doers in the sense that they knew or ought to have known that they were doing an illegal and wrongful act. In that case no suit for contribution would lie. But, on the other hand, if the defts, in the former suit were not guilty of a wrong in that sense, but acted under a *bona fide* claim of right, and had reason to suppose that they had a right to do what they did then, no doubt, they might have a right of contribution *inter se*. (*Halliffax, A. J. C.*) JHIBU *v.* BALAJI. **19 N. L. R. 75: 7 N. L. J. 30: 1923 Nag. 255.**

———*Joint tort-feasors.*

Between joint tort-feasors there is no contribution only when the wrong doer knew or ought to have known it to be illegal. (*Coutts and Sultan Ahmed, JJ.*) RAMDEO RAM MARVARI *v.* BAIJ NATH GOENKA. **58 I. C. 31 : 1 P. L. T. 624.**

———*Joint tort-feasors.*

Plff. is not entitled to recover contribution from the deft if both had conspired to make a false claim in the Court of justice. (*Coutts and Sultan Ahmed, JJ.*) KALANATH CHOWDHURY *v.* JADU NANDAN KUMAR. **58 I. C. 28 : 1 P. L. T. 620.**

———*Joint tort-feasors—Costs— Liability of other defts. for contribution.*

The rule of non-contribution between joint tort feasors exist in India but it applies in cases where the parties are wrong-doers in the sense that they knew or ought to have known that they were doing an illegal or wrongful act. 7 W. R. 384, Ref. The setting up of a defence to a suit which the defts. in that suit knew, could not be substantiated in fact if it is not followed up by the production of perjured evidence, is a legitimate act and a right of contribution exist in cases where one deft. had to pay entire costs awarded against the defts. in such an action. 13 Cal. 800 and 26 Mad. 373 Ref. (*Miller, C. J. and Adami, J.*) MAHABIR PRASAD *v.* DARBANNU THAKUR. **4 Pat. L. J. 486: 51 I. C 697: 1919 Pat. 289.**

Partners.

———*Partners—Decree against—One partner paying off—Suit by.*

One partner who is compelled to pay off a decree against all the members of a partnership can maintain a suit for contribution against the other partners, but it is open to the latter to show that on proper accounts being taken, nothing is due to the former, 9 B.H. C. R. 39, Dist; 52 Mad. 203, Rel on. (*Tudball, J.*) LALARAM *v.* SHIO PRASAD. **20 I. C. 176: 11 A. L. J. 657.**

CONTRIBUTION—Miscellaneous.

———*Partners—Liability of co-partners for debt.*

Though partners are jointly liable to third persons, a partner who pays more than his share of the partnership debt whether voluntarily or not, is entitled to contribution from his co-partners. Where advances are made by one partner not to the partnership concerned, but to other partners in respect of what he has to contribute to the joint capital, he can sue the other partners for contribution. (*Asutosh Mukerjee and Beachcroft, JJ.*) LABAN SARDAR *v.* CHOYEN MALLICK. **29 I. C. 811: 19 C. W. N. 768.**

———*Partners—Suit, when maintainable—Dismissal of.*

The general rule is that one partner cannot sue another except for a dissolution and the taking of the general accounts of the partnership. The Court is right in dismissing a suit for contribution by an assignee from a partner who had paid off a decree against the partnership. (*Sadasiva Aiyar, J.*) DAMODARA SHANBHAGA *v.* SUBRAYA PAI. **33 M. L. J. 509: 43 I. C. 217: 6 L. W. 742.**

———*Partners—Joint debt paid by one.*

In the case of a dissolved partnership a suit for contribution is maintainable by a partner who has paid the whole of the debt. 32 Mad, 203, Foll. In such a case it would be open to the deft. to show that nothing was really due to the plaintiff according to the accounts of the partnership as they stood. (*Sundara Aiyar, J.*) GUDLAVELLARU VENKATARATNAM *v.* VELLA THAMBI VENKATARATNAM. **11 M. L. T. 188: 15 I. C. 218: (1912) M. W. N. 384.**

Miscellaneous.

———*Co-judgment-debtors—Extent of liability* inter se—*Proof of.*

In a suit for a contribution as between co-judgment debtors the latter may show the extent of their liability, and the decree in the prior suit does not operate as *res-judicata* in this respect. (*Ryves and Gokul Prasad, JJ.*) ITWARI LAL *v.* MATA PRASAD. **L. R. 3 A. 425.**

———*Co-judgment-debtors—Payment by one—Creditor's right—Contribution.*

A payment by one judgment-debtor more than his share gives him no charge on the property of his co-judgment-debtor, but his right is to get simple money contribution. (*Richards, C. J. and Rafique, J.*) BINDESHRI PERSHAD CHAND *v.* GIRDHARDAS. **34 I. C. 91.**

———*Decree, form of.*

In a suit for contribution, the Court ought to determine the amount of liability of each defendant and make a decree apportioning to each of them the amount for which he is found to be liable. A joint decree is clearly erroneous. As between debtors, each of them is liable for so much of the debt as he has not paid to the creditor and as the plaintiff had paid for him. (*Banerji, J.*) SHEO PRASAD *v.* LALA RAM. **29 I. C. 205.**

———*Joint mortgagors — Decree set aside against—Second suit to recover proportionate amount.*

CONTRIBUTION—Miscellaneous.

S. the mortgagor died leaving two daughters, a brother and an illegitimate son. *A*, the mortgagee assigned his mortgagee's right to the plff's. the sons of *S's* brother. Plff. sued on the mortgage and obtained a separate decree against each of the heirs for the proportionate liability. *R.* one of the two daughters of *S*, then brought a separate suit and had the decree set aside as against her. The plffs. then, brought a second suit to recover the proportionate part of the mortgage-debt from R's share of the mortgaged property. *Held*, that plffs. had a right to recover the portion of the mortgage money even from *R.* (*Richards, C. J., Banerji and Chamier, JJ.*) RASHID-UN-NISSA *v.* MAHAMMAD ISMAIL KHAN.
34 All. 474: 16 I. C. 85 : 9 A. L. J. 738.

———*Limitation.*

Limitation and time for a suit for contribution by one defendant against another, begins to run after the former pays off his share and begins to pay the shares of the other defendants. (*Johnstone, J.*) TAJA KHAN *v.* MUHAMMAD KHAN.
71 P. L. R. 1911: 10 I. C. 839: 66 P. W. R. 1911.

——— *Evidence—Joint decree—Judgment—Admissibility of.*

Where the basis of a suit for contribution is a judgment against the plaintiff. and the deft. acted as defts. in the prior suit, the judgment in that suit is admissible in contribution suit. The propriety of the conclusion reached in the former judgment cannot be attacked but it may be used to show that the deft. was not jointly liable. (*Kumarasami Sastry, J.*) KOPPANA CHELAMIAH *v.* DATLA SURYANARAYANA. **37 M. L. J. 346: 26 M. L. T. 363. 10 L. W. 261 : 53 I. C. 77. (1920) M. W. N. 265.**

———*Defence—Joint decree against plaintiff and defendants—Payment by plaintiff—Exaggerated claim—If ground for dismissing the suit.*

In a suit brought by the plaintiff for the money he paid to satisfy a decree under which both the plaintiff and the defendant were jointly liable, no defence can be raised that the decree should not have been joint. In a suit for contribution by one of the judgment-debtors, the plaintiff the only defence is as to the extent of liability and the suit could not be dismissed though the claim is exaggerated. (*Seshagiri Aiyar, J.*) SAMBASIVA AIYAR *v.* SUBRAMANIA AIYAR. **4 L. W. 260 : 36 I. C. 576 : (1916) 2 M. W. N. 214.**

———*Joint promisors—Claim barred against one.*

A joint promisor, whose liability to the promissee, is kept alive beyond the ordinary period of limitation and who is consequently compelled to pay by a decree of Court, more than his proportion of the debt to the promissee, can sue his joint promissors for contribution though the decree exonerated them from payment, on the ground that the debt was as against them barred by limitation. Per *Tyabji, J.*—The duty to contribute is clearly distinct from the duty to pay to the promissee. The first is to the promissor, the second is to the promissee. The right of each joint promissor to claim indemnity does not consist merely of being subrogated to the right of the original promissee for though promissee's rights may have been released, the responsibility to the joint promissor is not annulled. (*Oldfield and Tyabji, JJ.*) ABRAHAM *v.* RAPHIAL.
39 Mad. 288 : 27 M. L. J. 746 : 27 I. C. 337 : 16 M. L. T. 569.

CONVEYANCE.

———*Joint decree.*

Where the plaintiff paid the amount under a decree for costs passed against palintiff and defendant's father, the latter is liable to contribute and the liability descends to the defendant as the latter's son. (*Wallis, J.*) DESAI NAMBERUMAL *v.* NARAIN SWAMI. **9 I. C. 1023 : 9 M. L. T. 449.**

——— *Joint decree—Mortgagee's suit to enforce mortgage—Rights of mortgagor and subsequent transferees impleaded as defendants.*

A decree may often be *prima facie* evidence of common liability as co-obligors between the persons against whom it is passed. But whereas in the case of a suit by a mortgagee to enforce the mortgage the mortgagors and their subsequent transferees are merely impleaded as defendants to give them a right to redeem it is not evidence of the rights of the defendants *inter se*. The liability to pay a debt due on a simple mortgage is as between the mortgagor and his subsequent mortgagee or lessee primarily on the former and if the mortgagor or lessee pays that debt he cannot claim contribution in respect of that payment from his mortgagee or lessee. The position of the heir of a mortgagor is in this respect in no way better than that of the person to whom he succeeds. (*Kanhaiya Lal, J. C. and Daniels, A. J. C.*) GAJRAJ KUNWAR *v.* INDRAPAL KUNWAR.
21 O. C. 360 : 49 I. C. 406 : 6 O. L. J. 7.

———*Defence.*

A defendant in a suit for contribution cannot escape liability on the plea at the time when the contribution is sought against him the right of the original creditor had become barred. (*Lindsay, A. J. C.*) SARDHA BAKSH SINGH *v.* DURGA BAKSH SINGH. **22 I. C. 263 : 16 O. C. 285.**

CONTRIBUTORY LIABILITY. *See* TORT.

CONTRIBUTORY NEGLIGENCE.

See (1) RAILWAYS ACT.
(2) TORT—NEGLIGENCE.

CONVERSION.

See also (1) CASTE DISABILITIES REMOVAL ACT.
(2) HINDU LAW—SUCCESSION.
(3) MAHOMEDAN LAW.

———*Judgment—Effect of title.*

Where a decree is satisfied, then alone a judgment in conversion passes the property. Distinction between detinue and conversion in English law considered. (*Schwabe, C. J. Oldfield and Ramesam, JJ.*) SINNAN CHETTY *v.* ALAGIRI AIYAR. **45 M. L. J. 516 : 18 L. W. 545 : 46 Mad. 852 : 77 I. C. 580 : (1924) M. W. N. 6 : 1924 Mad. 438 (F.B.).**

CONVEYANCE.

See (1) DEED.
(2) T. P. ACT, SS. 8 AND 54.
(3) PART PERFORMANCE.

CO-OCCUPANT.

See (1) CO-SHARER.
(2) OCCUPANCY HOLDING.

CO-OPERATIVE CREDIT SOCIETIES ACT (X OF 1904).

———**S. 6 (2)**—*Suit against a member by chairman.*

The Chairman of a Co-operative Credit Society has no right to sue a member of a society in his own name. The suit should be brought by the Society itself under S. 6 (2) of the Co-operative Credit Societies Act. (*Chitty and Coxe, JJ.*) MIRANDA *v.* MOHENDRA KUMAR ROY.
10 I. C. 570.

CO-OPERATIVE SOCIETIES ACT (II OF 1912).

———**S. 19**—*Musical instruments.*

Musical instruments are not industrial implements or machinery and do not come within any other part of the class of articles referred to in the section. (*Saunders, A. J. C.*) MAUNG THAU *v.* MAUNGA HLA.
38 I. C. 414 : (1916) 2 U. B. R. 133.

———**Ss. 19 and 20**—*C P. Code*, S. 73.

Under S. 73 of the C.P. Code the claim of a Co-operative Society cannot be enforced under S. 19 of the Co-operative Societies Act unless they have a decree or charge under S. 20 of the latter Act. (*Holmwood and Chapmaan, JJ.*) ABDUR KADIR *v.* SHAH BAZPUR CO-OPERATIVE BANK.
42 Cal. 377 : 26 I. C. 81 : 18 C. W. N. 1140.

———**S. 19 (b)**—*Fat, whether "raw material for manufacture".*

Fat intended to be purchased and sold at a profit and not for the purpose of manufacturing some other commodity is not "raw material" within S. 19 (b) of the Act. (*Shadi Lal, J.*) MOHALLA KHAJURANWALA BANK *v.* MAMU.
3 P. W. R. 1917 : 39 I. C. 373 : 19 P. L. R. 1917.

———**S. 42**—*Registered Society—Winding up—Liquidator—Order passed by liquidator to wind up assets—Revision.*

The Civil Court cannot interfere with an order passed by a liquidator of a registered Co-operative Society, under S. 42 of the Act, (1912) in order to collect the assets of the Society from persons who, he thinks, are responsible to account to him for the assets. (*Macleod, C. J, and Heaton, J.*) GANPAT *v.* KRISHANDAS.
22 Bom. L. R. 732 : 57 I. C. 423 : 44 Bom. 582.

———**S. 42 (2)**—*Liquidator—Order of—Suit for declaration.*

A Civil Court cannot entertain a suit for a declaration that an order of the liquidator under S. 42 (2) of the Act is *ultra vires* and thus cannot be executed. (*Stuart and Kanhaiya Lal, A. J. C.*) BENI MADHAO SINGH *v.* LIQUIDATOR, DEWARA BANK.
44 I. C. 353 : 4 O.L.J. 583.

———**S. 42 (5)**—*Powers of liquidator—Powers of Civil Court—Appeal against Civil Court's order.*

The liquidator cannot order that the debtors are jointly and severally liable for each others' mortgage, but may determine the contribution to be made by several debtors to meet the debt.

CO-OPERATIVE SOCIETIES ACT (II OF 1912), S. 43.

Order passed by liquidator under S. 42, must be enforced by Civil Courts. No appeal lies from the Civil Court's order under this section. (*Richards, C. J. and Banerji, J.*) MATHURA PRASAD *v.* SHEOBALAK.
40 All. 89 : 42 I. C. 968 : 15 A. L. J. 868.

———**S. 43**—*Rules framed under Rules 31 and 34—Award under the rules—Application to Civil Court to enforce award as decree—Transfer of decree.*

Rules 31 and 34 framed under S. 43 of the Co-operative Credit Socities Act provide that awards shall be enforceable as decree of a court having local jurisdiction if application is made to it to enforce it. A court having a power to execute an award can transfer it for execution. (*Macleod, C. J.*) JAIRAM JADOWJI *v.* NAWROJI JAMSHEDHJI PLUMBER.
24 Bom. L. R. 909 : 47 B. 92 : 65 I. C. 212 : 1922 Bom. 449 (2).

———**S. 43**—*Rule 34—Award—Application for transfer.*

An award was made at Poona under Rules framed under S. 43 of the Co-operative Societies Act, (II of 1912) and then the Judge of the Small Cause Court, Poona, was requested to transfer the decree under S. 39, C. P. C. but he refused. *Held*, that he was empowered to transfer the decree and he could refuse to transfer it. (*Macleod, C. J. and Shah, J.*) KRISHNAJI *v.* MAHADEO.
46 Bom. 128 : 23 Bom. L. R. 909 : 64 I. C. 337 : 1922 Bom. 377.

———**S. 43**—*Object of—Disputes between society and members—Cognizance by Civil Court.*

The object of the Co-operative Societies Act is to encourage thrift, self-help, co operation among the agriculturists, artisans and persons of limited means, and it would be impossible to attain these objects if these people for the settlement of their disputes have necessarily to undergo all the troubles and worry of an extensive and protracted litigation. In the case of a dispute between a society and a member the substitutional remedy provided under the rules in the shape of a reference to the Registrar must be availed of and the common law remedy by an action in a Civil Court must by necessary application be deemed to have been taken away. (*Abdul Raoof and Moti Sagar, JJ.*) THE ZAMINDARA BANK, SHERPUR KALAN *v.* SUBA.
71 I. C. 722 : 1924 Lah. 418.

———**S. 43 (2) (1)**—*Scope and applicability—Director and Society—Dispute between, arising out of particular transaction—If within section—"Touching the business of a society"—Meaning.*

The words "touching the business of a society" in S. 43 (2) (1) of Act II of 1912 are not confined to disputes in connection with the internal management of the affairs of a society or disputes in regard to principles which would regulate the conduct of the business thereof. (*Mookerjee and Cholzner, JJ.*) BHUBAN MOHINI DASI *v.* KUMUDBULA DASI.
28 C. W. N. 131 : 39 C. L. J. 140 : 1924 Cal. 467.

———**S. 43 (2) (1)**—*Dispute between society and its officer.*

CO-OPERATIVE SOCIETIES ACT (II OF 1912), S. 49.

A dispute between a member who happens to be an officer of a co-operative society and the society in regard to sums of money entrusted to the former for purchase of certain articles is within S. 43 (2) (1) of the Act. A dispute between a member who happens to be an officer of a co-operative society on the one hand and the committee or an officer thereof on the other falls within the words of the section. (*Krishnan and Venkatasubba Rao, JJ.*) DASARATHA RAO *v.* CHEVVURU SUBBA RAO.

44 M. L. J. 382 : 17 L. W. 346 : (1923) M. W. N. 222 : 32 M. L. T. (H. C.) 321 : 72 I. C. 838 : 1923 Mad. 481.

——S. 49—*Bye-laws—Validity—Liability of son for debts due by father to Bank of which he was a member—Construction of bye-law* 12.

A person who became a member of a Village Co-operative Bank by election to it after the death of his father was held liable for all debts due to the Bank by his father who was a member at the time of his death over and above the assets received by him from his father under Bye-law 12 framed by the Bank which ran "Election of an heir or successor-in-interest gives successor all rights and subjects him to all liabilities possessed or incurred by his predecessor-in-interest towards the Bank". Such a bye-law was held not *ultra vires*. (*Lindsay, J. C.*) VILLAGE CO-OPERATIVE BANK *v.* KALI DIN.

31 I. C. 724 : 18 O. C. 157.

CO-OWNER.

See CO-SHARER.

CO-PARCENER.

See HINDU LAW.

COPIES.

See (1) EVIDENCE ACT, S. 65.
(2) LIMITATION ACT, S. 12.

CO-PLAINTIFF.

See (1) PRACTICE.
(2) CIV. PRO. CODE.

CO-PRISONER, EVIDENCE OF.

See EVIDENCE ACT, S. 30.

CO-PROPRIETORS.

See CO-SHARERS.

COPYRIGHT.

See also COPY RIGHT ACT (III OF 1914).

——*Compilation from other works—Compiler has copyright.*

Though a book is a compilation from other works, and is not original the fact that its contents have been arranged on a new plan will give the compiler a copyright in the book. (*Banerji and Gokul Prasad, JJ.*) FIRM OF SHEIKH GHAGOOR BAKSH *v.* JWALA PRASAD.

43 All. 412 : 61 I. C 394 : 19 A. L. J. 180.

——*What amounts to waiver of.*

A member of a Board of Studies who prepares a syllabus of studies at the request of the Board which is afterwards published with alteration by the board for the information of the public, has by his action in submitting unreservedly the results of his labour and skill before the Board,

COPYRIGHT ACT (III OF 1914).

gives up any right to copyright in the publication. Where a person does a literary work (at request) for another with full knowledge that the latter will publish them as a matter of course, and the latter publishes the same *brushing* aside, the desire of the plff. that he should be allowed the copyright for the work or that be should be suitably remunerated for the same, the publication amounts to complete waiver by the latter person of whatever rights he may have had in the work in the interests of the general public. (*Piggott and Lindsay, JJ.*) MUHAMMAD ABDUL JALID *v.* RAM DAYAL.

38 All. 484 : 34 I. C. 357 : 14 A. L. J. 724.

——*English and Indian Law—Fine Arts—Copyright in English Act* (25 *and* 26 *Vic. Ch.* 68.)

The Fine Arts Copyright Act (25 & 26 Vic., Ch. 68) does not extend to any part of the British Dominions outside the United Kingdom. (1903) A. C. 496, Foll. In England before the Statute of Anne (8 Anne. Ch 19) there was no copyright at common law for an author, or a publisher in his productions. 4 H. L. C. 815 ; 19 Bom. 557, Foll. (*Macleod, C. J. and Crump, J.*) VASUDEO *v.* ANUPRAM.

22 Bom. L. R. 808 : 57 I. C. 592 : 44 Bom. 720.

——*Infringement—Test of—Compilation—Directory—Measure of damages—Injunction.*

In an action by plffs. for an injunction and damages on the ground that the defendant's directory constituted an infringement of the plaintiff's copyright in their directory, it was found that, a substantial portion of deft.'s publication was a verbatim copy of the plff.'s directory, that the inaccuracies in both works were identical, that there was an identity not merely of information but of language, and that where the defts. did make enquiry that inquiry was limited to a mere correction and verification of the material collected by plffs.

Held, that the defendant's work involved an infringement of plff's copyright. In a case such as this, the plaintiffs are at liberty to claim general damages and also compensation for conversion based on the sales by the defendants. Where damages are not accurately calculable, they are damages at large. (*Le Rossignol and Campbell, JJ.*) KHOSLA BROS *v.* THACKER'S DIRECTORIES, LTD.

67 I. C. 983.

——*Sale of songs — Unpublished work — Purchaser, rights of.*

Where *P* purchased the right to publish and sell 90 songs composed by *D* and shortly afterwards *D* sold 40 of these to *M* who published the same and sold them. *held*, that that *P* was entitled to sue *M* for an injunction restraining him from publishing and selling the 40 songs in violation of the right exclusively acquired by him. (*Abdur Rahim and Moore, JJ.*) RAMIAH ASARI *v.* CHIDAMBARA MUDALIAR.

12 L. W. 151 : 39 M. L. J. 341 : 59 I. C. 229 : (1920) M. W. N. 426.

COPYRIGHT ACT (III OF 1914).

——*Selection of passages from wrok is not an original work and is not protected.*

COPYRIGHT ACT (III OF 1914).

A selection of passages from a non-copyright work is not entitled to protection.

Per *Macleod, C. J.*—Where about half of the original non-copyright work was adopted as an abridgement is not an original literary work entitled to copy right. Skill and labour by themselves will not make up for the want of originality when there is nothing original in picking out for publication portions of a work which are not copyright. Selection from classical authors for the use of schools if it connoted originality would certainly be protected. The word 'original' should be so construed as to allow a man the benefit of the use of his brain but adopting word for word a part of non-copyright work does not constitute an original work. (*Macleod, C.J. and Shah, J.*) COOPER *v.* MACMILLAN & Co.

65 I. C. 187: 23 Bom. L. R. 1299.

———*Law reports—Extracts by Reporter.*

A plff.'s copyrights is infringed when the deft. reproduced not only the judgments but also parts of plff.'s reports not forming parts of judgments, and extracts and facts collected by the plff. from the records of cases. The reporter has no copyright in the reports of judgment but he has the protection of the Law in selecting and reporting cases which he obtains by expenditure of time, labour and money. (*Imam, J.*) JOGESH CHANDRA *v.* MOHINI CHANDRA.

26 I. C. 30 : 18 C. W. N. 1078.

———S. 7 (a)—S. 179, *Cr. P. Code.*

The offence is complete as soon as the book infringing the copyright is printed and the consequence contemplated in S. 179, Cr. P Code, are not necessary for the completion of the offence. (*Shadi Lal, J.*) KALIDASS *v.* KARAMCHAND.

28 P. R. 1916 (Cr.) : 38 I. C. 737: 18 Cr. L. J. 353.

———S. 24—*XX of* 1847, S. 3—*Evidence Act*, S. 114.

Absence of provisions in the new Act to grant to owners of existing copyright right at least as valuable as the rights given under the old Act, does not bar the admissibility of evidence under S. 114 of the Evidence Act to prove such right. (*Sadasiva Iyer and Phillips, JJ.*) CHALLAPASWAMI *v.* SINGARAVELU MUDALIAR. **30 I. C. 721 : 16 Cr. L. J. 673.**

CORPORATE BODY.

See (1) CORPORATION.
(2) COMPANY.

CORPORATION.

See also COMPANY.

———*Statutory body — Abuse of powers—Remedy in Civil Court.*

Where a statutory body invested with powers of land acquisition for a city improvement scheme, proposes an acquisition solely with a view to claim exemption fee from the owners, its action is *ultra vires* and the owners have a right to sue for redress in the Civil Court. (*Lord Parmoor.*) TRUSTEES FOR THE IMPROVEMENT OF CALCUTTA *v.* CHANDRA KANTA. **47 Cal. 500 : 32 C. L. J. 65 : 24 C. W. N. 881 : 11 L. W. 566: 38 M. L. J. 511: 18 A. L. J. 521 : 22 Bom. L. R. 586 : 2 U. P. L. R (P.C.) 98: 47 I. A. 45: 56 I.C. 32 (P.C.) [On appeal from 36 I. C. 749].**

CORPORATION.

———*Member—Expulsion of, from Committee—Rules of natural justice.*

The Committee before expelling a member must make a fair enquiry into the truth of the alleged facts, after giving him notice that his conduct is about to be enquired into and giving him an opportunity of defending himself. To determine whether a tribunal, exercising a punitive jurisdiction on an alleged charge of misconduct, whereby a man may be deprived of his property, has given a sound decision, the Court has to investigate whether they have observed the rules of natuaral justice and the particular statutory or other rules, if any prescribed for their guidance. The rules of natural justice demand that a man is not to be removed from office or membership or otherwise dealt with, to his disadvantage without having an opportunity of making his defence, and that the decision must be arrived at in good faith with a view to the common interest of the institution concerned. And a Court of Justice will not interfere with their decision if the above conditions are satisfied. (*Mookerjee and Fletcher, JJ.*) MAHOMED KALIMUDDIN *v.* A. B STEWART.

47 Cal. 623 : 56 I. C. 556 : 31 C. L. J. 247.

———*Mode of transacting business—Circulation—Dismissal of officer—Enquiry.*

The ordinary way of bodies in the position of a Corporation to transact business is, at a meeting and assuming that it is open to them to transact some of the business in circulation they have no such power as regards matters such as suspension or dismissal of free hold officers under their superintendence as to which their authority must be strictly construed. 30 M. L. J. 619 Foll. Even if the matter of suspension or dismissal could properly have been dealt with in circulation that could only have been by consent of all the members and any one of them would have had the right to insist on the question being dealt with, at a meeting. (*Wallis, C. J. and Kumaraswamy Sastri, J.*) VENKATA NARAIN *v.* PONNUSWAMY. **41 Mad. 357 : 33 M. L. J. 660 : (1917) M. W. N. 839 : 22 M. L. T. 454 : 43 I. C. 205 : 7 L. W. 85.**

———*Managing Committee—Quorum.*

Per *Seshagiri Iyer, J.*—Quorum for a managing Committee can be fixed by the body which elected the Managing Committe. The Managing Committee may fix it if empowered. (*Ayling and Seshagiri Aiyar, JJ.*) HASAN RAZA SAHIB *v.* HASANALI SAHIB. **40 Mad. 941 : 5 L. W. 419 : 38 I. C. 528. 33 M. L. J. 348: (1917) M. W. N. 389.**

———*Municipality— Ownership—Streets and drains—Municipal towns.*

Streets and drains are vested in Municipalities for purposes for which they are constituted. Their right is no easement but a special kind of property previously unknown to the law and created by statute. 25 Mad. 635, Ref. The Municipalities cannot give up the right of the public or affect their right of way over the streets but this does not affect adverse possession by a stranger. The construction of a pial over a drain is an adverse act and 12 years' enjoyment extinguishes the right of the Municipality on the space of the pool and

CORPORATION.

years' enjoyment the right of the Government. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) BASAVESWARASWAMI *v.* HAVALJI HUSSAIN.
38 Mad. 6: 12 M. L. T. 405 : 17 I. C. 158 : (1912) M. W. N. 1080 : 23 M. L J. 479.

——— *Powers given to, under statute—Construction of.*

The powers of a statutory Corporation are to be construed very strictly and to this extent that what is not expressly permitted to be done by it, is forbidden. 11 I. C. 665, Foll. (*Ayling and Spencer, JJ.*) MUNICIPAL COUNCIL OF KUMBAKONAM *v.* ABBAH SAHIB. 36 Mad. 113 : 10 M. L. T. 168 : 11 I. C. 669 : (1911) 2 M. W. N. 95 : 21 M. L. J. 790.

——— *Powers.*

The powers of a statutory person are regulated by statute and the Court should regard that, as implicidly prohibited, which is not expressly or by necessary implication conferred on him. (*Das and Adami, JJ.*) BABU BHAGWATI KOER *v.* BABURIA RAMSAKHI KUAR. 1 P. L T 304 : 5 P. L J. 347 : 57 I. C. 583 : 1920 Pat. 187.

——— *Powers—Natural limitations.*

The general limitation as to all statutory powers of public functionaries is that the orders issued under it are reasonable and not inconsistent with the Act. (*Pratt, J C. and Boyd, A. J. C.*) MUNICIPALITY OF KARACHI *v.* MAHOMED ALI.
33 I. C. 675 : 9 S. L. R. 126.

CO-SHARER.

Abadi.
Adverse Possession.
Building on Common land.
Exclusive Possession.
Jagir.
Joint Possession.
Lambardar.
Mutual Relation.
Partition.
Right against Trespasser.
Right to Alienate.
Suit for Possession.
Suit for Rent.
Miscellaneous.

See also (1) CONTRACT ACT, SS. 43 AND 45.
(2) PARTITION.

Abadi.

——— *Abadi—Exclusive right to—Ejectment.*

No individual proprietor can appropriate to himself a portion of the common land and use it in such a way as to affect the rights of all the co-sharers.

If some co-sharers assert individual rights to a piece of *abadi* land which they do not possess, they are liable to eviction at the instance of the other co sharers, for an act of trespass could in no way be remedied at partition. (*Wilberforce, J.*) GARHIA *v.* MAYA RAM. 64 I. C. 2.

——— *Abadi—Right.*

A co-sharer cannot appropriate a vacant site in abadi to the prejudice of the other co-sharers. (*Abdul Raoof, J.*) MANJI *v.* GHULAM MUHAMMAD.
57 I. C. 207 : 1 Lah. 249.

CO-SHARER—Adverse possession.

——— *Abadi—Shamilat—Encroachment—Special damage—Suit.*

One of the village proprietors sued certain others for the removal of certain buildings which had lessened the area of the village *sath* or narrowed the entrance to it. The trespassers had not taken more than the share which would fall to them on partition. *Held*, the plff. cannot succeed in his action without proof of special damage. (*Shah Din and Chevis, JJ.*) LEKHU *v.* HANWANTA.
114 P. R. 1918 : 176 P. W. R. 1918 : 48 I. C. 418 : 129 P. L. R. 1918.

——— *Abadi—Right to—Vests in all proprietors of village—Loss of right to share of kuri Kamini.*

Nothing that is not specifically mentioned in the wajib-ul-arz can be allowed to derogate from the common right of all the proprietors of a village to the *abadi*. The fact that a proprietor has lost the right to a share in the *Kuri Kamini* does not deprive him of the right to control the disposal of the *abadi* land. (*Le Rossignol, J.*) PARWARISH BAKSH *v.* MUHAMMAD HUSSAIN.
43 I. C. 456 : 19 P. W. R. 1918.

Adverse Possession.

——— *Adverse possession.*

Denial of title of a co-sharer is the starting point for limitation. (*Lord Atkinson.*) ARAB ALI KHAN *v.* MAHMUD ALI KHAN.
43 M. L. J. 104 : 20 A. L. J. 545 : 24 Bom L. R. 951 : 35 C. L. J. 554 : 31 M. L. T 94 : 1922 P. C. 84 (P. C.)

——— *Adverse possession.*

Where *A*, a co sharer takes more than his share and *B*, not interfering, consents to *A* remaining in possession of more than his share, the possession of *A* is adverse against *B*. (*Walsh, J.*) MUSTAFA KHAN *v.* MUSAMMAT DULARI.
3 U. P. L. R. (All.) 5 : 1922 A. 483.

——— *Adverse possession—Rights in joint property.*

One joint owner of private property cannot do anything which will enhance his interest in the joint property. If one joint owner of a passage builds a balcony projecting over the passage, the other joint owner can sue for its removal. (*Richards, C. J. and Banerji, J.*) SHIBBAMAL *v.* NAURANG MAL. 39 I. C. 739 : 15 A. L. J. 293.

——— *Adverse possession—Muhammadan Law.*

Without the assertion of an adverse title, a co-heir's possession in the absence of the others cannot become adverse to the others (*Piggott, J.*) CHANDA KHAN *v.* ALI KHAN. 15 I. C. 292.

——— *Adverse possession—Ouster—Joint property—Notice to co-sharer of mortgage redeemed.*

Mere notice by one co-sharer who redeemed mortgaged joint property to the other to the effect that, if he did not pay his share of the amount required for paying off the mortgage, he will have no right over the property redeemed, is not sufficient to constitute ouster. If since the date of the notice to the defendant has not been in possession of the family property, sufficiently long, it cannot

CO-SHARER—Adverse possession

be presumed that such long possession amounts by itself to an ouster. (*Macleod and Shah, JJ.*) KESHAV NARAYAN SHASTRI PRABHANE *v.* RAMACHANDRA GANESH PRABHANE.

1922 Bom. 156 (1).

———*Adverse possession—Considerations governing*

Where a person entered not as co-owner but asserting a hostile title and then became a co-owner and held the property exclusively, his possession continues to be adverse. which does cease by the appointment of Receiver. (*Chatterjee and Panton, JJ.*) PANKAJ MOHAN BAL *v.* BIPIN BIHARY CHAKLADAR.

38 C L. J. 220 : 1924 C. 118.

———*Adverse possession—Ouster.*

The possession of a co-owner is generally possession on behalf of all, but if there is ouster or acts equivalent to it, it will begin to be adverse. (*Walmsley and B. B. Ghose, JJ.*) BHAIRABANDRA NARAIN ROY *v.* RAJINDRA NARAIN ROY.

50 Cal. 487 : 1924 Cal. 45.

———*Adverse possession—Injunction—Ouster—Possession of portion of joint property.*

The sole occupation by one co-sharer of a portion of joint property does not constitute an ouster of the other co-sharers. A co-sharer in possession of a portion of the common land with the tacit or express consent of his co-sharers cannot change the nature of that possession or use the property in a mode different from how it has been used. (*Mookerjee and Beachcroft, JJ.*) ISRAIL *v.* SAMSET RAHMAN.

41 Cal. 496 : 18 C. W. N. 176 : 21 I C. 861 : 19 C. L. J. 47.

——— *Adverse possession.*

Where a sale is made by one co-owner, the purchaser's possession is to be treated as adverse to his co sharers. (*Broadway, J.*) ANWAR *v.* KISHEN SINGH.

1922 Lah. 205.

———*Adverse possession.*

Where the defts. acted on their own behalf only in suing a trespasser for possession their adverse possession begins from the date of their possession as against their co sharers. (*Le Rossignol, J.*) ZULPHI *v.* ASGHAR.

3 Lah. L. J. 441.

———*Adverse possession—Title derived from other co sharer.*

A person who held no other position than that of a co-sharer cannot plead adverse possession, and the fact that he derives his title from one co-sharer does not enable him to assume a title adverse to other co-sharers. (*Reid, C. J. and Kensington, J.*) MUHAMMAD UMAR ALI *v.* AMAN ALI.

170 P. W. R. 1911 : 12 I. C. 140 : 251 P. L. R. 1911.

———*Adverse possession—Co-heirs—Possession of one—Where adverse to others.*

Where one of several heirs takes possession of an inheritance, his possession is not adverse to his co-heirs. 34 Mad. 511, Foll. (*Sadasiva Aiyar and Napier, JJ.*) PONNUSWAMY AIYAR *v.* PERMAYE.

26 I. C. 346 : 16 M. L. T. 530.

CO-SHARER—Building on Common Land.

———*Adverse possession.*

The possession of one co-sharer cannot become adverse possession to that of other co-sharers. What act necessary is the assertion of exclusive title as against the others. (*Pipon, J. C.*) GHULAM HAIDAR KHAN *v.* SARDAR ALI KHAN.

73 I. C. 718.

Building on Common Land.

———*Building on common land—Party wall—Building.*

Where one of the owners of a party wall commences to build upon it without the consent of the other and the other interferes with his building, he is not entitled to an injunction to restrain the other co-owner from interfering. One of two tenants in common is not entitled to build upon a party wall without the consent of the other. *Watson* v. *Gray*, 14 Ch. D. 192; 19 Mad. 38, Foll. (*Tudball, J.*) IKRAM ULLAH KHAN *v.* MUHAMMAD YUNIS ALI KHAN.

30 I. C. 33 : 13 A. L J. 473.

———*Building on common land—Right.*

A co-sharer though in separate use and occupation of a joint land cannot erect permanent structures upon it. ((*Chamier, J.*) JADUNATH LAL *v.* BACHU LAL

25 I. C. 43.

———*Building on joint property—Rights of others.*

Where there is no ouster of the plaintiff by the defendant co-sharer building upon joint property, the plaintiff is not entitled to a decree for joint possession of the portion built upon, but is entitled to a declaration of his title as co-sharer. (*Teunon and Richardson, JJ.*) HARI DAS *v.* RADHA CHARAN.

46 I. C. 496.

———*Building on common land—Injunction.*

A proprietor may be restrained by his co-sharers from appropriating a vacant site to his own exclusive use by erecting a building thereon. It is not necessary for the other co-sharers to prove special damage. 1 Lah 249 ; 2 Lah. 73 referred to. (*Martineau, J.*) RUSTAM KHAN *v.* RAHMAN.

15 P W. R. 1923 : 1923 Lah 289.

———*Building on common land—Injunction—Re-building by one co-sharer—Effect.*

Whatever the powers of the Court may be in adjudicating on the rights of parties and in passing injunction (or conditional injunctions) in consequence of such adjudications it is a different matter to say that where a party admittedly owns a piece of property the Court has any authority to create and impose conditions as to the enjoyment of the same, neither breach of contract nor the infringement of any right being alleged to have taken place. Consequently a co-sharer who had rebuilt at his expense a common wall belonging to him and the defendant, another co-sharer, cannot obtain an injunction restraining the latter from treating the half belonging to him as his property until he had paid his portion of the cost of re-building the wall. (*Harrison, J.*) TALIB HUSSAIN *v.* MAHOMED HUSSAIN.

1924 Lah. 297 (2).

CO-SHARER—Building on Common Land.

———*Building on common land—Rights—Special damage—Limitation.*

Proof of special damage is not necessary to restrain a co-sharer from appropriating a portion of the common land. The suit must however be brought at once and before the erection of substantial buildings. (*Abdul Raoof, J.*) MANJI *v* GHULAM MUHAMMAD. 57 I. C. 207 : 1 Lah. 249.

———*Building on common land—Building by some—Suit for demolition by others—Special damage—Proof.*

Some of the proprietors of the village cannot sue for dem lition of a house built by another co-proprietor on common land without proof of special damage to the plaintiff. 54 P. R. 1892 : 33 P. R. 1901 ; 44 I. C. 844 : 48 I. C. 418, Foll. Where plff. did not raise any objection to the building of the house at the time and brought their suit after five or six years, the plffs. had acquiesced in the building and they were therefore not entitled to the relief sought. (*Martineau, J.*) SHEO RAM *v.* MUSSAMMAT DHAPON. 56 I. C. 454 : 2 Lah L. J. 635.

———*Building on common land—Injunction—Rights adjustable at partition—Refusal.*

In the absence of proof that the erection of the walled enclosure had actually caused such material and substantial injury as could not be remedied on a partition of the joint land, one co-owner cannot obtain an injunction restraining the other from building on a portion of common land, 54 P. R. 1888 and 54 P. R. 1892, Ref (*Broadway, J.*) MAJJU *v.* TEJA SINGH. 29 P. R. 1918 : 114 P. W. R. 1918: 44 I. C. 844 : 118 P. L. R. 1918.

Exclusive Possession.

———*Exclusive Possession—Ejectment—Khudkasht—Partition.*

Where a co-sharer suing for the exclusive possession of a plot of land proves that it was his khudkasht and the defendant trespassed upon the property and dispossessed him, the plaintiff is entitled to a decree and he could not be driven to a suit for partition in the Revenue Court. (*Gokul Prasad, J.*) KULDIP CHAUBE *v.* JAGNANDAN CHAUBE. 1923 A. 363.

———*Exclusive possession.*

As between co-sharers the rule is that where there is land to be cultivated, each sharer may take into his own cultivation out of the culturable land an amount proportionate to his share. If he takes more he must recompense his other co-sharers, but until he has taken more he need not recompense anybody. (*Stuart, J.*) BHIRUG RAI *v.* HAZARI RAI. 64 I. C. 922

———*Exclusive enjoyment of building on a plot by one—Rights of other parties.*

Where one co-sharer is for many years in exclusive possession of a particular plot and makes constructions thereon, the presumption is that he is so in possession with the consent of the other co-sharers. The other co-sharers cannot after lying by for many years, come in and ask to have the construction demolished. In making a

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partition, the lands will be allotted to him. (*Richards, C. J. (Banerjee and Tudball, JJ.)* LAHASO KUNWAR *v.* MAHABIR TEWARI. 37 All. 412 : 29 I. C. 15 : 13 A. L. J. 565 (F. B.).

———*Exclusive possession—Separate plots in abadi—Right to continue.*

If joint owners are in exclusive possession of separate plots in *abadi* they can continue such possession and enjoy it as they please so long as such user or possession does not interfere with the user of other owners of what is in their possession. 11 C. W. N. 517, Ref. (*Richards, C. J. and Banerjee, J.*) JAGANNATH PERSHAD *v.* BADRI PERSHAD. 34 All. 113 : 11 I. C. 768 : 9 A. L. J. 48.

———*Exclusive possession for enjoyment—Right to eject—Lessee if can sue for ejectment.*

Where co-sharers were in exclusive possession of parts of joint property, a lessee of one of the co-sharers can sue for possession if he is dispossessed by other co-sharers. (*Newbould and Panton, JJ.*) SHIAM LAL SAHA *v.* FULIA MOOSAMAT. 1922 Cal. 147.

———*Exclusive possession—Ouster—Tenant in common in occupation of portion of joint property—Liability to account.*

Each joint owner has the right to the possession of all the property held in common, equal to the right of each of his companions in interest and superior to that of all other persons. He has the same right to the use and enjoyment of the common property, that he has to his sole property except to so far as it is limited by the equal rights of his co-sharers. But the owner out of possession cannot complain of the mere possession of the co-owner, so long as he refrains from setting any claim to share in that possession. Hence in order to give rise to a cause of action against the co-sharer, it must be proved that his act had amounted to ouster or disseizin. Where there is an actual turning out or excluding out of the party entitled to the possession, there is an ouster. Any resistance preventing a co-sharer from obtaining effective possession is an actual ouster. A tenant cannot be held liable to his co tenant for damages for use and occupation of the joint property unless there has been waste or ouster, 42 Cal. 837, Ref. Where one tenant-in-common occupies part of the joint property without assertion of hostile or exclusive title and without claim by his co tenant to be admitted into possession, he is under no obligation even to account. (*Mookerjee and Walmsley, JJ.*) DEBENDRA NARAYAN SINGH *v.* NARENDRA NARAYAN SINGH. 23 C. W. N. 900 : 51 I. C. 976 : 29 C. L. J. 504.

———*Exclusive possession — Common land—Mutual arrangement.*

Where one of the joint owners of an estate, who by mutual arrangement with the other co-sharers has been placed in exclusive occupation of some of the joint lands as representing his share, he cannot be equitably disturbed by the latter unless they seek a partition of all the lands comprised in the estate. (*Mookerjee and Beachcroft, JJ.*) DURGA CHARAN ACHARJEE *v.* KHUNKUR ENAMAL HUQ 45 I.C. 705 : 27 C. L. J. 441.

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——— *Exclusive possession or enjoyment—Mutual arrangement—Damages.*

Where the plaintiff sues one of his co sharers for damages for the wrongful removal of fish from a tank and it is found that there was an arrangement by which the defendant was put in possession of the tank with the right of fishing in it. *Held*, the defendant was justly exercising his right in fishing in the tank and damages could not be claimed against him. (*Fletcher and Roe, JJ.*) BEHARI LAL NANDI *v.* KEDARNATH NEBU.
29 I. C. 806 : 19 C. W N. 872.

———*Exclusive possession—Joint ownership — Biggest adult share-holder—Presumption.*

The biggest adult share holder of a property will be presumed to be the trustee for the others if he holds entire possession of the property during their minority. (*Holmwood and Chapman, JJ.*) JAJNESWAR SAHA *v.* SATISH CHANDRA SHAH
23 I. C. 562

———*Exclusive possession—Ouster - Suit for joint possession.*

A portion of the joint land was a marsh and was jointly possessed by all the co-owners though they had other lands in separate possession. The marsh silted up and was occupied by one sharer to the exclusion of other. In a suit for joint possession, *Held*, a co-owner is entitled to a decree without bringing a suit for partition. Where parties are contended with joint possession of a certain land and a separate possession of the rest, from the point of view of justice, equity and good conscience, the dissatisfied party, may sue for partition. (*Carnduff and Richardson, JJ.*) KUMUD LAL RAI *v.* JOGINDRA MOHAN RAI.
22 I. C. 683 : 18 C. W. N. 609.

———*Exclusive possession—Ouster of one co sharer occupying portion of joint property—Whether other sharers entitled to joint possession.*

The mere fact of sole occupation by one co-sharer of a portion of the common property does not constitute an ouster of the other co sharers nor does it entitle them to a decree for joint possession especially where no hostile title is set up and even sole occupation of different parcels of land by different co-sharers according to convenience does not constitute ouster of other. 18 Cal. 10 (P. C) 11 C. L. J. 189 : 4 C. L J. 198, Ref. Ouster means dispossession of one co-sharer by another where a hostile title is set up by the latter and where the occupation of the latter is inconsistent with joint ownership. (*Chatterjee and Walmsley, JJ.*) BASANTA KUMARI DASYA *v.* MOHESH CHANDRA SHAHA. **21 I. C. 621 : 18 C. W. N. 328.**

———*Exclusive possession—Shamilat land—Land possession—Ejectment.*

Where a co sharer has been in exclusive possession of a portion of the common shamilat land, it is not open to the other co-sharers to sue to eject him or to obtain joint possession with him, so long as a partition of the shamilat does not take place. (*Scott Smith, J.*) MAHOMED AMIN *v.* KARIM DAD. **1924 Lah. 293.**

———*Exclusive possession—Mutual arrangement—When can be disturbed.*

CO-SHARER—Jagir.

A co-owner cannot set up a claim exclusively to any parcel of the joint property where by mutual arrangements co-owners enjoy different parcels in exclusive possession without partition. Courts will not interfere with the arrangement at the instance of any one co-owner and will do so only on partition, so far as may be necessary to make an equitable division of the property. 18 Cal. 10 (P. C.) 28 Cal. 323 : 27 All. 88 : 11 C. W. N. 143, Foll (*Stanyon, A. J. C.*) JAGANNATH *v.* RAMPRASAD. **46 I. C. 272 : 14 N. L. R. 101.**

———*Exclusive possession—Common land—Remedy of excluded members.*

In case land is in the exclusive possession of one co-sharer for a long time, the other co-sharers of the village cannot disturb him in his possession except by means of partition suit 7. O. C. 336 and 11. O. C. 355, Dist. (*Kanhaiya Lal, J. C.*) HARDEO SINGH *v.* CHANDKA BAKHSH SINGH. **52 I. C. 7 : 6 O. L. J. 278.**

———*Exclusive possession — Remedy—Ejectment—Partition.*

The remedy for co-sharer against another in possession of the entire estate lies, by suit for partition and not by ejectment. (*Stuart and Kanhaiya Lal, A. J. C.*) IKBAL NARAIN *v.* RAJENDRA NARAYAN. **21 O. C. 276: 48 I. C. 767 : 5 O. L. J. 701.**

——— *Exclusive possession — Joint property—Rule of enjoyment—Effect.*

The general rule as regards the enjoyment of joint property by the co-sharers is that one co-sharer has no right to appropriate himself a specific portion of the common land and to exclude his co-sharers from all use and enjoyment of the same without a lawful partition. But where a person has been in possession of a piece of joint land for long time without any let or hindrance by the other co-sharers the latter have no right to eject him or his transferee or to disturb his possession or enjoyment or otherwise than by seeking partition and he is entitled to continue in such possession so long as such user does not interfere with the use by other co-sharers of what was in their possession. (*Lindsay, J. C.*) RAM PIYARE LAL *v.* NAGESHWAR. **21 O. C. 214 ; 48 I. C. 91: 5 O. L. J. 613.**

——— *Exclusive possession — Ouster—Possession.*

The sole possession and long enjoyment of profits by one co owner exclusive of others continuously for a long period, evidences presumption of the ouster of the other co-owners. (*Adami, J.*) PARMA PANDE *v.* RAM SARUP PANDE.
58 I. C. 731.

Jagir.

———*Jagir—Profits.*

Profits of co-sharers in jagir land can be ascertained according to the letting value of the home farm land. (*Mittra, A. J. C.*) LAXMAN *v.* NARAYAN. **55 I. C. 652.**

——— *Jagir village in Berar—Suit against managing co-sharer for profits of village—Negligence on part of managing co-sharer—Onus of proof—Method of calculating emoluments of village offices in Jagir.*

CO-SHARER—Joint possession.

In a suit by co-sharer against the managing co sharer the plff. must prove that the managing co-sharer's negligence is responsible for short collections. The method of calculating emoluments of village offices in a Jagir explained. (*Prideaux, A. J. C.*) BALWANT *v.* DEORAO.
41 I. C. 848 . 13 N. L. R. 127.

Joint Possession.

———*Joint possession—Common Land.*

Held, following 44 A. 5 that no co-sharer who has been in physical or actual possession of any part of joint land is liable to be ejected by any of the other co-sharers except by means of a partition lawfully obtained. Where he has been ousted from the land occupied by him he is entitled to be restored to the actual possession which he had before and not merely to joint possession with the defendant co-sharer. (*Daniels, J.*) RAM HARAKH PANDAY *v.* CHUNI SINGH.
1923 A. 446.

———*Joint possession—Decree for.*

A co-sharer is entitled to a decree for joint possession and it should not be refused merely on account of troubles and difficulties arising by reason of parties not being on good terms, but it may be refused when there are circumstances which render it improper to pass such a decree. (*Banerjee and Gokul Prasad, JJ.*) BIRGUNATH RAI *v.* AP NARAIN RAI. L. R. 3 A. 515 (Rev.) : 45 A. 157 : 1923 A. 445

———*Joint possession—Common land—Cultivation by one of the co-sharers—Suit for possession by others.*

Where one of the co-sharers brings land under cultivation it is open to the other co-sharers to get a decree for joint possession in their favour. (*Gokul Prasad, J.*) BADRI UPADHIA *v.* DWARKA UPADHIA. L. R. 5 A. 23 (Rev.) : 1923 A. 416.

———*Joint possession—Ouster by one—Suit for possession—Decree.*

One co-sharer is entitled to a decree for joint possession and declaration of his joint rights, against the other co-sharers who have ousted him. (*Lindsay and Kanhaiya Lal, JJ.*) SARABJIT SINGH *v.* RAI KUMAR. 19 A. L. J. 783 : 3 U. P. L. R. (All) 146 : 44 A. 5 : 1922 A. 162

———*Joint possession—Ouster by one—Suit for possession—Decree.*

One co-sharer is entitled to a decree for joint possession and not merely a declaratory decree, against the other co-sharers who have ousted him. (*Lindsay and Kanhaiya Lal, JJ.*) BISHESHWAR SINGH *v.* HANUMAN SINGH. 19 A. L. J. 780 : 3 U. P. L R. (All.) 143 : 44 A. 1 : 1922 A. 314.

———*Joint possession — Right to—Partition suit.*

Where a suit for partition is pending between the co-sharers and the rights of the parties to *khas* possession of different lands would be finally decided, the court would not disturb the existing possession of the lands by the co-sharers, unless it

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is compelled by cogent reasons. (*Newbould and Panton, JJ.*) MAHOMED HYDER ALI KHAN *v.* MAHOMED WAJED ALI KHAN PANI.
36 C. L J. 155 : 1923 C 208.

———*Joint possession.*

The plff. claiming an undivided share in a Taluk was entitled to a declaration that the settlement in favour of the deft. claiming through the owner of the remainder was invalid and inoperative but joint possession of the plff. with the deft would not be decreed in absence of proof of possession of remaining lands. (*Chitty and Cuming, JJ.*) KUMODINI ROY *v.* ABDUL GANI.
52 I. C. 171.

———*Joint possession—Right to co-sharer in exclusive possession.*

A co sharer can claim joint possession with another co-sharer where the latter has not only exclusive possession of the lands but asserts in his written statement exclusive possession in denial of the title of the plff. (*Richards and Beachcroft, JJ.*) SASHISHEKHARESHWAR RAY *v.* HEMANGINI DEBI. 44I. C. 689

———*Joint possession — Decree for—When given—Tenant— Encroachment by—Tenant subsequently becoming co-owner.*

If the tenant who afterwards became a co-sharer landlord had taken possession of land peacefully after he had become a co-sharer, the principle of the case of 18 Cal. 10 would apply where the plaintiffs were entitled to joint possession. (*D Chatterjee and N. R. Chatterjee, JJ.*) SAMARADDI *v.* SHYMA CHARAN SEN. 11 I. C. 637 : 16 C. W. N. 251.

———*Joint possession—Right to.*

Where one co-sharer in possession of a portion of the common land denies the title of the others the latter can sue the former for joint possession. *Quaere.* Whether the doctrine that a co-sharer in possession of a portion of the joint land, who has not denied the joint character of the property should be allowed to retain it until partition, is applicable to *abadi* land ? (*Shadi Lal, C. J. and Leslie Jones, J.*) MANJI *v.* GHULAM MUHAMMAD.
2 Lah. 73 : 61 I. C. 415 : 3 Lah. L. J. 75.

———*Joint possession among co-owners.*

In the absence of a superior title by custom to hold exclusive possession in the case of shamilat land, a plaintiff co-owner is entitled to only joint possession of it with another co-owner. (*Chevis, J.*) NIHAL SINGH *v.* MAL SINGH. 31 I. C. 862: 160 P. W. R. 1915.

———*Joint possession—Right to—Hotchpot.*

One co sharer who had joint property in his possession cannot seek a decree for joint possession of other property in the possession of a co-sharer defendant unless and until he brings the property in his own possession into a hotchpot. 28 All. 161 : 18 Cal. 10 P.C. : A. W. N. (1901) 48, Foll. (*Rattigan and Jones, JJ.*) MUHAMMAD HAYAT *v* MUHAMMAD ALI. 94 P R. 1915: 31 I. C. 489 : 210 P. W. R. 1915.

———*Joint possession — Purchaser from co-tenant.*

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A decree for joint possession ought not to be passed in favour of purchaser of property from a co-tenant who never had actual possession. 1[8] Cal. 10, Rel: 26 Bom 141, Dist (*Sadasiva Aiyar and Tyabji, JJ.*) CHAKRAPANI MISRO *v.* SADASIVA SODANJI. **25 M. L. J 352 : 21 I. C. 314 : 14 M. L. T. 346.**

——— *Joint possession—Right to.*

Each joint owner is entitled to joint possession of every part of the property equally with every other member. (*Butler, O. J. C.*) RAGHOBA *v.* ZIBOO. **11 I. C. 687 : 7 N. L. R. 82.**

———— *Joint possession—Decree for.*

A person entitled to joint possession, can be given a decree for joint possession, even if he had never been in possession at all. (*Daniels, J. C.*) RAM BAHADUR SINGH *v.* LAL NARASINGH. **63 I. C. 433 : 24 O. C. 227.**

——— *Joint possession—Limitation.*

Possession by some of the co-sharers of different portions in a joint mahal prevent limitation from running against them in regard to the remainder. (*Lindsay, J. C. and Kanhaiya Lal, A. J. C.*) JANG BAHADUR *v.* MUHAMMAD ABDUL HUSSAIN KHAN. **35 I. C. 743 : 3 O. L. J. 279.**

——— *Joint possession—Letting of land by one co-sharer—Right of others to joint possession.*

Where a tenant has taken a settlement only from the 12 annas sharer landlords, the 4 annas landlord who has not made any settlement is entitled to a decree for joint possession with the tenant 18 C 10: 28 C. 223: 19 C. W. N. 407 : 51 I. C. 31 dist. (*Ross and Coutts, JJ.*) BALGOBIND MANDAR *v.* DWARKA PRASAD. **1 P. 394 : 3 P. L. T 409 : (1922) Pat 142 : 1922 P. 279.**

Lambardar.

——— *Lambardar—Dues payable to—Agreement between co-sharers—Effect.*

In a suit by a lambardar against the co-sharers for the recovery of lambardari dues, the defence was that the co-sharers made collections themselves and paid revenue of their respective shares and that under the terms of the wajib-ul-arz of 1285 fasli the lambardar of the village was not entitled to any remuneration. At the settlement of 1285 fasli before the Board of Revenue had issued the rules under the U. P. Land Rev. Act there was an agreement between the co-sharers that the lambardar should receive no remuneration. At a subsequent settlement in 1312 Fasli the plaintiff lambardar contended that this agreement was abrogated. There was no evidence that it had been abrogated or reaffirmed. *Held*, that if the co-sharers as a body desired to contract themselves out of the rule framed by the Board of Revenue, they ought to have agreed upon some nominal remuneration for the lambardar. The lambardar is placed in a strong position ; he can bargain with the co-sharers for some reasonable remuneration, under threat of standing upon his extreme rights and claiming his full 5 per cent. on the land revenue. The agreement relied upon by the defendants (co-sharers) even if it survived the enactment of the Board of Revenue's Rules came to an end automatically at the close

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of the settlement for which it was made and could have no effect on the rights of the lambardar thereafter, at any rate, unless it were proved that it was expressly renewed. (*Mears, C. J. and Piggott, J.*) SHEO CHARAN *v.* PANNA LAL. **20 A. L. J. 795 : L. R. 3 A. 468 (Rev.) : 45 A. 84 : 1923 A 41.**

——— *Lambardar—Power to grant leases.*

The lambardar has authority to grant a lease of Zemindari property with due regard to the season. (*Gokul Prasad, J.*) HARDILAL *v.* ALAM. **L. R. 4 A. 298 (Rev) : 1924 A. 459.**

——— *Lambardar—Appointed after rent had accrued due—Liability.*

A *lambardar*, though appointed after the rents for a particular period have fallen due, would be liable to account for it in a suit by a co-sharer for profits, if the *lambardar*, after his appointment, realised the same or if he merely recovered decrees for the same, he would be liable for the amount realised under the decrees or for the ascertained value of the decree. (*Richards, C. J. and Banerjee, J.*) BHARAT INDU *v.* SYED MUHAMMAD MUSTAFA KHAN. **41 All 316: 52 I. C. 836: 17 A. L. J. 167.**

——— *Lambardar—Grant of lease by.*

A lambardar cannot grant a lease of co-parcenary land beyond a necessary period. But where it is beneficial to the general body of the co-sharers it is not open to them to have it declared invalid. (*Piggott, J.*) UMRAO SINGH *v.* UMRAO SINGH. **25 I. C. 61.**

——— *Lambardar—Suit against, by co-sharer—Interest* pendente lite—*Burden of proof.*

In a suit by a co-sharer against a *lambardar* for profits, the plaintiff would ordinarily be entitled to interest and the burden is on the lambardar to prove exemption from liability to pay interest. (*Richards, C J. and Banerjee, J.*) ABDUL GHANI *v.* ABDUL MAJID. **13 I. C. 116.**

——— *Lambardar—Acquiring derelict holding—Benefit of, when can belong to co-sharers.*

All co-sharers have a right to share in the benefit acquired by a lambardar co-sharer by way of recovering possession of a derelict holding if they contribute their share of the expenses incurred by the lambardar for such acquisition. 10 C. P.L.R. 37: 10 C.P.L R. 40: 13 C. P. L. R. 153. Relon. A lambardar though he gets an extra share of the profits ought not to be made liable for an extra share of the expenses. The *Mukaddam* remuneration should be deemed part of the expenses of the acquisition of the holding. (*Mookerjee and Beachcroft, JJ.*) BALKA GAUNTIA *v.* LOCHAN GAUNTIA. **20 I. C. 972: 19 C. L. J. 202.**

——— *Lambardar—Appointment of woman—Land-Revenue Rules 17 and 27.*

A woman is not entitled to an appointment of headman either by sole ownership or any other feature in the position of the individual concerned. There are however features among which sole ownership is one, which may justify an appointing officer in selecting a woman in spite of her

sex if there are no sufficient counteracting considerations of another order. (*Maynard, F.C. and Fagon, A F. C.*) MUSSAMMAT JIWANI *v.* GANGA RAM. 2 Lah. L. J. 172.

——— *Lambardar—Dismissal for failure to assist in recruiting—Family claims—Appointing successor.*

The failure of a particular *lambardar* to assist in recruiting is not a matter which should exclude the claims of the family unless he is a member of a tribe or family which for specific reasons is permanently unlikely to be successful in the work. (*Maynard, F C.*) HAIDIR *v.* EMPEROR. 54 I. C. 861 : 4 P. R. 1919 (Rev.).

——— *Lambardar—Qualifications of candidate—Acquisition of* lambardari *by special arrangement—Orders of Deputy Commissioner—Appeal—Zaildari.*

In appeals in *Zaildari* cases the Deputy Commissioner's orders therein should in all cases, if possible, be upheld. In making an appointment in *Zaildari cases* previous good public service satisfactorily discharged entitles him to special consideration. (*Fenton, F. C.*) ATARSINGH *v.* GANGA SINGH. 1 P. W R. 1913 (Rev.) : 1 P. R. 1913 (Rev) : 18 I. C. 594 : 148 P. L. R. 1913.

——— *Lambardar—Suit for arrears of profits—Burden of proof.*

In a suit by co-sharers against lambardar for profits, the burden of proving amount of arrears lies on the lambardar. (*Prideaux, A. J. C.*) SARJE RAO *v.* HARAK CHAND. 6 N. L. J. 234 : 1923 Nag. 287.

——— *Lambardar — Lease — Lambardar's authority to give.*

A lease granted by the Lambardar of a village and impliedly consented to by his co-sharer is binding on the co-sharer. The position of a Lambardar with reference to his co-sharer in the matter of letting out vacant land cannot well be put higher than that of a Manager of the joint property of a Hindu family. (*Droke-Brockman, J. C.*) KUNJILAL *v.* C. CHANDARSINGH. 64 I. C. 775 : 17 N. L. R. 169.

——— *Lambardar—Imperfect partition—Lambardar's authority.*

In an imperfect partition, the *lambardar's* representative authority is at an end except in relation with the Government. A lease of *lao patera* by a *lambardar* is not binding on the co-sharers. (*Mitra, A. J. C.*) HARIPHAJAN *v.* ZAHARAN BI. 57 I. C. 318.

——— *Lambardar—Position of.*

As between a *lambardar* and a person jointly interested with others in a *patti*, there is no such privity of contract as would entitle the latter to treat the former as his agent in respect of the item in his hands. (*Mitra, Offg. J. C.*) HARIDAS CHATTERJI *v.* GAHENABAI. 56 I. C. 761.

——— *Lambardar— Power to lease vacant lands—Consent.*

A provision in a *wajib-ul-arz* of a village that the *lambardar* should consult the wishes of the

co-sharers of the village does not mean that the consent of the co-sharers should be obtained to a lease. The general rule in the Central Provinces is that the *lambardar* leases the vacant lands in the ordinary course of management. The mere fact that the co sharers are not consulted does not entitle them to avoid *bona fide* lease. (*Mitra, A. J. C.*) HARI PRASAD *v.* GOVINDA RAO. 54 I. C. 634.

——— *Lambardar—Profits—Interest--Liability to account—Onus.*

The burden of proving by *prima facie* evidence the actual receipts of profits, lies on the co-sharer suing the *lambardar* for his share of the profits. Interest ought not to be allowed except in special circumstances on the profits claimed by the co-sharer, since the relation between the parties is not of debtor and creditor. The co sharer must prove a demand and refusal before claiming interest. (*Batten, A. J. C.*) GOPALA KUNBI *v.* RAM KRISHNAPURI. 50 I. C. 930 : 15 N. L. R, 85.

——— *Lambardar— Wajib-ul-arz.*

A co-sharer cannot avoid a lease created by a *lambardar* he being generally empowered to create lease with the consultation of his co sharer by an entry in the *wajib-ul-arz.* His remedy is to sue for damages against the *lambardar*, or his removal from office or by claiming partition. (*Stanyon, A. J. C.*) POONAMCHAND *v.* NANDLAL. 48 I. C. 72.

——— *Lambardar—Authority of—Suit for partition instituted—Effect of.*

The mere institution of partition proceedings by a co-sharer against a *lambardar* does not of itself put an end to the authority of the *lambardar* to lease out waste land. The absence of consultation by the *lambardar* with his co-sharers in the matter of leasing out waste lands does not affect the position of a stranger taking the lease in good faith. (*Mitra, A. J. C.*) FACKIRGIR *v.* MULCHAND. 43 I. C. 934 : 14 N. L. R 18.

——— *Lambardar—Power of—Lease of Banjar—Right of co-sharers—Fraud of lambardar.*

As a rule, the lambardar cannot lease Banjar land without the consent of the whole proprietary body. But if the lease does not injuriously affect the interests of the body or villagers and is on the contrary beneficial to both, it will not be set aside at the request of a co-sharer who stood by and allowed the lessee to spend money in reclaiming the land. It would be unfair to view a new tenancy of this nature in the same light as one which seriously curtails the villager's rights of grazing and *nistar* and is prejudicial to them. The lambardar's power to act on behalf of the whole body of landlords in relation to an act done in their interests must be treated differently from a fraudulent one. 2 C. P. L. R. 106, Ref. (*Frideaux, O. A. J. C.*) KEDARNATH *v.* MARUTI. 36 I. C. 544 : 12 N. L. R. 136.

——— *Lambardar—Chanda District—Custom of taking land.*

In Chanda District there is an old established village custom allowing a lambardar to take lands

CO-SHARER—Lambardar.

out of the possession of any tenant for cultivation of sugarcane. (*Batten, A. J. C.*) GANGADHAR RAO CHITNAVIS *v.* RAJANNA, **27 I. C. 502.**

———*Lambardar—Agent—Custom.*

The practice of appointing a lambardar is so universal that a presumption arises that a lambardar is the agent of the proprietary body in every village unless the contrary is shown. But the presumption does not extend to the case of a minor lambardar nor to that of his guardian. (*Halifax, A. J. C.*) HAIJNATH *v.* RAGHUNATH. **26 I. C. 608 : 10 N. L. R. 93.**

———*Lambardar — Powers—Institution of partition proceedings.*

The mere institution of partition proceedings does not terminate the powers of the lambardar to consent to the transfer of an absolute occupancy holding. (*Mittra, A. J. C.*) CHOWBE JAIGOPAL *v.* RAMESHWAR. **26 I.C. 606 : 10 N. L. R. 896.**

——*Lambardar—Customary agent—Whether can sue alone.*

A lambardar as the customary agent of the proprietary body can sue alone to set aside a voidable transaction. 6 I. C. 389 and 4 N. L. R. 45, Dist. (*Mittra, Offg. A. J. C.*) MURLIDHAR *v.* JAGANNATH. **23 I. C. 20 : 10 N. L. R. 5.**

———*Lambardar—Suit for profits—Liability of heirs of Lambardar.*

A lambardar is under a duty to take reasonable care in collecting the rents and the liability incurred by the failure to perform that duty survives after his death. The heirs of the deceased lambardar are liable to the extent of the assets of their deceased father which have come into their hands for the co-sharer's share of the profits which might with reasonable care have been collected. Where the difference between the gross rental and the collections is very great, there is a presumption either of dishonesty or of gross negligence on the part of the deceased lambardar and the burden is on his heirs to rebut that presumption. (*Lyle, A. J. C.*) SURAJ PRASAD *v.* DEBI DAYAL. **25 O. C. 49 : 8 O. L. J. 485 : 1922 Oudh 149**

———*Lambardar—Suit for profits—Liability for interest.*

In the absence of proof that the lambardar has deliberately or contumaciously declined to render accounts or pay his dues to a co-sharer, he can not be made liable for interest on sums found due on taking the accounts. 12 O. C. 140; 14 O. C. 150 dist. (*Kanhaiya Lal, J. C.*) KAMPTA SINGH *v.* MATA BHIKA SINGH. **3 U. P. L. R. (J. C.) 24: 8 O. L. J. 630 : 1923 Oudh 107.**

——*Lambardar—Power of—Grant of long leases.*

Under exceptional circumstances it is competent to a lambardar in the exercise of his powers as a manager to grant leases for a longer term than what the requirements of the particular year or season may necessitate if he thereby secures the largest amount of benefit to the co-sharers by saving the property from sale. (*Kanhaiya Lal, J. C and Dalal, A. J. C.*) MAHOMED MASUDALAM *v.* MAHOMED MAHUMUD ALAM. **24 O. C. 369: 9 O. L. J. 66: 1922 Oudh 40.**

CO-SHARER—Lambardar.

———*Lambardar—Power to lease joint property—Sub-lease outliving the original lease.*

A *lambardar* cannot grant lease of joint property except for the particular year in which the lease is granted or for a reasonable period, No sub-lease can be granted as to outlive the original lease. (*Kanhaiya Lal and Kendall, A. J. C.*) SANKATA DIN *v.* GAYA DIN, **33 I C. 399: 3 O.L.J. 729.**

——*Lambardar—Rent—Liability--Co-sharer not a lambardar.*

A co-sharer who is not a lambardar of the village is not bound to the other co-sharers to collect the village rent and cannot be made to surrender any portion of his collections if the collections do not exceed his own share of the profits. (*Lindsay, J. C.*) KALKA *v.* RAI JWALA PRASAD, **38 I. C. 89: 19 O. C. 326.**

——*Lambardar—Cost of collection—Reasonable allowance*—Haq lambardari.

10 per cent. is a reasonable allowance for costs of collection. The 5 per cent. by way of *haq lambardari* paid to him is quite independent of the charges for collection. (*Lindsay, J. C.*) IQBAL NARAIN *v.* SURAJ NARAIN. **24 I. C. 673: 1 O. L. J. 156.**

——*Lambardar—Powers—Perpetual lease.*

The grant of a perpetual and heritable lease is not beneficial to the general body of co-sharers and is beyond the competence of a lambardar unless justified by custom or by the special circumstances of the particular case. (*Piggott, J. C.*) RAGHUBAR DAYAL *v.* MAHESHGIR. **20 I. C. 147.**

——*Lambardar—Lease perpetual—Acquiescence—Effect of.*

The granting of a perpetual lease is beyond the competence of a *Lambardar* acting on behalf of the entire body of co-sharers, in the absence of a special custom to the contrary. A co-sharer in an undivided *mahal* may acquiesce in an arrangement by the *lambardar* or other co-sharers for the cultivation of the lands of the *mahal* without thereby binding himself to accept all the terms of any contract of lease which the other co-sharers may have entered into. (*Piggott, J. C.*) IBAD ALI KHAN *v.* RAMESWAR PRASAD. **20 I. C. 57.**

——*Lambardar—Suit against co-sharer for his share of revenue paid—Contribution--Decree—Interest.*

A suit by a lambardar against his co-sharers for revenue paid by the former on the latter's default does not differ from an ordinary suit for contribution and the decree in such a suit should, therefore, specify the liability of each co-sharer separately and should not be joint as against all co-sharers. A lambardar can also recover interest from the defaulting co-sharers. 20 Mad 481, Ref. (*Evans, J. C. and Piggott, A.J.C.*) ARJAN SINGH *v.* RUDRA PARTAB SINGH. **11 I. C. 674 : 14 O. C. 164.**

CO-SHARER—Mutual relation.

Mutual Relation.

——*Mutual relation—Position of—Good faith in dealings—Intentional default in payment of revenue.*

The relative position of co-sharers in respect of the payment of revenue, demands from each, such measure of candid dealing and good faith, as will ensure that a sharer is not tempted to make a deliberate default with a view to ousting his co-sharers and appropriating to himself their common property. 16 Cal. 194, Disappr ; 17 C. W. N. 1233, Appr. (*Sir Lawrence Jenkins*) DEONADHAN PRASAD *v.* JANKI SINGH. **44 Cal. 573 : 15 A. L. J 154 : 32 M L. J. 206 : 21 C. W. N. 473 : 1 P. L. W. 294 : 25 C. L. J. 259 : 21 M. L. T. 240 : 5 L W. 526 : 44 I. A. 30 : 19 Bom. L. R 410 : 39 I. C. 346 : (1917) M. W. N. 254 (P. C.).**

——*Mutual relation—If can put an end to undivided character of, by private arrangement.*

Co-sharers in a *mahal* cannot put an end to the undivided character of the *mahal* by a private arrangement. (*Karamat Husain and Chamier, JJ.*) KISHORI LAL *v.* TODDAR SINGH. **13 I. C. 535: 9 A. L. J. 244.**

——*Mutual relation—Partition wall—Rights inter se.*

Conditions attaching to party wall are not easy to define. Each party is entitled to act as owner of his half, but cannot compel the owner of the other half to bear any greater burden than he chooses to place on it An encroachment cannot take place in defiance of the other's rights. (*Macleod, C. J. and Crump, J.*) DAUDKHAN MUSEKHAN *v.* CHANDULAL KANHAYALAL **1923 Bom. 370.**

——*Mutual relation—Joint property—Incidents.*

One of the incidents of joint property is that it may be enjoyed by jointly; another incident is that its joint character is likely to be terminated. If a co-owner is content to enjoy joint property as such he should not be driven to seek for partition merely because his co-owner chooses to dispute the extent of his share. (*Mookerjee and Buckland, JJ*) JOYNARAIN *v.* SUCHITRA. **33 C L. J. 592 : 26 C. W. N. 206 : 1922 Cal. 8.**

——*Mutual relation—Possession.*

Possession of one co-owner is possession for another unless he asserts hostile title and acquires title. Actual and exclusive possession of co-sharers cannot be on behalf of one who abandons the land. (*Chatterjee and Newbould, JJ.*) TOMEJUDDI *v.* MULAI CHOWKIDAR. **35 I. C. 72.**

——*Mutual relation—Ownership—Government revenue.*

It is doubtful whether between co-sharers any mutual confidence exists as regards the payment of Government revenue. 3 Cal. 504; 16 Cal. 194, Ref. (*Chatterjee, J.*) MAIMUNNISSA KHATOON *v.* FAIZAR RAHMAN. **9 I C. 507.**

——*Mutual relation—Improvements—Right of one co-tenant to claim compensation.*

CO-SHARER—Mutual relation.

A tenant in common is not entitled to compensation for improvements effected by him on the common property as against the other co-tenants in the absence of any necessity for repairs or improvements or of the other co-tenants' concurrence, express or implied, in their execution. 2 C.L.J. 25 dissented from. *Swan* v. *Swan*, 8 Price 518; *Harrington* v. *Forrester* (1893) 2 Ch. 461 ; *Leigh* v *Dickeson*, 15 Q. B D. 60 referred to. (*Oldfield and Devadoss, JJ.*) JANTAPURAM SUBBIAH *v.* VENKATARAMAYYA. **44 M. L. J 43 : 17 L. W. 77: 46 Mad. 104 : (1923) M. W. N. 13 : 1923 M. 358.**

——*Mutual relation—Separate possession—Mutual agreement—One party in possession of excess area—Remedy.*

Joint co-owners of a field cannot enjoy possession of the field except by cultivating each separate portions of the field. If they have once agreed to cultivate definite portions, neither can they be allowed to bring a suit for joint possession of the portion of the other as it would open the door to large infructuous litigation. If one party is cultivating more than his share, the remedy of the other is to bring his suit for partition. 14 N. L. R. 101, Ref. (*Macnair, A. J. C.*) RADHAKISHAN *v.* DAULAT. **64 I. C. 427.**

——*Mutual relation—Cultivation by one—Effect of.*

Cultivation by one co-tenant is *prima facie* on behalf of himself and his co-tenants. (*Mitra, A. J. C.*) SADOO *v.* GANJI. **57 I. C. 495.**

——*Mutual relation—Lessee from co sharer—Right to sue for profits.*

It is not competent to a co sharer or his lessee or transferee to deal with joint land against the wishes of the other co-sharers. Though a lessee or grantee may be a co-sharer for the purpose of a suit for profits that does not mean that he has acquired the full rights of a proprietor for all purposes. Where a lessee of a certain plot of Shamilat land from one of the co-sharers also obtains a lease or mortgage from some of the other co-sharers he is not entitled to deal with the lands as he likes, but he is bound by the terms of the leases in his favour. (*Daniels, A. J. C.*) PANDIT SRI NATH *v.* NAJMUNNISA. **9 O. L. J. 92 : 1922 Oudh 16**

——*Mutual relation—Relationship of, when comes to an end.*

The relationship of the sharers of a village *inter se* continues for all legal purposes till a partition by the Revenue Court takes effect. The confirmation of a proposed partition is not itself sufficient to destroy an existing co-parcenership. (*Stuart and Kanhaiya Lal, A. J. C.*) KERI SINGH *v.* DEO KUNWAR. **46 I. C. 339 : 5 O. L. J. 215.**

——*Mutual relation—User of joint property—Interference by another.*

A co-sharer cannot materially alter the condition of the joint property without obtaining the permission of and with detriment to the user of the other co-sharers. (*Ross, J.*) DEBENDRA PRASAD SUKUL *v.* SURENDRA PRASAD SUKUL. **59 I. C. 975.**

CO-SHARER—Mutual relation.

———*Mutual relation—Suit between, for use, and occupation.*

A suit by one co-owner against another will not lie simply for use and occupation. (*Fox, C J. and Parlett, J*) SWAN TEE *v.* MA NGWE.
32 I. C. 630 : 9 Bur. L. T. 69.

———*Mutual relation.*

It is common enough to find one or more co-heirs acting on behalf of the general body of co-heirs. (*Twomey, J.*) SUBRAMANIAM CHETTY *v.* MAUNG SHUE THE. **11 I. C. 781 : 4 Bur. L. T. 163.**

Partition.

———*Partition—Suit for, by one member—Other co-sharers necessary parties.*

In a suit for partition by one co-sharer the other co-sharers are necessary parties and the decree in the suit is binding on them. A subsequent suit for partition by one of the co-sharers who was a party to the previous suit is barred by *res judicata*. (*Lord Moulton.*) NALINI KANTA LAHIRI *v.* SARNAMOYI DEBYA.
1 L. W. 607 : 27 M. L. J. 76 : 16 M. L. T. 544 : (1914) M. W. N 948 : 21 C. L J. 23 : 17 Bom. L. R 1 : 24 I. C. 294 : 19 C. W. N. 531 P. C.).

———*Partition.*

If a co-sharer files a suit within 12 years from the date of the partition for the removal of the trees allotted to one co-sharer and standing on the land allotted to another co-sharer, he is entitled to have the same removed and the land vacated. (*Kanhaiya Lal, J.*) NIAMAT ULLAH *v* SA-UT-UN NISSA BIBI. **L. R. 4 A. 314 (Rev.) : 1924 A. 160.**

———*Partition—Properties omitted in preliminary decree—Power of court to add.*

Ordinarily a suit for enforcing partition of some only of the common property will not lie, if however by mistake, fraud or some other reason, some properties are left out, any of the co-owners can apply to have them divided. So also, even after preliminary decree, a court may direct discovery of properties still remaining joint and pass preliminary decrees in respect thereof. (*Mookerjee and Cholzner, JJ.*) BHUBAN MOHINI DASI *v.* KUMUDBULA DASI. **28 C. W. N. 131 : 39 C. L. J. 140 : 1924 Cal. 467.**

———*Partition—Improvements—Equity.*

If a joint owner has in good faith made valuable improvements upon the common property at his own expense, equity takes the fact into consideration upon a partition and in some suitable way makes an allowance to him therefor in addition to his rateable share of the property. (*Mookerjee and Buckland, JJ.*) JAGANNATHA MARWARI *v.* CHANDNI BIBI. **26 C. W. N. 65 : 67 I. C. 31 : 34 C. L. J. 432.**

———*Partition—Right to—Defence—Acquisition of subordinate interest.*

Where two persons are in joint possession as joint owners, entitled to claim partition against another it is no valid answer to a claim for a partition by one that the other has acquired a subordinate interest over the whole property.

CO-SHARER—Right against trespasser.

Property held in co-tenancy may be partitioned by suit and the only essential is that the property must be held in co-tenancy. (*Mookerjee and Richardson, JJ.*) KALI CHURN *v.* MOHANANDA DUTTA. **29 I. C. 467.**

———*Partition, suit for—Shamilat—Cultivation of part of common land by one sharer—Remedy of others.*

Where a co-sharer cultivated a part of the common land, the other co-sharers are entitled to apply for partition but are not entitled to an injunction restraining the co-sharer from cultivating the land. A fact that a fair is held on the land every year when the land is free from crop and it is reserved for camps of officers on tour, does not affect the matter. (*Rattigan, C. J.*) AHMAD *v.* SUNDER SINGH. **51 I. C. 567 : 36 P. L. R. 1919.**

———*Partition.*

A co-sharer by taking possession of half the land without the consent of his co-sharer cannot compel him to accept the other half as his share. (*Mitra, A. J. C.*) SADOO *v.* GANJI. **57 I. C. 495.**

———*Partition—Landlord and tenant—Surrender of tenancy to one co-sharer—Suit for possession.*

Plaintiffs and defendant were co sharers in a village. Defendant took a surrender of tenancy lands. The other co-sharers gave notice to vacate their shares. No mention was made in the notice about contributing to the defendants for their share of the cost of acquisition of surrender. Two years after the notice pffs. filed a suit for joint possession with defendant. *Held*, that there had been unreasonable delay in instituting the suit. As the notice was simply of a threatening nature not making any mention of the intention to contribute to the costs of acquisition, the suit should be dismissed. Plaintiff's remedy was held to be a suit for partition. (*Batten, A. J. C.*) BAPU *v.* SITTI. **45 I C. 902.**

———*Partition—Collection of rents and payments of revenue by each co-sharer—Liability to profits.*

Under private partition in a village each co-sharer collected profits to the extent of his share and paid revenue separately. *Held* there can, between the co-sharers, be no liability for profits so long as this arrangement remains in force. (*Daniels, A. J. C.*) MUSSAMMAT SUBHANI *v.* JAGDEO SINGH. **53 I. C. 776 : 6 O. L. J. 468.**

Right against trespasser.

———*Right against trespasser—Ejectment—Khudkasht—Exclusive operation—Partition.*

Where a co-sharer suing for exclusive possession of a plot of land proves that it was his khudkasht and the defendant trespassed upon the property and dispossessed him, the plaintiff is entitled to a decree and he could not be driven to a suit for partition in the revenue court. (*Gokul Prasad, J.*) KULDIP CHAUBE *v.* JAGNANANDAN CHAUBE. **1923 A. 363.**

CO-SHARER—Right against trespasser.

———*Right against trespasser.*

One of the co-sharers can sue to eject a trespasser from the joint land and the suit is maintainable. (*Lindsay and Kanhaiya Lal, JJ.*) SRI THAKURJI *v.* HIRA LAL. **20 A. L. J. 609 : L. R. 3 A. 581 : 44 A. 634 : 1922 A. 408**

———*Rights against trespasser—Suit by one joint owner—Other co-owners made defts.--Decree, form of.*

In a suit against a trespasser by one joint owner where the other joint owners are made defts. on the ground that they would not join as plffs. the decree should be one for possession in favour of the plff. on his own behalf and on behalf of his co-owners to the extent of their respective shares. (*Piggott, J.*) SHEO DIAL *v.* PARBATIA. **22 I. C. 841 : 12 A. L. J. 23.**

———*Rights against trespasser— Ejectment by co-sharer landlord— Trespasser—Tenant—Effect.*

A co-sharer landlord cannot by himself sue to eject a tenant ; but he can so sue a trespasser such as a transferee of a non-transferable holding. (*Coxe, J.*) GANODANNESSA BIBI *v.* MAKSEDANNESSA BIBI. **11 I. C. 84.**

———*Right against trespasser.*

The principle that in a suit for the ejectment of a tenant from a joint holding all the co-sharers must act jointly or obtain partition is not applicable, where the defendant is not a tenant but a trespasser. (*Moti Sagar, J.*) LEKHA *v.* BHANI. **1923 Lah. 647.**

———*Right against trespasser — Shamilat land—Encroachments.*

Where the land encroached upon had been reserved for the common purposes of the village body and in consequence of the encroachments there is hardly sufficient space left on the spot for the common purposes of the village body. *Held*, a decree can be passed for restoration of the land to its original use as there will be no exclusion of the defendants from joint possession of a legitimate character. 2 Lah. 73, Foll. (*Campbell, J.*) PASAWA SINGH *v.* AMAR CHAND. **1923 Lah. 308 (2).**

———*Right against trespasser—Suit by one for ejectment—Form of decree.*

In a suit by one of the co-sharer landlords for ejectment of the defendant who was found to be a trespasser, the court can pass a decree only for the plff.'s share. (*Brasher, J.*) DIPA *v.* LAL CHAND. **49 P. L. R. 1922 : 68 I. C. 428 : 1922 Lah. 393.**

———*Right against trespasser.*

Any one of co-owners or co-tenants is entitled individually to maintain an action in ejectment against a trespasser, 7 Cal. 414 ; 15 Cal. 40; 5 All. 602 ; 6 M. L. J. 27, Foll. (*Seshagiri Aiyar and Kumaraswami Sastry, JJ.*) AHMED SAHIB SHUTARI *v.* MAGNESITE SYNDICATE, LTD. **39 Mad. 501 : 28 M. L. J. 598 : 2 L. W. 460 : 29 I. C. 60 : 17 M. L. T. 387.**

———*Right against trespasser—Ownership—Tenants-in-common—Right.*

CO-SHARER—Right to alienate.

The right of a tenant-in-common to recover the whole property as against a trespasser is a right which he is entitled to assert, only on behalf of himself and his co-tenants. He cannot do so in the assertion of right in himself to the whole property. 21 M. L. J. 997; 9 C. L. J. 623, Ref. A tenant in-common is not bound to make a claim on behalf of his co-tenants. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) PONNAYA TIRUMALAI VENDAYA *v.* KANDASAMI VENDAYA THEWAR **17 I. C. 136.**

———*Right against trespasser—Ejectment—Tenant—Trespasser.*

No co-sharer landlord singly can eject a tenant unless he represents the other co-sharers, but the case of a trespasser is different. A man inducted into the land by a co-sharer and who remains therein for many years is *prima facie* a tenant. (*Stanyon, A. J. C.*) DHANOOLAL *v.* RAMLAL. **45 I. C. 496.**

———*Right against trespasser—Ejectment—Right of one to eject.*

A person wrongfully dispossessed from property is entitled to sue for its possession. It is not a defence to the suit that the plff. is not the sole owner of the property. (*Mitra, A. J. C.*) BHAGWANSA *v.* MAROTI. **43 I. C. 395.**

———*Right against trespasser—Ejectment—Suit to be brought only by the entire body of co-sharer landlords.*

If a lambardar co sharer landlord seeks to maintain such suit, he can do so only as the agent of the whole body. The institution of a suit for ejectment against a purchaser is not one of the duties which a lambardar has to perform as the representative of the landlords. A lambardar has no power to eject trespassers or tenants. 37 Cal. 694, Ref. (*Mullick and Atkinson, JJ.*) TRILOCHAN PANDA *v.* DINAPANDHU PANDA. **44 I. C. 317 : 3 P. L. J. 88.**

Right to alienate.

———*Right to alienate—Mortgage of undivided share by co-sharer—Subsequent partition—Mortgage property allotted to another.*

In the case of a mortgage of an undivided share in the joint property, the mortgagee cannot follow his security into the hands of a co-sharer of the mortgagor who has obtained the mortgaged share upon partition. The mortgage lien is transferred to the portion of the joint property obtained by mortgagor at the partition. Where the final decree for partition was passed after a decree for sale of the mortgaged share had been passed in favour of the mortgagee but before the actual auction sale, the mortgaged share which had ceased to be the property of the mortgagor could not be sold under the decree and that decree could not affect the interests obtained by the co-sharer under partition. If a mortgagee before he obtains a decree for sale has to submit to a substitution of the mortgaged property effected by partition, he must also do the same even after his decree, unless the sale has already taken place before the partition. (*Banerjee and Sulaiman, JJ.*) BHUP SINGH *v.* CHEDDA SINGH. **42 All. 596 : 18 A. L. J. 807 : 58 I. C. 171 : 2 U. P. L. R. (A) 345.**

CO-SHARER--Right to alienate.

——*Right to alienate—Mortgagee's rights—Mortgage by co-sharers—Fraudulent partition.*

If the co sharers fraudulently exchange lands in partition, the mortgagee has rights to the undivided share of his mortgagor. (*Ryves and Gokul Prasad, JJ.*) NANU *v.* MATHURA PRASAD.
58 I. C. 97.

——*Right to alienate—Separate holding—Convenience of enjoyment.*

Co-sharers in an undivided property may by arrangement among themselves take possession of definite portions of that property and hold them so as to enjoy their proper share of the profits. But a co-sharer cannot alienate, to a third person, as his exclusive property, the portion which he has been occupying by agreement with his co-sharers. (*Lindsay, J.*) JAMNA *v.* JHALLI.
55 I. C 94 : 18 A. L. J. 129.

——*Right to alienate— Sale — Proprietary rights, sale of—Ex-proprietary tenant.*

Where his proprietary right is sold by a co-sharer in a patti, he becomes, in respect of his *sir*, an ex-proprietary tenant of all the co-sharers in the patti, including the purchaser of his share. (*Richards, C. J., Banerjee and Tudball, JJ.*) DEBI PARSHAD *v.* BHAGWAN DIN. **35 All. 27 : 16 I. C. 399 : 10 A. L. J. 437.**

——*Right to alienate— Co-sharer — When liable to be ejected.*

A co-owner cannot be ejected from joint property at the instance of his co-sharer unless his act amounts to an ouster; so where one co-owner dealt, with the joint property and alienated it to a stranger who claimed the property in denial of the rights of the co-owners, then the act is hostile to them and they were entitled to recover possession of their share. 11 C. L. J. 189, Foll. (*Mookerjee and Carnduff, JJ.*) NAGENDRA KUMAR NATH *v.* HARACHANDRA PODDAR.
13 I. C. 376: 14 C. L. J. 646.

——*Right to alienate—Registered mortgages by one co-owner—Effect on other co-owners.*

Registration cannot be held to give to other co-owners notice of dealings with the property. It is not necessary for one joint owner of property to constantly examine the registers with a view to satisfying himself that his co-owner is not holding himself out as the sole proprietor of the property. (*Broadway and Moti Sagar, JJ.*) ISHAR DAS *v.* FAZAL ILAHI.
1923 Lah. 522.

——*Right to alienate—Rights in joint undivided property.*

Every co-sharer in joint undivided property has a right to every part of that property until partition. What he can sell is his share or a fraction of his share in the whole of that undivided property. (*Le Rossignol, J.*) SARDAR ALI *v.* FAZIL. **1923 Lah. 75.**

——*Right to alienate—Sale—Alienation of specific plot—Validity of.*

A joint owner of properties may sell a portion of his share in the holding. One of the co-sharers of a joint holding can exchange his interest in certain specified fields and the transferee of such interest suing for possession would be entitled to get a decree only for joint possession. (*Broadway, J.*) ABDULLA *v.* MAHOMED KHAN. **2 Lah. L. J. 601.**

CO-SHARER—Right to alienate.

——*Right to alienate—Donee's right—Shamilat—Gift of land to proprietary body.*

A sold certain land to *M* in 1870 and in 1904-1905 the village shamilat was partitioned and *M*'s descendants were given a share in respect of the *khewat* land held by them as owners, and a share in respect of the land purchased by *M* in 1870. In 1910 *A*'s sons sued M's descendants for possession, of the latter share on the ground that the sale conveyed no right to a share in the shamilat, that at the time of sale there was no shamilat attached to the village and after the sale a large area was made over to the village by the Government and recorded as shamilat *deh*, *Held* that the gift was made to the whole proprietary body as it then was and each proprietor was entitled to a share proportionate to his proprietary holding as it stood recorded at the date of the gift and therefore the defts should retain the area in suit. (*Shadilal and Broadway, JJ.*) SULTANALI *v.* AMIR KHAN. **57 I. C. 132 : 2 U. P. L. R. (L.) 125.**

——*Right to alienate*—Shamilat—*Transfer of.*

A co-sharer cannot object to a transfer of right of occupation of village common land, made by another co-sharer. (*Broadway, J.*) BHAGMAL *v.* HARI SINGH. **50 I. C. 895 : 40 P. L. R. 1919**

——*Right to alienate—Donee's right—Shamilat—Gift of land to plaintiff—Whether confers full rights as regards the shamilat also.*

When the plaintiff's suit for possession of half a share of the holding was dismissed and the defendants some time after made a gift of a portion to the plaintiff, in a suit by plaintiff for their share of the shamilat it was held that the plaintiff was entitled to their share only of the shamilat in the area gifted to them. 113 P. R. 1901, Dist. (*Kensington, J.*) MAHAMAD *v.* IMAM KHATUM.
25 P. L. R. 1912 : 13 I. C. 172 : 37 P. W. R. 1912.

——*Right to alienate—Lease—Permanent lease by majority—When binding—Suit to set aside by minority—Form of decree.*

It is not competent to a majority of co-sharers to grant a permanent lease of common land so as to bind the minority except in cases of unavoidable necessity or obvious benefit to the whole body of co-sharers or a valid custom to that effect. Where a permanent lease so granted by the majority is sought to be set aside by the minority of the co-sharers and it is found that the transaction is not binding on the latter, the proper decree to be passed is one for possession in favour of the plaintiffs for themselves and on behalf of the other co-sharers. (*Wallis, C. J. and Seshagiri Aiyar, J.*) RAGHAVACHARLU *v.* GOVINDASARI
41 Mad. 1068 : 48 I. C. 198 : 35 M. L. J. 402.

——*Right to alienate—Pledge of property.*

Under the law which governs the right of co-owners, any two of them are not competent to

CO-SHARER—Right to alienate.

pledge the credit of the others. (*Wallis, C. J. and Seshagiri Aiyar, J.*) RAJA OF ARKAL *v* CHURIA KUNHI KANNAN. **31 I. C. 482 : 29 M. L. J. 632.**

———*Right to alienate—Power of—Lease of joint property by one—Effect.*

A perpetual lease of joint property granted by one co-sharer is not binding as against the others. (*Ashworth and Wazir Hasan, J.Cs.*) LAL MAHOMED KHAN *v.* MT. AMATUL FATIMA.
26 O. C. 239 : 1924 Oudh 60.

———*Right to alienate--Patti—Sale and mortgage by one sharer—Effect.*

One of the co-sharers of a patti cannot sell anything more than his joint interest in the plots subject to the result of any partition which may be made among the co-sharers of the patti or village. The purchaser is entitled to have his possession maintained subject to the result of any partition that may take place though his title would be confined to the interest which his vendor held in the plots or was capable of transferring. (*Kanhaiya Lal, J. C.*) JARBANDHAN *v.* DATA DIN
1922 Oudh 46

———*Right to alienate—Lease—Right of one to challenge—Effect of partition.*

A co-sharer cannot grant a perpetual lease of any portion of the joint property so as to affect the right of co-sharers. The validity of acts done by one co-sharer to the prejudice of others can be challenged both before and after partition. (*Kanhaiya Lal, A. J. C.*) TAJAMMUL *v.* KANDHAI LAL. **18 I. C. 281.**

———*—Right to alienate—Transfer of occupancy holding without landlord's consent.*

The co-sharer landlord having purchased the occupancy holding in execution of a decree for rent can raise the question of transferability of the holding to the extent of his own share against the mortgagee of the holding though not as an execution purchaser, still in his superior right of co-sharer and evict him on proof of a mortgage without his consent. (*Atkinson and Adami, JJ.*) NARPAT SINGH *v.* DOMILAL CHOWDHURY.
57 I. C. 511 : 1920 Pat. 200.

———*Right to alienate—Common land--Ouster—Dealing with a portion of the property by one of co-sharers.*

Before a Court will make in the case of co-sharers, an order directing that a portion of the joint property alleged to have been dealt with by one of the co-owners without the consent of the others, should be restored to its former condition, the plaintiff must show that he has sustained by the act complained of, some injury which materially affects him. 8 Cal. 708 ; 14 Cal. 189 ; 14 Cal. 236 ;.9 All. 661. Ref. When there is a denial of the title of one of the co-owners by the other co-owners and there is in law an ouster, the co-owner ousted is entitled to a decree for joint possession. (*Das, J.*) RAM NANDAN SAHAY *v.* JAI GOBINDA PANDEY. **52 I. C. 543.**

———*Right to alienate—Lease—Common land—Lease by one—Suit for damages by other co-sharers.*

CO-SHARER— Suit for rent.

It is not trespass for one co-owner *A* either by himself or by his tenants to use or enjoy. The remedy of the other co-owner *B*, is to sue *A* but not his tenants for compensation. 18 Cal. 10 (P. C.) ; 19 Cal. 253 (P. C.) ; 28 Cal. 22 Rel. A co-sharer landlord cannot recover compensation for use and occupation from a tenant inducted into the land by another co-sharer landlord. (*Das, J.*) SATNARAIN SINGH *v.* ANANT PROSAD.
51 I. C. 31.

———*Right to alienate—Rights of - Mortgagee—Usufructuary—Allotment of plots to a different co-sharer on partition.*

If a co-sharer mortgages specific plots in an undivided estate and those plots are allotted to some other co-sharer on partition the mortgagee is entitled only to a money-decree and cannot follow the lands in the hands of the other co-sharers. (*Chapman and Roe, JJ.*) MAHESHWAR PERSHAD *v.* LAGAUBANAT KUAR. **39 I. C. 95 : 3 P. L. W. 276.**

———*Right to alienate—Sale.*

A sharer has an absolute right to dispose of his own share even while the property is undivided, subject to the right of pre-emption by co-heirs. (*Twomey, J.*) SUBRAHMANIAM CHETTY *v.* MAUNG SHUE THE. **11 I. C. 781 : 4 Bur. L. T. 163.**

Suit for possession.

———*Suit for possession—Lands held in severally--Dispossession—Rights of parties.*

A co-sharer dispossessed by another in a *mahal* where lands are held in severalty, is entitled to recover separate possession even apart from the provisions of the Specific Relief Act. 26 All. 588. Dist. (*Piggott, J.*) MATA BHIKH SINGH *v.* GAYA SINGH. **14 I. C. 580.**

———*Suit for possession—Landlords—Suit for partition of a small portion of joint estate.*

Parties having, as *patnidars*, a joint interest only in a small portion of a joint estate can sue for partition of that small portion. (*Chatterjee and Newbould, JJ.*) RAMADA SUNDARI MANDAL *v.* SHYAMA KANTA. **37 I. C 939.**

Suit for rent.

———*Suit for rent—Suit by some of the landlords—Subsequent suit.*

A subsequent suit by a co-sharer landlord for the arrears of his share of rent is not maintainable when in the previous suit for rent between another co-sharer and the tenant he was a party. (*Newbould and Panton, JJ.*) KISHORE MOHAN TALAPATRA *v.* OSI PRAMANICK. **48 I. C. 536.**

———*Suit for rent by two co-sharer landlords—Execution of decree—Sale—Right of other co-sharer.*

When a property passes to the auction purchaser in consequence of a sale of the tenure by one of the two co-sharer landlords who have obtained separate decrees for rent for the same period the other co-sharer landlord is not entitled to sell the tenure again in order to satisfy his decree. (*Brett and Sharfuddin JJ.*) NILAMBAR SAHU *v.* SUTTYO PRIYA GHOSHAL. **14 I C. 568 : 16 C. W. N. 701.**

———*Right to alienate—Lease—Common land—Lease by one—Suit for damages by other co-*

CO-SHARER—Suit for rent.

———*Suit for rent—Landlords—Suit for share of rent—Division.*

A co sharer can sue for his share of the rent if there is such an arrangement, without actual division of the lands. In the absence of separate collection, one co-sharer can maintain a suit for the whole rent making the other co-sharers parties to the suit. 27 Cal 479, Expl. (*D. Chatterjee and N. Chatterjee, JJ.*) SHYAMA CHARAN DAS *v.* JOGESH CHANDRA ROY. **14 I. C 292 : 16 C. W. N. 774.**

———*Suit for rent—Decree—Deft. not to be liable except for surplus not realised from sale of patni.*

Where a co-sharer zemindar obtained a decree against the tenant on condition that she can hold them personally liable only for any surplus remaining unsatisfied after the sale of the property in arrear and in execution, the *patni* was purchased by the zemindar co sharer herself, *held* in a suit for arrears of rent accrued due prior to the purchase that the plff. could not obtain a personal decree against the defts. that the decree which the co-sharer landlord obtained was a money decree and the purchase was subject to the liability to the rent due prior to the sale. (*Caspersz and Chatterjee, JJ.*) SHASHIBALA DEBI *v.* SARAT KAMINI DEBI. **14 I. C. 49.**

———*Suit for rent—Proportionate share—If binding on other co-sharer.*

A joint owner cannot sue for proportionate rent. But if the parties agree to accept and pay proportionate rent according to shares, there is nothing illegal in it. It is a question whether stranger co sharers will be bound by the agreement between other sharers and the tenants. (*Sankaran Nair and Ayling, JJ.*) SRINIVASA VARADACHARI *v.* SAMI REDDI. **16 I. C. 458 : 23 M L. J. 161**

———*Suit for rent—Landlords—Right to sue for rent.*

A co-sharer landlord who has no right to separate collection cannot maintain a suit for rent without impleading the other sharers. 31 Cal. 707; 6 C. W. N. 326, Foll. (*Mullick and Atkinson, JJ.*) MADHVA NAND RAM *v.* MAHOMED KHAN. **42 I. C. 452 : 2 P. L. W. 227.**

Miscellaneous.

———*Shamilat—Right to or grazing dues—Proprietary rights.*

The mere payment of *terni* or grazing dues by a person who is not a proprietor, paying land revenue, does not confer any right to share in the *shamilat* of a patti. (*Sir John Edge.*) BAGGA *v.* SALEH. **19 C. W. N. 1023 : 29 M. L. J. 137 : 2 L. W. 706 : (1915) M. W. N. 642 : 6 P. R. 1916 : 29 I. C. 1005 : 1 P. W. R. 1916 (P. C.).**

———*Government revenue—Default in payment of revenue—Purchase by defaulter or in connivance with him.*

A co-sharer who has defaulted to pay the Government dues and has thereby brought about the sale of the estate, cannot be permitted if he purchases the estate at the sale, to hold it to his own benefit to the exclusion of his co-owner. The

CO-SHARER—Miscellaneous:

position is similar when a tenant, in violation of his agreement defaults to pay, on behalf of his immediate landlord, the dues of the superior holder and thereby brings about a sale of the interest of his land. 44 C. 373, 16 C. 194 ; 15 C. W. N. 776 ; 12 C. L. J. 336 ; 10 M. I. A. 540 ; 18 W. R 240 ; 20 C. L. J. 11 Rel. The essence of the matter is that the co-owner or lessee who thus acts in breach of his obligation contractual or fiduciary, cannot be permitted to profit by his own wrong to the detriment of the person whose interest it was his duty to protect. 12 C. L. J. 336 ; 10 M. I. A. 540 ; 18 W. R. 240 ; 20 C. L. J. 11 ; 24 C. W. N. 201 ; 30 C.L J. 475, Rel. (*Mookerjee and Chotzner, JJ.*) LALITMOHAN SEN *v.* MANORANJAN GHOSH CHAUDHURI. **36 C. L. J. 208 : 1923 Cal. 13.**

———*Landlords—Suit for injunction by one co-sharer against tenants.*

One of several co-sharer landlords if he can make out a case has a right to obtain, an injunction against a tenant, especially where the rights of the landlords will be jeopardized. (*Chaudhuri and Walmsley, JJ.*) ISWAR CHANDRA SAHA *v.* SHASHINATH DAR. **55 I. C. 951.**

———*Landlords—Purchase of occupancy holding by one—Purchaser, if settled raiyat.*

Where a co-sharer landlord acquires the occupancy right of a raiyat, he holds the raiyat's interest without the right of occupancy. Though, he occupies the land for more than 12 years, he does not become a settled raiyat so as to be protected from eviction by an auction-purchaser under the Bengal Land Revenue Sales Act. (*Fletcher, J.*) ANOWAR ALI KHAN *v.* AZIZOR RAHAMAN KHAN. **55 I. C. 510.**

———*Landlords—Settlement with tenant by some.*

It is open to some of the co-sharer landlords to make a settlement proportionate to their share (*Newbould, J.*) BARKAT ALI *v.* DAS KAZI. **53 I. C. 260.**

———*Mines—Accounts—Working by one co-sharer—Money spent on mine—Partition—Equities.*

In the absence of proof of actual ouster or destruction of property one co-sharer cannot demand accounts from another co sharer for minerals taken by him out of the joint property unless he had shown that he had worked more than his fair share. No claim for account is maintainable where the co-sharer knowing that the other co-sharer had been spending large sums of money to develop the mines acquiesced. His remedy is by a suit for partition in which case the other co sharer should, if possible, be maintained in possession of the portion of the property upon which he has spent money. (*Fletcher and Huda, JJ.*) BENGAL COAL CO., LTD. *v.* MANORANJAN DAGCHI. **44 I. C. 297: 22 C. W. N. 441.**

———*Co-owners—Evidence of title—Living together—Not indicative of joint ownership.*

Two Mahomedan cousins living together on a property would not indicate that they were joint

owners thereof. (*Jenkins, C. J. and Mookerjee, J.*) RADHA KRISTO SAHA *v.* UMESH CHANDAR CHUKERBUTTY. 25 I. C. 588 : 19 C. L. J. 539.

———*Mesne profits—Recovery of possession by one co-sharer from another.*

In a suit by one co-sharer against another for recovery of possession of his share in certain joint property, mesne profits will be awarded only if there has been an ouster. (*Jenkins, C. J. and Chatterjee, J.*) GORA CHAND *v.* KESHALE CHUNDER. 23 I. C. 122

———*Raiyati interest—Purchase by co-sharer landlord—Rights of.*

A co-sharer landlord purchasing the interest of a *raiyati*, does not obtain all the lawful privileges of the *raiyat* but if he purchases the rights of a person in *khas* possession he is entitled to all the rights. (*Harrington and Newbould, JJ.*) CHERAGH ALI PRODHANIA *v.* MOHINI MOHAN BARDHAN. 19 I. C. 615.

———*Right to use of water—Does not make a man a co-sharer.*

The plaintiff's right to use the water on the defendant's land does not make him a co-sharer in the land itself nor is the defendant's title to the land affected thereby. (*Shadi Lal and Wilberforce, JJ.*) SADAMAN *v.* LAKKU. 4 Lah. L. J. 514.

———*Shamilat land—Abandonment—Sale of Khewat.*

Rights in Shamilat lands are independent rights. A sale of a khewat holding without any reference to the Shamilat would not result in the conveyance of the Shamilat. The question whether rights in the Shamilat had been abandoned after the sale of Khewat, is one of fact and the High Court is bound by the finding of the lower appellate Court. (*Broadway and Martineau, JJ.*) WALI *v.* MAHOMED.
4 Lah. L. J. 221 : 1922 Lah. 34.

———*Shamilat—User of excess area for private purposes of the proprietor.*

Where the area over which grazing rights extend is larger than that required by the persons with those rights a proprietor may use the excess for his own purposes. The defts. cannot prevent him from developing any excess area and using it to its best purposes. 31 Cal. 503; 86 P. R. 1911 ; 119 P. R. 1899 ; 100 P. R. 1830, Foll. (*Wilberforce, J.*) KARTAR SINGH *v.* KALLA.
67 I. C. 306 : 2 L. L. J. 44.

———*Common well—Right to irrigation—Implied right.*

Where several persons jointly own a well, it is implied in their covenant of partnership in the well that each co-sharer shall have a right to take water through the more adjacent field. The line of irrigation, once determined, cannot be altered at the caprice of any co-sharer and it is a fair presumption that the shortest line would be that selected by the co-sharers. (*Le Rossignol, J.*) JANA *v.* DOGAT. 2 P. W. R. 1920 : 2 U. P. L. R. (Lah.) 18 : 54 I. C. 104 : 21 P. L. R. 1920.

———*Shamilat—Appropriation by section to its use—Appropriation for particular use.*

A takia built on a shamilat should not be converted into a mosque thereby diverting the property from the purpose for which it was given and depriving a considerable section of the community of its use. (*Dundas, J.*) MAULA BAKSH *v.* DASONDHI. 51 I.C. 853.

———*Shamilat—Right to graze.*

The members of a village community can graze their cattle when *wajib ul-arz* entitles them to do so. (*Scott-Smith and Martineau, JJ.*) MUNSHIRAM *v.* MAYA. 48 I. C. 846 : 122 P. R. 1918.

———*Shamilat—Suit for declaration—Shamilat deh recorded as Shamilat taraf—Acquisition by Government.*

Plffs. sued for a declaration of ownership of a share of the village shamilat. The suit land was entered as a shamilat deh in settlements of 1856, 1868. 1891 and 1892 but in 1893 the land was shown as shamilat of *taraf Bedi*—one of the 3 tarafs in the village. Portions of the land having been acquired by the Government in 1906 and again in 1911 compensation money was taken by the Bedis. *Held*, that the old entries being all in plff.'s favour, the admission of Bedis meant nothing more than that the bedis should continue to manage the land taking whatever income might accrue and incurring whatever expense might occur. The action of the Bedis in 1911 in taking all the compensation money was a fresh invasion of the plffs'. rights and the suit was, therefore, within time. (*Chevis and Shadi Lal, JJ.*) MARNAM SINGH *v.* MAKHAN SINGH. 44 I. C. 31 : 43 P. W. R. 1918 : 21 P. L. R. 1918.

———*Shamilat — Agreement to partition according to revenue shares.*

The latest settlement is the guide for enforcing an agreement to divide according to revenue shares. (*Shadilal and Jones, JJ.*) NAWALI *v.* MAHOMED HAYAT. 33 I. C. 1006 : 29 P. W. R. 1916.

———*Ejectment—Joint holding—Co-sharer in possession for cultivation—If can create occupancy tenure—Remedy of other co-sharers.*

No co-sharer of a joint holding can create an occupancy tenure in any field though he is in possession of it separately for purposes of cultivation and any one who creates such a tenure can be treated as a trespasser and a suit will lie to eject him from the joint holding. (*Kensington, J.*) DUNI *v.* ALI MUHAMMAD. 13 I. C. 857 : 8 P. W. R. 1912 : 144 P. L. R. 1912.

———*Shamilat — Malik-i-quabza's incompetency to get share in shamilat.*

Ordinarily a *malik-i-quabza* cannot have a share in the shamilat and he must prove that he has a share. The mere fact of his having broken a bit of shamilat and having been allowed to retain it on partition of a portion of the shamilat does not sufficiently discharge the burden of proof specially where in three successive settlements he is recorded as being *malik-i-quabza*

CO-SHARER—Miscellaneous,

only. 53 P. R. 1879, Foll; 5 P. R. 1867; 113 P. R. 1900, Dist. (*Shah Din and Chevis, JJ.*) FAZAL DAD KHAN *v.* WARIS KHAN. **9 I C. 230 : 10 P. W. R. 1911.**

———*Rent—Collection of—Liable to be distributed proportionately.*

The plff. sued the deft. to recover his share of the *Peishcush* they had paid on the Mitta which they two owned in common the defts.' share being one-fourth. The defence was that a fourth of the amount collected by the plff. as rent was due from him. The p'ff. contended that the collection amounted to his share and did not exceed it. *Held* that the plff. ought to be deemed to have collected the rent on behalf of all the owners and so it ought to be proportionately distributed.

Per Sadasiva Aiyar, J.—Where rents are collected by a co-sharer expressly as his own share and paid by the tenants expressly for such share, the collection is for the share of the co-sharer collecting it and is not liable to be distributed among all the co-sharers. (*Olaifield and Sadasiva Aiyar, JJ.*) SIVANARASA *v.* DORAISAMI. **8 L. W 91 : 35 M. L. J. 272 : 41 M. 861 : 24 M. L. T. 247 : 45 I. C. 463 : (1918) M. W. N. 614.**

———*Suit for share of profits—Right to interest.*

A co sharer is not entitled to interest on his share of the profit unless there has been a refusal by the other co-sharers to pay the former his share of the profit. An offer to pay only a fraction of the sum due to the co-sharer is tantamount to a refusal. 15 N. L. R. 85, referred to. (*Hallifax, A. J C.*) YADO PRASAD *v.* GANGA RAM. **1923 Nag. 211.**

———*Co-sharer—Shamilat Patti in Thak—Effect of.*

Where a village consists of various thaks, divided into various patties, the revenues of which are payable and the rents of which are collected by each pattidar separately, the mere fact that the pertition of a particular thak is imperfect as containing a shamilat patti does not make pattidar in one patti a co-sharer in another patti. (*Lindsay, J. C.*) DURGA SINGH *v.* GAYA SINGH. **36 I. C. 55 : 3 O. L. J. 309.**

———*Patti—Ikrar Makkam debt—Custom—Ejectment.*

Plaintiff, pattadar sued to eject defts. other pattadars of the village who had directly obtained portions of house sites from the tenants of the plaintff and added them to their own. This was contrary to the Ikrar Malikkam debt. *Held*, that the plaintiff could maintain the suit. (*Lindsay, J. C.*) BHAIYA KANDHAI PARSHAD *v.* GOURI SHANKAR. **21 I C. 256.**

———*Profits.*

A co-sharer in possession of land in excess of his share under a private arrangement between the co-sharers is not liable to account for profits to the co-sharer who has land less than he is entitled to. (*Chamier, C. J. and Jwala Prasad, J.*) BHAIJNATH GOENKA *v.* AJAB LAL JHA. **33 I. C. 371.**

COURT FEES.

COSTS.

See also (1) CIV. PRO. CODE, S. 35.
(2) PRACTICE.

———*Co-defendants—Contribution—Right of, when excluded.*

Where several defendants have different antagonistic and exclusive defences, there is no contribution in the absence of special contract to the contrary. (*Ryves and Stuart, JJ.*) PARSOTTOM DAS KOLAPURI *v.* LACHMI NARAIN. **L. R. 3 A. 557 : 20 A. L. J. 890 : 45 A. 99 : 1923 A. 67.**

———*Divorce—Liability of husband—Rule and exceptions—Appeal.*

Costs in a divorce suit are on the husband. (*Schwabe, C. J. and Ramesam, J.*) PRITCHARD *v.* PRITCHARD. **45 M. L J. 327 : 18 L. W. 354 : 1924 M. 150.**

CO-TENANCY.

See CO-SHARER.

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See CO-SHAREP.

CO-TRUSTEE.

See TRUSTS ACT.

COUNSEL.

See (1) LEGAL PRACTITIONER.
(2) PRACTICE.

COUNSEL'S FEES.

See LEGAL PRACTITIONER.

COUNTER-CLAIM.

See CIV. PRO. CODE, O. 8.

COUNTERPART.

See (1) LEASE.
(2) EVIDENCE ACT, S 65.

CO-URALANS.

See MALABAR LAW.

COURT.

See also (1) CIV. PRO. CODE, Ss. 9 AND 20.
(2) PRACTICE.
(3) JURISDICTION.

———*Calcutta Improvement Tribunal — If a Court.*

The President of the Calcutta Improvement Tribunal is a Civil Court having power to make an order for costs and an inherent power to execute such order for costs made by him. (*Chatterjea and Cholzner, JJ.*) BATA KRISHNA *v.* A. K. ROY. **68 I. C. 177 : 26 C. W. N. 30.**

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———Conditional Decree.

See (1) COURT FEES ACT, S. 7 (iv) (*c*).
(2) Do. SCH. I. ART. 1.
(3) Do. SCH. II, ART. 17 vi).
(4) Do. S. 7 (ix)

——— Execution Orders.

See also (1) COURT FEES ACT, SCH. I, ART 1.
(2) Do. SCH. II, ART. 11.

———Insufficent Court-Fee.

See COURT-FEES ACT, S. 12,

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——Pauper.
See C. P. CODE, O. 33, R, 7.

——Reduction.
See COURT- FEES ACT, S. 10.

——*Petition to support decree is not cross-objections—No* ad valorem *Court-fee payable.*

Where for the purpose of supporting the decree dismissing plaintiff's claim on any ground, even on a ground other than that taken by the Court of first instance, respondents filed a petition stating the reasons on which they supported the decree, it does not amount to cross-objections for which an *ad valorem* court-fee was payable. (*Banerjee and Ryves, JJ.*) RAM PERSAD KALWAR *v.* MT. AJANASIA.
44 All. 677 :
1922 All. 280.

——*Execution orders—Appeal against order under S.* 144, *C. P. C.*

A two rupee Court-fee is sufficient for an appeal to the High Court against an order passed by the lower Court under S. 144, C. P. C., it being an order deciding a question falling under S. 47 (1), C. P. C. 6 I. C. 125. Ref. (*Chatterjee, J.*) MADAN MOHAN DEV *v.* NOGENDRA NATH DEY.
39 I. C. 640 : 21 C. W. N. 544.

——*Administration suit*—Ad valorem *fee.*

Every creditor, putting his claim after the preliminary decree and the settlement of the claims of other creditors, must pay *ad valorem* fee. (*Mookerjee and Cuming, JJ.*) SASI BHUSHAN BOSE *v.* MANINDRA CHANDRA.
44 Cal. 890 : 38. I. C, 835: 24 C. L. J, 448 :
21 C. W. N. 310.

——*Determination of amount—Duty of Court—Suit for declaration that decree is not binding.*

To determine the amount to be paid as Court-fee, the Court has got to look at and see in each particular case what is the nature of the relief claimed and for that purpose it must look at the allegations that are contained in the plaint. The Court-fee payable in a suit for a declaration that a certain *ex parte* decree is not binding on the plaintiff, is Rs. 10 ; and not an *ad valorem* Court-fee on the amount of the decree sought to be declared invalid. (*Fletcher and Teunon, JJ.*) BAGALA SUNDARI DEBI *v.* PROSANNA NATH MOOKERJEE.
35 I. C. 797: 21 C. W. N. 375.

——*Suit for declaration—Correction of rent entry—Rents varying according to castes and occupations.*

In a suit instituted for a declaration that an entry in *furd rewaz* is wrong and may be corrected, where the defendants belonged to different castes and followed different occupation and the rents payable by them differed. Accordingly, *held* that as the *furd rewaz* if the plaintiff's prayer were granted would show different rents payable by different classes of tenants, one suit however might be instituted against such of the tenants as belonged to the same caste and followed the same occupation with a court-fee of

ten rupees, because the same declaration would have to be made with respect to all the said ten tenants. And it was also *held* that with respect to each class of tenants a separate suit ought to be instituted. (*Chatterjea and Mullick, JJ.*) HARIHAR PROSAD *v.* ISWARDHARI SINGH.
30 I. C. 862 (2): 22 C. L. J. 57.

——*Decree passed against one of several defendants—Appeal so as to make other defendants liable.*

In a suit for recovery of money brought against several persons the trial Court passed a decree against one of them. The plaintiff preferred an appeal so as to make the other defendants jointly liable for the decree amount. On a question arising as to the amount of Court-fee payable on the memorandum of appeal, *held* that *ad valorem* Court-fee ought to be paid. 86 P.R. 1912 followed. (*Shadi Lal, C. J. and Abdul Qadir, J.*) RAM KISHEN *v.* HARDE RAM.
1923 Lah. 135.

——*Suit for possession—Decree on condition of paying a certain sum—Appeal.*

Where in a suit for possession a decree is passed on condition of the plaintiff paying a certain sum of money to the defendants as in a redemption suit and the plaintiff appeals against that liability, he must pay *ad valorem* court-fee thereon 59 I. C. 667 Rel. (*Abdul Raoof and Harrison, JJ.*) TIKKAN RAM *v.* BOSA RAM.
4 U. P. L. R. (Lah) 77 : 1922 Lah. 440.

——*Pre-emption suit—Market value of the property.*

Where in a pre-emption suit Court-fee is to be paid on the market value of the property sold the value of the suit should be determined with reference to what the value was on the date of the sale and not on the date of the institution of the suit. (*Scott-Smith, J.*) SHER MAHAMAD *v.* AHMAD SAID.
1924 Lah. 380.

——*Partition suit—Appeal relating to certain items.*

Where the memorandum of appeal from the final decree in a partition suit attacks various items allowed or disallowed in the final decree, *ad valorem* court-fee should be paid on the items (*Broadway and Martineau, JJ.*) MUHAMMAD MAJID ULLAH KHAN *v.* MUHAMMAD HAMID ULLAH KHAN.
1924 Lah. 325.

——*Appeal— Rejection of plaint for non-payment of court-fee—Extension of time.*

An order rejecting a plaint for non-payment of extra Court-fee amounts to a decree, and the memorandum of appeal from that decree must bear an *ad valorem* Court-fee. Where a memorandum of appeal was presented bearing a Court-fee label of Rs. 2 and it was pointed out to the appellant that the document was insufficiently stamped and the memorandum of appeal was consequently returned to him, but he refiled it without making up the deficiency in the Court-fee. *Held*, that no valid memorandum of appeal was presented within the period of limitation

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prescribed for the appeal, and that no adequate ground for the extension of the period has been established. (*Shadi Lal, C. J. and Wilberforce, J.*) SHAHU *v.* BAKRI.
67 I C. 901 : 3 Lah. L.J, 237.

——— *Appeal—Instalment decree—Court-fees.*

In an appeal from an instalment decree Court-fees must be paid on the difference between the amount claimed in appeal and the amount decreed and also on the difference to the appellant between getting his money on the date of the decree under appeal and getting it by instalments as ordered. (*Jhonstone and Chevis, JJ.*) GOBIND LAL *v.* RAO BALDEO SINGH. 226 P. L. R. 1914 : 128 P. W. R. 1914 : 24 I. C. 931 : 12 P. R. 1915.

——— *Memorandum of appeal—Valuation.*

If the appeal in a suit for accounts is from the whole decree the appellant is bound by the plaintiff's valuation in the plaint. (*Spencer, J.*) DAMODAR PADHAND *v.* HARIBHANDHU PATNAICK.
(1921) M.W.N. 558: 70 I. C. 392 : 14 L. W. 389.

——— *Cross objections—Subject-matter incapable of money valuation—Reasonable valuation.*

Where the subject-matter of certain cross-objection cannot be valued in money the Court should accept any reasonable valuation put by the appellant. (*Kanhaiya Lal, J. C. and Lyle, A. J. C.*) REJEO LOCHAN MAHARAJ *v.* RAM MANOHAR PRASAD. 25 O. C. 275: 1923 Oudh 44 (1).

——— *Interest—Future.*

Court-fee on an appeal relating to future interest is charged on the amount up to the date of presenting the appeal. (*Lindsay, J. C.*) GOHARDHAN DAS *v.* NARENDRA BAHADUR SINGH.
22 O C. 1 : 50 I. C. 798 : 1 U. P. L. R. (J. C.) 29.

—— *Declaratory suit—Property in the custody of Court—Court-fee payable.*

The property was in the custody of the Court ; all that the plff, had to do was to establish his title to the property. Therefore, it is only necessary for him to file a suit for a declaration of his title to the property, but not for recovery of possession, it is enough if the court-fee is paid as in a declaratory suit. (*Das and Kulwant Sahay, JJ.*) SABURI PANDE *v.* RAM KHELAWAN PANDE. 1924 P. 385 :

——— *Cross objections—Mere criticism of judgment.*

Mere criticism of a judgment cannot be filed as cross-objections. Where there is nothing in the decree to which objection or exception could be taken by a party in whose favour a suit is dismissed with costs, and he files some critcisms of the judgment as cross-objections, it should not be accepted by the office. Such a petition does not require any stamp at all. (*Roe, J.*) SAHDEO NARAIN DEO *v.* KUSUM KUMARI.
1 P. 258 : 1922 P. 483 (2).

——— *Mortgage suit—Interest between date of suit and decree—Appeal—Court-fee, if payable on interest.*

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Where the decree in a mortgage suit awarded the amount claimed in the plaint and also the interest from the date of the institution of the suit to the date of decree: *Held*, in calculating court-fees for purposes of appeal, the amount of interest awarded in addition to that claimed in the plaint should also be taken into consideration. 10 M. L J. 144 ; 13 Mad. 508 and 30 Cal. 516 ref. to. (*Jwala Prasad, A. C. J. and Ross, J.*) JAMUNA RAI *v.* RAMTAHAL RAUT.
1 P. 19 : 3 P. L. T. 790 : 1922 P. 387 (2).

——— *Interest— Future interest — Ex-parte decree—Appeal—Interest after period of grace.*

A decree-holder is as a matter of right entitled to interest at the rate of 6 per cent. per annum from the date of grace up to the date of realization. If no such interest is allowed and the decree-holder appeals, he is not liable to pay court-fee on interest due in the interval between the expiry of the period of grace and the date of hearing of the appeal. 17 B. 41, Ref. (*Adami and Bucknill, J.*) BHAGWATI PRASAD SINGH *v.* BISHNU PRAGASH NARAIN.
6 P. L. J. 676 : 3 P.L.T. 310 : 1922 Pat 73: 1922 P. 386.

——— *Deficiency of, on cross-objections in lower court—No appeal relating thereto—High Court can levy.*

Where in the lower appellate court there was a deficiency of Court-fee on a memorandum of cross-objections which was not noticed, the High Court has an inherent power to insist on the payment of the same, even though the appeal does not relate to the subject-matter of the memorandum of cross-objections in the lower Court. (*Miller, C. J. and Adami, J.*) RASIK BEHARI PRASAD CHAUDHURI *v.* HRIDOY NARAIN.
3 P. L. T. 327: 1 P. 471 : 1922 Pat. 162 : 1922 P. 284.

——— *Execution orders—Recovery of interest.*

A party is required to pay a Court-fee upon the sum for the recovery of which he seeks the assistance of the Court in proceedings under S. 47 of the C. P. Code which are of the nature of a suit. Where a decree-holder sues to recover a sum as interest in addition to the sum named in the decree he must pay Court-fees on the amount he claims. 17 Bom 41, Not foll. (*Roe, J.*) TARAH PADA MITRA *v.* JAGDAMBA KUMARI. 52 I. C. 802.

——— *Determination of—Evidence.*

To decide if a suit has been valued properly for purposes of Court-fees evidence should be recorded on the point. An application for the appointment of a curator under Act XIX of 1841, which contains a description of the value of the property does not impose a corresponding obligation as to the stamp duties leviable on it, and hence is not a safe creterion as to the value of the property. A decision as to valuation based on it cannot be sustained. (*Fawcett, J. C. and Raymond, A. J. C.*) RAMDAS *v.* AJUDHIADAS.
63 I. C. 685 : 14 S. L. R. 137.

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COURT FEES ACT (VII OF 1870).

———*Object of.*

The object of the Court-Fees Act is not to arm a litigant with a weapon of technicality but to secure revenue to the State and its provisions are to be so construed. (*Sir Lawrence Jenkins.*) RACHAPPA *v.* SHIDDAPPA. **43 Bom. 507 : 46 I. A. 24 : 17 A. L. J. 418 : 25 M. L. T. 298 : 36 M. L. J. 437 : 29 C. L. J. 452 : 21 Bom. L. R. 489 : 10 L. W. 274 : 50 I. C. 280 : 24 C. W. N. 33 (P. C.).**

[On appeal from 36 Bom. 628 : 16 I. C. 1005 : 14 Bom. L. R. 757.

———*Alternative reliefs.*

Where plff. has paid court-fee on smaller of two alternative reliefs that relief alone should be tried. (*Abdul Raoof, J.*) KUNDAN LAL *v.* ANUND SARUP. **1923 Lah. 456.**

———*Decree for possession on payment of money—Appeal—Relief prayed for possession without payment — Court-fee must be paid on amount directed to be paid.* (*Scott-Smith, J.*) WADHAWA SINGH *v.* SUNDAR SINGH. **59 I. C. 667 : 21 P. W. R. 1921.**

———*Applicability.*

The Amending Act (VI of 1905), has withdrawn a class of suits falling under S. 14 of Madras Civil Courts Act and included them under S. 8 of Suits Valuation Act. 25 I. C. 975 ; 11 M. L. T. 155, Foll. (*Sadasiva Iyer and Phillips, JJ.*) G. NARAYANASWAMY *v.* VENNAVALLI SESHAGIRI. **39 Mad. 873 : 18 M. L T. 398 : 2 L. W. 1031 : 31 I. C. 104 : 29 M. L. J. 572.**

———*Basis of taxation.*

Under the Act, it is the value of the property, in respect of which the Grant of Probate or Letters of Administration is made that is taxed. The Court cannot consider what the value of the property would be, if it passes into the hands of an efficient manager well equipped with capital and

COURT FEES ACT (VII OF 1870).

energy. (*Das and Ross, JJ*) DEPUTY COMMISSIONER OF SINGHBHUM *v.* JAGADISH CHANDRA DEO. **2 Pat. L. T. 683 : 62 I. C. 513 ; 6 P. L. J. 411.**

——*Fiscal enactment—Strict construction.*

The Court Fees Act is an Act dealing with purely fiscal matters, and the rule of construction adopted by the courts that statutes imposing pecuniary burden on the subject, must, in cases of doubt, be interpreted in favour of the subject, applies to the Act. (*Saunders, J. C.*) JAGANATH KAHAR *v.* EMPEROR. **23 Cr. L. J 121 : U. B. R. 1921) 72 : 1922 U. B 14.**

——S. 4—*Letters Patent Appeal—No Court-fees.*

No Court-fees are leviable upon a petition of appeal under the Letters Patent of the Allahabad High Courts from the judgment of a Single Judge (*Tudball, J.*) BHADOOL PANDEY *v.* MANNI. **19 A. L. J 677 : 68 I. C, 318 : 44 A. 13 : 1922 A. 164.**

——S. 4—*Appeal not to be entertained without payment of Court-fee on original valuation.*

An Appellate Court should not entertain an appeal against the entire decree without its being stamped with a Court-fee on the original valuation. (*Sharfuddin and Mullick, JJ.*) SURENDRA NARAIN SINHA *v.* HAFIJUR RAHAMAN. **30 I. C. 379.**

——S. 4—*Letters Patent Appeal—Court fee payable on.*

S. 4 of the Court Fees Act is not applicable to a Letters Patent Appeal from the judgment of a single Judge of the High Court and no Court fee is leviable thereon except Rs. 2 prescribed for an application to the High Court. 44 A. 13 ; 65 I. C 675, followed. (*Shadi Lal, C.J. and Abdul Qadir, J.*) HAR DIAL SHAH *v.* SECY. OF STATE FOR INDIA. **3 Lah. 420 : 1923 Lah. 275.**

——Ss. 4 & 28—*Memorandum of appeal—Omission to affix stamp.*

Where a memorandum of appeal is filed without a duly stamped decree appealed against, the appeal is liable to be rejected. if the deficiency is not made up within the limitation period for filing an appeal. (*Scott Smith, J.*) SHAHADAT *v.* HUKAM SINGH. **1924 Lah. 401.**

——S. 4—*Applicability—Letters Patent appeal—Decision of single Judge.*

Where an appeal is filed under S. 10 of the Letters Patent (Patna) against a decision of a single Judge. S. 4 of the Court-fees Act cannot apply as it refers only to appeals against the judgment of two or more Judges or of a Division Court and as there is no provision under which court fee is leviable, the appeal must be accepted without any court-fee. (*Coutts, J.*) RAGHUBAR SINGH *v.* JETHU MAHTON. **1 Pat 384 : 3 Pat. L. T 194 : 1922 Pat. 88 : 1922 P. 13.**

——S. 4—*Payment of deficit.*

A memorandum of appeal could not be considered to have been properly filed, till the deficit

COURT FEES ACT (VII OF 1870), S. 5.

Court-fee is paid up. (*Roe and Coutts, JJ.*) JODHAN PRASAD SINGH *v.* NANHKU PRASAD SINGH. **5 P. L. W 136 : 46 I. C. 509 : 3 P. L. J. 484.**

——S. 4—*Memo of appeal with insufficient Court-fee.*

S. 4 of the Court-fees Act forbids a High Court to receive a memorandum of appeal unless the proper Court-fee is paid. (*Chamier, C. J. and Mullick, J.*) RAM SAHAY RAW PANDEY *v.* LAKSHMI NARAIN SINGH. **3 P. L. J. 74 : 42 I. C. 676 : 5 P. L. W. 18.**

——S. 5—*Appeal from original side of High Court—Dispute as to court-fee payable—Power of Judge to decide dispute—Madras High Court Rules, Original Side, Art. 36.*

It is competent to the Chief Justice of the High Court to refer a dispute between a suitor or his attorney and the Officer of the court, as regards the court-fee payable on an appeal from an order of a single Judge on the original side, to the decision of a particular Judge of the High Court under S. 5 of the Court-fees Act. The Court fee payable on an appeal against a final order on a guardianship petition presented on the original side of the High Court is Rs. 100 under Art. 36 of App II to the Madras High Court Original Side Rules. (*Coutts Trotter, J.*) MAHOMED ISHACK SAHIB *v.* MAHOMED MOIDEEN. **43 M. L. J. 436 : (1922) M. W. N. 511 : 16 L. W. 210 : 45 M. 849 : 1922 Mad. 421.**

——S. 5—*Decision of Taxing Officer—Finality of.*

The Bench hearing an appeal will not interfere with fees taxed on memorandum of appeal even by the taxing officer, even though it is done wrongly. (*Mullick and Bucknill, JJ.*) SHEOPUJAN RAI *v.* KESHO PRASAD SINGH. **2 Pat 919 : 5 Pat. L. T. 315 : 1924 P. 310.**

——S. 5—*Taxing Judge if can refer to Bench.*

It is not proper for a Judge to whom a Court-fee matter is referred, under S. 5 of the Court Fees Act to refer the matter to a Bench. (*Jwala Prasad, J.*) KULDIP SAHAY *v.* HARIHAR PRASAD. **4 Pat. L. T. 638 : 3 Pat. 146 : 1924 P. 161.**

——S. 5—*Decision of taxing officer—Finality of.*

Under S. 5 of the Court Fees Act, the Taxing Officer has jurisdiction to fix the amount of fee payable, and if he decides that the valuation put by the appellants upon the relief was incorrect, he can correct it. Even if he has done anything not expressly allowed by law, the Court Fees Act gives he High Court no power to interfere with his decision as to the amount of fee. (*Miller, C. J. and Mullick, J.*) RAM SEKHAR PRASAD SINGH *v.* SHEONANDAN DABEY. **1922 Pat. 337 : 2 Pat. 198 : 4 Pat L. T 71 : 1 Pat. L. R, 25 : 1923 P. 137.**

——S. 5—*Court-fee — Decision of taxing officer.*

The decision of the Taxing Officer regarding the proper fee payable upon a memorandum of appeal is final. A Division Bench of the High Court has

COURT FEES ACT (VII OF 1870), S. 5.

no jurisdiction to re-open the valuation of the appeal before it is admitted. (*Mullick and Atkinson, JJ.*) MUSSAMMAT CHANDERBATI KUER *v.* GOREY LAL SINGH. **52 I. C. 508 : 4 Pat. L. J. 700.**

——— **Ss. 5 and 12**—*Decision of Taxing Officer—Finality of.*

Where there is a difference of opinion between an appellant and the stamp reporter and the matter is referred to the Taxing Officer, the decision of the Taxing Officer is final with or without reference to the Taxing Judge. It is not open to appeal, review or revision. (*Sharfuddin and Roe, JJ.*) LAGAN BARAT KUAR *v.* KHAKHAN SINGH. **43 I C. 521 : 3 Pat. L. J. 92.**

——— **S. 7**—*Decree for redemption on payment of principal money—Appeal denying right of redemption and claiming further amounts due—Court-fee payable on appeal.*

Where in a suit for redemption, a decree was passed directing redemption on payment of the principal money, and an appeal was filed by the defendant denying the plaintiff's right to redeem and claim sums due on other charges on the property. The Court-fee payable on such appeal is on the amount claimed by them in excess of the amount awarded by the Court of first instance, though they claimed that amount only as a last resort, in case their plea of denial of the plaintiff's right to redeem was not accepted. (*Kanhaiya Lal, A. J. C.*) LACHMAN SINGH *v.* BAHADUR SINGH. **22 I. C. 642 : 16 O. C. 354.**

——— **Ss 7 and 17**—*"Subject" meaning of—Suit embracing two or three distinct subjects—Court-fees payable on the aggregate and not on each separately.*

In a suit for possession of land with mesne profits and a *malkhana* claim, plaintiff had valued each of the items separately. *Held*, he was liable to pay Court-fee only on the aggregate amount and not on each item separately, as that was the established practice in Bengal from 1882. The word "subject" in S. 17 means cause of action and is not to be interpreted with reference to S. 7 (*Chapman and Atkinson, JJ.*) NAURATAN LAL *v.* WILFORD JOSEPH STEPHENSON. **1922 P. 359: 1922 Pat. 79.**

——— **S. 7 (i) and (ix)**—*Mortgage—Personal decree*—Ad valorem *fee on appeals.*

An *Ad valorem* fee is payable in appeals against decrees passed under O. 34, R 6 of the C. P. C. (*Stuart, A. J C.*) WASI ALI *v.* JANG BAHADUR SINGH. **30 I. C. 497: 18 O. C. 121**

——— **S 7 (i)**—*Mesne profits—No ascertainment by decree—Valuation of appeal.*

In a suit for recovery of possession of land and mesne profits, the latter was valued at the value of the amount of antecedent mesne profits: The suit was decreed but the Court did not ascertain the amount of mesne profits. On an appeal *held*, that the appeal must be valued at the same valuation as the suit and must bear the same Court-fee stamp (*Roe, J.*) MANIK CHAND RAM *v.* MUSSAMMAT BIBI NAJIBAN. **49 I. C 962.**

COURT FEES ACT (VII OF 1870). S. 7 (iv) (b).

——— **S. 7 1, Sch. 1, Art. 1**—*Suit for balance due on commission agency account is a suit for money.*

A suit for the balance due on a commission agency account is a money suit under S. 7 (1) of the Court Fees Act the amount of Court fee payable for an appeal against the preliminary decree in such a suit will be according to Sch. I, Art. 1 of the Act. (*Fawcett, J. C. and Kemp, A. J. C.*) RAI BAHADUR HARJIMAL *v.* DHANPATAL DEWAN CHAND. **64 I. C. 626 : 15 S. L. R. 82.**

——— **S. 7 (ii)**—*Declaration of right to receive periodical payment and for arrears.*

The Court-fee for the declaration of a right to receive the periodical payment would be 10 times the amount payable for one year and usual fees for the amount of arrear claimed. (*Mears, C. J. and Banerji, J.*) SHAHZADI BEGUM *v.* MAHABUB ALI. **42 All. 353: 18 A. L. J. 328: 55 I. C. 809 : 2 U. P. L. R. (All). 149.**

——— **S. 7 (ii) and (iv) (c)**—*Periodically recurring sums—Meaning of—Suit for assessment of rent, and damages.*

In construing S. 7, cl. II the expression. "The sums payable periodically" must be limited by the specific words that precede it. Court fee on a suit for assessment of rent and recovery of a specific sum of money as damages for use, an occupation should be computed under cl. (iv) (c) of S. 7. (*Das, J.*) KALI CHARAN ROY *v.* KESHO PRASAD SINGH. **51 I. C. 15 : 4 Pat. L J. 561.**

——— **S. 7 (iv)**—*Valuation of relief.*

Although in cases falling under S. 7 (IV), the plaintiff is to state the amount at which he values the relief sought, it was never intended that he should assign an arbitrary value and then choose capriciously, the forum of trial. (*Mookerjee and Beachcroft, JJ.*) RAJ KRISHNA DEY *v.* BEPIN BEHARY DEY. **40 Cal 245: 16 C. L. J. 194 : 17 I. C. 162 : 17 C. W. N. 591.**

——— **S. 7, cl. (iv)**—*Suits Valuation Act, S. 8—Declaration and consequential relief.*

Where a suit for a declaration and consequential relief was valued differently for different reliefs and the plaint was returned for amendment whereupon the plaintiff chose the higher valuation, he cannot afterwards go back upon it. (*Wallis and Ayling, JJ.*) KRISHNA MALLAR *v.* SECRETARY OF STATE. **16 M. L. T. 516: 25 I. C. 375: (1914) M. W. N. 767.**

——— **S. 7(iv) (b.)**

See also COURT FEES ACT (1) SCH. 1, ART. 1.
(2) SCH. II, ART. 17 (iii) and (vi)

——— **S. 7 (iv) (b)**—*When plaintiff is out of possession.*

Ad valorem court fee must be paid where plff. is not in possession of any joint family property. (*Mookerjee and Beachcroft, JJ.*) LOKANATH SINGH *v.* DHWAKESHWAR PROSAD. **21 C. L. J. 253 : 27 I. C. 465: 20 C. W. N. 51.**

——— **S. 7 (4) (b)**—*Suit to enforce right to share in joint family—Court fee.*

S. 7 (4) (*b*) is applicable to a suit to enforce a right to a share in any joint family property.

COURT FEES ACT (VII OF 1870), S. 7 (iv) (b).

(*Chevis and Scott-Smith, JJ.*) DWARKA DAS *v.* KRISHAN KISHORE. **2 Lah. 114 : 61 I. C. 628 : 3 Lah. L. J. 349.**

——S. 7 (iv) (b) and Art. 17 (vi).

A suit for partition of joint property by a person in possession is impossible to be valued and S. 7 (iv) (b) has no application to the case and the proper provision under which it should be valued is Art. 17 (vi) of the third schedule of that Act (*Johnstone C. J. and Smith, J.*) FATEH CHAND *v.* BILAS RAI. **61 P. L. R 1916 : 89 P. W. R. 1916: 96 P. R. 1916: 34 I. C. 587 : 140 P. W. R. 1916.**

——S. 7 (iv) (b) and (v) and Sch. II, Art. 17 (6)—*Suit by co-tenant in possession for partition—Court fee.*

A suit by a co-tenant for partition of immoveable property of which he is in joint possession, is incapable of valuation under Sch. II, Art. 17(6) of the Court Fees Act and is not governed by S. 7 (v). (*Wallis, C. J. and Sadasiva Iyer, J.*) R. P. GILL *v.* LINGAMALLU VARADA RAGHAVAYYA. **43 Mad. 396: 38 M. L. J. 92: 11 L. W. 174: 27 M. L. T. 146: 55 I.C. 517: (1920) M. W. N. 124.**

——S. 7 (iv) (b)—*Partition suit for—Valuation.*

The valuation of the relief, though arbitrary, cannot be rejected by the Court in a suit for partition of properties of which the plaintiff claims to be in joint possession along with his co-parceners 24 Mad. 34 and 27 Mad 480 Foll. (*White, C. J. Sankaran Nair and Sadasiva Aiyar, JJ.*) CHELASAMI RAMIAH *v.* CHELASAMI RAMASAMI **13 M. L. T. 128 : 24 M L. J. 233 : 18 I. C. 363 : (1913) M. W. N. 105 (F. B.).**

——S. 7 (iv) (b) and (v)—*Suit for partition — Prayer for declaration of title—Removal of cloud on title—Court-fee.*

Where in a partition suit, the plaintiff distinctly prays for a declaration of his title to and confirmation of possession of certain land in order to disperse a cloud cast on his title by reason of an adverse entry in the Record of Rights, an *ad valorem* Court fee is payable on the value of the plaintiff's share in the land in respect of which the cloud is cast in addition to the fixed fee for partition. (*Dawson Miller, C. J. and Coutts, J.*) RACHHYA RAUT *v.* MUSAMMAT CHANDO. **6 Pat. L. J. 662 : 1922 Pat. 65 : 3 P. L. T. 293 : 1923 P. 113.**

——S. 7 (iv) (b) and Sch. II, Art. 17 (iv) *Partition—Suit for—Court-fee.*

If plff. is in possession of his share but wants to change the mode of enjoyment as his separate property, he has to pay 10-rupee stamp but if he is not in possession he has to pay *ad valorem* fee for his share in the whole. (*Jwala Prasad and Adami, JJ.*) DUKHI SINGH *v.* HARIHAR SHAH. **5 P. L. J. 540 : 1 P. L. T. 595 : 1921 Pat 89.**

——S. 7 (iv) (b) and Sch. II, Art. 17. (iv)—*Suit for partition—Deft. in possession—Court-fee.*

Where defts. are in possession of any part of the property to be partitioned and have denied the plff.'s title thereto, the suit is not one for partition but one to recover possession of that part of the property and a Court fee *ad valorem* on the share claimed in that part must be charged. (*Roe, J.*) DIP CHAND RAI *v.* CHETRU LAL. **56 I. C. 570 : 1 Pat. L. T. 529.**

COURT FEES ACT (VII OF 1870), S. 7 (iv) (c).

——S. 7 (iv) (b)—*Partition—Stamp on plaint.*

The plaint must be stamped according to the plff.'s valuation of his share which he seeks to recover. (*Twomey and Ormand, JJ.*) MAUNG SAWE BON *v.* MAUNG P. **35 I. C. 731 : 9 Bur. L. T. 97.**

——S. 7 (iv,) (c.)

See also (1) COURT-FEES ACT, SCH. I,
(2) SCH II, ART. 17 (iii AND vi)

——S. 7 (iv) (c)—*Valuation of suit — Court-fees—Declaratory decree—Injunction—Court fees Act, Sch. II, Art. 17—Objection to jurisdiction not raised in first Court—Suits Valuation Act, S. 8.*

The Court-fees Act has no other object than to secure revenue and its provisions should be construed accordingly. A suit, the subject-matter of which exceeded Rs. 5,000 was instituted in the first class Subordinate Judge's Court, the only Court competent to hear it. The prayer was for a declaration in respect of the bulk of the properties and for an injunction regarding a house. The prayer for declaration was valued at Rs. 130 and that for injunction at Rs. 5 and Court-fee of Rs. 10 6-0 was paid. The suit was decided without any objection to jurisdiction by deft. On appeal to the High Court by plff. the deft. contended that under S. 7, (iv) (*c*) the subject-matter was less than Rs. 5,000 and the appeal lay to the Dist. Court only. *Held* that by Sch. II (17) a fixed fee of Rs. 10 has to be paid on a plaint for a declaratory decree where no consequential relief is prayed for; the Bombay practice of stating a value of Rs. 130 upon a plaint of that description is not warranted by law and is misleading. (*Sir Lawrence Jenkins.*) RACHAPPA *v.* SHIDAPPA. **43 Bom. 507 : 46 I. A. 24 : 17 A. L. J. 418 : 25 M. L. T. 298 : 36 M. L. J. 437 : 29 C. L J. 452 : 21 Bom. L. R. 489 : 10 L. W 274 : 50 I. C. 280 : 24 C. W. N. 33 (P. C).**

——S 7 (iv) (c) and (v) (a) and (b) —*Suit to set aside alienation by father—Suit for declaration and possession—Valuation—Court fee.*

Where a junior member of a joint Hindu family brings a suit for cancellation of a sale of joint family property by his father and elder brother and for possession of his share, he is liable to pay *ad valorem* court-fee on the value of the whole of the property as he had asked, though quite unnecessarily, for cancellation of the sale-deed. Where, however, the court below decreed the plffs.' suit subject to the payment of certain sums to the purchasers, the defendant in his appeal against the decree need pay court fee only on ten times the Government revenue of the property in dispute. 3 Pat. L. J. 448 Dist. (*Piggott, J.*) RUP NARAIN *v.* BISHWA NATH SINGH. **44 All. 629 : 20 A. L. J. 587 : 4 U. P. L. R. (A.) 192 : 1922 All. 358.**

COURT FEES ACT (VII OF 1870), S. 7 (iv) (c).

———S. 7 (iv) (c) and (V) (b)—*Suit for declaration and possession—Suit by Hindu reversioner—Alienation by widow.*

A Hindu widow executed a sale of her husband's estate and the vendees were in possession. In a suit brought by the reversioners praying for a declaration that the sale was void and ineffectual as against them and for possesssion, *held*, it was unnecessary for the plff. to ask for any declaration in respect of the sale-deed, that the suit was not one for a declaration with a consequential relief, and that the Court fee paid on five times the Government revenue was correct. (*Tudball, J.*) TIKA RAMA *v.* SALIGRAM.

18 A. L J. 903 : 57 I. C. 494 : 2 U. P. L. R. (A.) 216.

———S. 7 (iv) (c)—*Suit for sale on mortgage—Prior charge—Appeal as to—Court fee.*

In a suit for sale on a mortgage, one of the defts. claimed priority in respect of a charge in her favour. The Court decided that the plff's mortgage was prior in date. The deft. appealed and in her appeal sought that her security should have priority. *Held*, that the deft. must pay *ad valorem* Court-fees on the amount of her mortgage inasmuch as she was seeking a declaration with a consequential relief. (*Tudball, J.*) MOTI BEGAM *v.* HAR PRASAD. **47 I. C. 311 : 16 A. L. J. 81.**

———S. 7 (iv) (c)—*Suit for declaration and injunction—Consequential relief prayed for.*

In a suit for declaration as well as for an injunction where consequential relief was prayed for, *ad valorem* fee is payable on the amount at which the relief sought is valued. *Per Richards, O. C. J.* Plff. must truly state the amount at which he values the relief. (*Richards, C. J. and Tudball, J.*) MUSSAMMAT JAGESHRA *v.* DURGA PRASAD SINGH.

36 All. 500 : 24 I. C. 679 : 12 A. L. J. 844.

———S. 7 (iv) (c) — *Valuation on — Suit for declaration and injunction.*

The plaintiff has the right to put his own valuation on his claim for the purposes of Court-fees in a suit for a declaration and for an injunction by way of consequential relief : and the same is the value for the purpose of jurisdiction. (*Shah and Hayward, JJ.*) BALA KRISHNA NARAIN SAWANT *v.* JANKI BAI SITARAM **44 Bom. 331 : 56 I. C. 340 : 22 Bom. L. R. 289.**

———S. 7 (iv) (c)—*Consequential relief—Administration of estate and appointment of receiver, are such reliefs.*

Plaintiff sued for a declaration of his right, to administration of the estate and appointment of an interim receiver. *Held*, that the suit fell within S. 7 (iv) (c) of the Court Fees Act. In the absence of a prayer for possession of the property the plaintiff was not bound to pay court fee on the market value. (*Chatterjee and Walmsley, JJ.*) RUPCHAND GHOSH *v.* KSHIRODAMAYI DASI.

27 C. W. N. 457 : 1923 Cal. 329.

———S. 7 (iv) (c) and (v) (a)—*Mortgage—Personal decree for sale—Suit to set aside.*

Plff. sued to set aside an execution sale of certain properties on the ground that the decree having been previously adjusted could not be executed and that the sale was therefore null and void and for a declaration that a personal decree passed against the plff. was inoperative against him. On a question arising as to the Court-fee payable on the plaint. *Held*, that the suit was one substantially for possession though framed as one for declaration and consequential reliefs and that Court fee was payable under S. 7 (v) of the Court Fees Act and not under S. 7 (iv). (c). (*Mookerjee and Cuming, JJ.*) RADHA KANTA SAHA *v.* DEBENDRA NARAYAN SAHA.

49 Cal. 880 : 27 C. W. N. 566 : 38 C. L. J. 74 : 1922 C. 506.

———S. 7 (iv) (c)—*Declaration that a decree is fraudulent—Plaintiff can put his own value.*

In a suit for declaration that a decree and a sale held thereunder is fraudulent, without a prayer for possession, the plff. can put his own value on the plaint and pay Court fee thereon. (*N. R. Chatterji and Panton, JJ.*) JOGENDRA NATH SEN *v.* TORIANTNESSA. **62 I. C. 685.**

———S. 7 Cl. (iv) (c)—*Bengal Tenancy Act S. 111, A—Suit under—Consequential relief.*

Where in a suit under S. 111, A., B. T. Act, the plff. prays for a declaration of his occupancy right of which he claims to be in possession and for another declaration that the entry in Record of Rights as to his status is a nullity, the latter relief is consequential on the former one and the plaint comes under S. 7, Cl. (iv) (c) of the Court-fees Act. (*Sanderson, C. J. and Mookerjee, J.*) MIDNAPUR ZAMINDARI CO. *v.* SECRETARY OF STATE.

44 Cal 352 : 40 I. C. 96 : 21 C. W. N. 834.

———S. 7 (iv) (c) and (d)—*Suit for declaration of title to land comprised in deft.'s* miras patta—*Valuation.*

For jurisdiction, a suit for declaration of title to land in plff.'s possession and for a perpetual injunction against the deft who resists the plff.'s claim on the strength of *miras patta* which includes the land, should be valued at the market value of the land actually in suit and not of the whole area comprised in the *miras patta* although the decision of the suit in plff.'s favour would set aside the whole *miras patta*. (*Teunon and Smither, JJ.*) SARAT CHANDRA BASU *v.* SWARNOMOYE GHOSE. **36 I. C. 615.**

———S. 7 (iv) (c)—*Plaint— Insufficiently stamped—Giving no valuation of relief sought—Computation according to jurisdictional value—Amendment of plaint.*

A suit under S. 7, cl (iv) with a plaint containing no valuation of relief sought but giving a valuation for purposes of jurisdiction is valued for purposes of Court-fees according to jurisdictional value, unless plff. amends the plaint with the leave of the Court. (*Richardson and Imam, JJ.*) KRISHNA KUMAR RAY *v.* CHANDRAKANTA MITRA. **31 I. C. 807.**

———S. 7 (iv) (c)—*Valuation of suit—Plaint—Court-fee.*

In a suit for a declaration that a decree for over Rs. 22,000 was bad, and might be set aside, the plffs. were interested only in three annas share of the property valued at Rs. 9,000, *Held*,

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that the plffs. must value their suit according to the extent of their claim, and the Court-fee need therefore be paid only upon that amount. 85 Cal. 202 : 40 Cal. 615 Ref. (*D. Chatterjee and Walmsley, JJ.*) GANESH BHAGAT *v.* SARADA PRASAD MUKERJEE. 42 Cal. 370 : 30 I. C. 111 : 19 C. W. N. 895.

———S. 7 (iv) (c) and (v)—*Suit for declaration with consequential relief, not for possession—application of section.*

A suit for a declaration that a certain decree was fraudulent and unfit for execution and that the family property could not be sold in execution and that, if the whole property could not be released from execution, at least the plff.'s portion, would come under S. 7 (iv) (c) being a declaratory suit with a prayer for consequential relief ; and Sub. S. V does not apply because the suit is not for possession. (*Bart and Carnduff, JJ.*) HARIHAR PANDA SINGH *v.* SHYAM LAL SINGH. 21, I. C. 404 : 40 Cal. 610:

———S. 7 (iv) (c)—*Suit under S. 104-H of the Bengal Tenancy Act.*

A suit under S. 104-H of the B. T. Act for a declaration that the plaintiff is a raiyat and not a tenure-holder, and for settlement of fair rent falls under S. 7 (iv) (c) and not under Sch. II, Art. 17, Cl. (i) and (iii). (*Chitty and Teunon, JJ.*) TRAYLOKYA NATH PAL *v.* SECRETARY OF STATE. 18 I. C. 188: 17 C. L. J. 426.

———S. 7 (iv) (c)—*Suit for declaration and for injunction.*

A suit for a declaration that plff, is the sole *shebait*, and for an injunction restraining the deft, from interfering with his possession of the endowed properties, falls within S. 7. (iv) (c). (*Mookerjee and Beachcroft, JJ.*) RAJKRISHNA DEY *v.* BEPIN BHERAJ DEY. 40 Cal. 245: 16 C. L. J. 194: 17 I. C. 162: 17 C. W. N. 591.

———S. 7, cls. (iv) (c), (v), (x), (xi) (c)—*Suit by grantee of mine for possession.*

An owner having leased out a certain mine for a term of years to the plff. subsequently entered into an agreement with the other persons to grant them a lease. The plff. unable to obtain possession, sued the owner and the other persons for possession of the mine, mesne profits, damages, costs and interest: *Held*, that the suit did not fall within cl. xi (*c*) of S 7 of the Court-fees Act, because as it was one not merely between the tenant and the landlord, but also between the tenant and other persons who claimed to have acquired an interest from the landlord. 32 Cal. 268, 31 Mad. 14. Foll. The suit did not fall within (iv) (c,) but it was a suit for possession of land within meaning of Cl. v and must be valued according to the value of the subject-matter. (*Mookerjee and Beachcroft, JJ.*) SUNDARA MAL MARWARI *v.* MURRAY. 16. I. C. 963 : 16 C. L. J 375.

———S. 7 (iv) (c)—*Suit to declare decree void by non-party thereto, is not within the clause.*

A person who was no party to the decree may sue to have it declared void without asking for any consequential relief and the suit is not governed by S. 7 (v) (c). (*Broadway and Zafar Ali, JJ.*) MT. NIHAL DEVI *v.* RAI CHUNI LAL. 5 Lah. L. J. 357 : 1923 Lah. 373.

———S. 7 (iv) (c)—*Suit for declaration and injunction—Valuation.*

Where plaintiff sues (1) for a declaration that he is the owner of certain property (2) that an ejectment decree obtained against him by defts. should be cancelled on the ground of fraud and declared not binding and (3) for a perpetual injunction that defts. should not interfere with his possession, the suit is one for a declaration with consequential relief within S. 7 (iv) (c) of the Court Fees Act, The courts are bound to accept valuation placed by the plff. upon the relief sought by him, even though such valuation is arbitrary and inadequately represents the value of the property. (*Scott Smith, J.*) NANDAN MAL *v.* SALIG RAM. 1922 Lah. 236.

———S. 7 (iv) (c)—*Will—Cancellation of.*

Suit for cancellation of a will falls under S. 7 (iv) (c). 29 Bom. 207 ; 5 All. 331 ; 15 B. L. R. 172. Ref. (*Shadi Lal and Jones, JJ.*) HUKHAM SINGH *v.* MT. GYAMDEVI. 127 P. W R. 1916 . 31 P. L. R. 1917 : 36 I. C. 95 : 87 P. R 1916.

———S. 7 (iv) (c)—*Suit for declaration and injunction—Valuation of suit for purposes of jurisdiction—Discretionary with the plff. to fix arbitrary value.*

Under S. 7 (iv) (c) the plff. can in a suit falling thereunder, value the relief sought at any amount which he thinks fit and Courts cannot object to it though such valuation is arbitrary. (*Rattigan, Beadon and Agnew, JJ.*) BARU *v.* LACHHMAN. 228 P. W. R. 1913 : 111 P R. 1913 ; 22 I. C. 503 : 23 P. L. R, 1914.

———S. 7 (iv) (c) and (d)—*Suit for declaration—Alienation by Hindu widow—Appointment of receiver—Suit to be valued by plaintiff.*

A suit for a declaration that certain alienation made by a Hindu widow does not affect plaintiff's reversionary rights, for appointment of a receiver and for restoration of property to the *status quo ante* falls within the purview of S. 7 (iv) (c) and (d) and *ad valorem* Court-fee is calculated on the valuation of the plaintiff is leviable. (*Reid, C. J. and Beadon, J.*) LACHMI DAS *v.* MUSSAMMAT DAROPTI. 134 P. W. R. 1913 : 232 P. L. R. 1913 : 19 I. C. 859 : 93 P. R. 1913.

———S. 7 (iv) (c)—*Suit for removal of manager.*

A plaint praying for the removal of the manager of the religious institution based on the allegation that the institution is a private one and is founded and maintained by plff's ancestors and that the plff. alone has the power to appoint and dismiss the manager is really one for possession. 58 P. R. 1893, 56 P. R. 1895, Foll. (*Chatterjee and Mande, JJ.*) BASAWA SINGH *v.* BHAGWAN KAUR. 181 P. W. R. 1912 : 17 I. C. 270 : 216 P. L. R. 1912

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——S. 7 (iv) (c) and (d)—*Suits Valuation Act VIII of* 1887, S. 8—*Punjab Chief Court rules under S. 9, R. 4.*

In a suit for declaration and injunction, the value for purposes of Court-fees and jurisdiction, is the amount at which the plff. values the relief, between Rs. 100 and 500 ; 63 P. R. 1902, Foll. 17 Bom. 56, Rel. on ; 30 Mad. 18 Dist. (*Chevis, J.*, KHAIR AHMAD *v.* MIR AHMAD ULLAH.

62 P. W. R. 1912 : 13 I. C. 408 : 93 P. L. R. 1912.

——S. 7. (iv) (c)—*Declaratory Suit—Consequential relief.*

A suit for a declaration that the plff. is the real owner of a decree obtained by defts. against a third party and praying for transfer of the decree to the plff. is a mere declaratory suit on which no consequential relief is sought. 20 Bom. 736; 30 Cal. 788, Foll. 25 Cal. 49 ; 26 Cal. 845 ; Dist. (*Shah Din and Chevis, JJ.*) GANESHI LAL *v.* BENI PERSHAD. **47 P. L. R. 1911 : 22 P. W. R. 1911 : 9 I. C. 673 : 1. P R. 1911.**

——S. 7 (iv) (c)—*Suit for declaration that decree is fraudulent and not binding.*

A suit for a declaration that a decree is not binding as having been obtained by fraud comes within S. 7 (iv) (c) and the Court fee payable thereon is an *ad valorem* fee on the value at which the suit is valued in the plaint. 38 Mad 922, Foll. (*Abdur Rahim and Bakewell, JJ.*) PILLA KAKKADU *v.* VADULA CHANDRAYYA.

(1918) M. W. N. 562 : 51 I. C. 536 : 24 M. L. T. 254.

——S. 7. (iv) (c)—*Consequential relief—Injunction—Valuation of.*

Where there is a prayer, for an injunction, relief can be valued arbitrarily and such valuation is conclusive. If along with the injunction relief, additional consequential reliefs are prayed for, they should be valued according to law. The proper Court fee for the plaint would then depend upon the total value of the consequential reliefs. (1913) M. W. N. 105 and (1914) M. W. N. 707, Ref. (*Sadasiva Iyer and Bakewell, JJ.*) AZIMUDDIN SAHIB *v.* KADIRSA ROWTHER.

43 I. C. 995 : (1918) M. W. N. 40.

——S. 7 (iv) (c)—*Suit to declare a document not binding.*

A suit by an insolvent, to declare a deed by the Official Receiver not binding on him, and for consequential relief, can be valued as plff. likes. Such a suit is not in substance a suit to obtain a cancellation of the deed. 20 M. L. J. 791 : 30 Mad. 18; 20 Mad. 490. Dist. (*Abdur Rahim and Srinivasa Iyengar, JJ.*) RAMASWAMY NADAN *v.* SUBRAMANIA NADAN. **40 I. C. 620 : 32 M. L. J. 447.**

——S. 7 (iv) (c)—*Valuation—Suit for declaration of invalidity of alienations by widow and for appointment of receiver.*

A suit by a reversioner for declaration that certain transactions do not bind the estate and for the appointment of a receiver to preserve the property from waste is to be valued as under S. 7 (iv) (c). (*Srinivasa Iyengar, J.*) DODDA SANNEKAPPA *v.* SAKRAVVA. **36 I. C. 831.**

COURT FEES ACT (VII OF 1870), S. 7 (iv) (c).

——S. 7 (iv) (c)—*Suit to declare decree invalid—Valuation.*

A suit to declare a decree or document to which plaintiff was a party is not binding on him in a suit for consequential relief within S. 7, Cl. (iv (c)of the Act. An *ad valorem* Court-fee is payable. A suit for declaration and consequential relief *prima facie* comes within S. 7, Cl. (iv) (c) but if at the same time it comes within any of the other classes of suits specified in the section, it must be so treated (*Wallis, O. C. J. Seshagiri Iyer and Kumaraswami Sastri, JJ.*) ARUNACHELLAM CHETTY *v.* RANGASWAMI PILLAI. **38 Mad 922: 26 M. L. J. 118 : 17 M. L. T. 154 : 28 I. C. 79 : (1915) M. W. N. 118.**

——S. 7, (iv) (c), Sch. II, Art. 17, cls. 3 and 6—*Consequential relief—Meaning.*

Consequential relief means a substantial remedy in accordance with the title of which declaration is prayed for. A prayer for possession being unwarranted by plaint averments, is not a relief consequential upon a declaratory decree. (*Bakewell, J.*) MURZA HYDER ALI SAHIB *v.* HUSSAIN RAZA SAHIB. **24 I. C. 316 : 1 L. W. 398.**

——S. 7 (iv) (c)—SCH. II, ART. 17, (vi)—*Suit under S. 31 Sp. Rel. Act for declaration and Consequential Relief—Falls under cl. (iv) (c).*

A suit under S. 31 of the Sp. Rel. Act brought for a declaration with consequential relief, for purposes of court-fees and jurisdiction is governed by S. 7 (iv) (c) of the Court Fees Act, and Art. 17 (vi) of Sch. II of the Court-fees Act cannot apply where it is possible to estimate the money value of the claim. 7 N. L. R. 190 Foll. (*Batten, J. C.*) MT. BARI BAHU *v.* KUNDAN SINGH.

1922 Nag. 264.

——S. 7 (iv) (c)—*Suit to declare invalidity of adoption.*

For the sake of Court-fees, a suit to declare that an adoption did not take place is one to declare it invalid; and where it affects title to immoveable property *ad valorem* fee is to be charged, (*Kotwal, A. J. C.*) CHINKI *v.* NARAYAN.

58 I. C. 965.

——S. 7 (iv) (c)—*Suit for declaration that decree is void—Consequential relief.*

A suit for a declaration that a decree is nullity and that it should be set aside is one for a declaration with consequential relief and is governed by S. 7 (iv) (c). (*Kotwal, A. J. C.*) GOVIND *v.* DHEKLU. **56 I C. 550.**

——S. 7 (iv) (c)—*Consequential relief—Prayer for setting aside decree.*

A suit to set aside a decree on the ground of fraud is one for declaration and for a consequential relief and the Court fee must be computed under S. 7 (iv) (c). 5 All. 331 : 20 Bom. 736 : 30 Cal. 788, Ref. (*H. Drake Brockman, J. C.*) BALDEO PRASAD *v.* R. S. SETH GHASIRAM.

56 I. C. 360 : 16 N. L. R. 84.

——S. 7 (iv) (c) and (d)—*Suit for declaration of invalidity of mortgage, for cancellation and Injunction—Valuation.*

COURT FEES ACT (VII OF 1870), S. 7 (iv) (c).

The value for purposes of Court fees and jurisdiction of a suit for declaration of the invalidity of a mortgage deed, for cancellation and for an injunction restraining the deft. from enforcing its terms, is the amount of liability under the deed, as stated in the plaint. 6 C. L. J. 427, Foll (*Batten, A. J. C.*) DEVIDAS *v.* RAM LAL,
13 I. C 864 : 7 N. L. R. 190.

——— S. 7 cl. (iv) (c)—*Suit by minor for declaration that mortgage decree against him was void involves a consequential relief.*

Where a minor sued, on attaining majority, to set aside a final decree foreclosure passed against him on the ground that the decree, though based on a compromise sanctioned by the Court, was void and therefore unenforceable against him. *Held* that the relief for declaration involved a consequential relief and that the suit should be valued under S. 7. cl. (iv) (c) of the Court Fees Act with an *ad valorem* court fee. (*Daniels, J.C.*) SRIPAL SINGH *v.* JAGDISH NARAYAN.
65 I. C. 980 : 24 O. C. 361.

——— S. 7, (iv) (c) — *Court-fee — Mortgage — Appeal.*

An appellant, who claims on appeal that a portion of the property is not liable to be sold in execution of a mortgage decree, must pay *ad valorem* Court-fee on the appeal. (*Lindsay, J. C.*) SHEORAJA *v.* DEBI DIN, **48 I. C. 535: 5 O.L.J. 663.**

——— S. 7 (iv) (c)—*Consequential relief—Confirmation of possession—Arbitrary valuation.*

Under S. 7 (iv) (c) of the Court Fees Act, it is not open to the plaintiff to fix an arbitrary or incorrect valuation. 36 A. 500 ; 6 C. L. J. 427 ; 14 C. L. J. 47 ; 16 C. L. J. 194 : 4 Pat. L. J. 703 Rel. A prayer for confirmation of possession is nothing more than a prayer that the fact of, and his right to possession may be declared but the words "confirmation of possession" have now acquired a technical meaning and include a prayer for recovery of possession if the court thinks the plaintiff is out of possession. Consequently a prayer for confirmation of possession has come to be regarded as consequential relief. 19 W. R. 18 : 22 C. L. J. 415 : 23 C.L.J. 561 Ref. (*Miller, C. J. and Mullick, J.*) RAM SEKHAR PRASAD SINGH *v.* SHEONANDAN DUBEY. **4 Pat. L. T. 71: 1 Pat. L. R. 25: 2 Pat. 198: 1922 Pat. 337: 1923 P. 137.**

——— S. 7, (iv) (c) and (v)—*Suit for declaration of title and possession.*

Where a challenge is directly thrown on the title of the plaintiff who comes to Court in order to meet that challenge, it is a suit clearly under S. 42 of the Specific Relief Act and if the Plaintiff asks for possession also in that suit, his suit comes under S. 7, cl. (4), Sub. cl, (c) of the Court Fees Act and not within Sec. 7, cl, (5) of the Act

A challenge having been directly thrown upon the title, a suit for declaration of title as adopted son and for possession is a suit that comes within S. 7, cl. (4) Sub-cl. (c) of the Court Fees Act. (*Das and Foster, JJ.*) UGRAMOHAN CHOWDHRI *v.* LACHMI PRASAD CHOWDHRI. **1922 Pat. 6: 1923 P. 100.**

COURT FEES ACT (VII OF 1870), S. 7 (iv) (c).

——— S. 7 (iv) (c)—*Suit for declaration of invalidity of decree against Hindu family.*

In execution of a decree obtained against some members of a Hindu family, certain properties were sold. Some of the other members of the family brought a suit for a declaration that the sale was null and void. *Held*, the suit was one for declaratory decree and consequential relief and under S. 7 (iv) (c) *ad valorum* fee was payable. (*Das and Bucknill, JJ.*) SURENDRA NARAIN SINGH *v.* SHAMBIHARI SINGH.
1 P. 197 : 1922 P. 404.

——— S. 7, cl. (iv) (c)—*Suit for declaration of status as landlord and ejectment--Suit falls under cl. iv (c).*

Where a plff. sues for a declaration that he is a raiyat and that the defts. are his under raiyats and for ejectment of the latter the suit falls within S. 7 cl. (iv) (c) of the Court Fees Act. (*Miller, C. J. and Mullick, J.*) PARAMESHWAR SINGH *v.* SUREBA KUER. **65 I. C 240.**

——— S. 7, (iv) (c)—*Assertion of adverse title*—Ad valorem *fee.*

As a claim before a survey officer or an entry made in the survey records amounts to an assertion of adverse title, the plff. in a partition suit, must clear up his title and possession over the plots recorded adversely to him in the survey records and pay *ad valorem* fee with respect to the property. (*Jwala Prasad, J.*) HARNARAYAN PANDEY *v.* SURESH PANDEY. **63 I. C. 203.**

——— S. 7, (iv) (c)—*Declaration of right to recover money when necessary—Sp. Rel. Act, S. 42,*

A suit for a declaration that the defts, were liable to pay a certain amount and that the plff. should recover the same it and when the plff. is compelled to pay the same is one for a declaratrory decree without a consequential relief for the purposes of the Court Fees Act, but the suit not being one contemplated by S. 42 is not maintainable. (*Das and Adami, JJ.*) SHAIKH RAFIQUDDIN *v.* SHAIKH ASGAR ALI. **63. I. C. 38.**

——— S. 7, (iv) (c)—*Hindu Reversioner—Suit by, for appointing Receiver to the estate of a deceased Hindu.*

A suit by a Hindu reversioner, to prevent waste of property in the hands of the widow and for the appointment of Receiver falls under S. 7 (iv) (c). (*Jwala Prasad, J.*) HARBANS SAHU *v.* LALMONI KUER. **62 I. C. 86.**

——— S. 7, (iv) (c) Sch. II, Art. 17—*Inter pleader suit—Appeal.*

In an appeal from a decision in an interpleader suit in respect of money the Court-fee payable is Rs. 10 under Art. 17 of Sch. II of the Act and not under S. 7 (iv) (c) of the Act (*Jwala Prasad, J.*) BRIJNARAIN *v.* BALMIKI PRASAD.
61 I. C. 820 : 2 Pat. L. T. 280.

——— S. 7, (iv) (c) (v)—*Suit for declaration and possession falls under IV (c).*

A suit by a reversioner, after the death of the widow, for a declaration and possession: against an alinee of the widow, falls, under Cl. IV (c and

COURT FEES ACT (VII OF 1870), S. 7 (iv) (c).

not under Cl. (*v*) of S. 7 of the Court-Fees Act. (*Jwala Prasad, and Ross, JJ.*) KHETRA MOHAN *v.* GANESH LAL.
2 Pat. L. T. 607 : 61 I. C. 565 : 6 P. L. J. 10

——S. 7 (iv) (c)—*Conditional decree—Appeal against—Court fee.*

Plaintiff's suit for possession was decreed on condition of the plff. paying off the encumbrances on the property and plff. preferred an appeal against the condition in the decree. *Held, ad valorem* Court-fee should be paid on the value of the encumbrance. (*Coutts, J.*) KISHEN DUTT PANDEY *v.* KASHI PANDE.
5 Pat. L. J. 455 : 1 Pat. L. T. 738 : 57 I. C. 481 : 2 U. P. L. R (Pat.) 196.

——S. 7 (iv) (c) and (v)—*Suit for possession of properties as adopted son—Contest as to validity of adoption.*

A suit for possession of an estate by plff. as having been adopted by the widow of the last male owner under the authority of the latter is in effect a suit for declaration that the plff. was the adopted son of the male owner and for consequential relief, namely, possession. Therefore *ad valorem* Court-fees were payable under S. 7 (iv) (c). (*Das and Adami, JJ.*) UGNAMOHAN CHAUDHURY *v.* LACHMI PRASAD CHOUDHURY.
56 I. C. 422 : 5 Pat. L. J. 339.

——S. 7 (iv) (c)—*Suit for declaration—Consequential relief—Decree and sale—Setting aside—Valuation.*

The valuation for the purposes of Court-fees under S. 7 (iv) (c) must be in accord with the value of the subject-matter and not an arbitrary valuation. In a suit for a declaration and consequential relief, the plff. is bound to pay *ad valorem* fees in proportion to the loss from which he seeks to be relieved. In a suit for a declaration that a decree obtained against them is void on the ground of fraud, plffs. are bound to pay *ad valorem* Court-fees on the value of their share of the property sold and not merely an *ad valorem* fee on the amount of the decree. (*Mullick and Adami, JJ.*) PANDIT BRJJ KRISHNA DAS *v.* CHOWDHURI MURI RAI.
56 I C. 316 ; 4 Pat. L. J, 703.

——S. 7 (iv) (c) and Sch. II, Art. 17 (iii)—*Suit for declaration—Court-fee.*

A suit for a declaration that plffs. were occupancy tenants and not tenure-holders and that the survey entry describing them as tenure-holders was wrong and not binding on them falls under Art. 17 (iii) of the Court-Fees Act. (*Roe, J.*) TEWARI KORA *v.* BHUPAT MANDAR.
50 I. C. 298 : 4 P. L. J. 302.

——S. 7 (iv) (c)—*Declaration—Consequential relief.*

A suit for a declaration that a revenue sale is invalid and for confirmation or restoration of possession falls under S. 7 (iv) (c), 38 Mad. 922. Appl. (*Roe and Jwala Prasad, JJ.*) DHAKESHWAR PRASAD SINGH *v.* JIOO CHOWDHURY.
46 I. C. 385 : 3 Pat. L. J. 448.

——S. 7 (iv) (c)—*Suit for cancellation of registered deed—Court fee.*

COURT FEES ACT (VII OF 1870), S. 7 (iv) (c).

A suit for the cancellation of a Registered Instrument under S. 39 of the Specific Relief Act, is a suit for declaration and consequential relief, within the meaning of S. 7 (iv) (c) in as much as the declaration necessitates the further and consequential relief of sending the decree to the Registration Office. *Ad valorem* Court-fee must be paid on the relief. 29 Bom 207, Foll. (*Roe, J.*) NOGWOOAGAR OJAIN *v.* SHIDHAR JHA.
45 I. C. 238 : 3 Pat. L. J. 194.

——S. 7 (iv) (c)—*Suit to set aside decree on mortgage to the extent of the plff.'s share—Valuation—Court-fee*

Plff. sued to set aside a compromise decree on a mortgage executed by their father. The value of the entire property was Rs. 2,000 and that of the plff.'s share was two-thirds. *Held*, that the plffs. were not bound to pay Court fee on the whole amount of the decree but only on the value of their share of the property in suit. (*Chapman and Atkinson, JJ.* BANKEY BEHARI *v.* RAM BAHADUR.
4 Pat. L. W. 281 : 4 Pat. L. J. 191 : 44 I. C. 891 : 1918 Pat. 223.

——S. 7 (iv) (c) and Sch. II, Art. 17 (1)—*Declaration and consequential relief—Prayer for releasing property from attachment and possession—Appeal—Court-fee.*

Where plff.'s property was attached at the instance of a creditor of its ostensible owner and plff. asked only for the release of his property from attachment, the Court-fee payable would be Rs. 10 under Sch. II, Art. 17 (1) of the Court-fees Act. If the ostensible owner is also joined as a party to the suit and a prayer is made against him for recovery of possession, the Court-fee payable would be on the value of property in accordance with S. 7 (iv) (c) of the Act. If in such a suit the plff. is defeated and he prefers an appeal he must pay Court-fees on the value of the property plus Rs. 10 for declaration. If the plaintiff succeeds and an appeal is preferred by the defts. the Court-fee to be paid must be regulated by a consideration of the relief sought in appeal. If the attaching creditor appeals, the Court-fee payable would be Rs. 10 only. If the ostensible owner appeals, the Court-fee payable would be Court-fee calculated upon the value of the property. (*Roe, J.*) CHANDRADHARI SINGH *v.* TIPAN PRASAD SINGH.
43 I. C. 971.

——S. 7 (iv) (c) and (v)—*Possession—Incidental declaration that document is void or inoperative—Valuation.*

Where, in order to succeed in a suit for possession, it is necessary for the plff. to obtain a declaration that a document or a decree is void or inoperative the Court fee to be paid must be calculated on the actual value of the property. (*Sharfuddin and Roe, JJ.*) MUSSAMMAT LAGAN BURT KUER *v.* KHAKHAN SINGH.
43 I. C. 962 : 3 Pat. L. J. 92.

——S. 7, (iv) (c)—*Suit for declaration with consequential relief—Suit by sons for recovery of possession of properties sold in execution of decree against father.*

When consequential relief is sought in addition to a declaration, the plff. is bound to fix a reasonable valuation upon the consequential relief. If

COURT FEES ACT (VII OF 1870), S. 7 (iv) (c).

he puts a ridiculous value upon it, the Court must fix a reasonable value for him, dealing with each case on its own merits. 6 C. L J. 427, Foll ; 35 Cal. 202 ; 42 Cal. 370, Ref. to. In a suit by sons to set aside decrees made upon mortgages executed by their father and sales held under such decrees, and to obtain possession of their individual shares in the joint family property : *Held*, that in effect the suits were not for recovery of possession but for declarations with consequential relief. The Court-fee payable in each case was not a sum equal to ten times the Government revenue but *ad valorem* calculated on the value of the plff.'s share in the joint family property. (*Sharfuddin and Roe, JJ.*) SHAMA PERSHAD SAHI *v.* SHEO PRASAD SINGH. **41 I. C 95 : 2 P. L. W. 173.**

——S. 7 (iv) (c) Sch. II, Art. 17 (iii).

Where a party prays for a cancellation of a document which he believed he had signed as witness but which he subsequently read as though executed by him as the vendor of the property conveyed thereby, he must pay *ad valorem* fee on his plaint for the relief by way of cancellation, more especially because he had valued the suit for purposes of jurisdiction at a big figure. Rs. 10 is not the proper fee. (1893) R. P. 109. Dist. (*Saunders, A. J. C.*) NGA CHIT WET *v.* KIVANAN. **33 I. C. 624 : (1915) II U. B. R. 102.**

——S. 7, Cl. (iv) (d)—*Injunction, suit for—Valuation.*

The Court-fee for a suit for an injunction must be computed according to the amount at which the relief sought is valued in the plaint and which the plaintiff is entitled to fix himself. (*Macleod, C. J. and Fawcett, J.*) GOVINDA KRISHNA SATHE *v.* HANMAYA LINGAYA FULMALI. **45 Bom. 567 : 59 I. C. 777: 22 Bom. L. R. 1450.**

——S. 7 (iv) (d)—*Injunction, suit for—Valuation.*

The valuation of a suit for injunction restraining the defendant from cutting timber from plaintiff's jungle is the amount at which the plaintiff values the relief sought. (*Fletcher and Syed Huda, JJ.*) RAICHARAN PANDA *v.* KUNJA BEHARI DAS. **46 I. C. 884.**

——S. 7, (iv) (d)—*Declaratory suit.—Injunction—Valuation—Suits Valuation Act, S. 8.*

Where in a declaratory suit the plff. asked for injunction, the suit falls under S. 7 iv (d) and must be valued alike for purposes of Court fees and jurisdiction under S. 8 of the Suits Valuation Act. (*Mookerjee and Beachcroft, JJ.*) MOHENDRA SUNDAR THAKUR *v.* DINOBANDHU THAKUR. **21 I. C. 771 : 19 C. L. J. 15.**

——S. 7, (iv) (d)—*Declaratory suit.*

In a declaratory suit, the value of the property is the value of the relief claimed. And the value of the relief cannot be arbitrarily fixed. (*Mookerjee and Caspersz, JJ.*) KRISHNA DAS *v.* HARI CHARAN. **14 C. L. J. 47 : 10 I. C. 865. 15 C. W. N. 823.**

——S. 7, Cl. (iv) (d)—*Suit for injunction—Valuation for purposes of Court Fees and Jurisdiction, is same.*

COURT FEES ACT (VII OF 1870), S. 7 (iv) (f).

A suit for injunction was valued at Rs. 4,000 for purposes of jurisdiction and at Rs. 110 for Court Fees. The suit was dismissed with costs. On a question arising as to the Pleader's fee payable, *held* that the valuation for the purposes of Court Fees should, under S. 8 of the Court Fees Act, determine the valuation for purposes of jurisdiction; that the Court below ought to have asked the plaintiff to re-state his value and as it did not do so, it must be taken to have accepted the valuation of Rs 110 as correct. Consequently Pleader's fee was allowed on Rs. 110 only 11 P. R. 1913 referred to. (*Scott Smith, J.*) AMIR CHAND *v.* HAKIM ALI. **1924 Lah. 364.**

——S. 7, iv (d) and (i)—*Suit for rent declaration and injunction.*

A suit for rent, and for declaration of title with injunction falls under S. 7 (i) and (iv) (d). The value for purposes of Court fees and jurisdiction is the same. (*Pratt, J.C. and Hayward, A. J. C.*) PARUMAL AILMAL *v.* MOLUMAL. **17 I. C. 44 : 6 S. L. R. 114.**

——S 7, (iv) (e) and (v)—*Suits Valuation Act, S. 8—Declaration and possession—Suit for.*

A suit for a declaration that a certain decree is not binding on the plaintiffs or the properties in their hands and for possession of a portion of those properties which had been sold in execution of the decree is a suit for declaration and consequential relief and Court-fee is to be paid only on the relief for possession. 30 Mad. 335 (F. B.) Dist. (*Oldfield and Tyabji, JJ.*) RAJAGOPALA NAIDU *v.* VIJAYARAGHAVALU NAIDU. **38 Mad. 1184 : 25 I. C. 683 : 1 L. W. 824.**

——S. 7, Cl. (iv) (f)—*Suit for account—Appeal from preliminary decree—Plff's valuation to be accepted.*

Where a person appeals from a preliminary decree in a suit for account, he is allowed the option of placing his own valuation upon the memorandum of appeal and he is not bound by the valuation put upon the claim in the plaint. 7 A. L J. 546 ref 30 M. L J. 402 not foll. (*Piggott, J.*) KANHAIYA LAL *v.* SETH RAM SARUP. **44 A. 542 : 20 A. L. J. 416 : L. R. 3 A. 193 : 4 U. P. L. R. (A) 99 : 1922 All 228.**

——Ss. 7 (iv) (f) and 11—*Suit for accounts and administration—Valuation, if lies in the discretion of the plaintiff.*

Where the plaintiff in a suit for accounts and administration and for her share in the estate valued the suit at Rs. 130 for purposes of Court-fees and at Rs. 30,00,000 for purposes of jurisdiction, *held*, that the suit was for an account and was properly valued under S 7 (iv) (f) (*Scott, C J. and Batchelor, J.*) KHATIJA *v.* ADAM HUSSAIN ALLY VASI. **39 Bom. 545 : 29 I. C. 949 : 17 Bom. L. R. 574.**

——S. 7 (iv) (f)—*Suit for winding up of partnership and for accounts—Valuation.*

In a suit for the winding up of a partnership and for accounts the amount at which the relief

COURT FEES ACT (VII OF 1870), S. 7 (iv) (f).

sought is valued in the plaint controls the computation of fees payable. (*Batchelor and Shah, JJ.*) BAI HIRAGAVRI *v.* GULABDAS.
22 I. C. 71 : 15 Bom. L. R. 1123.

——Ss. 7 (iv) (f), and 11; Sch. II, Art 17 (6,—*Partition suit.*

Under Sch. II, Art. 17, Cl. (6) the Court fee on a plaint for partition is Rs. 10 and if the suit includes also a claim for accounts, the plff. can value it approximately under S 7 and if the Court finds it insufficient it should pursue the course laid down in S. 11. (*Teunon and Choudhuri, JJ.*) BENI MADHAB *v.* GOBIND CHANDRA.
46 I. C. 165 : 22 C. W. N. 669.

——S. 7 (iv) (f)—*Valuation—Suit for administration and accounts.*

A suit for administration and accounts is in essence a suit for accounts within the meaning of S. 7 (iv) (f) and the plff. can value the claim for accounts approximately and pay Court-fees thereon. If ultimately a decree be passed in favour of the plff. for a larger amount than that covered by the Court-fees already paid, the plff. can under the provisions of S. 11 of the Court fees Act execute such a decree only on paying the fee on the whole amount of the decree. 39 Bom. 545, Foll. (*Mookerji and Walmsley, JJ.*) SARAJUBALA DASI *v.* JOGESWAR RAI. 45 Cal. 634 : 26 C. L. J. 265 : 41 I. C. 693 : 22 C. W. N. 115.

——S. 7 (iv) (f)—*Administration suit.*

An administration suit by a creditor is in fact a suit for account within S. 7 (iv) (f) and the plaintiff can place his own valuation on the relief claimed in such suit, which valuation is the same as the valuation for jurisdiction under the Suits Valuation Act, S. 8. (*Mookerjee and Cuming, JJ.*) SASI BHUSHAN *v.* MANINDRA CHANDRA. 44 Cal. 890 : 24 C. L. J. 448 : 38 I. C. 835 : 21 C. W. N. 310.

——S. 7 (iv) (f)—*Appeal—Preliminary decree—Suit for dissolution of partnership.*

On an appeal against the preliminary decree for winding up a partnership, a Court fee of Rs. 10 is sufficient, other questions relating to allowing or disallowing certain items being incidental. (*Rattigan, C. J. and Abdul Raoof, J.*) RAM SINGH *v.* RAM CHAND. 1 Lah. 6 : 19 P.L.R. 1920 : 57 I. C. 185 : 6 P. W. R. 1920.

——S. 7 (iv) (f)—*Appeal from preliminary decree—Suit for dissolution of partnership and rendition of accounts.*

Under S. 7 (iv) (f) an appeal from the preliminary decree in a suit for dissolution of partnership and rendition of accounts must bear Court-fees *ad valorem* on the amount at which the relief is valued in the plaint. 50 P.R. 1908: 18 Bom. 202 13 P. R. 1901: 6 Bom. 143 and 13 C. W. N. 815 (819). Ref. (*Johnstone and Shadi Lal, JJ.*) KANJI MAL *v.* PANNA LAL. 7 P. R. 1915 : 28 I. C. 262 : 15 P. L. R. 1916.

——S. 7 (iv) (f)—*Administration suit.*

A suit for an account of any property and for its due administration falls within the purview of S.7 (iv) (f), Court fees Act. The valuation for Court-fees and jurisdiction is the same. A suit for administration of the estate of an intestate is in some respects unique but it has certain common features with a suit for winding up of an insolvent's estate or for dissolution of a partnership. The taking of accounts is important in all the suits and the fact that Courts act on different lines in different classes of cases does not take any of them out of the purview of suits for accounts. (*Johnstone and Scott Smith, JJ.*) SHUJA-UD-DIN *v.* AISHNABI. 100 P. R. 1914 : 26 I. C. 342 : 239 P. L. R. 1915.

——S. 7 (iv) (f)—*Partnership suit—Right of defendant.*

In a partnership case, a deft. may get a decree or whatever is found due to him, without being called upon to pay Court-fee on what he alleges himself entitled to. (*Kensington and Johnstone, JJ.*) BERAGI RAM *v* RAJA RAM.
163 P. L. R. 1911 : 10 I. C. 250: 214 P. W. R. 1911.

——S 7 (iv) (f)—*Partition suit—Valuation.*

In a suit for partition, part of the joint property to be divided is comprised of a mundi trade the plff. can value it under S. 7, Cl. iv (f) and need not value it in accordance with a tentative valuation to be amended subsequently after inquiry. (*Oldfield, J.*) BALA PATTABHI *v.* SUBBARAYA CHETTY.
14 L. W. 446 : 41 M. L. J. 433: 70 I. C. 17 : (1921) M. W. N. 611.

——S. 7 (iv) (f)—*Appeal—Valuation.*

If a suit falling under S. 7 (iv) is valued by plaintiff at a certain figure and if plaintiff has obtained a preliminary decree for an amount, the defendants appeal against the whole decree the appeal must be valued at the same figure. (*Wallis, C. J., Sadasiva Aiyar and Srinivasa Aiyangar, JJ.*) DHUPATI SRINIVASACHARLU *v.* PERINDE VAMMA. 39 Mad. 725 · 33 I. C. 602 : 30 M. L. J. 402.

——S. 7 (iv) (f)—*Suit for accounts—Value of—Jurisdiction—Appeal.*

The value of a suit for accounts both for original trial and for appeal is the value stated in the plaint by the plaintiff and the Court trying such suit does not lose its jurisdiction because the amount found due on inquiry exceeds the jurisdiction of the Court. (*Batten and Stanyon, A. J. Cs.*) OLPHERTS *v.* ARJUNDAS. 20 I. C. 928 : 9 N. L. R. 112.

——S. 7 (iv) (f)—*Suit for administration of estate of deceased—Prayer for accounts.*

A suit for administration under O. 25, R. 13, C. P. C. of the estate of the deceased, and giving plaintiff his share after taking accounts is a suit for accounts and *ad valorem* fee is payable (*Lindsay, J. C. and Kanhaiya Lal, A. J. C.*) SURAIYA QADIR *v.* QUDSIA BEGUM. 24 I. C. 643 : 1 O. L. J. 281.

——S. 7 (iv) (f)—*Suit for accounts—Valuation by defendant in appeal—Right to give own value.*

In an appeal by the defendant against a preliminary decree directing accounts where what is disputed is not the liability to render accounts but the plaintiff's mode of doing so, the relief does not admit of correct valuation and the

COURT FEES ACT (VII OF 1870), S. 7 (iv) (f).

appellant is at liberty to fix his own valuation without being tied down to the valuation in the plaint. (*Jwala Prasad, J.*) KULDIP SAHAY *v.* HARIHAR PRASAD. 4 Pat. L. T. 638 : 3 Pat. 146 : 1924 P. 161.

——— S. 7, Cl. (iv) (f)—*Mesne profits.*

A claim for mesne profits is not a claim, the value of which cannot be ascertained and *ad valorem* Court fee is to be paid thereon and plaintiff cannot recover anything in excess for the valuation put by him. Per *Roe, J.* If it be regarded as a suit for an account, the Court-Fees Act S. 7, Cl. (iv), is peremptory and such suits shall be approximately valued. (*Chapman and Roe, JJ.*) NAND KUMAR SINGH *v.* BILAS RAM MARWARI. 1 P. L. W. 781 : 40 I. C. 579 : 3 P. L. J. 67.

———Ss. 7 (iv) (f) and 11—*Suit for accounts—Valuation—Deficiency.*

A suit for administration is a suit for accounts purposes of Court-fees, and is to be valued under S. 7 (iv) (*f*) of the Court-fees Act, according to the amount of the relief sought. If the amount decreed is in excess of the relief amount such deficiency of court-fees must be made good under S. 11 of the Act. (*Twomey, C. J. and Maung Kin, J.*) SAN PAW *v.* MAYIN. 55 I. C. 258 : 12 Bur. L. T. 207.

———S. 7 (v)—*Tenant suing landlord and another tenant—Valuation.*

A suit by a tenant against the landlord and other tenants is governed by S. 7 (v). (*Stephen and Mullick, JJ.*) RAM EKBAL SINGH *v.* BALDEO SINGH. 25 I. C. 507 : 19 C. L. J. 418.

——— S. 7 (v)—*Suit for possession and for an order enforcing the defendant to execute a sale-deed is within the clause.*

Plaintiff who alleged that defendant had sold his land to him and had received part of the consideration, sued for possession and prayed that the defendant be ordered to execute a deed of sale and have it registered on receiving the balance. He treated the suit as one for possession, while the Court held that it was also for specific performance. *Held*, on Second Appeal, that the suit was one for possession only, and the Court-fees should be paid according to S. 7 (v). (*Martineau, J.*) GOPAL DAS *v.* PERMANAND. 60 I. C. 512.

———S. 7 (v)—*Pre-emption—Sale of revenue paying land—Court-fee.*

The Court-fee on the plaint in a pre-emption suit in respect of a sale of land paying revenue should be calculated according to S. 7 (v) of the Court-Fee Act. (*Scott-Smith and Broadway, JJ.*) SUNDER SINGH *v.* DHIAN SINGH. 15 P. R. 1919 : 49 I. C. 358 : 43 P. L. R. 1919.

———S. 7 (v) and Sch. II, Art. 17—*Jurisdiction—Appeal—Suit for declaration in respect of land.*

For the purpose of determining the course of appeal and jurisdiction the value of a suit for a declaration that an alienation of land is null and void so far as plaintiff's rights are concerned, is thirty times the land revenue of the land in respect of which the declaration is sought. 60 P.R. 1907, Foll. : 24 P. R. 1903, Dist. (*Shah Din and Scott-Smith, JJ.*) SAHIB DITTA *v.* NARINJAN DAS. 226 P. L. R. 1912 : 15 I. C. 272 : 182 P. W. R. 1912.

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———S. 7, Cl. (v) and Sch. II, Art. 17 (3) (6)—*Suit for recovery of possession of immoveable properties—Decree, conditional on payment of a sum—Appeal against the condition—Court-fee.*

The value of an appeal is not in all cases the value of the suit as originally filed but the value of the relief granted which a party wants to get rid of. Where in a suit for recovery of possession of immoveable properties, the plaintiff is given a decree, conditional on his paying a sum to the defendant, an appeal by him against the condition must be valued *ad valorem* on the amount he was asked to pay. (*Kumaraswami Sastri, J.*) PORKODI ACHI, *In re.* 45 Mad. 246 : 41 M. L. J. 587 : 14 L. W. 624 : 68 I. C. 444 : (1921) M. W. N. 854: 1922 Mad. 211.

———S. 7 (v)—*Suit against—Tenant holding over in defiance of notice is governed by clause* (v).

Where the defendant remained in possession after the end of the period of tenancy, with express disagreement of plaintiff, as it was evidenced by the act that the latter gave him written notice to quit.

Held, the defendant could not be called a tenant holding over, but that the suit was clearly for the possession of land held by a trespasser and fell under clause (v) and not under xi (cc) of S. 7. (*Hallifax, A. J. C.*) NARAYAN *v.* TUKARAM. 1923 Nag. 310.

———S. 7 (v)—*Suit for declaration of title and possession—Court fee.*

Where a challenge is directly thrown on the title of the Plaintiff, and the Plaintiff comes to Court in order to meet that challenge, it is a suit clearly under S. 42 of the Specific Relief Act and if the Plaintiff asks for possession also in that suit, his suit comes under S. 7 cl. (4), Sub cl. (c) of the Court Fees Act and not within S. 7, cl. (5) of the Act. A suit for declaration of title as adopted son and for possession is a suit that comes within S. 7, cl. (4), Sub-cl. (c) of the Court Fees Act. (*Das and Foster, JJ.*) UGRAMOHAN CHOWDHRI *v.* LACHMI PRASAD CHOWDHRI. 1922 Pat. 6 : 1923 P. 100.

——— S. 7 (v) and (iv) (c)—*Suit by Hindu reversioner to recover possession of property gifted by Hindu widow after her death falls under cl.* (v).

In a suit by the reversioners of a deceased Hindu for recovery of possession of properties gifted away by the widow after her death, the plaintiffs prayed *inter alia* (1) that on consideration of the above facts the court may be pleased to hold that the properties in dispute constitute the estate of B. (the last male owner), that the plaintiffs as reversionary heirs of the said B. are entitled to get possession of the properties in dispute since the death of K. (the widow), that it is illegal on the part of the defendant not to give up possession of the properties and that the defendant's possession is quite wrongful and illegal. (2) That on adjudication of the above points a decree may be passed in favour of the plaintiffs in respect of properties in dispute by dispossessing the

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defendant or such person as may be found in possession at the time of delivery of possession. *Held*, that the suit was not one to obtain a declaratory decree where consequential relief was prayed for but one for possession under S. 7 (v) of the Court Fees Act. 6 P. L. J. 101 ; 5 P. L. J. 339 ; 34 C, 329. (*Miller, C. J. Mullick, Jwala Prasad, Coutts and Das, JJ.*) RAM SUMRAN PRASAD *v.* GOBIND DAS. **4 U. P. L. R (Pat.) 75 : 3 Pat. L, T 704 : 1922 Pat. 291 : 1922 P. 615. (F.B.).**

——— S. 7 (v) (a)—*Fee for possession of a share and the under-proprietary tenure.*

A share in an under-proprietary tenure in a village is a definite share and therefore Court-fee for possession is ten times its revenue. (*Wazir Hasan, A. J. C.*) SWAMI NATH *v.* JANG BAHADUR SINGH. **24 O. C 29 : 7 O. L. J 403 : 58 I. C. 132 : 2 U. P. L. R. (J. C.) 127.**

———S. 7 (v) (a)—*Suit for possession*—Mokarasi *deed—Court-fee.*

A *mokarasi* lease of a definite share in a revenue paying estate is land within S. 7 Cl. (v) (a) of the Court-Fees Act. A suit for possession of a *mokarasi* lease hold property is purely one for possession of immoveable property' within S. 7 cl. (v) (a) of the Act. (*Roe, J.*) BIBI KULSUM *v.* SYED MUHAMMAD HAMID. **45 I. C. 928.**

———S. 7 (v) (b)—*Suit declaratory and possessory—Hindu reversioners—Nature of suit—Court-fee payable.*

A suit by Hindu reversioners asking that a sale-deed be declared null and void against them and that the possession of property be granted to them, is an ordinary suit for possession of property and the Court-fee payable thereon is five times the Government revenue. (*Tudball, J.*) TIKA RAM *v.* SALIG RAM. **2 U. P. L. R. (A) 216 : 57 I. C. 494 : 18 A. L. J. 903.**

———S. 7, (v) (b)—*Relief for declaratory decree in appeal—Suit for possession.*

The plff. sued for possession as the transferee of one G. The first Court gave him a decree on condition that his possession should continue only during the life-time of his transferor. The plff. appealed against this condition and paid a Court-fee of Rs. 10. *Held*, that the Court-fee was proper, The plff. appellant was in possession of the property who seeks to clear his title and to obtain a declaration that he had the full right of ownership to the property. (*Tudball, J.*) RUP CHAND *v.* FATEH CHAND. **33 All, 705 : 11 I. C. 977 : 8 A. L. J. 821.**

——— S. 7 (v) (b) and (d)—*Suit for possession of specified plot sold out of a holding—Court-fee how calculated.*

A suit for possession of a plot of land but not a definite fractional share, sold out of a holding, is governed by S. 7 (v) (d) of the Court-Fees Act and the Court-fee payable should be calculated on the market value of the land, where it is impossible to find out the actual revenue on the said plot. (*Tudball, J.*) CHANDAN *v.* BISHEN SINGH. **38 All. 630 : 11 I. C. 816 : 8 A. L. J. 798.**

— S. 7 (v) (b) and (d)—*Suit for portion of a survey number—Court-fee.*

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The Court-fee payable in respect of a suit for recovery of land forming part of an entire area, but neither sub-divided nor separately assessed to land revenue must be computed on the market value of the land sued for, under S. 7 (v). (*Ayling and Seshagiri Aiyar, JJ.*) GODAVARTHY SUNDARAMMA *v.* GODAVARTHY MANGAMMA. **34 M. L. J. 558 : 47 I. C. 543 : 8 L. W. 88.**

———S. 7 (v) (b) and (c)—*Suit for* inam *lands wrongly classed as* ryotwari—*Valuation.*

A suit for possession of *inam* lands wrongly classed by Government as *ryotwari* and in respect of which *Pattas* were issued to tenants, may be valued by the plff. as *ryotwari* lands held on *patta* at five times the revenue payable thereon under cl. (v) (b) of S. 7. The fact that after the institution of the suit, the lands are classed as *inam*, will not affect the question. (*Spencer and Phillips, JJ.*) NARAYANI AMMAL *v.* SECRETARY OF STATE. **41 I. C. 167.**

———S. 7 (v) (b)—*Garden, what is—Suit for lands—Valuation—If trees therein should be valued separately.*

The word "garden" in S. 7 (v) (*b*) means chiefly ornamental, pleasure or vegetable garden. The *juxta* position of the words "house or garden" conveys much significance in support of this view. The conversion of an assessed *arable* field into a cocoanut tope does not make the land a garden within Cl. (v) (b) of S. 7. In a suit for land, trees standing thereon need not be separately valued A decree for land will pass also the trees standing thereon. 12 Mad. 301, 22 Mad. 39 ; 24 Mad. 421, Rel. on. (*William Ayling and Seshagiri Aiyar, JJ.*) KULLAPPA GOUNDEN *v.* ABDUL RAHIM SAHIB. **40 Mad. 824 : 5 L. W. 270 : 39 I. C. 254 : 21 M. L. T. 251.**

———S. 7 (v) (b) and (d)—"*Definite share of an estate,*" *meaning of.*

The words "definite share" of an estate used in Cl. (v) (*b*) of S 7 mean an undivided tangible fraction of an estate as distinct from a defined demarcated plot which has been taken out of an estate. (*Coutts Trotter, J.*) MANGAMMA *v.* SUNDARAMMA. **19 M. L. T. 266 : 33 I. C, 683 : (1916) 1 M. W. N. 325.**

———S. 7 (v) (b)—*Suit for possession—Unconditional decree.*

Ad valorem Court fee on five times the Government revenue of the lands in an appeal by the mortgagee for an unconditional decree for possession of the property, is sufficient. (*Daniels, A. J. C.*) RAGHA SAH *v.* WAJID ALI. **50 I. C. 353.**

———S. 7, (v) (b) and (v) (d)—*Suit for fraction of holding—Court fee payable is on market value.*

In a suit for recovery of land which is not an entire holding or a definite share or fractional part of a holding separately assessed to revenue but consisting of individual field plots which form part of a holding but which are not separately assessed Court fees are payable under S 7, Cl. 5 (d) and not under S. 7, Cl. 5 (b) of the Act. (*Heald, J.*) MA SHA MA *v.* SOMASUNDARAM CHETTY. **2 Bur. L. J. 39 : 1 R. 492 : 1923 Rang. 246.**

COURT FEES ACT (VII OF 1870), S. 7 (v) (c).

———S. 7 (v) (c) and (d)—*'Such revenue'—Lands subject to fluctuating assessment.*

'Such revenue' in S. 7 (v) means an annual revenue payable to Government on an entire estate or definite share or part of an estate fixed permanently or not. Lands subject to fluctuating assessment are within S. 7 (v) (c) and not within S. 7 (v) (d). (*Scott Smith and Wilberforce, JJ.*) MAHNA SINGH *v.* BAHADUR SINGH.
50 I. C. 142 : 100 P. R. 1919.

———S. 7 (v) (c)—*Land paying no revenue—'Religious land.'*

If the subject-matter of suit is land paying no revenue and has produced no profits during the year next preceding the suit, the valuation should be made with reference to similar land in the neighbourhood, irrespective of the fact that the land is 'Religious land.' (*Heald, A. J. C.*) MAUNG MEIK *v.* U. KUMARI 60 I. C. 5 : (1920) 3 U. B. R. 236.

———S. 7 (v) (d) (a) (b) and (c)—*Suit for possession of lands—Part of an estate paying revenue to Government—Not separately assessed with revenue—Court-fee payable.*

In a suit for possession of land, forming an indefinite share of an estate paying revenue to Government, and not being assessed separately, Sub-Cl. (d) of Cl. (v) of S 7 of the Court-fees Act applied and the Court-fee is according to the market value of the land. (*Mookerjee and Beachcroft, JJ.*) CHANDRA NARAYAN SINGH *v.* ASUTOSH DE. 41 Cal. 812 : 19 C. L. J. 342 : 23 I. C. 89 : 18 C. W. N. 659.

——S. 7, Cl. (v) (d)—*Suit for pre-emption—Market value of the property is its value at the date of sale.*

The market value of the property in a suit for pre-emption is to be determined with reference to its value at the date of the sale and not with reference to its value at the date of the institution of the suit for pre-emption. 7 A. 778 followed (*Scott-Smith, J.*) SHER MAHOMED *v.* AHMAD SAID. 1924 Lah. 380.

——S. 7 (v) (d) *Market value—Definite share of an estate—Recovery of.*

Where the suit is for recovery of X and odd acres of land of a plot, a definite part of which was already sold, the suit is not for recovery of a definite share of an estate within the meaning of Cl. (v) (b) of S. 7 of the Court-fees Act and so the value for purposes of jurisdiction and Court-fees, must be calculated on the market value of the property sought to be recovered. (*Coutts Trotter, J.*) MANGAMMA *v.* SUNDARAMMA.
19 M. L. T. 266 : 33 I. C. 683 : (1916) 1 M. W. N. 325.

———S. 7 (v) (d) and xi (cc)—*Valuation for jurisdiction.*

A suit to recover possession of land from a tenant is valued according to a year's rental next before date of presenting the plaint under S. 7 (xi) (cc) for purposes of jurisdiction and not the market value, under S. 14 of Madras Civil Courts Act, (III of 1873) or under S. 7, Cl. (v) (d)

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of the Court-fees Act, (*Sadasiva Iyer and Phillip, JJ.*) NARAINASWAMI NAIDU GARU *v.* VENNAVALLI SESHAGIRI RAO. 39 Mad. 873 : 18 M. L. T. 398 : 2 L. W. 1031 : 31 I. C. 104 : 29 M. L. J. 572.

——— S. 7 (v) (d)—*'Market value'—Suit for possession as usufructuary mortgagee.*

The plff. sued for possession as usufructuary mortgagee and valued the property on the amount of the mortgage-money. *Held*, that the word "market value" in S. 7 of the Court-Fees Act must mean the market value of the subject-matter of the suit, which in this case is not a proprietory interest but a mere mortgagee interest in the property. (*Daniels, A. J. C.*) MADHI *v.* GAJADHAR. 9 O. & A. L. R. 85 : 1924 Oudh 163.

———S. 7 (v) (e)—*Suit—Valuation.*

The value of a suit is the value of the interest claimed by the plff so that the value of the suit for establishing a right as an occupancy raiyat in a garden and for possession thereof, is that of the interest claimed and not that of the entire interest in the land, including that of the superior landlord. (*Mookerjee and Beachcroft, JJ.*) UPENDRA CHANDRA MITRA *v.* SAT KOURIDHAR. 23 I. C. 964.

——— S. 7 (v) (e)—*Pre-emption—Garden with house, out houses and trees market value to be given.*

What was sold was described as a garden together with a house and out houses as well as trees of all kinds. In a suit for pre-emption *held*, that the property sold was a garden and that under S 7 (v) (e) the fee payable should be *ad valorem* on the market value. 146 P. R. 1918 ; 71 P. R. 1914, Foll. 40 Mad. 824 Dist. The High Court finding that the appellant had no intention of making good the Court-fees by the fixed date, as per order declined to give him any further opportunity (*Shadi Lal and Broadway, JJ.*) BEHARI LAL *v.* NANDLAL. 68 I. C. 345 : 2 Lah. L. J. 362.

———S. 7 (v) (e)—*Garden land—Assessed to land revenue—Market value.*

A suit for possession of garden land, though assessed to land revenue is governed by S. 7 (v) (e). (*Johnstone and Chevis, JJ.*) BHAG BHARI *v.* JAWAHAR SINGH. 71 P. R. 1914 : 241 P. L. R. 1914 : 25 I. C. 545 : 155 P W. R. 1914.

——— S. 7 (v) (e) and Sch. II, art. 17 (B)—*Suit for recovery of a Hindu temple—Valuation—Market value.*

There is no market value for a temple as such and for purposes of Court fees, a suit for the recovery of possession of a temple falls under Sch. II, Art. 17 (b) of the Court-Fees Act and not under S. 7 (v) (e) of the Act. (*Schwabe, C. J. Oldfield and Pamesam, JJ.*) RAJAGOPALA NAIDU *v.* RAMASUBRAMANIA AYYAR. 45 M L. J. 274 : (1923) M. W. N. 550 : 18 L. W. 326 : 33 M. L. T. 21 (H C.) : 46 Mad. 782 : 1924 Mad. 19 (F. B.).

COURT FEES ACT (VII OF 1870), S 7 (v) (e).

——— S. 7 (v) (e) (a) and (b) (c)—*Land with cocoanut trees—"Garden"—Question of fact—Revision*

In ascertaining the value of a piece of land on which cocoanut trees have been planted, for the purpose of deciding the jurisdiction of the Court, the question whether it came under Cl. (v) (c) or Cl. (v) (e) of S. 7 of the Court-fees Act, is a question of fact to be determined on the evidence as to whether having regard to the position of the land and the number of trees thereon, the plot of land can be said to be a garden. Assessment is not the criterion in determining the question whether the land is assessed or unassessed. It will fall under Cl. (v) (e) if it can be defined as a 'garden." A few isolated trees on a piece of land will not make it a garden, but where a number of trees are planted on a particular piece of land which is well defined and can be marked off from the rest of the land, that particular plot may be treated as a garden if the land is cultivated with flower, fruit or vegetables. 12 Mad. 301. Expl. (*Kumaraswami Sastri, J.*) ABDUR RAHIM SAHIB *v.* KALAPPA GOUNDEN.
30 I. C. 845 : 18 M. L. T. 243.

——— S. 7 (vi)—*Pre-emption decree—Appeal—Court fee.*

Where a claim for pre-emption of five villages was decreed in respect of two villages only on payment of a sum and plff. appealed. *Held*, that the appeal was divisible into two parts. In respect of that part in which the question related only to the sale consideration, the plff must pay *ad valorem* Court-fee on the difference between the amount alleged as the sale price on the one side and the amount decreed on the other. In regard to the other part in which the right of pre-emption was in dispute, he need only pay Court-fees on five times the Government revenue. (*Tudball, J.*) ABINASH CHANDRA *v.* SHEKHAR CHAND.
40 All. 363 : 44 I. C. 666 : 16 A. L. J. 174

——— S. 7 (vi)—*Pre-emption.*

Where appeal is by the vendees objecting that plff. is not entitled to the land, the Court fee to be affixed will be in accordance with S. 7. (vi) (*Reid, C. J., Robertson and Rattigan, JJ.*) WARIYAM SINGH *v* MAHTAB SINGH.
76 P. R. 1913 : 240 P. L. R. 1913 : 19 I. C. 961 : 141 P. W. R. 1913.

———S. 7 (ix).

See also COURT FEES ACT (1) SCH. I, 'ART.' I (*v*) SCH. II, ACT 17.

———S. 7 (ix)—*Mortgage—Suit for redemption—Court-fee to be paid only on principal amount.*

In a suit for redemption court fee is payable only upon the principal amount secured by the mortgage. The plaintiff is not bound to pay court fee upon the surplus amount claimed as mesne profits. 29 A. 471 ; 68 I. C. 226 foll. (*Banerji and Gokul Prasad, JJ.*) CHHIDDU SINGH *v.* JHANJHAN RAI.
L. R. 3 A. 628 : 45 All. 154 : 1923 All. 261.

——— S. 7 (ix)—*Mortgage—Appeal from preliminary decree and the order fixing the amount for redemption—Consolidation.*

COURT FEES ACT (VII OF 1870, S. 7 (x).

In a redemption suit, the mortgagee denied the right to redeem and also the amount of redemption. The Court decreed plff.'s suit and directed accounts. Deft. appealed against the decree and in the meanwhile the trial Court took accounts and fixed a certain sum. The deft appealed claiming a higher sum. *Held*, the two appeals should be consolidated and the full amount of Court-fee should be levied, as if the two appeals were one appeal. (*Tudball, J.*) LALTA PRASAD *v.* SHEORAJ SINGH.
39 All. 452 : 41 I. C. 346 : 15 A. L. J. 464.

——— S. 7 (ix)—*Mortgage decree for sale—different properties separately charged—Appeal in respect of one—Court fee.*

Where a mortgage decree for sale declares the separate liabilities of different properties for "different sums of money" the Court fee on appeal by one of the defendants, whose property had been held liable for a specific sum of money, must be calculated on the sum for which the property had been held liable. (*Tudball, J.*) CHHABRAJ *v.* COURT OF WARDS.
35 All. 92 : 18 I. C. 577 : 11 A L. J. 33.

——— S. 7 (ix)—*Mortgage decree—Appeal by defendant—Court fee.*

The value of the subject matter of the appeal by the defendant against a mortgage decree is the amount declared by the Court as due to the plaintiff on the date fixed for payment exclusive of costs. (*Tudball and Rafique, JJ.*) BALDEO SINGH *v.* KALKA PRASAD.
35 All. 94 : 18 I. C. 365 : 11 A L. J. 20.

——— S. 7 (ix) and Sch. I, Art. 1 — *Suit for redemption—Appeal for reduction of amount.*

In a redemption suit, the Court below passed a preliminary decree in which the amount payable by the plaintiffs was fixed at Rs 39,240-11-7 on the 24th June, 1919. The plaintiffs having paid the amount fixed, into the Court together with an additional sum of Rs. 409-6-0 interest accruing up to the date of payment, a final decree was passed on the 29th April, 1920. The plaintiffs filed appeals from both these decrees asking for reduction of the amount fixed in the preliminary decree by Rs. 32,225-11-7. On the appeal from the preliminary decree the plaintiffs paid Court fees *ad valorem* on the sum by which they wished the amount fixed therein to be reduced. On the appeal from the final decree they paid a Court-fee of Rs 2 only. *Held*, the preliminary decree decided what the amount payable was and in the appeal from it the appellants contested the amount and paid full Court-fee on the relief claimed by them The final decree is a mere corollary to the preliminary decree and followed it as a matter of course : the plaintiffs having paid into Court, the amount fixed, there was nothing fresh for the Court to decide before it passed that decree, and the appeal from that decree is really of a formal nature, and does not contest anything beyond what is contested in the appeal from the preliminary decree. (*Scott Smith and Fforde, JJ.*) BUDHU RAM *v.* NIAMAT RAI.
6 L. L. J. 72 : 4 Lah. 406 : 1923 Lah. 632.

COURT FEES ACT (VII OF 1870), S. 7 (ix).

——S. 7 (ix)—*Redemption Suit—Appeal for reduction of redemption amount.*

Ad valorem Court fee must be paid on the amount sought to be reduced from the mortgage decree in a redemption suit. 3 L. L. J. 370 Foll. (*Campbell, J.*) RAMJI LAL *v.* SHIBBA.

1923 Lah. 309.

——S. 7, Cl. (ix) and Art. 1, Sch. I—*Redemption suit appeal—Valuation.*

An appeal from a judgment in a suit for redemption seeking reduction of the decretal amount must be valued *ad valorem* and not on the principal amount of the mortgage. 13 All 94 and (1891) P. J 218 diss. (*Scott Smith and Wilberforce, JJ.*) LEKH RAM *v* RAMJI DAS.

1 Lah. 234 : 57 I. C. 215 : 3 Lah. L. J. 370.

——S. 7 (ix)—*Appeal against a decree for redemption—Fee must be paid on principal amount*

In an appeal for a decree against redemption on payment of a certain sum, the Court fee should be according to the principal sum. (*Scott-Smith and Leslie Jones, JJ.*) FATEH SINGH *v.* BABU RAM. **67 I. C. 130 : 3 Lah. L. J. 156.**

——S 7 (ix)—*Enhancement in redemption suit.*

The Court-fee payable on the memorandum of second appeal is to be calculated on the difference between the sum alleged by the mortgagor as payable and the sum fixed by the Appellate Court. Such a question arises in a redemption suit when the sum is enhanced in first appeal. (*Johnstone and Shah Din, JJ.*) BUR SINGH *v* GUJAR SINGH.

55 I. C. 177 : 156 P. W. R. 1910.

——S. 7 (ix)—*Mortgage—Redemption—Appeal for reduction of mortgage money.*

The Court-fee, payable on an appeal by a mortgagor in which he claims to redeem on payment of a smaller sum than that allowed by the lower Court, is the difference between the amount admitted by him and the amount decreed by the lower Court. (*Johnstone and Shah Din, JJ.*) CHUNI LAL *v.* BELI RAM.

166 P. W. R. 1915 : 58 P. R. 1915 : 30 I. C. 104 : 58 P L. R. 1916.

——S. 7, cl. ix—*Redemption suit—Appeal—Court fee*—Ad valorem *fee.*

The memo. of appeal in a suit to set aside a decree for redemption on payment of a certain sum should bear *ad valorem* Court-fee on the amount on payment of which the redemption is ordered. 44 P. R. 1888 : 5 P. R. 1911. foll. (*Robertson and Shah Din, JJ.*) DYAL SINGH *v.* RAM RAKHA. **122 P. W. R. 1912 : 14 I. C 78 : 54 P. R. 1912.**

——S. 7 (ix)—*Mortgage—Redemption decree—Cross-objections by mortgagor for reduction of amount payable—Power of appellate Court to reduce amount.*

In an appeal by the mortgagee in a redemption decree where the respondent files cross objections for reduction of the amount payable to him for redemption, he must pay *ad valorem* Court fee on the sum by which he seeks to have the amount reduced ; and the Appellate Court has no power to reduce the amount by a sum greater than that in respect of which Court fee has been paid on the cross objections. (*Arthur Reid, C. J. and Kensington, J.*) MANSA RAM *v.* UMRA.

134 P. W. R. 1911 : 11 I. C. 198 : 213 P. L. R. 1911.

——S. 7 (ix)—*Redemption suit — Appeal against—Subject matter for purposes of Court fee*

Where there are two mortgages upon the same property in favour of the same person and one of the mortgages is declared to be not genuine, the subject matter for the purpose of determining the Court-fee payable on any appeal against the decree is the value of the mortgage found to be genuine by the Court in appeal. In redemption suits, the subject matter in dispute for the purposes of Court Fees Act is the existence of the right to redeem. (*Ayling and Spencer, JJ.*) MELOTH KAMAN NAIR *v.* KODATH KAMMARAM NAIR. **22 I. C. 609 : 1 L. W. 102 : (1914) M. W. N. 231.**

——S. 7 (ix)—*Redemption suit.*

A suit merely to redeem mortgage without praying for additional relief falls under S. 7 cl. (ix). But if there is also a prayer for payment of money found due on accounts taken, additional Court fees should be paid on the amount so claimed. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) KODI VENKATAPPA ROW *v.* BARALA SURYANARAYANA. **17 I. C. 442 : 12 M L. T. 493.**

——S. 7 (ix)—*Suit—Valuation.*

The proper valuation of a suit for redemption is the amount of the mortgage admitted by the plff. to be binding on him, and not that of the mortgages set up by deft. The question of jurisdiction must be decided on the allegations in the plaint, and not with reference to the pleas of the deft. 9 Mad. 208 ; Foll. 14 Mad. 26 at p. 28 Ref. (*White, C. J. and Sankaran Nair, J.*) CHAPPAN *v.* RAM. **37 Mad. 420 : 15 I. C. 587 : 13 M. L. T. 118.**

——S. 7 (ix)—*Valuation of suit—Redemption without stating the amount to be paid.*

Where plff. seeks to redeem mortgaged property without stating the amount he is willing to pay, the value of the suit for jurisdiction and Court fees is the principal amount stated in the mortgage deed. (*Halifax, A. J. C.*) BANSILALA *v.* SITRU. **57 I. C. 673.**

——S. 7 (ix) and (i)—*Foreclosure suit—Appeal for enhancement of mortgage money—Court-fee.*

Appellants sued to forclose a mortgage and joined as one of the defendants a co-mortgagee, who, they alleged, had parted with his rights to their predecessors-in-title. The co-mortgagee also filed a suit admitting appellant's right to a half share making them defendants as they refused to join with him as co-plaintiffs. The suits were tried jointly and two different decrees were passed. On the appellant's appealing for an enhancement of the mortgage-money, *Held* they must pay *ad valorem* Court-fees on the amoun of the enhancement sought by them. (*Drake Brockman, J. C. and Prideaux, A.J.C.*) VASUDEO *v.* DAYARAM. **29 I. C. 609 : 11 N. L. R. 83.**

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——S. 7 (ix)—*Foreclosure—Court-fee.*

Where, in a claim foreclosure, there is no dispute as to the price of redemption; but only as to the right to foreclosure of the whole or a portion of the property, the value of the suit or an appeal for purposes of Court-fee is the principal sum secured by the mortgage. 3 I. C. 920 Dist. : 8 I. C. 1125 Rel on. (*Hallifax, A. J. C.*) GHASI RAM *v.* LILADHAR 20 I. C. 257 : 9 N. L. R. 86

——S. 7 (ix)—*Foreclosure suit.*

In a suit for foreclosure of a mortgage, when the value of the mortgaged property is not less than the amount of the charge, the value of the suit for purposes of jurisdiction is the sum claimed as due for principal and interest under the motgage (*Drake-Brockman, J. C.*) KOTHIRAM *v.* GANPATI. 17 I. C. 886 : 8 N. L. R. 179.

——S. 7 (ix) and Sch. I, Art. 1—*Provisions if applicable to appeals—'Suit', meaning of—Mortgage suits—Court-fee payable in appeal.*

The provisions of S. 7 are applicable equally to appeals as to original suits and the word 'suit' is not there used in contra distinction to 'appeal'. Court-fees are payable not on suits or on appeals but on documents which are filed, exhibited or recorded in Courts in accordance with S. 6 of the Act. The court-fee payable in appeal need not be the same as in the suit, as the nature of the litigation may be changed in appeal. (1) If a suit for redemption or foreclosure has been dismissed the court-fee payable by the plaintiff-appellant on his memorandum of appeal will be computed in accordance with the provisions of cl. ix of section 7 of the Court-Fees Act, that is according to the principal money expressed to be secured by the instrument of mortgage. In such a case clearly the suit has not changed its nature in appeal (2) If a suit to redeem has been decreed and the defendant-appellant merely challenges the right to redeem, the court-fee payable on the memorandum of appeal will be computed in accordance with the provisions of cl. ix of section 7 of the Court Fees Act. Here again there is no change in the nature of the suit. (3) If a suit to redeem or foreclose has been decreed and the plaintiff or the defendant in appeal merely challenges the amount to be paid or received without questioning the right to redeem or foreclose, the court-fee payable on the memorandum of appeal will be on the subject-matter in dispute that is on the additional amount claimed or the amount in respect of which the appellant seeks to avoid liability. In this case the suit has clearly changed its nature in appeal, and is no longer a suit falling within the provisions of cl. (ix) of section 7 of the Act, (4) Where in a foreclosure suit a decree has been passed for a certain sum in default of payment of which within a fixed time the property shall be foreclosed and the defendant in appeal denies the plaintiff's right to foreclose on the grouud that he is not liable to pay any portion of the sum decreed, the court-fee payable on the memorandum of appeal will be calculated *ad valorem* on the subject-matter in dispute according to Article 1 of Schedule I, that is, on the amount of the decree the payment of which the defendant by his appeal seeks to avoid. In this case the suit has clearly changed its nature in appeal and has become a suit to avoid the payment of a specific sum. (5) Where a decree has been passed for redemption on payment of a certain sum and in appeal the defendant not only denies the plaintiff's right to redeem but in the alternative claims that if he be entitled to redeem he can do so only on payment of a larger sum than that fixed by the Court of first instance, the court-fee will be paid on the relief which is liable to pay the higher fee ; on the former the fee would be computed in accordance with the provisions of cl ix of section 7 read with Article 1 of Schedule I and on the latter the court-fees would be *ad valorem* on the difference between the amount found due by the lower Court and that claimed by the appellant. (*Daniels and Lyle, A. J. Cs.*) SANGAT BAKHSH SINGH *v.* RAWAT DIJDEO BAKHSH SINGH. 25 O. C. 30 : 1922 Oudh 82.

——Ss. 7 (ix) and 12—*Suit for redemption or foreclosure—Appeal—Court-fee payable on.*

In a redemption or foreclosure suit, where the question raised in appeal is the right to redeem or foreclose for an adjudged sum, Court fee payable on memorandum of appeal is on the mortgage money. If, however, the appeal challenges the amount to be paid or received by appellant, the fee will be assessed on the difference between the sum awarded as payable or receivable by the lower Court and that claimed as due in the memorandum of appeal. (*Ashworth, J.*) MUSSAMMAT GUMANI *v.* BHAWANI. 54 I. C. 733 : 22 O. C. 289.

——S. 7 (ix)—*Suit for redemption by a co-mortgagor—Court-fee.*

In a suit for redemption by a co-mortgagor of his share of the mortgaged property, the Court-fee is to be calculated on the amount of the mortgage debt charged on his share of the property. (*Lindsay, J. C.*) BHAIRON BAKSH SINGH *v.* RAGHU BANSA KUNWAR. 45 I. C. 300 : 5 O. L. J. 43.

——S. 7 (ix) and Sch. I, Art. 1—*Appeal from final decree.*

If any proceedings, which have terminated in a final decree under O. 34, R. 3, are made the subject of appeal, the appeal must be treated as an appeal from the decree and must be stamped accordingly and an *ad valorem* fee should be paid (*Lindsay, J. C. and Stuart, A. J C.*) RAM DHANI *v.* CHAUDURI MAKBUL AHMAD. 30 I. C. 492 : 18 O. C. 114.

——S. 7 (ix)—*Mortgage—Redemption—Subject-matter.*

Where in an appeal in a suit for redemption the mortgagor seeks to establish that he is not liable to pay the money which has been adjudged by the Court below to be due to the mortgagee he is liable to pay the Court-fee on the amount of the subject matter in dispute in the appeal. 9 O. C. 153; 29 All 471; 17 I. C. 442 Ref (*Lindsay, J. C. and Kanhaiya Lal, A. J. C.*) MARDAN SINGH *v.* SHEORAJ NARAIN SINGH. 30 I. C. 322 : 2 O. L. J. 257.

——S. 7 (ix)—*Appeal—Suit by reversioner for possession and also for redemption—Court-fee.*

A reversioner sued for possession of property and in the alternative for redemption, the Courts

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below gave him a decree for redemption on payment of a certain sum which the plff. disputed in appeal. *Held*, that the plff. must pay *ad valorem* court-fee on the amount which he was ordered to pay. 13 O. C. 62 Foll. : 12, O. C. 130 not foll. (*Lindsay, J. C.*) MATA BADAL SINGH *v.* JAI SINGH. **15 I. C. 746.**

———S. 7 (ix)—*Mortgage suit—Appeal—Valuation—Interest* pendente lite.

Where a mortgage suit is dismissed, the plaintiff is entitled to value his appeal at the sum claimed in the plaint in respect of the principal and interest up to the date of filing the plaint and is not bound to value the future interest which he may claim from the date of the suit up to the date of realization or to pay court fee thereon. But if any future interest is determined by the trial court and is entered in the decree, additional court fee on such interest has to be paid. If the appellate court grants him a decree for an amount larger than that claimed in the court below, court fee must be paid on the difference and unless this is done the decree cannot be executed. (*Jwala Prasad, J.*) KALI PRASAD SINGH *v.* MATHURA PRASAD SINGH.
3 Pat. L. T. 813 : 1 Pat. L. R. 16 : 1923 P. 28.

——— S. 7 (ix)—*Suit for possession—Condition of plff. paying off incumbrances—Appeal.*

A suit for possession was decreed conditionally on payment of incumbrances and plff. appealed against that part of the decree which required him to pay off the incumbrances. *Held*, that Court-fees on the memo. of appeal were payable *ad valorem* on the value of the incumbrances. 4 I. C. 941 Foll. (*Coutts, J.*) KISHUN DUTT *v.* KASI PANDEY. **5 Pat. L. J 455 : 57 I. C. 481 : 2 U. P. L. R. (Pat.) 196 : 1 Pat. L. T. 738.**

———S. 7 (ix)—*Mortgage—Appeal—Appellant interested with others—Joint Hindu family.*

Members of a joint Mitakshara family have no specified shares in the family property and where some of them appeal against a decree in a suit to enforce a mortgage of the family property, Court-fees must be paid on the amount decreed and not on the appellant's share of that amount (*Das, J.*) RUPAN RAUT *v.* PITAMBAR LAL CHAUDHURY. **55 I. C. 233.**

——— S. 7 (ix) and Sch. II, Art. 17 (vi)—*Appeal*—Ad valorem *fee.*

If the object of appeal is to get the final decree in a mortgage suit set aside, memo. of appeal must bear *ad valorem* court-fee. (*Roe, J.*) BARKATUNISSA BEGUM *v.* KUMARUNNISSA. **50 I. C. 279.**

———S. 7 (ix) (a)—*Contract of sale—Stamp must be paid on consideration.*

Court-fees payable in suits for the specific performance of a contract of sale will be levied according to the amount of the consideration. The suit is not a suit for possession of immoveable property so as to be liable to a stamp of value 10 times the *jama*. (*Abdul Raoof, J.*) KUNDAN LAL *v.* ANAND SARUP. **1923 Lah. 456**

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———S. 7 (x) (a)—*Specific performance--Possession in addition to execution and registration of sale-deed.*

S. 7 (x) (a) applies to a suit for the specific performance of a contract to sell, in which the plaintiff seeks to force the vendor to execute and register a sale deed and also to hand over possession of the property. (*Tudball, J.*) NIHAL SINGH *v* SEWA RAM. **38 All. 292 : 35 I C. 275 : 14 A L. J. 434.**

——— S. 7 (x) (a) v—*Executory contract of sale—Suit for both specific performance and possession, whether lies—Value of subject-matter.*

A suit lies for specific performance of an executory contract to convey and also for possession, the right to which springs out of the contract, such a suit for purposes of the Court Fees Act, is one for possession of the property and ought under S. 7, cl. (v), be valued according to the real value of the subject-matter. (*Mookerjee and Caspersz, JJ.*) MADAN MOHAN SINGH *v.* GAJA PROSAD SINGH.
11 I. C. 228 : 14 C. L. J. 159.

———S. 7 (x) (a)—*Exchange on same foot as sale.*

The framers of clause (x) of S. 7 of the Court Fees Act contemplated that for the purposes of court-fee under this clause an exchange should also be dealt with as a sale; for otherwise that is no reason why separate provision should not have been made relating to exchange. (*Abdul Raoof, J.*) KUNDAN LAL *v.* ANUND SARUP
1923 Lah. 456.

——— S. 7 (x) (a)—*Suit for specific performance of a contract of sale and for possession—Court-fee.*

A suit for specific performance of a contract of sale by execution of a sale deed and for possession of land sold is governed by S. 7 (v) and not by (x) (a). 14 C. L. J. 159 Fol. (*Wilberforce, J.*) NATHE KHAN *v.* MUHAMMAD KHAN.
46 I. C. 534 : 128 P. W. R. 1918.

——— S. 7 (x) (a)—*Suit for specific performance—Prayer for possession does not alter nature of suit.*

The nature of the suit is not altered by an additional prayer for possession in a suit for specific performance of a contract or sale and for the purpose of court-fees as well as jurisdiction, the suit falls under S. 7 (x) (a). (*Krishnan and Venkatasubba Rao, JJ.*) SUNDARA RAMANUJAM NAIDU *v.* SIVALINGAM PILLAI.
45 M. L. J. 431 : 18 L. W. 333 : 47 Mad. 150 : (1923) M. W. N. 726 : 1924 Mad. 360.

——— S. 7 (x) (a)—*Suits Valuation Act, S. 8—Suit for specific performance.*

Valuation of a suit for specific performance of a contract of sale for the purposes of Court-fee at the amount of the consideration is valid under S. 7 (x) (a) of the Court Fees Act. In such a suit the valuation for the purposes of jurisdiction will be the same under S. 8 of the Suits Valuation Act. (*Dalal, A. J. C.*) SAIYED ASHFAQ HUSAIN *v.* SAIYED BUNYAD HUSAIN.
2 O & A L. R. 415 : 1923 Oudh 252.

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———S. 7 (x) (c)—*Lease on annual rent of Rs. 51—Suits Valuation Act, S. 8—C. P. Code, S. 114—Decision facts—Failure of Court below to grasp real point—Interference.*

S. 7 cl. (x) (c) and S. 8 of the Suits Valuation Act lay down that for the purposes of court-fee and jurisdiction the valuation of a suit for declaration of *Mourasi Mokurari* rights and for a direction to the deft. to grant a lease to the plff, depends on the yearly rent payable on the lease. (*Brett and Sharfuddin, JJ.*) BORT CANNING AND LAND IMPROVEMENT CO., LTD. *v.* ROSON ALI.
15 I. C. 46 : 17 C. W. N. 160

———S. 7 (x) (c)—*Decree declaring priority of a mortgage—Appeal—Court-fee.*

In an appeal from a mortgage decree which declared that third defendant had a prior mortgage for Rs. 14,000 the appellant prayed that the decree should be modified by removing the condition as to priority of the deft. No. 3 and its redemption by the appellant. *Held*, that an *ad valorem* Court-fee on Rs. 14,000 should have been paid. (*Roe, J.*) PREMSUKH DAS *v.* SHA GOPI SARAN. 51 I. C. 786 : 4 Pat. L. J. 323.

———S. 7 (x) (c)—*Suits Valuation Act, S. 8—Suit for specific performance of lease—Court-fees—Jurisdiction.*

A suit for specific performance of a contract of lease should first be valued for court-fees under S 7 (x) (c) of the Court Fees Act and the value should be adopted under S. 8 of the Suits Valuation Act for jurisdiction. (*Mookerjee, J.*) SAILENDRANATH *v.* RAM CHARAN. 34 C. L. J. 94 : 66 I. C. 268 : 25 C. W. N. 768.

———S. 7 (xi) (cc)—*Suit—Valuation.*

Suits between landlord and tenant have to be valued for court-fees upon the rent for the previous year and the valuation for the jurisdiction is the valuation for the court-fees. (*Sunderlal, J.*) NANDAN SINGH *v.* DEBI DIN. 25 I. C. 975 : 12 A. L. J. 933.

———S. 7 (xi) (cc)—*Suit against tenants and other holding over.*

In a suit by a landlord against his tenants and others, who were holding over after the period of their tenancy, for recovery of possession of immoveable property, the court-fee is to be paid on the amount of the rent of the property in suit payable for the year next before the date of presenting the plaint. Suit by a landlord against several persons for *khas* possession cannot proceed without a prayer for declaration of title, if some of them do not stand in the relation of tenants. (*Chatterjee and Newbould, JJ.*) PROMOTHA NATH GANGULY *v.* AMIRADDI SHEIKH.
55 I. C. 178 : 24 C. W. N. 151.

———S. 7 (xi) (cc)—*Madras Civil Courts Act.*

The valuation for purposes of jurisdiction of a suit to recover possession of land from a tenant is not its market value under S. 14 but one year's rental payable by the tenant, for the year next before the date of presenting the plaint under S. 7, Cl. (xi) (cc) of the Court Fees Act. (*Sadasiva Aiyar and Phillips, JJ.*) NARAYANASWAMI NAIDU GARU *v.* VENNAVALLI SESHAGIRI RAO.
39 Mad. 873 : 2 L. W. 1031 ; 29 M. L. J. 572 : 31 I. C. 104 : 18 M. L. T. 398.

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———S. 7 (xi) (cc)—*Suit in ejectment—Competency of Court to enquire into title.*

Where plaintiffs-landlords instituted a suit for ejectment and arrears of rent against defendants-tenants by paying a stamp duty calculated on one year's rent under S. 7 (xi) (cc), the Court will not go into the question of title. (*Seshagiri Aiyar and Kumaraswami Sastri, JJ.*) BALASIDHANTAM *v.* PERUMAL CHETTI.
1 L. W. 641 : 27 I. C. 162 : 27 M. L. J. 475.

———S. 7 (xi) (cc)—*Suits Valuation Act, S. 8—Suit for recovery of immoveable property from tenant—Valuation for Court-fees and jurisdiction.*

In a suit for the recovery of immoveable property from a tenant the valuation is the same for Court-fees as well as for jurisdiction. (*Ayling, J.*) VANNAVALLI SESHAGIRI RAO *v* GOPISETTI NARAYANASAMI NAIDU. 38 Mad. 795 : 24 I. C. 374 : 26 M. L. J. 573.

———S 7 (xi) (cc)—*Tenant holding over—Suit for possession.*

Where after the expiry of a tenancy, the tenant in spite of notice to quit refuses to hand over possession, a suit for possession against him is not one against a tenant holding over but against a trespasser and falls under S 7 (v) of the Court Fees Act. (*Hallifax, A. J. C.*) NARAYAN *v.* TUKARAM. 1923 Nag. 310.

———S. 7 (xi) (cc)—*Suit to eject Thicadar is within the clause.*

A suit to eject a thicadar on the expiry of his lease falls within S. 7 (xi) (cc) of the Court Fees Act. Wherever a landlord seeks to recover property from a person whose tenancy has come to an end either by the efflux of time or by reason of some breach of covenant, the case would be governed by S. 7 (xi) (cc) of the Court Fees Act. (*Miller, C. J. and Ross, J.*) RAM CHARAN SINGH *v.* SHEO DUTTA SINGH. 2 Pat. 260 : 4 Pat. L. T. 666 : 1923 P. 380.

———S. 7 (xi) (e).

See SCH. II, ART. 5.

———S. 8—*Appeal by claimant in Land Acquisition case—Valuation of claim.*

The memorandum of appeal by a claimant to land acquired in a Land Acquisition proceeding should bear a Court fee stamp *ad valorem* on the value of the land claimed since what was styled as apportionment was really the determination of the amount payable by Government to the claimant for the land. (*Shah and Hayward, JJ.*) MANGAL DAS *v.* THE ASST. COLLECTOR OF PRANTIJ PRANT AHMEDABAD. 45 Bom. 277 : 64 I. C. 582 and 584 : 23 Bom. L. R. 148.

———Ss. 10 and 17—*Distinct causes of action.*

Where three declarations were sought arising from distinct causes of action, held Rs. 30 should be paid as court-fee. (*Stuart, J.*) SHAMBHU DIYAL SINGH *v.* ISWAR SARAN. 1923 A. 306.

———S. 10—*C. P. C., O. 7, R. 11.*

A plaintiff who fails to pay additional Court-fee within the time allowed by the Court is liable to have his suit dismissed under S. 10 and not to have his plaint rejected under O. 7, R 11. And

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he cannot be allowed the option to abandon part of his claim and retain that part for which he has paid court-fee, especially at the last moment. (*Scott, C. J. and Hayward, J.*) VALLI ISE AMANJI *v.* MAHOMED ADAM ASMAL.
26 I. C. 746 : 16 Bom. L. R. 763.

——Ss. 10 and 12—*Point of deficit Court-fees—When to be raised*

The question of deficit Court-fees should be dealt with by the Appellate Court as soon as it is discovered, though it may be postponed at the Court's discretion in exceptional cases. If the question arises on appeal, the appeal should first be admitted so as to remove doubts, as to jurisdiction and this point should be decided before other issues and the appeal should be stayed till the deficit is paid ; and it is also desirable that the expenses of printing paper book should not be incurred till the question is decided. (*Miller, C.J., Mullick and Bucknill, JJ.*) HITENDRA SINGH *v.* RAMESHWAR SINGH. **2 Pat. L. T. 383 : 62 I. C. 43 : 6 P. L. J. 293 : 1921 Pat. 161.**

——Ss. 10 and 12—*Court-fee—Deficiency in the lower Court—Rejection of appeal under O 41, R. 11, C. P. C.*

After an appeal is dismissed by the High Court under O 41, R. 11, the Court has no power to recover from the respondent a deficiency in the Court-fee due on a memo. of appeal filed by him in the lower Court. If in such a case the second appeal resulted in a decree in the respondent's favour, the High Court would refrain from signing the decree until payment of the deficit Court-fee. When it is intended to recover a deficit from the respondent before the High Court in respect of something due in the lower Court, the appeal should be admitted for hearing and action taken under S. 12 read with S. 10 (*Mullick and Jwala Prasad, JJ.*) RAJ DEO NARAIN *v.* RAMDIL SINGH.
58 I. C. 271 : 5 Pat. L. J. 508.

——S. 10—*Court-fee deficiency in, on plaint—Procedure to recover—Dismissal on failure to make up the deficit.*

Where a Court finds a deficit in Court-fee, the plaintiff should be ordered to make it up and on his failure to do so, his suit should be dismissed as enjoined by Court Fees Act, S.10. (*Mullick and Adami, JJ.*) BRIJ KRISHNA DAS *v.* MURLI BAI.
56 I. C. 316 : 4 Pat. L. J. 703.

——Ss. 10 (2), 12 and 17—*Suit for specific performance and possession.*

Where in a suit for specific performance of a contract of sale, and for possession of the property agreed to be sold, the relief for specific performance is the main relief and not ancillary to the claim for possession, a separate Court-fee must be paid in the Original Court as well as in the Appellate Court. Where on appeal, the Court-fee is found to be deficient, an order should be made to make good the deficiency and in case of non-compliance, the suit or appeal should stand dismissed. (*Daniels, A. J. C.*) RAM NIDH *v.* BALKRISHNA SINGH. **60 I. C. 654: 23 O. C. 388.**

——S 10 (2)—*Reduction of claim.*

Quaere—Whether an Appellate Court has power to allow a valuation of a claim in the Court

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below to be reduced in order to relieve a party from liability to pay the proper court fee. (*Chamier, C J. and Jwala Prasad, J.*) NARAIN PRASAD *v.* KAMESHWAR PRASAD SINGH.
43 I. C. 489 : 3 Pat. L. J. 101.

——S. 11—*Mesne profits—Decree for—When becomes operative.*

A decree for mesne profits does not become operative till after the amount has been ascertained by the Court and the Court-fee under S. 11 has been paid by the decree-holder. A decree to be operative must define the extent of the liability for mesne profits. 24 Cal. 173 ; 39 Cal. 265 Ref. (*Mookerjee and Beachcroft, JJ.*) JITENDRA NATH ROY *v.* RASIK LAL SEN. **27 I. C. 300.**

——S. 11—*Mesne profits before suit and pendente lite.*

Court-fee is not leviable on a claim for mesne profits *pendente lite*. 21 Mad. 171 ; 13 C.W.N. 815 Rel. on. But where the mesne profits had accrued due before suit and the plaintiff is in a position to value it even approximately he is bound to state the amount under O. 7, R. 2 (2), C. P. C. (*Mookerjee and Beachcroft, JJ.*) BHUPENDRA KUMAR *v.* PURNA CHANDRA BOSE. **24 I. C. 232.**

——S. 11—*Mesne profits—Suit for possession and mesne profits — Appeal—Court-fee on valuation—Subsequent assessment of mesne profits—No fee payable*

In a suit for possession and profits, plff. valued the relief for lands at Rs. 1,020 and the mesne profits antecedent to the suit at Rs. 4,199. The Courts below made a decree in favour of the plff. Defts. appealed to the High Court and valued their appeal at Rs. 5,291 and paid Court-fees on their memorandum of appeal *ad valorem*. During the pendency of this appeal mesne profits were assessed at Rs 2,570 and a decree made in favour of the plff. for this amount. *Held*, that as the deft had already paid Court-fees upon the claim for mesne profits valued at Rs. 4,199, they could not be called upon to pay Court-fee a second time, and that their appeal against the assessment of mesne profits should be filed without any Court-fee being paid on the memorandum of apppal. (*Mookerjee and Beachcroft, JJ.*) KANCHAN MANDAR *v.* KAMINI PRASAD CHAUDHURY.
15 I. C. 572 : 16 C. L. J. 564.

——S. 11—*Applicability of final provision to first paragraph.*

The final provision of S. 11 of the Court Fees Act does not apply to the conditions set forth in the first paragraph of that section. (*Jenkins, C. J. and Cox, J.*) GANESH CHANDRA *v.* PROMOTHO NATH. **11 I. C. 73.**

——S. 11—*Extension of time.*

A Court has discretionary power under S. 11 to enlarge the time originally fixed for the payment of the Court-fees, even when application to enlarge the time is made after the expiry of the time originally granted. (*Mookerjee and Teunon, JJ.*) GHULAB CHAND *v.* BAHURIA RAM MURAT KOER. **10 I. C. 268 : 13 C. L. J. 432.**

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——S. 11—*Ascertainment and recovery of profits—Partition suit—Order directing payment of additional Court-fee within fixed time—Non-payment—Effect.*

No special procedure for dismissal for default in payment of Court-fee is prescribed by S. 11 or elsewhere, and no special procedure need be insisted on, so long as it is clear that the parties have had fair notice of the nature of proceedings. An Appellate Court has no power to extend the time fixed by the first Court, for payment of Court-fee or to reduce the amount fixed on the amount of mesne profits ascertained by the Lower Court either under S. 148 or S. 149, C. P. C. (*Oldfield and Tyabji, JJ.*) NATHERSA ROWTHER *v.* MAHOMED ROWTHAN. **28 I. C. 890.**

——S. 11—*Suit for accounts and mesne profits—Valuation on estimate.*

In a suit for accounts or mesne profits, the plaintiff has a right to value his claim on estimate and the court has power to decree larger amount. (*Kanhaiya Lal, A. J. C.*) DURGA BHARATI *v.* BHAGWATI PRASAD. **24 O. C. 209 : 64 I. C. 101 : 8 O. L. J. 477.**

——S. 11—*Value of relief ascertained after trial—Court-fee payable.*

Where the value of the relief is ascertained after trial, the Court-fee on the difference between the plaint valuation and the amount decreed should be paid. (*Lindsay, J.C. and Kanhaiya Lal, A. J. C.*) SURAIYA QADR *v.* QUDSIA BEGAM. **24 I. C. 643 : 10 L. J. 281.**

——S. 11—*Mortgage suits—Amount decreed higher than amount claimed—Additional court fee not leviable.*

Where in a suit on a mortgage, the mortgagee ultimately got a decree of a much larger amount than he claimed on account of the interest *pendente lite*, and on his trying to execute the same, it was objected that he could not do so before paying the court-fee on the excess amount awarded, *held*, S. 11 of the Court Fees Act refers only to suits for immoveable property, mesne profits and accounts, and as such does not apply to mortgage suits. Hence no additional court-fee is leviable. (*Coutts and Ross, JJ.*) RAM BUJHAWAN PRASAD SINGH *v.* NATHO RAM. **3 Pat. L. T. 146 : 1922 P. 59.**

——S. 11—*Mesne profits—Application for—Ad valorem fee.*

On an application for mesne profits the Court-fee payable is an *ad valorem* fee. (*Miller, C. J. and Imam, J.*) RAM BILAS SINGH *v.* AMIR SINGH. **55 I. C. 24 : 1 Pat. L. T. 235.**

——S. 11—*Future mesne profits.*

Fees are payable on the difference between the amount paid on the mesne profits claimed in the plaint and the amount ascertained to be due subsequent to the filing of the suit. (*Rigg, J.*) DAWOOD *v.* RAHMAN. **10 L. B. R 276 : 62 I. C. 175 : 13 Bur L. T. 165.**

——S. 11, Para. 2—*'Decree', means in a partition suit final decree—Additional Court-fees, non-payment of—Penalty—Court cannot fix time for payment.*

COURT FEES ACT (VII OF 1870), S. 12.

The word 'decree' in S. 11, para. 2, of the Act as applied to a suit for partition and mesne profits means the final and not the *interim* decree. Where in such a suit the court decrees the claim and awards a specific sum for mesne profits on the plaintiff paying additional Court-fee, if any, due in respect of the profits the Court has no power to fix any time for payment and the only penalty which the plaintiff will incur if he does not pay the Court-fee is that he cannot execute the decree until he pays such fee. (*Spencer and Krishnan, JJ.*) S. K. NATHERSA ROWTHER *v.* MUHAMMAD ROWTHER. **59 I. C. 385.**

——S. 12—*Deficiency in Court fee—Realisation by attachment and sale of the properties—Ultra vires.*

After the dismissal of a suit, the Court ordered the deficit Court-fee to be paid by the plff. and on his default ordered the attachment of his properties. *Held*, that the Court had no jurisdiction to do so. (*Woodroffe and Chitty, JJ.*) JATRA MOHAN SEN *v.* THE SECRETARY OF STATE FOR INDIA. **52 I. C. 435 : 46 Cal. 520.**

——S. 12—*Scope of—Suit by grantee of mine for possession.*

S. 12 does not apply where the question for decision is as to the class under which a suit falls and not merely as to the valuation in that class. 6 Cal. 249 ; 12 C. L. R. 148 : 23 Cal. 723; 16 C. L. J. 371; 28 Cal. 331 Foll. (*Mookerjee and Beachcroft, JJ.*) SUNDER MAL MARWARI *v.* MURRAY. **16 I. C. 963 : 16 C. L. J. 375.**

——S. 12—*Valuation fictitious—Inquiry by Commissioner—Valuation found less—Return of plaint.*

Plff. sued in the Sub-Court for declaration and valued his claim at Rs. 1,100. The deft. objecting the Court appointed a Commissioner who fixed the value at Rs. 750. The Court returned the plaint to be presented to the proper Court. *Held*, that the question concerned essentially the jurisdiction of the Court to entertain the suit and was not one relating to valuation for the purpose of determining the amount of Court-fee. Therefore S. 12 was inapplicable and the appeal to the Lower Appellate Court by the plff. was competent. S. 12 is evidently framed for fiscal purposes. The section ought to be strictly interpreted. It cannot be applied to preclude an appeal where the question raised is one of the class under which the suit falls or of the competency of the Court of first instance to entertain the suit. (*Mookerjee and Holmwood, JJ.*) PEARI SHAH *v.* SURJA MAL. **17 C. W. N. 503 : 16 I. C. 575 : 16 C. L. J. 371.**

——S. 12—*Valuation of first Court—Decision—When open to challenge on—Appeal.*

Held, by the Full Bench (*Chevis and Broadway, JJ. dissenting*). The meaning of S. 12 is that the decision of the Court is final only as regards the actual appraisement of the suit and the determination of such question as relates directly and immediately thereto. The question whether such Court was right or wrong in holding the suit to be one of a particular class does not relate directly or immediately to such appraisement and it is open to challenge on appeal. If

COURT FEES ACT (VII OF 1870), S. 12

the Appellate Court holds that the suit has been rightly classified by the Court of first instance, the latter's valuation is final ; otherwise it will be set aside. Cases reviewed. (*Rattigan, C. J., Chevis, Scott-Smith, Le Rossignol and Broadway, JJ.*) MAHNA SINGH *v.* BAHADUR SINGH

16 P. R. 1919 : 49 I. C. 711 : 11 P. W. R. 1919. (F. B.).

——S. 12—*Decision on the value of the subject-matter incidental to decision on jurisdiction—Appeal to District Judge lies.*

In a suit the deft. contended that the suit was under-valued and a local Commissioner was appointed to fix the value, but the Munsif trying the suit, did not accept the valuation fixed by the Commissioner and came to the conclusion that the value was much more than that fixed by the Commissioner and consequently returned the plaint for presentation to the proper court. On appeal, the District Judge held that the Munsif ought not to have disregarded the valuation fixed and so he returned the case to him for disposal. *Held*, in second appeal the Munsif in arriving at a valuation, only looked at the question from the point of view of his own pecuniary jurisdiction and although, inasmuch as the values for the purposes of court-fees, and that of jurisdiction were identical he decided the value for purposes of court-fee, this decision was merely incidental to his decision on the question of the value for purposes of jurisdiction. Therefore S. 12 of the Court Fees Act did not apply and the appeal was rightly perferred and rightly decided by the District Judge. (*Broadway, J.*) SIKANDAR SHAHA *v.* GHULAM NABI SHAHA.

47 I. C. 7 : 151 P. W. R. 1918.

——S. 12—*Appeal — Limitation — Whole claim time barred—Failure to pay stamp duty on portion of claim—Effect.*

A defendant appealing on the ground that the suit ought to have been dismissed *in toto* as time barred must appeal on the whole case and pay stamp duty on the whole claim. Otherwise the court will not give him relief to the full extent. (*Leslie Jones, J.*) HUKAM SINGH *v.* SAHAB DIN.

44 I. C. 890 : 14 P. W. R. 1918.

——S. 12— *Court-fee— Objection to— On appeal.*

Where on an objection to the sufficiency of Court-fee on a memorandum of second appeal, it appeared that the Trial Judge had, after framing an issue on the point, decided it in favour of the plff. and the deft had accepted the decision and stamped his own appeal in the Lower Appellate Court accordingly. *Held*, that the objection could not be entertained and must be overruled. (*Shadi Lal and Le Rossignol, JJ.*) CHUNNU LAL *v.* BANK OF UPPER INDIA, LTD.

40 I. C. 904 : 106 P. W. R. 1917.

——S. 12—*Appeal— Insufficiently stamped appeal—Reduction of claim.*

The appellant who has not properly stamped the appeal and is unable to do so may leave a part of the claim retaining only that much as is covered by his stamp. (*Rattigan, J.*) DUNI CHAND *v.* AZIZ KHAN.

131 P. L. R. 1911 : 180 P. W. R. 1911 : 10 I. C. 207 : 11 P. R. 1912.

COURT FEES ACT (VII OF 1870), S. 12.

——S. 12—*Scope of.*

This section has no application where the Court makes valuation for determining whether the suit is within the pecuniary limits. An order returning a plaint for representation on the basis of such valuation is appealable. (*Kumaraswami Sastri, J.*) CHILUKURI NARASIMHACHARYULU GARU *v.* ZEMINDAR OF BOBBILI.

10 L. W. 178 : 26 M. L. T. 153 : 52 I. C. 1001 : (1919) M. W. N. 599.

—— S. 12—*Appeal—Payment of Court-fee on portion—Attack on whole decree.*

There is nothing to prevent an appellant from attaching only a portion of the decree by paying court-fee only, thereon, though the reason for the attack might cover the whole decree. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) SYED IBRAHIM SAHIB *v.* ARUMUGATHAYER.

16 I. C. 877 : 38 Mad. 18.

——S. 12—*Fraud—Fraud on Government Court-fee, whether to be tolerated by Court.*

An irregularity amounting to fraud on Government Revenue by depriving State of its legitimate Court-fee is not to be permitted by Courts. (*Stuart, J. C. and Kanhaiya Lal, A. J. C.*) DIL AFZA BEGAM *v.* DEPUTY COMMISSIONER, BAHRAICH. **37 I. C. 133 : 3 O. L. J. 570.**

——S. 12—*Sufficiency of—Dispute— Allegations in plaint.*

If an objection is taken that a plaint is insufficiently stamped all that the Court has to do, is to see whether the Court-fee is sufficient assuming the allegations in the plaint to be true. The Court does not decide that those allegations are true. 34 All. 184 Ref. (*Lindsay, J. C. and Kanhaiya Lal, A. J. C.*) LALTA PRASAD *v.* BURMAH DIN. **30 I. C. 73.**

——S. 12—*Deficiency in Court-fee on plaint—Power of Appellate Court to call upon respondent to pay deficiency—C. P. Code, O. 7, R. 11—Applicability of.*

If a plff.-respondent fails to make good a deficiency in the court-fee paid on the plaint, it is competent to the Appellate Court to call upon him to pay the deficit ; and in the event of his failure to dismiss the suit. 20 All. 362 and 16 C. L. J. 375 Ref. O. 7, R. 11, of the C. P. C. is not applicable to a case in which an Appellate Court acts under S. 12 of the Court Fees Act. In such a case the rejection of the plaint is inappropriate and the law enjoins a dismissal without option, though it may be that the result of the dismissal, from the point of view of *res judicata*, is the same as a rejection. (*Mullick and Adami, JJ.*) PANDIT BRIJ KRISHNA DAS *v.* CHOUDHURY MURLI RAI. **56 I. C. 316 : 4 Pat. L. J. 703.**

——S. 12—*Order rejecting plaint—Appeal.*

Where an order rejecting a plaint necessarily involves a decision of the category or class under which a suit falls, even though it incidentally decides a question of valuation, the order is appealable. (*Atkinson and Manuk, JJ.*) CHANDRA MAMKOER *v.* BASDEO NARAIN SINGH.

49 I. C. 442 : 4 Pat. L. J. 57.

COURT FEES ACT (VII OF 1870), S. 12.

———S. 12—*Taxing Officer, decision of—Final—Appeal—Stamp insufficient.*

The decision of the Taxing Officer in the matter of Court-fee is final. The Court fee fixed by him must be paid. If the appellant has failed to pay sufficient Court-fees in the Court below, his appeal will not be heard till the deficiency has been made good. Where it was the respondent who was in default, no decree shall be executed in his favour till the deficiency has been made good. (*Roe, J.*) ROWLINS *v.* LACHMI NARASIMHA. **4 P. L. W. 223 : 3 P. L. J. 443 : 44 I. C. 50 : 1918 Pat. 264.**

———S. 12—*High Court—Duty of to see proper fees are paid.*

It is the duty of the High Court to see that the Court-fees are paid to the High Court and in the Courts below from which, the case has come. (*Chamier, C. J. and Jwala Prasad, J.*) BABOO NARAIN PRASAD *v.* KAMESWAR PRASHAD SINGH. **48 I. C. 489 ; 3 P. L. J. 101.**

———S. 12—*Applicability of—Decided cases.*

The Act does not apply to decided cases but applies only to pending cases. 7 All. 528 Foll. (*Twomey and Ormond, JJ.*) SHANGAI LIFE ASSURANCE COMPANY, LTD. *v.* MRS. HELLENS CONSTENS BROWN. **32 I. C. 534 : 9 Bur. L. T. 43.**

———S. 12—*Appeal—Class under which suit falls.*

In determining whether a plaint bears sufficient Court-fee, regard must be had to the allegations of the plff. in the plaint, as to the nature of the relief sought in the substance, irrespective of the evidence in the case. S. 12 precludes an appeal only in respect of the valuation of a suit in a particular class. It does not preclude an appeal as to the class to which the suit should be referred for such assessment. 23 Bom. 486 Foll. (*Pratt, J. C. and Crouch, A. J. C.*) MANGHANMAL *v.* TOLARAM. **16 I. C. 773 : 6 S. L. R. 72.**

———S. 12 (1) and (2)—*Court-fee—Decision of first Court—Finality of.*

A decision on the question of Court-fee of the Court of First Instance is final between the parties, under S 12 (1) but can be re-opened by an Appellate Court under S. 12 (2) in the interest of Revenue. (*Sadasiva Aiyar and Tyabji, JJ.*) TEKANA KAVANDAN *v.* ALIGIRI KAVANDAN. **25 I. C. 506.**

———S. 12 (2)—*Court-fee to be paid on memorandum of appeal—Duty of High Court in second appeal to order deficiency to be made good.*

A decree for redemption was passed by the trial Court for Rs. 2,550 of which Rs. 80 was admitted by plaintiff. He should pay stamp duty on Rs. 2 550 less Rs. 80 admitted by him under S. 12 (2). The High Court was bound in second appeal to require the plaintiff to make good the deficiency. (*Ralligan and Scott-Smith, JJ.*) NIHAL CHAND *v.* GULAM MUHAMMAD. **235 P. L. R. 1913 : 19 I. C. 856 : 146 P. W. R. 1913.**

———Ss. 12 (ii) and 10 (ii)—*Sufficiency of Court fee on plaint—Appeal on insufficient stamp—Power of Court of second or further appeal*

COURT FEES ACT (VII OF 1870), S 13.

The word "suit" in S. 10 (ii) includes appeal ; if a Court of First Instance, whose duty it is to see that the fees paid are correct, proceeds to the trial of the suit, without expressly deciding that the plaint is correctly stamped, it must be assumed that the Court has *tacitly* decided that the amount of fees paid, is correct. Acting on that assumption it would be competent to the first Appellate Court to call upon the party to make good the deficiency within a reasonable time to be fixed and to dismiss the claim of the plaintiff if he fails to do so. Similarly a Court of second or further appeal has the same power. 1 A. L. J. 392 Foll. 20 All. 362 ; 26 All. 270 Ref ; 115 P. R. 1884 Overruled. (*Ried, C. J., Robertson and Shah Din, JJ.*) DYAL SINGH *v.* RAM RAKHA. **109 P. R. 1912 : 15 I. C. 463 ; 136 P. W. R. 1912 (F. B.).**

———S 12 (2)—*Appeal dismissed—Court has thereafter no power to call upon respondent to pay deficiency in Lower Court.*

Once an appeal has been dismissed the High Court ceases to have seisin of the appeal or case and is powerless to call upon the respondent to pay any deficiency due by him in respect of Court-fees payable in the lower Court and consequently has no jurisdiction in such circumstances to restrain the respondent from executing the decree obtained by him. (*Atkinson, Jwala Prasad and Das, JJ.*) RADHIKA RAMAN PRASAD SINGH *v.* JANKI KUAR. **4 P. L. J. 472 : 51 I. C. 756 : 1919 Pat. 276 (F. B.).**

———S. 12 (2) and Sch. I, Art. 1—*Appellate Court—Payment of additional Court-fee.*

An Appellate Court cannot under S. 12 (2) order for payment of additional Court-fee stamps, unless the first Court has decided the question of valuation. (*Fox, C. J. and Twomy, J.*) M. E. PILLAY *v.* MAISTRY. **36 I. C. 957 : 10 Bur. L. T. 242.**

———S. 13—*Refund of excess Court-fees—Power of High Court.*

In an appeal to the High Court refund of excess court-fee paid could be granted only by the Collector of the District and not by the High Court. (*Banerjee and Tudball, JJ.*) LALTA PRASAD *v.* SHEORAJ SINGH. **57 I. C. 26 : 2 U. P. L. R. (All.) 180.**

———S. 13—*Case remanded in appeal as against some respondents—Appellant if entitled to refund.*

This section applies where a decree in favour of the respondents is set aside and the case is sent back "for a second decision". Where the decision in favour of the respondents is set aside *qua* a portion only of the subject-matter of the suit, the proviso applies ; but in either case, the decree appealed against must be set aside against all the respondents. Where the decree is set aside against some respondents only and the case is only remanded in appeal for a second decision, the successful appellant cannot get a refund of Court-fee. (*Sunderlal, J.*) *In the matter of* BHAGWANTI. **39 I. C. 28 : 14 A. L. J. 671.**

———S. 13—*C. P. Code, S. 115—Remand—Refund of Court-fee—Revision.*

COURT FEES ACT (VII OF 1870), S. 13.

If an appeal is remanded the Court is bound to grant a certificate for the refund of Court fees under S. 13 of the Act. Refusal to grant such a certificate is a material irregularity within the meaning of S. 115, C. P. C. (*Beaman and Heaton, JJ.*) BHAUSING RAGHO *v.* CHANGNIRAM HARCHAND. **42 Bom. 363 : 45 I. C. 552 : 20 Bom. L. R. 348.**

——— **S. 13**—*Refund of excess—Court-fee paid by mistake in memo. of appeal.*

The High Court can order a refund of the excess amount of Court-fee paid by mistake on a memorandum of appeal. (*Mookerjee and Beachcroft, JJ.*) HARIHAR GURU *v.* ANAND MAHANTY. **20 I. C. 498 : 40 Cal. 365.**

——— **S. 13**—*Appeal allowed with costs—Meaning of—Stamp on memo. of appeal.*

The High Court reversed the decision of the first Court on a preliminary point with costs. The decree as drawn up directed that the respondents in the appeal do pay the costs of the appeal as also of the first Court, and the Court fee paid by appellant on the memo. of appeal was also included. *Held*, that an order ought to have been made under S 13 for refund of the fee paid on the memorandum of appeal, and that the amount ought not to have been entered in the decree so as to throw an unecessary burden upon the unsuccessful respondent. Such an order should be made on application for amendment. (*Mookerjee and Teunon, JJ.*) SURENDRA NATH ROY *v.* GIRIJA NATH ROY. **15 I. C. 910 : 15 C. L. J. 658.**

——— **S. 13**—*Remand — Inherent power—Refund of Court-fee.*

Where an appellate Court remands a case for retrial in a case not coming within O. 41, R. 23, C. P. C., no order for refund of Court fee can be passed, 36 I C. 541 : 26 C. L. J. 49 Rel. (*Mitra, A. J. C.*) VITHOBA *v.* WAMAN. **42 I. C. 304.**

——— **S. 13**—*Refund of stamp duty.*

Refund of stamp duty paid on the memorandum of appeal will be ordered only when the appeal is remanded under O. 41, R. 23. (*Stanyon, A. J. C.*) JAGANNATH *v.* MARUTI. **36 I. C. 241 : 12 N. L. R. 126.**

——— **S. 13**—*Appeal against preliminary decree—Refund of Court-fee—Remand on grounds other than those covered by O. 41, R. 23.*

S. 13 of the Court Fees Act does not apply to the case of an appeal against a preliminary decree. S. 13 requires an Appellate Court to grant a certificate for refund of Court-fees where a suit is remanded under O. 41, R. 23, C. P. C, O. 41, R. 23, C. P. C. applies only where the original Court had disposed of the suit on a preliminary point. (*Chapman and Jwala Prasad, JJ.*) NANDKUMAR SINGH *v.* BILAS RAM MARWARI. **4 Pat. L. W. 100 : 3 Pat. L. J. 116 : 48 I. C. 855 : (1917) Pat. 377.**

——— **S. 13**—*Refund of Court-fee—Memorandum of appeal—Presented in time but stamped after limitation period—Arguments heard and appeal dismissed on ground of limitation—Refund of Court-fee if can be claimed.*

COURT FEES ACT (VII OF 1870), S 17.

Where a counsel stamps the memorandum of a time-barred appeal and is heard on the point of limitation and the appeal is dismissed he cannot set up the plea of the failure of the Court clerk to inform him of the practice about stamping in appeal memorandums as a ground of claiming refund of the Court-fee paid. (*Hartnoll, O. J. C. and Young, J.*) ANNAMALAI *v.* O. M. M R. M. CHETTY FIRM. **22 I. C. 884 : 7 L. B. R 90.**

——— **S. 17**—*Balance due on* Khata, *suit for.*

In a suit for a balance on a *Khata*, which would ordinarily contain a number of items, each item does not constitute a distinct subject. The subject-matter of the suit is the balance due on the account, and the Court-fee is payable on the aggregate amount. (*Macleod, C.J., Shah and Fawcett, JJ.*) HIRALAL *v.* GANPAT. **64 I. C. 486 (2) : 23 Bom. L. R. 995.**

——— **S. 17**—*Distinct subjects.*

A'plff. brought a declaratory suit in respect of properties, partly in the Collector's possession which he valued at more than Rs. 5,000 and partly in his possession which he valued at less than Rs. 5,000 in the court of Subordinate Judge having special jurisdiction to try suits valued more than Rs. 5,000. The reliefs claimed were, declaration as to the former, and a declaration with consequential relief, valued at Rs. 5 for the latter. It was held (1) that the value exceeded Rs. 5,000 and (ii) the suit was within the Court's special jurisdiction and (iii) consequently the appeal lay to the High Court and not to the District Judge. The plaint cleary stated the plaintiff's claim was for two distinct subjects, the first exceeding in value Rs. 5,000 and the aggregate value of both the properties constituted the value of the suit. (*Chandavarkar, A. C. J. and Batchelor, J.*) SHIDAPPA VENKATRAO JADHAV *v.* RACHAPPA SUBRAO JADHAV. **14 Bom. L. R. 757 : 16 I. C. 1005 : 36 Bom 628 :**

[On appeal 50 I. C. 280 : 43 Bom. 507 (P. C.)]

——— **S. 17**—*Subject—What is—Suit for specific performance and possession.*

Per Krishnan, J. :—The word "subject" is of a somewhat uncertain connotation and is not capable of any precise definition.

In a suit for specific performance and possession, court fee need be paid only for one prayer, (*Krishnan and Venkata Subba Rao, JJ.*) SUNDARA RAMANUJAM NAIDU *v.* SIVALINGAM PILLAY. **45 M. L. J. 431 : 18 L. W. 333 : 47 Mad. 150 : (1923) M. W. N. 726: 1924 Mad 360.**

——— **S. 17**—*Redemption of usufructuary mortgage—Section does nat apply.*

Where the plff seeks to redeem the usufructuary mortgage the Court fee is payable on the principal amount exclusive of any surplus profits realised by the mortgagee and claimed in the suit. S. 17 of the Court Fees Act relates only to a suit which embraces two or more distinct subjects and does not apply to such a case. 29 All. 471 : 8 N.L. R. 179 Foll. 16 Mad. 328 Dist. (*Drake Brockman, J. C.*) GOPIKISAN *v.* SARABJI. **1922 Nag. 259.**

COURT FEES ACT (VII OF 1870), S. 17.

———S. 17—*Alternative reliefs—Several causes of action.*

S. 17 applies to alternative reliefs claimed with reference to more causes of action than one. The section is not necessarily confined to cases where cumulative reliefs are claimed. (*Drake-Brockman, J. C.*) DHARMCHAND *v.* GORELAL.

47 I. C. 886.

———S. 17—*Suit on mortgage—Same person holding two mortgages—Valuation—Subject—Meaning of.*

A person holding two mortgages from the same mortgagor hypothecating the same properties and even when the due date in both is the same can bring suits separately on both bonds. In other words, there is nothing to prevent a mortgagee from suing on the first mortgage without joining the second and *vice versa*. If that is so, there can be no question that the mortgages were separate subjects and one under S. 17 of the Court Fees Act. The ordinary meaning of the word "subject" when used in law is a thing or matter, over which a right is exercised and the two mortgages were certainly two distinct matters. They could be deemed to be one either by a covenant in the mortgage consolidating the two together, or by some provision in law. Hence the suit to enforce the two mortgages is covered by S. 17 of the Court Fees Act. (*Jwala Prasad and Ross, JJ.*) NAWABA WAZIRI BEGAM *v.* BABU SHASHI BHUSAN ROY. **2 Pat. 874 : 4 Pat. L. T. 546 : (1923) Pat. 293 : 1924 P. 77.**

———S. 17—*Subject, meaning of.*

The word 'subject' in Sec. 17 means 'Cause' of action' and is not to be interpreted with reference to Sec. 7. (*Chapman and Atkinson, JJ.*) B. NAURATAN *v.* W. J. STEPHENSON.

(1922) Pat. 79 : 1922 P. 359.

———S. 17—*Suit on two mortgages—Hypothecating same property—Court-fee.*

Plff. sued on two mortgage-bonds, in which the same properties were hypothecated, *held*, he had to pay *ad valorem* Court-fee on the amount due under each of the two bonds separately and not on the total claim. The word "subject," in S. 17 of the Court Fees Act, means causes of action and the plff. has two causes of action on the two bonds although the mortgagee could sue on the first mortgage and sell the property subject to the second or sue on the second mortgage for the sale of the property subject to the first. 14 C. W. N. 1053 : 7 Bom. L. R. 811 Ref. (*Adami and Coutts, JJ.*) NAWABA WAZIRI BEGUM *v.* SOSHI BHUSAN RAY. **57 I. C. 685 : 1 Pat. L. T. 444.**

———S. 17—*Suit against several tenants—Corrections of Record-of-Rights—Court-fee.*

In a suit by a landlord against several sets of tenants in respect of 25 holdings for a declaration that their several lands were held under the *batai* system and were wrongly recorded as paying cash rent, the Court-fee of Rs. 10 should have been paid in respect of each of the 25 sets of tenants. 4 Pat. L.J. 297 Foll. (*Roe, J.*) LATCHMAN SAHU *v.* SHEIKH ABDUL KARIM.

51 I. C. 767 : 4 Pat. L. J. 299.

———S. 17—*'Subject' meaning of—Claims arising out of the same cause of action.*

COURT FEES ACT (VII OF 1870), S. 19.

The word 'subject' in S. 17 means cause of action, and it has no reference to the division of subjects adopted in S. 7 of the Act. Where a suit comprises several claims arising out of the same cause of action, the Court-fee should be charged on aggregate of the values of all the claims and not on the value of each claim separately 2 All. 676 : 8 Cal. 593 : 16 All. 401 Ref. (*Chapman and Atkinson, JJ.*) NAURATAN LAL *v.* WELFORD JOSEPH STEPHENSON. **50 I. C. 470 : 4 P. L. J. 195.**

———S. 17—*Alternative reliefs—Court-fee.*

S. 17 applies to cases in which two different reliefs may be applied simultaneously to the wrong done to the plff. Where alternative reliefs are sought Court fee must be paid on the relief which appears to be of the higher value. (*Roe, J.*) MUKHLAL GIR *v.* RAMDHEYAN RAI. **44 I. C. 143.**

———S. 17—*Costs—Court-fee, on.*

Where in an appeal relief is sought with regard to costs independently of the result of the main contest between the parties, Court-fees must be paid *ad valorem* on the cost decreed. (*Roe, J.*) ROWLINS *v.* LACHMI NARAIN JHA.

3 P. L. J. 443 : 4 P. L. W. 223 : 44 I. C. 50 : 1918 Pat. 264.

———S. 17—*"Distinct subjects" meaning—Claims for rent, damages and possession.*

Claim for possession and damages for use and occupation after the tenancy terminates are not distinct subjects within S. 17 as they arise out of the tenancy having come to an end. A claim for rent, however, is a distinct subject as it arises out of the contract of tenancy and can be enforced by a separate suit. (*Fox, C. J., Ormond and Twomey, JJ.*) JAMAL *v.* CYRIL BROWN.

10 Bur. L. T. 60 : 36 I. C. 883 : 8 L. B. R. 529.

———S. 17—*Single debt—Suit against debtor and guarantors—Court-fee.*

Where a creditor sues the principal debtor and several persons who have guaranteed that amount, for the full amounts to which they have guaranteed it by separate pro-notes or mortgages, the plaint is chargeable under S. 17 with the aggregate amount of fees due on amounts claimed from each and all guarantors, separately. (*Fox, C. J., Twomey and Ormond, JJ.*) THE BANK OF BENGAL *v.* MUTHIA CHETTY. **8 Bur. L. T. 217: 30 I. C. 705 : 8 L. B. R. 219.**

———Ss. 19, 8 and 19-I Sch. I, No. 11, Sch. III —*Annexures A and B.—Probate duty.*

No duty is payable in respect of a grant of probate or Letters of Administration where the value of the estate after the reductions specified in Sch. III, Annexures A and B, is less than Rs. 1,000. (*Richards, C. J. and Banerjee, J.*) MAIK IN THE GOODS OF MRS. F. E. W.

46 I. C. 865 : 40 All. 279.

———Ss. 19, 8, 19 I and 19-K—*Probate and Letters of Administration—Fee to be paid—Exemption—Gross value above and net value below one thousand*

S. 19 (viii) and No. 11 of Sch. I of the Court Fees Act exempt from liability to fees, Probate or Letters of Admn. where the amount or value of

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the property in respect of which the grant is made does not exceed one thousand rupees. This exemption, however, applies only in cases where the gross value of the property does not exceed Rs. 1,000. The fee mentioned in No. 11 of Sch. I is to be paid on the said valuation mentioned in Sch. III and is to be paid on the net value of the property. Where the gross value is above and the net value below one thousand rupees, a fee of 2 per cent. is payable on the net value. (*Stephen and Richardson, JJ.*) COLLECTOR OF MALDAH *v.* NIRVODE KAMINI DEBYA. **15 I. C. 621 : 17 C. W. N. 21.**

[See contra the next case.]

———**S. 19 (viii) Sch. I, Art. 11**—*Probate or letters of estate, whose net value is less than Rs.* 1,000—*Court-fee.*

Where the net value of an estate in respect of which probate or letters are granted, is less than Rs. 1,000, no fees are chargeable. 21 I C. 502 ; 24 I.C. 793 Fol. (*Hatnoll and Ormond, JJ.*) *In re*, CHIN ALI YAING. **7 Bur. L. T. 275 : 24 I. C. 823 : 7 L. B. R. 359.**

———**S. 19, Cl. (xvii)**—*Prisoner—Petition of appeal through pleader.*

A petition of appeal presented by a pleader on behalf of the prisoner is exempted from Court-fees. (*Batten, A. J. C.*) EMPEROR *v.* MAROTI TELI. **19 Cr. L. J. 494 : 45 I. C 158: 14 N. L. R. 77.**

———**S. 19 (xvii)**—*Petition on behalf of prisoner by counsel—If requires stamp.*

No stamp is required for an appeal or revision petition put in on behalf of a prisoner by his counsel as it is none the less a petition by the prisoner. (*Robinson, C. J.*) *In re*, COURT FEES ACT, S. 19 (xvii). **1 Rang. 510 : 25 Cr. L. J. 277 : 1924 R. 160.**

———**S. 19 (xvii)**—*Bail—Application signed by advocate—No stamp necessary.*

An application made by the Advocate of a prisoner in duress or under restraint is an application made by the prisoner himself. Consequently an application for bail by the advocate of a prisoner in jail does not require to be stamped. (*Saunders, J. C.*) JAGANATH KAHAR *v.* EMPEROR. **23 Cr. L. J. 121 : 4 U. B. R. (1921) 72 : 1922 U. B. 14.**

———**S. 19 (xx)**—*'Due by Government'—Application for refund of costs deposited for paper book.*

An application for refund of money deposited for the costs of preparing a paper book etc. is not an application for payment of money due by Government to the applicant within the meaning of S. 19 cl. (xx). On the other hand it is an application or petition presented to the High Court within the provisions of Sch. II, Art. 1 of the Court Fees Act. (*Sanderson, C. J, and Richardson, J.*) HARIDASI DEBI *v.* GOPESWAR. **27 C. W. N. 646 : 1923 Cal. 599.**

———**Ss. 19-A, 19-B, 19-C, and 19-I**—*Probate, application for—Court-fee payable.*

On an application for probate, the Court fee chargeable is to be assessed on the value of the

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estate at the time of application. Subsequent changes in value do not alter the amount of Court-fee payable. (*Gates, F. C.*) *In the Estate of* A. C. MACMILLAN. **14 I. C. 804 : 5 Bur. L. T. 39.**

———**S. 19 C and 19-I**—*Succession—Probate duty—Full fees chargeable—Second grant—No further fee—English Law—Intention of legislature—Prob. and Admn. Act, S* 86

Where a full fee chargeable under the Court Fees Act on the probate at the time it was granted has been paid, no further fee shall be chargeable when the second grant is made in respect of that property as comprised in that estate. The law is in accordance with English Law in this respect ; the full fee chargeable must be determined with reference to point of time when the second grant is sought. When an executor to whom the probate is granted dies leaving a part of the testator's estate unadministered and a new representative is appointed for completing the administration, there is no new succession and no new devolution of the estate. Therefore no fresh succession duty should be levied 3 Cal. 733 Foll. An order refusing to issue probate till a sum of money not legitimately leviable is paid as succession duty, refuses in effect the application for probate and is, therefore, appealable under S. 86 of the Pro. and Admn. Act. (*Mookerjee and Newbould, JJ.*) SWARNAMOYI DEBI *v.* THE SECRETARY OF STATE **48 Cal. 625 : 20 C. W. N. 472 : 30 I. C. 394 : 22 C. L. J. 370.**

———**S. 19-C** — *Probate — Full Court fee—Death of beneficiary—Application for probate—Court-fee.*

An applicant for probate of his wife's will is bound to pay the full Court-fees due even though the bulk of the property dealt with in the will was included in the wife's father's will of which probate had been granted on full payment of Court fees. (*Miller and Jwala Prasad, JJ.*) BHAGWATI SARAN SINGH *v.* THE SECRETARY OF STATE FOR INDIA. **5 Pat. L. J. 36 : 54 I. C. 703 : 1920 Pat. 81.**

———**S. 19-D**—*Joint family—Letters of Administration—Application by son.*

A son applying for letters of Administration limited to joint family property left by his father, need not pay any Court-fee. (*Shah, A. C. J., Crump and Coyajee, JJ.*) KESHAVLAL PUNJALAL SHETH *v.* COLLECTOR OF AHMEDABAD. **25 Bom. L. R. 1240 : 48 Bom. 75 : 1924 Bom. 228 (F. B.)**

———**S.-19 D**—*Property belonging to joint Hindu family—Probate—Exemption.*

A will purporting to dispose of properties held jointly between the testator and his minor son as members of a joint family under Hindu Law is not exempt from probate duty under S. 19 (d) and annexure B of Sch. III on an application for probate. The whole of the property was liable to pay probate duty inasmuch as the parties claiming under the will could not go behind its terms or claim any exemption whatsoever upon allegations inconsistent with provisions. **29 Bom. 161.**

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Dist. (*Beaman and Hayward, JJ.*) KASHI NATH *v.* GOURABAI. **39 Bom. 245 : 28 I. C. 473 : 17 Bom. L. R. 169.**

——S. 19-D—*Residue devised to son—Property passing by survivorship.*

In obtaining probate on a will, the legatees must pay full duty leviable on the property comprised in the will. No exemption is allowed to persons capable of inheriting in their natural rights. A Hindu left the residue of his property to his son. The executors applying for probate claimed exemption from Court-fees on the residue on the ground that the son was entitled to the property by survivorship. *Held*, that they were not entitled to the exemption. 23 Cal. 980. Not foll. 39 Bom. 245, Foll. 33 Mad. 93 Ref. (*Coutts, J.*) *In the Estate of* RAM KUMAR PRASAD.

5 Pat. L. J. 510 : 58 I. C. 1007 : 1 P. L. T. 710.

——S. 19-E—*Penalty—Suit for recovery, if maintainable.*

A suit lies in the Civil Court by the Secretary of State for recovery of a penalty lawfully imposed under S. 19-E. S. 19-E contemplates an application on the part of a person who has taken out probate and produces the same as duly stamped. Where the estimated value of the estate is less than what the value has afterwards been proved to be, then only a Revenue Court can impose penalty. Where there is no determination of value by the Probate Court, S. 19-E has no application. (*Mookerjee and Newbould, JJ.*) NIGUNJARANI *v.* SECRETARY OF STATE.

43 Cal. 230 . 20 C. W. N. 504 : 31 I. C. 460 : 22 C. L. J. 375.

——S. 19-H—*Proceeding under—Court cannot award costs.*

A proceeding under S. 19-H merely decides a revenue dispute between the Collector and the holder of the probate. The Court has no power to award costs in a proceeding under S. 19-H of the Act. (*Chatterjee and Cuming, JJ.*) HRIDAY MOHINI DASI *v.* SECRETARY OF STATE.

50 Cal. 239 : 1923 Cal. 406.

——S. 19-H (4)—*Letters of Administration—Court-fee—Proceedings to amend valuation—Date of exhibition of inventory—Probate and Administration Act*, S. 98.

The six months within which the Collector may move under S 19-H (4) to obtain an amended valuation of the estate in respect of which Letters of Administration have been granted, runs from the date of the lodging of an inventory as required by S. 98 of the Probate and Administration Act and no inventory satisfies the statutory requirement which does not contain a "full and true estimate of all the property in possession." The period of six moths does not begin to run from a period when a certain document which might be classed or denominated an inventory satisfied a particular District Judge. (*Lord Shaw.*) RAJ KUMARI BHUBANESWARI KUMARI *v.* COLLECTOR OF GAYA. **41 Cal. 556 : 18 C. W. N. 153 : 19 C. L. J. 136 : 26 M L. J. 56 : 15 M. L. T. 87 : 12 A. L. J. 69 : 16 Bom. L. R. 95 : 40 I. A. 236 : 21 I. C. 975 : (1914) M. W. N. 13 (P. C.)**

COURT FEES ACT (VII OF 1870), S. 31.

——S. 19-H (4)—*Probate—Grant—Delay of Collector.*

The grant of probate to petitioner cannot be delayed because the Collector has not made the motion under S. 19-H 4 of the Court-Fees Act. (*Beachcroft and Walmsley, JJ.*) *In re*, SRIMATI PRASANNA MOYEE BASU **40 I. C. 576.**

——S. 19-I and 19 C—*Succession—Probate—Fees chargeable—Second grant—No further fee.*

Where the full fee chargeable under the Act on a probate at the time it was granted has been paid, no further fee shall be chargeable when the second grant is made in respect of that property as comprised in that estate. The law is in accordance with English Law in this respect. When an executor to whom the probate is granted dies leaving a part of the testator's estate unadministered and a new representative is appointed for completing the administration there is no new succession and no new devolution of the estate. Therefore no fresh succession duty should be levied. 6 B. L. R. App. 137 : 3 Cal. 733 Foll. (*Mookerjee and Newbould, JJ.*) SWARNAMOYI DEBI *v.* SECRETARY OF STATE.

43 Cal. 625 : 20 C. W. N. 472 : 30 I. C. 394 : 22 C. L. J. 370.

——S. 19-J—*Scope.*

Where S. 19-J is properly applicable, the petitioner is entirely in the hands of the chief controlling Revenue authority who is at liberty to refuse to stamp probate till the penalty has been paid. Therefore the question of recovery by summary process or by suit, of the penalty imposed under S. 19 cannot arise. (*Mookerjee and Newbould, JJ.*) NIKUNJARANI *v.* THE SECRETARY OF STATE FOR INDIA. **43 Cal. 230 : 20 C. W. N. 504 : 31 I. C 460 : 22 C. L. J. 375.**

——S. 28—*Revenue Officer has power to direct payment of Court-fee.*

A Revenue Officer has the powers under Section 28 of the Court Fees Act to direct the payment of Court-fees in revision when no objection has been raised as to the same in the Court of First Instance. (*Chatterjee and Mullick, JJ.*) HARIHAR PROSAD *v.* ISWARDHARI SINGH.

30 I. C. 862 (2) : 22 C. L. J. 57.

——Ss. 30 and 28—*Plaint return of, under O. 7, R. 10, C. P. Code—Credit to be given for old stamp.*

Where a plaint is returned by one Court for presentation to another Court, the latter Court should give credit for the old stamp on the plaint. 8 Bom. 313, Foll : 8 Bom. 380 Dist. (*White, C. J., Munro and Sankaran Nair, JJ.*) VISHWESWAR SARMAN *v.* DR. T. M. NAIR.

35 Mad. 567 : 21 M L. J. 533 : 10 I. C. 201 : 10 M. L T. 29.

——S. 31—*Court-fee—Direction to pay complainant—Revision.*

The commission of a non-cognisable offence gives the right to the complainant to receive the charges of court-fees If under S. 31 of the Court Fees Act the order is not proper it can be corrected in appeal or revision. (*Stuart, J.*) MINGAN *v.* EMPEROR. **L. R 3 A. 187 (Cr.) : 1923 All. 86.**

COURT FEES ACT (VII OF 1870), S. 31.

——S. 31—*Cognizable case—Costs.*

In a cognisable case it is inequitable to order the accused to pay the costs of the complaint. (*May Oung, J.*) MAUN SAN MYIN *v.* EMPEROR.

2 Bur. L. J. 37 : 1923 Rang. 245.

——Sch I, Art. 1.

See also Sch. II, Art. 17 (iii) and (vi).

——Sch. I, Art. 1—*Gross—Objections—Sale deed—Suit to set aside—No legal necessity as to part.*

In a suit for setting aside a sale deed it was found by the Court that a part of the sale amount (Rs. 1,001) was not covered by legal necessity, and the Court dismissed the suit. An appeal was preferred against this dismissal and the respondents filed their cross-objections questioning the finding that part of the sale-amount (Rs. 1,001) was not covered by legal necessity. On this cross-objection *ad valorem* Court-fee on that amount must be paid. (*Piggott, J.*) ISHDAT TIWARI *v.* TAMESHWARI TIWARI.

45 All. 537 : 1924 All. 175.

——Sch. I, Art. 1—*Set off—Court-fee must be paid* ad valorem.

Where the defendant claims right of set off, he has to pay *ad valorem* court-fee on the same. (*Piggott and Walsh, JJ.*) CHAKKAN LAL *v.* KANHAIYA LAL.

20 A. L. J. 1005 : 90. & A. L. R. 146 : 45 A. 218 : L. R. 4 A. 40 : 1923 A. 118.

——Sch. I, Art. 1—*Application for personal decree—Order on—Appeal—Court to be paid* ad valorem.

A mortgage decree did not provide for the balance remaining due even after the sale of the properties and on an application being put in under O 34, R. 6, a pers.nal decree was passed. *Held*, on an appeal for such an order *ad valorem* court-fees must be paid and not Rs. 2 on the basis that it was a matter in execution. (*Walsh and Ryves, JJ.*) BINDHIACHAL RAI *v.* SITA RAM MISIR.

1924 A. 292.

——Sch. I, Art. 1—*Two appeals against one decree.*

Where a plaintiff sued for sale upon a mortgage and the first Court gave him only a simple money decree, and both parties preferred appeals against that decree, but that of plff. was dismissed while that of the defendant's was allowed the result being that the suit was dismissed *in toto* and the plaintiff preferred two appeals against these two decrees, each being valued at the full amount of the claim, *held*, he was liable to pay full Court-fee on each of the appeals and the two appeals cannot be consolidated. (*Tudball, J.*) SHIB DAYAL *v.* MEHARBAN.

43 All. 56 : 2 U. P. L. R. All. 295 : 58 I. C. 230 : 18 A. L. J. 894.

——Sch. I, Art. 1—*Decree—Refusal to make—O. 34, R. 6, C. P. Code—Appeal.*

An order refusing to make a decree under O. 34, R. 6, of the C. P. Code, must be regarded as a 'decree' within S. 2 (2) *advalorem* Court-fees must be paid on the memorandum of appeal against the orders. (*Richard, C. J. and Banerjee, J.*) ILTIFAT HUSA *v.* ALIMAN NISSA.

40 All. 551 : 47 I. C. 562 : 16 A. L. J. 437.

COURT FEES ACT (VII OF 1870), Sch. I, Art. 1,

——Sch. I, Art. 1—*C. P. C., S. 2, O. 34, R. 6.*

Order refusing to make a decree under R. 6 is a decree within S. 2, C. P. C., and an appeal from it must bear *ad valorem* Court-fees calculated on the subject-matter of the appeal. (*Richards, C.J. and Banerjee, J.*) MUHAMMAD ILTIFAT HUSSAIN *v.* ALLIMUNNISSA.

16 A. L. J. 438 : 47 I. C. 561 : 40 All. 553.

——Sch, I, Art. 1—*Cross objections*—ad valorem *fee.*

Under Art. 1, of Sch. I a cross objector must pay an *ad valorem* fee according to the value or amount of the subject-matter in dispute. (*Tudball, J.*) LAKHAN SINGH *v.* RAM KISHEN DAS.

40 All. 93 : 43 I. C. 179 : 15 A. L. J. 886.

——Sch. I, Art. 1—*Suit for possession of property—Plea that defts. dower debt must be paid—Court-fee for appeal by deft.*

Where the deft.'s plea in a suit for possession that the plff. cannot get possession without payment of Rs. 80,000 for dower debt was rejected by the Lower Court and the suit decreed and the deft. appealed. *Held*, that deft. was not bound to pay any court-fee on the dower amount and the Court could grant a decree to plffs. conditional on payment of dower debt to deft. (*Tudball, J.*) HAIDARI BEGAM *v.* GULZAR BANO.

36 All. 322 : 25 I. C. 395 : 12 A. L. J. 481.

——Sch. I, Art. 1—*Cross objection in appeal—Court-fees chargeable — Future interest, if chargeable.*

Where the amount due could be ascertained from the judgment and decree, that should be the value of the appeal or cross objection and future interest need not be taken into account. (*Banerjee, Tudball and Piggott, JJ.*) RAGHUBIR PRASAD *v.* SHANKER BUX SINGH.

21 I. C. 723 : 36 All. 40 : 11 A. L. J. 1016.

——Sch. I, Art. 1, Sch. II, Art. 1 (d) and 11—*Cross-objection on question of costs.*

A memo. of cross-objections filed in the High Court on the question of costs only does not fall under Art 1, Sch. I, or Art. 11, Sch. II of the Act but may be treated as a petition under Art. 1 (d) of Sch. II of the Act and a Court-fee of Rs. 2 is leviable thereon. (*Chatterjee, J.*) KAMAL KUMARI DEBI *v.* EMADUDDIN.

64 I. C. 606 : 25 C. W. N. 934.

——Sch. I, Art. 1—*Cross objections—Court-fee on.*

A memorandum of cross objections must bear Court-fees *ad valorem*. A respondent who files a memo. of objections cannot claim to have Court-fees reduced simply because the appellant has paid more than what he should have paid. (*Mookerjee and Beachcroft, JJ.*) SECRETARY OF STATE *v.* DIGAMBAR NANDA.

46 Cal. 160 : 45 I. C. 939 : 27 C. L. J. 443.

COURT FEES ACT (VII OF 1870), Sch. I, Art. 1.

——— **Sch. I, Art. 1**—*Mortgage—Redemption suit—Valuation.*

Art. 1 of Sch. I applies to appeal from decrees in redemption suits and not S. 7 (ix) of the Court Fees Act where the redemption is sought for a particular amount and the decree directs payment of a different sum. (*Scott Smith and Wilberforce, JJ.*) LOKH RAM *v.* RAMJI DAS. **3 Lah. L. J. 370 : 1 Lah. 234.**

——— **Sch. I, Art. 1**—*Appeal—Dissolution of partnership.*

Ten rupees stamp is sufficient for an appeal in a preliminary decree for dissolution of partnership dealing with certain items disallowed, as such disallowance is only incidental to the main relief. (*Rattigan, C. J. and Abdul-Raoof, J.*) RAM SINGH *v.* RAM CHAND. **6 P. W. R. 1920: 1 Lah. 6: 57 I. C. 185: 19 P. L. R. 1920.**

——— **Sch. I, Art. 1**—*Single decree—Appeals—Several defts.—Separate appeals—Full Court-fee.*

When several defts. who could have preferred a single appeal prefer separate appeals against a decree, each must pay full Court-fee on his appeal. (*Rattigan, C. J. and Shah Din, J.*) PANNA LAL *v* MARWAR BANK, LTD. **48 I. C. 424: 91 P. R. 1918.**

——— **Sch. I, Art. 1, S. 7 (1)**—*Suit for money due on adjustment of accounts*—Ad valorem *Court-fee.*

Art. 1 of Sch. I applies only to those cases which are not otherwise provided for, under the Act. In a suit for a certain amount as damages, deducting a certain sum as the price of goods due to the deft. from plff., *ad valorem* Court-fee is payable on the amount actually claimed. (*Shadi Lal and Le Rossignol, JJ.*) QYAMUDDIN *v.* THE DELHI FLOUR MILLS CO. **61 P. R. 1919 : 47 I. C. 992 : 175 P. W. R. 1918.**

——— **Sch. I, Art. 1**—*Appeal to remove charge.*

An appeal, seeking to remove a charge created on property by a decree should bear *ad valorem* Court-fee on the amount of the charge. (*Shah Din and Le Rossignol, JJ.*) THARU MAL *v.* CHANDU RAM. **11 P. R. 1916 : 33 I. C. 138 : 59 P. W. R. 1916.**

——— **Sch. I, Art. 1**—*Valuation of appeal.*

When the subject-matter of the suit is also the subject-matter of the appeal the amount or the value of the appeal is the value of the property sought to be recovered. (*Johnstone, C. J. and Leslie Jones, J.*) SOHAN LAL *v.* SARDAR KHAN. **25 P. R. 1916 : 32 I. C. 121 : 16 P. W. R. 1916.**

——— **Sch. I, Art. 1**—*Pre-emption appeal—Measure of fees.*

In a pre-emption appeal in which the appellant asks the Court to reduce by a certain sum the amount ordered by the first Court, the difference between the amount ordered to be paid by first Court and the amount admitted by him is the subject-matter of his appeal on which he should pay *ad valorem* fee specified in Art. 1, Sch. I. (*Reid, C. J., Robertson and Rattigan, JJ.*) WARYAM SINGH *v.* MAHTAB SINGH. **76 P. R. 1913: 240 P. L. R. 1913: 19 I. C. 961: 141 P. W. R. 1913.**

COURT FEES ACT (VII OF 1870), Sch. I, Art. 1.

——— **Sch. I, Art. 1**—*Second appeal—Valuation.*

The court-fee payable on a memorandum of further appeal in a redemption suit by the mortgagee against the amount fixed by the Appellate Court as the redemption amount is to be calculated on the difference between the amount claimed by the mortgagee in appeal and the amount fixed by the Appellate Court. 29 Mad. 367; 27 A. 447 Foll. ; 23 P. R. 1909 Dist. (*Reid, C. J.*) BANWARI LAL *v.* NATHU SHAH. **5 P. R 1911 : 48 P. L.R. 1911 : 9 I. C. 676 : 59 P. W. R. 1911.**

——— **Sch. I, Art. 1**—*Appeal from final decree—Subsequent mesne profits—Court-fee.*

An appeal from a final decree under O. 20, R. 12 (2), of the Civil Procedure Code, in respect of subsequent mesne profits is chargeable with *ad valorem* Court fee under Art. 1 of Sch. I to the Act. (*Ayling, C. J. and Odgers, J.*) BALRAMA NAIDU *v.* SANGAN NAIDU. **14 L. W. 730: 30 M. L. T. 83: 42 M L. J. 184: 45 M. 280 : 1923 M. 19.**

——— **Sch. I, Art. 1**—*Cross objection.*

Cross-objections must bear a Court-fee calculated on the amount or value of the subject-matter in dispute. (*Kanhaiya Lal, J. C and Lyle, A. J. C.*) SRI RAJEO LOCHAN MAHARAJ *v.* MAHANT RAM MANOHAR PRASAD. **25 O. C. 275: 1923 Oudh 44 (1).**

——— **Sch. I, Art. 1**—*Redemption decree—Appeal—Claim of larger amount*—Ad valorem *fee is payable on excess.*

In an appeal against a redemption decree on the ground that more is due, *ad valorem* Court-fee is payable on the excess amount claimed. (*Wazir Hasan, A. J. C.*) SANT BAKHSH *v.* DILDAR HUSAIN. **74 I. C. 88 (1) : 1924 Oudh 170.**

——— **Sch. I, Art. 1**—*Appeal in foreclosure suit—Court-fee.*

If a suit for foreclosure or redemption is dismissed then for the purpose of the memorandum of appeal Court-fee should be calculated in accordance with the provisions. *Daniels and Lyle, JJ.*) SANGAT BAKHSH SINGH *v.* RAWAT DIJDEO BAKHSH SINGH. **25 O. C. 30 . 1922 Oudh 82.**

——— **Sch. I, Art. 1**—*Mortgage decree - Appeal by defendants—Exoneration of items—Valuation.*

Where a defendant in a mortgage suit appeals against the decree claiming exoneration of the properties in his possession, the appellant is bound to pay *ad valorem* Court-fee on the memo. of appeal. (*Lindsay, J. C.*) SHEORAJA *v* DEBI DIN. **48 I C. 535 : 5 O. L. J. 663.**

——— **Sch. I, Art. 1 and Sch. II, Art. 17**—*Cross objections.*

In an appeal preferred against a decree refusing to grant a declaration, the proper Court-fee is Rs. 10 under Art, 17 of the Act. But if the party fails to prefer the appeal in time but files a cross-objection in an appeal by his adversary he should pay *ad valorem* Court-fees and not a fee of Rs. 10. (*Roe, J.*) DAROGA RANT *v.* PAREMA KUER. **3 P. L. J. 197: 45 I. C. 568: 4 P. L. W. 368.**

——— **Sch. I, Art. 1**—*Mortgage suit—Appeal—Valuation—Future interest—Court-fee.*

COURT FEES ACT (VII OF 1870), Sch. I. Art. 1.

In the case of appeals or cross-objections in suits for redemption or for foreclosure, whether a decree for interest has been made in them or not, where Court-fee declared by the Court due at the date of the decree can be ascertained by reference to the judgment and the decree, it is that amount at which the appeal or cross-objection should be valued and future interest should not be taken into account. In all original appeals the Court-fee should be levied on the sum due at the date of original decree and in all second appeals, it should be levied on the sum due at the date of the decree of the Lower Appellate Court. 36 All. 10; 17 Bom. 41; 29 Mad 367 Ref. (*Roe, J.*) ROWLINS *v* LACHMI NARAIN JHA **3 P. L. J. 443: 4 P. L. W. 223: 44 I. C. 50: 1918 Pat. 264.**

———**Sch. I, Art. 1 and Sch. II, Art. 17 (6)**—*Partition—Suit* Ad valorem *on share claimed must be paid.*

In partition suits whether the plaintiff is in joint possession or out of possession the plaint or memorandum of appeal must bear *ad valorem* Court-fees on the value of his share. Art. 17 (6) of Schedule will not apply. (*Pipon, J. C.*) MURLI MAL *v.* VAISHNO DITTA. **73 I. C. 788.**

———**Sch. I, Art. 1 and Sch. II, Art. 11**—*Order under C. P. Code* (1908), *O. 21. R. 50 (2).*

The order under O 21, R. 50 (2), C. P. Code. 1908, having the force of a decree, the Court-fee payable on the appeal from such decree is regulated by Art. 1 Sch I, of the Court Fees Act and not by Sch. II, Art. 11. (*Ormond and Twomey, JJ*) VALLIAPPA CHETTY *v.* RANGASWAMY NAICKER. **10 Bur. L. T. 42 : 35 I. C. 429 : 8 L. B. R. 300**

———**Sch. I, Art. 1**— *Partnership — Suit for accounts—Counter-claim.*

The defendant's claim in a suit for accounts and recovery of moneys due on a dissolved partnership for a decree on accounts is not a counterclaim and no Court-fee is leviable thereon until the amount has been ascertained. In a suit for partnership accounts, the Court will not drive the defendant to a fresh suit if the balance turns out in his favour. A set-off is a cross debt on which a separate action may be had. (*Boyd, A. J. C.*) JESSARAM DHANURAM *v.* ISARDASS. **27 I. C. 320 : 8 S. L. R. 124**

———**Sch. I, Art. 1** — *Suit for dissolution of partnership—Defendant's claim for accounts — Court-fee.*

In a suit for accounts and to recover moneys of a dissolved partnership, the defendant's claim for a decree on accounts is not a counter-claim. No Court-fee need be paid thereon until the amount has been ascertained. (*Boyd, A. J. C.*) FATEH MAHOMED HAJI SULAIMAN *v.* RAMZAN KHAN. **27 I. C. 316 : 8 S. L. R. 122.**

———**Sch. I, Arts. 4 and 5** —*Review— Application filed on 90th day—Previous day—Sunday.*

Where an application for review of a judgment is filed on the ninetieth day, the eighty-ninth day being Sunday, it must be stamped with the full fee payable on the plaint or the memorandum of appeal. (*Mookerjee and Teunon, JJ.*) SAYERA BIBI *v.* BHUTNATH HALDER. **15 I. C. 455 : 15 C. L. J. 505.**

COURT FEES ACT (VII OF 1870), Sch. I, Art. 11.

———**Sch I, Art. 5**—*Application for review—Court-fee payable on.*

The proper fee payable on an application for review of judgment, if presented before the 90th day from the date of decree, is one-half of the fee leviable on the plaint or memorandum of appeal and not on the value of the subject-matter in respect of which relief was sought by the application for review. (*Daniels and Lyle, A.J.C.*) NAGESHAR SAHAI *v.* SHIAM BAHADUR. **26 O. C. 33 : 1924 Oudh 108.**

———**Sch. I, Art. 8**—*General power of Attorney—Copy produced in Court.*

A fiscal enactment such as the Court Fees Act must be strictly construed. A copy of a general power of Attorney produced in Court for verification does not require a Court-fee stamp of annas 8 under the Court Fees Act, Sch. I, Art. 8. Art. 8 of Sch, I of the Act is intended to authorize the levy of annas 8 in the case contemplated uuder O. 13, R. 9 of the C. P. Code. (*Scott-Smith and Leslie Jones, JJ.*) RUSTOMJI *v.* KALA SINGH. **136 P. W. R. 1917 : 43 I. C. 383 : 9 P. R. 1918.**

———**Sch. I, Art. 11.**

See also COURT FEES ACT, S. 19 (viii).

———**Sch. I. Art. 11**—*"Amount or value of the property"—Net value.*

For purposes of Art, 11 the expression "the amount or value of the property" signifies the net value obtained by the deduction of the debt and expenses from the gross value, 17 C. W. N. 21, Diss. (*Mookerjee, J.*) QUININBOROUGH. *In the goods of.* **22 C. L. J 160 : 30 I. C. 958 : 20 C. W. N. 591.**

———**Sch. I, Art. 11**—*Probate, application for—Court-fee to be paid, calculation of.*

To calculate the duty payable on a probate application in respect of the estate of the deceased, the net value of the estate obtained after deducting the debt from the gross value of the estate should be ascertained and the Court-fee should be paid on the ascertained amount. (*Mookerjee, J.*) HARRIETT TEVIOT KERR, *In the goods of.* **18 C. W. N. 121 : 21 I. C. 502 : 18 C. L. J. 308.**

———**Sch I, Art. 11**—*Order in probate proceedings—Appeal against—Fee on value of estate.*

The Court-fee payable on a memorandum of appeal against an order in probate proceedings is governed by Art. 1, Sch. II. Therefore an *ad valorem* duty on the value of the estate need not be levied: 16 Bom. 408 : 23 Cal 723, Foll. (*Munro and Sankaran Nair, JJ.*) RODRIGUES *v.* MATHIAS. **(1911) 1 M. W. N. 237 : 9 I. C. 538 : 9 M. L. T. 314 : 21 M. L. J. 481.**

———**Sch. I, Art. 11**—*Probate— Property situate in two districts.*

On the death of a testator in March, 1916, his executor applied for probate to the Dist. Judge of one of the districts in which the testator's property was situate. He did not file an affidavit as in Sch. III, Court Fees Act. The Dist. Judge granted probate in respect of property situate in both districts. On 16—8—19 he applied to the High Court of another district in which lay some property of the testator for Letters of Administration

COURT FEES ACT (VII OF 1870), Sch. I, Art. 11.

The High Court granted letters and proceeded to determine the value of the property for purposes of Court-fees. *Held*, that the value of the property must be assessed to the date, on which the first affidavit on 11—4—16 was filed and that on deducting the duty already paid under Art. 11, Court Fees should be paid on the value of the entire estate situate in both districts. (*Das and Ross JJ.*) DEPUTY COMMISSIONER OF SINGHBHUM *v.* JAGADISH CHANDRA DEO
2 Pat L. T. 683 : 62 I. C. 513 : 6 P. L. J. 411.

——— **Sch. I, Art. 11**--*Letters of Administration to widow—Buddhist Law.*

Court-fees on Letters of Administrati n granted to a Buddhist Burmese widow are to be paid only on half the estate of her husband for it is that alone that she takes as administratrix. The other half she takes as heir. (*Young, J.*) U PO KHIM, *In the Estate of.* **50 I. C. 545 : 11 Bur. L. T. 258.**

——— **Sch. I, Art. 11 (iii)**—*Form— Meaning of "Value".*

"Value," in Sch. I, Art. 11, means net value. (*Hartnoll, C. J. and Ormond, J.*) CATHERINE THADDEUS *In re.* **7 Bur. L. T. 272 : 24 I. C. 793 : 7 L B. R. 356.**

——— **Sch. I. Art. 12**--*Court-fees, whether necessary on succession certificate, when paid by prior applicant—Succession Certificate Act, S 14.*

Court-fee should be paid by a Hindu daughter on an application for certificate in succession to mother who succeeded to her husband's properties th ough duty was paid by the latter on her application. (*Fletcher and Teunon, JJ.*) SA AJBASHINI DEBI, *In re.* **36 I. C. 125 : 20 C. W. N. 1125.**

——— **Sch. I, Art. 13**—*Application for revision against order rejecting objection to award.*

An application for revision against an order refusing to set aside an award is really one against the decree passed in accordance therewith and is chargeable with *ad valorem* Court fee under Sch, I, Art. 13. (*Johnstone, J.*) NARPAT RAI *v.* DEVI DAS. **13 P. W. R. 1911 : 9 I. C. 388 : 4 P. L. R. 1911.**

——— **Sch I, Art. 17**—*Charge held enforceable against portion of property—Appeal that charge enforceable against whole property — Court fee must be paid on value of property in dispute.*

Where in a suit for the enforcement of a mort gage or charge against certain property, the trial Court held the charge to be enforceable only against a portion of the property and where in appeal the relief sought was that the charge should be declared against the whole property, it was held, that an *ad valorem* Court fee on the value of the property in dispute was payable. (*Daniels, J. C.*) SAHEB ALI *v.* MAHOMED ZAHIB.
65 I. C. 114: 24 O. C. 295.

——— **Sch. II, Art. 1**—*Appeal against order in probate proceedings.*

The Court-fee payable on a memorandum of appeal against an order in probate proceedings is governed by Art. 1, Sch. II Therefore an *ad valorem* duty on the value of the estate need not be levied. 16 Bom. 408: 23 Cal, 723 Foll. (*Munro and Sankaran Nair, JJ.*) RODRIGUES *v.* MATHIAS. **9 M. L. T. 314 : 21 M. L J. 481 : 9 I. C. 538 : (1911) 1 M. W. N. 237.**

COURT FEES ACT (VII OF 1870), Sch. II Art. 6.

——— **Sch. II, Art. 2**—*Application for mesne profits—Appeal against order of Court-fee payable.*

An application under S. 144, C. P. Code, for mesne profits by way of compensation relates to the execution, discharge or satisfaction of the decree and in an appeal from an order dismissing the application, *ad valorem* Court-fees need not be paid but only a sum of 8 annas. (*Drake-Brockman, J. C.*) GABBA *v.* KANCHHEDILAL,
18 N. L. R. 15 : 1922 Nag. 62.

——— **Sch. II, Arts. 5 and 17 (iii)**—*Declaration of occupancy right—Memo. of appeal—Court fee.*

In a suit to establish or disprove a right of occupancy, the plaint or memorandum of appeal should bear a Court fee of eight annas as provided in Art. 5 of Sch. II, S. 17 (iii) of the Act, does not apply to such a suit. (*Tudball, J.*) RATAN SINGH *v.* KHEM KARAN. **40 All 358 : 44 I. C. 608 : 16 A. L. J. 167.**

——— **Sch. II, Art. 6**—*Surety bond—Duty payable.*

A security bond filed by a claimant in a claim case, being an instrument of obligation given in pursuance of an order of Court is governed by Sch. II, Art. 6, of the Court Fees Act. (*Newbould and Panton, JJ.*) SARBO MUSALMANI *v.* SAFAR MANDAL. **49 Cal. 997 : 1923 Cal. 269 (2).**

——— **Sch. II, Art. 6**--*Stay of execution--Security bond—Court-fee—Non-judicial stamp—Stamp Act, Sch. I, Art. 15.*

Security bonds given in pursuance of an order of the Court for stay of execution must be written on paper properly stamped under the Stamp Act and not on a plain paper bearing a Court-fee stamp of annas 8 only, as they are not made by order of the Court within Art. 6 of Sch II of the Court-Fees Act. (*Holmwood and Tuenon, JJ.*) DWARKANATH DEY *v.* SAILAJA KANTA MALLIK.
43 I. C. 376 : 21 C. W. N. 1150.

——— **Sch. II, Art. 6**—*Security bond executed by Receiver to Court—Stamp Act, S. 2 (5) and Art. 40.*

Where a Receiver executes a security bond to the Court binding himself and his heirs and as security thereof pledging immoveable property worth Rs. 200, the bond must be stamped as a bond under the Court-Fees Act and under Art. 40 of Sch. I of the Stamp Act as it came within the definition of a mortgage in S. 2 (5) of the Stamp Act. (*Wallis, C.J., Oldfield and Seshagiri Aiyar, JJ.*) AMIRTHAMMA *v.* RAMALINGA GOUNDEN.
43 Mad. 363 : 38 M. L. J. 503 : 12 L. W. 537 : 57 I. C. 184 : 1920 M. W. N. 245.

——— **Sch. II Art. 6**—*Security bond for production of attached moveable property—Stamp Act, Sch. I, Arts. 15 and 57.*

A security bond for the production of attached live stock given in accordance with the rules framed under S. 269, C. P. C. (1882), is a bond

COURT FEES ACT (VII OF 1870), Sch. II Art. 10

given in pursuance of an order made by a Court within Art. 6 and the stamp leviable on such a bond is under the latter Act, and not under Arts. 15 and 57 of the Stamp Act. (*White, C. J., Munro and Sankaran Nair, JJ.*) REFERENCE UNDER STAMP ACT, *In re.* **37 Mad. 17 : 20 I. C. 775 : 24 M.L.J. 637.**

——Sch. II, Art. 10—*Power not in favour of pleader.*

A power of attorney not executed in favour of a person who is not a certified mukhtear or pleader is not governed by Art. 10. (*Richards, Griffin and Tudball, JJ.*) PERMANAND *v.* SAT PERSHAD, **33 A. 487 : 9 I. C. 617 : 8 A. L. J 878.**

——Sch II, Art. 10—*Power of attorney—Stamp duty leviable—Attorney not a legal practitioner—Stamp Act, Sch. I, Art. 48.*

A power of attorney empowering a person who is neither a Vakil of a Court nor a certified *mukhtear* to represent another in a Civil Court is governed not by Art. 48 of the Stamp Act but the Art. 10 of the Court Fees Act, (*Reid, C. J. Kensington and Chevis, JJ.*) GANPAT *v.* PREM SINGH. **108 P. W. R. 1912 : 15 I C 122 : 202 P. L. R. 1912 (F. B.),**

——Sch. II, Art. 11 and Sch I, Art. I—*Final decree in mortgage suit—Appeal—Court-fees.*

Ad valorem Court-fee is required for an appeal from a final decree passed under O. 34, R. 5 C.P. C. (*Macleod, C. J.*) JANKI BAI RAM DAYAL *v.* CHIMNA SADASHIV VANI. **57 I. C. 579 : 22 Bom. L. R 811.**

——Sch. II, Art. 11—*Restitution proceedings Appeal—Court-fee.*

Proceedings in restitution are proceedings in execution and the Court-fee payable on an appeal therefrom is under Sch. II, Art. 11 of the Court Fees Act (*Oldfield, J.*) SUDALAI MUTHU PILLAI *v.* SUDALAI MUTHU PILLAI. **17 L. W. 623 : (1922) M. W. N. 831 : 1923 M. 3 70.**

——Sch II, Art. 11—*Scope—Order in probate proceedings.*

An order in probate proceedings has the force of a decree and so Art. 2 is not applicable. (*Munro and Sankaran Nair, JJ.*) RODRIGUES *v.* MATHIAS. **9 M. L. T. 314 : 21 M. L. J. 481 : 9 I. C. 538 : (1911) 1 M. W. N. 237.**

——Sch. II, Art. 11—*Appeal—Order rejecting application for ascertaining mesne profits*—Ad valorem *fee.*

A memorandum of appeal from an order dismissing an application for the ascertainment of mesne profits must be stamped with an *ad valorem* stamp on the amount claimed. (*Chamier, C. J. and Jwala Prasad, J.*) NARAIN PRASAD *v.* KAMESHWAR PRASAD SINGH. **43 I. C. 489 : 3 P. L. J. 101.**

——Sch. II. Art. 11—*Order under O. 21, R. 50 (2).*

As the order under O. 21, R. 50 (2), C. P. Code, 1908, has the force of a decree, the Court-fee payable on the appeal from such decree is regulated by Art. I, Sch. I of the Court-Fees Act and

COURT FEES ACT (VII OF 1877), Sch. II Art. 17.

not by Sch. II. Art. 11. (*Ormond and Twomey, JJ.*) VALLIAPPA CHETTY *v.* RANGASWAMY NAICKER. **8 L. B. R. 300 : 35 I. C. 429 : 10 Bur. L. T. 42.**

——Sch. II, Art. 12—*Caveat—Probate proceedings--Objections by persons to whom citations are issued if must be stamped as caveat*

A petition, by which a party upon whom citation has been issued, opposes the grant of probate is not a caveat and need not be stamped as such. (*Teunon and Chaudhuri, JJ.*) BHORATARINI DEBI *v.* HARI CHARAN. **36 I. C. 38 : 20 C.W.N. 787.**

——Sch. II, Art. 17—*Appeal—Court-fee—Money decree against one defendant— Appeal with regard to the liability of other defendants.*

Where a plaintiff who obtained a decree for the full amount sued for against one of the defts. appealed with a view to make the other defendants also liable, *held* he was bound to pay *advalorem* Court-fee on the amount for which the other defendants were sought to be made liable. 13 M. 508 foll. (*Macleod, C. J. and Coyajee, J.*) ANNA NARAYAN PAVGI *v.* MADHYAMA STHITITILA. **24 Bom. L. R. 313 : 46 Bom. 840 : 1922 Bom. 172.**

——Sch. II, Art. 17—*Suit to set aside an order on claim—Court-fee.*

Under Art. 17, Sch II of the Act a Court-fee of Rs 10 is payable upon the plaint in a suit to set aside an order of dismissal of a claim in execution proceedings. (*Chatterjee and Pearson, JJ.*) SATINDRA NATH *v.* SHIVA PRASAD. **26 C. W. N. 126 : 1922 C. 166.**

——Sch. II, Art. 17—*Claim suit under O. 21, R. 63—Court-fee payable is Rs. 10.*

The plaint in a suit under O 21, R. 63, C. P. Code, is not chargeable with an *ad valorem* Court fee but with a fixed Court-fee of Rs 10. (*Walmsley and Greaves, JJ.*) SRIMATI GOL ASMATER KHATUN *v.* HABIBULLA. **64 I. C. 49.**

——Sch. II, Art. 17—*Declaratory suit to cancel registered release deed.*

A declaratory suit that a registered release deed be considered cancelled, must be valued for Court-fees at the amount at which the relief is valued. (*Kensington and Beadon, JJ.*) NANAKCHAND *v.* JIWAN MAL. **35 P. R. 1914 : 25 I. C. 435 : 237 P. L. R. 1914.**

——Sch. II, Art. 17—*Claim suit—Court-fees.*

A suit under O. 21, R. 63, C. P. Code, is one to declare the plaintiff's right to the property attached and the mere fact that that the property has been sold in the meanwhile in execution does not affect the plaintiff's right of suit. The Court-fee payable upon the suit is Rs. 10 under Art. 17. Sch II of the Court-Fees Act, (*Jwala Prasad, J.*) MT. MANIK *v.* RAMJAS AGARWALLA. **1 Pat. L. R. 51 : 3 P. L. T. 832 : 1923 P. 152.**

——Sch. II, Art. 17 (1)—*Suit by claimant under O. 21, R. 63, C. P. C.—Court-fees—Test.*

In suits under S. 283 C. P. C. (1882), the test for the purpose of Court-fee is what is the value

of the quantum of interest which the plaintiff wants to establish. (*Kumaraswami Sastri, J.*) NARAYANA SINGH *v.* AYYASAMY REDDI.
27 I. C. 265 : (1914) M. W. N. 910.

——Sch. II, Art. 17-A—*Suit for declaration that adoption never took place.*

A suit for a declaration that an adoption never took place can be called to be a suit for a declaration that an adoption is invalid and therefore, the rule that in such suits the court-fee payable is on the value of the property, title to which is affected holds good. (*Kotwal, A. J. C.*) CHINKI *v.* NARAYAN. 58 I C. 965 (1).

——Sch. II, Art. 17 (i)—*Claim suit--Plaintiff in possession—Sale of property does not affect Court fee.*

When a suit is filed as contemplated by O. 21, R. 63, C. P. Code, after the dismissal of a claim petition, the court-fee payable is governed by Sch II, Art. 17 (i). The fact that the property was sold before the suit was filed does not matter if the plaintiff claims to be in possession and as such does not claim to be restored to possession. (*Jwala Prasad J.*) MT. MANIK *v.* RAMJAS AGARWALA. 3 Pat. L. T. 832 : 1 Pat. L. R. 51. : 1923 P. 152.

——Sch. II, Art. 17 (i)—*C. P. C., O. 21, R. 63—Court-fee necessary for a suit under.*

A suit under O. 21, R. 63, C. P. C., should bear a stamp of Rs. 10 as prescribed by Art. 17 (i). (*Saunders, A. J. C.*) NGA SEIK *v* NGA PU.
22 I. C. 676 : (1913) 1 U. B. R. 181.

——Sch. II. Art. 17 (iii)—As amended by Bengal Act (IV of 1922)—*Suit for mere declaration—Appeal—Court-fee—Basis of calculation—What appellant ought to have claimed cannot be considered.*

Where a plaint or a memorandum of appeal asks only for a pure declaration, the Court in calculating Court-fees cannot go into the question whether he should also have asked for consequential relief. The effect of failing to claim consequential relief is for the final decision of the Court A fixed fee under Sch. II, Art. 17 (iii) is sufficient. (*B. B. Ghose, J.*) IDOL SRI SRI GOKUL NATH JIN *v.* NEW BIRBHUM COAL CO., LTD. 27 C. W. N. 972 : 1924 Cal. 183.

——Sch. II, Art. 17 (iii)—*B. T. Act—S. 106—Suit transferred to Civil Court—Court-fee.*

A suit under S. 106 of the B. T Act which is transferred to the Civil Court is a suit for a declaratory decree within Art. 17, cl. (3) of Sch II and is not chargeable with an *ad valorem* fee (*Fletcher and Huda, JJ.*) SAILAJA NATH ROY CHAUDHURY *v.* CHANDI CHARAN LAHA.
48 I C. 552 : 28 C. L J. 301.

——Sch. II, Art 17 (iii)—*Suit to declare that declaratory decree is not binding on ground of fraud.*

Court-fee payable on a suit by the plaintiff for declaration that a decree passed in a previous suit declaring that certain alienations were not valid and not binding on her, is Rs. 10 only, because no consequential relief is needed or sought for. (*Fletcher and Teunon, JJ.*) BAGALA SUNDARI DEBI *v.* PRASANNA NATH MOOKERJEE.
35 I. C. 797 : 21 C. W. N. 375.

——Sch. II, Art. 17 (iii)—*Suit under S. 106 of the Bengal Tenancy Act—Court-fee.*

In the case of a suit under S. 106 of the Bengal Tenancy Act, claiming only those reliefs that are provided for thereunder the Court fee is Rs. 10. But where such suit is transferred to a Civil Court under S 106 the Court is not bound to confine itself to those reliefs alone. It should determine the proper Court-fee and should compel plff. to pay *ad valorem* Court-fee for consequential relief. (*Brett and Richardson, JJ.*) CHANDY CHARAN *v.* MANORANJAN. 18 I. C. 275 : 17 C. L. J. 416.

——Sch. II, Art. 17 (iii)—*Declaration that adoption is valid—No consequential relief—Valuation.*

A suit for declaration without consequential relief that an adoption is valid is a suit which does not, on the face of it, admit of being satisfactorily valued and falls under Sch. II, Art. 17 (iii) of the Court-Fees Act. (*Batten, Prideaux and Mitra, A. J. Cs.*) GANPATRAO *v.* LAXMI BAI.
43 I. C. 64 : 15 N. L. R. 24.

——Sch II, Art. 17 (iii)—*Decree for mortgage money by sale of some properties only—Appeal seeking to make the other properties also liable—Court-fee payable.*

Where the decree providing for realisation of mortgage money by sale of only some of the properties mortgaged was appealed against, only on the point that the other properties are also liable and a court-fee of Rs. 10 only was paid, *held, ad valorem* fee on the value of the property, was payable. (*Lindsay, J. C.*) SUKHNANDHAN *v.* LAKSHMAN PRASAD. 24 I. C. 286 : 17 O. C. 90.

——Sch. II, Art. 17 (iii)—*Different causes of action.*

Suit for declaration that holdings by several tenants were fixed rate holdings and the decrees for rent obtained by their common landlord were inoperative, does not come under Sch. II, Art. 17 (iii) and Court-fee will have to be paid, in respect of each cause of action. (*Roe, J.*) CHETHRU MAHTON *v.* MUHAMMAD KARIM MAWAN.
50 I. C. 328 : 4 P. L. J. 297.

——Sch. II, Art. 17 (iv).

See also COURT-FEES ACT, S. 8.

——Sch. II, Art. 17 (iv)—*Suit for declaration that money is jointly due.*

No *ad valorem* fee need be paid, when a suit is brought for a declaration that money is jointly due and that the plaintiff does not object to its being received by defendants (*Scott-Smith and Moti Sagar, JJ.*) MT. UTTAM DEVI *v.* DINA NATH.
1923 Lah. 359.

——Sch. II, Art. 17 (iv) and S. 8—*Scope of.*

S. 8 applies only to appeals by persons who claim compensation. For an appeal by Secretary of State against the compensation award of the Court, a Court-fee of Rs. 10 only is required under Art. 17 (iv). (*Reid, C. J. and Robertson, J.*) SECRETARY OF STATE *v.* BASAWA SINGH.
17 P. L. R. 1912 : 57 P. R 1913 : 17 I. C. 764 : 19 P. W. R. 1913.

COURT FEES ACT (VII OF 1870), Sch. II, Art. 17.

———Sch. II, Art. 17 (v)—*Declaration that adoption is valid and that plff. is owner—Appeal—Court-fee.*

Where a suit for a declaration that plff. is the adopted son of the last male owner and therefore entitled to property in his possession was dismissed, the Court fee payable on the appeal is an *ad valorem* fee on the value of the property in possession of the appellant as the adopted son of the last male owner. (*Batten, Prideaux and Mitra, A. J. C.*) GANPATRAO *v.* LAXMI BAI.
43 I. C. 64 : 15 N. L. R. 24.

——— Sch. II, Art. 17 (vi).

See also (1) COURT-FEES ACT, S. 7 (iv) (*b*), (*c*).
(2) SCH. I, ART. 1.

———Sch. II, Art. 17 (vi)—*Suit for declaratory decree—Valuation of at Rs.* 130.

The Bombay practice of valuing suits for declaration at Rs. 130 and paying a Court-fee of Rs. 10 thereon is misleading and unwarranted by law. A fixed fee of Rs. 10 is to be paid thereon. (*Sir Lawrence Jenkins.*) RACHAPPA *v.* SHIDAPPA.
17 A. L. J. 418 : 46 I. A. 24 : 25 M. L. T. 298 : 29 C. L. J. 452 : 21 Bom. L.R. 489: 43 Bom. 507 : 10 L. W. 274 : 24 C. W N. 33 : 50 I. C. 280 : 36 M. L. J. 437 (P. C.).

———Sch. II, Art. 17 (vi)—*Refusal to grant Letters of Administration.*

The Court-fee payable in an appeal against an order refusing grant of Letters of Administration is Rs. 10, under Art. 17 (vi) as the subject-matter in dispute cannot be estimated at a money value. (*Tudball and Rafique, JJ.*) MISS EVA MOUNTSTEPHENS *v* MR. HUNTER GARNETT ORME.
22 I. C. 98 : 35 All. 448.

———Sch. II, Art. 17 (vi)—*Suit for partition by plff. in possession—Proper Court-fee.*

When a plff. in possession sues for partition of his share, a Court-fee stamp of Rs. 10 is sufficient but where the plff. is not in possession, the proper fee would be calculated on the value of the share claimed by him. 28 All. 340 ; 6 C. L J. 651, Foll (*Karamat Hussain and Chamier, JJ.*) TARACHAND MUKERJEE *v.* AFZAL BEG.
34 All. 184 : 13 I. C. 185 : 8 A. L. J. 1329.

———Sch. II, Art. 17 (vi)—*Suit for restitution of conjugal rights—Court-fee payable.*

A suit for restitution of conjugal rights falls within Cl.(vi) of Art. 17, and the Court-fee chargeable is Rs. 10. (*Tudball, J.*) AISHA BIBI *v.* FAIYAZ HUSSAIN. **33 All. 767 : 11 I. C. 186 : 8 A. L. J. 889.**

———Sch. II, Art. 17 (vi)—*Partition suit—Mode of partition impeached.*

Where the appellant in a partition suit, only seeks to impeach the mode of partition, there being no dispute as to the shares, the case comes under Art. 17 (vi) and memo. of appeal requires only 10 rupees stamp. Where the plff. seeks only to separate his own share, his share determines the valuation of the suit as well as the forum of appeal, though the decree in the suit effects full partition. (*Shadi Lal, C. J. and Wilberforce, J.*) HARCHARAN DAS *v* SUKHRAJ DAS. **62 I. C. 979.**

COURT FEES ACT (VII OF 1870), Sch. II, Art. 17.

———Sch. II, Art. 17 (vi)—*Partition suit—Order of Court directing defendants to put in stamped applications for separation of shares—Appeal—Court-fee.*

A memorandum of appeal against an order of the court in a partition suit, directing the defendants to put in properly stamped applications if they wished to have their respective shares separated off by the Court, must be stamped with a Court-fee of Rs. 10 under Sch. II, Art. 17, Cl. (vi). (*Rattigan and Shah Din, JJ.*) MASHKURUNNISSA *v.* HASHMATULLAH. **274 P. L. R. 1913 : 20 I. C. 177 : 183 P. W. R. 1913.**

———Sch. II, Art. 17 (vi)—*Decree against one deft.—Appeal for joint decree—Court-fee on appeal.*

Plff. who obtained a money decree against only one of several defts. appealed with the object of getting a joint decree for the same amount against the other defts. as well. *Held*, he should pay an *ad valorem* court-fee on the amount of the decree and not a court-fee of Rs. 10 under Cl. (vi), Art 17. (*Shah Din and Scott-Smith, JJ.*) AMIR CHAND *v.* KANHAIYA RAM. **86 P. R. 1912 : 222 P. L. R. 1912 : 16 I. C. 777 : 225 P. W. R. 1912.**

———Sch. II, Art. 17 (vi)—*Partition—Decree in accordance with award—Objections—Revision—Court-fee payable*—Ex parte *proceedings—Objections to award.*

From a decree in accordance with an award by which one of the parties was directed to pay a sum of money to the other side in cash and by which actual partition of joint properties was also effected, a petition for revision was filed urging that he was not liable to pay the sum of money ; and that the Court failed to consider and dispose of his objections to the award He paid an *ad valorem* court-fee as regards the first relief and a court-fee of Rs. 10 as regards other relief. *Held*, that the petition for revision was properly stamped ; that it was not possible to estimate the second relief at a money value and consequently in respect thereof a court-fee stamp of Rs. 10 was sufficient. 70 P. R. 1881 ; 104 P. L. R. 1905 ; 152 P. L. R. 1905 : 33 Cal. 11 Expl. and Dist. (*Shah Din and Scott Smith, JJ.*) LALA LILA RAM *v.* LALA MUKAND RAI. **1 P. L. R. 1913 : 15 I. C. 57 : 229 P. W. R. 1912.**

———Sch. II, Art. 17 (vi)—*Two reliefs.*

Where a person was sued by certain members of a joint family on a bond executed by the former to the latter and be made payment to some of them but the suit was decreed in full on the ground that payment to some could not be regarded as payment to the plffs. and the deft. appealed against the decree on a Rs. 10 stamp, *held*, that the memo. of appeal was sufficiently stamped as regards his prayer for a declaration as to who was entitled to the money, but that he must pay *ad valorem* fee on the amount of the decree which he wants to have reduced. (*Rattigan and Shah Din, JJ.*) KIR PAL SINGH *v.* SANTA SINGH.
71 P. R 1911 : 30 P. L. R. 1912 : 13 I. C. 305 : 205 P. W. R. 1911.

COURT FEES ACT (VII OF 1870), Sch. II, Art. 17.

——Sch. II, Art. 17 (vi)—*Suit for separate possession—Mahomedan co-sharer.*

Where a Mahomedan co-sharer sues the other co-sharers for partition and possession of her share of her father's properties, alleging she is in possession of some items indicating a joint possession in law, the suit falls under Sch. II, Art. 17 (vi) of the Court-Fees Act. (*Krishnan, J.*) KURSHIT KATHUM *v.* HYDER KHAN SAHIB.

(1923) M. W. N. 564 (2) : 1924 Mad. 207.

——Sch. II, Art. 17 (vi)—*Relief capable of money value—Section does not apply.*

Art. 17 (vi) of Schedule II of the Court-Fees Act cannot apply where it is possible to estimate the money value of the claim. (*Batten, J. C.*) BARI BAHU *v.* KUNDAN. **1922 Nag. 264.**

——Sch. II, Art. 17 (vi)—*Payment after date.*

The memo. of appeal against a redemption decree absolute on the ground that the money was deposited at a later date than that allowed and that it should not have been so received should bear Rs. 10 stamp as the value of the relief cannot be determined. (*Stanyon, and Sikmner, A. J. Cs.*) DADNOO *v.* SOMNATH.

10 I. C. 736 : 7 N. L, R. 41.

——Sch. II, Art. 17 (vi)—*Suit for partition—Valuation—Dispute as to share of the plaintiff—Court-Fees Act, S. 7, Cl. 4 (c)--Suits Valuation Act, S. 8.*

A suit for partition, pure and simple, where the plaintiff is in joint possession of his share and there is no dispute as to his title or share falls within Sch. II, Art.17, Cl. vi of the Court-Fees Act. A suit in which plaintiff prays for declaration of his title and partition as a consequential relief falls within S. 7, Cl. iv (*c*) of the Court-Fees Act. In the former case the suit must be valued for purposes of jurisdiction at the value of the entire subject-matter and not at the value of the plaintiff's share only. In the latter case the plaintiff's share becomes also the valuation of the suit for purposes of jurisdiction. (*Das and Kulwant Sahay, JJ.*) RANJIT SAHI *v.* MAULAVI QASIM. **2 Pat. 432 : 4 Pat. L. T. 257 : 1923 P. 342.**

——Sch. II, Art. 17 (vi) and S. 7 (i) and (iv)—*Partition suit—Prayer for accounts—Valuation—Court-fee payable.*

If a suit is a plain suit for partition, the Court-fee payable thereon is Rs. 10. If it is in essence of a suit to obtain a decree for money or a decree for immoveable property then *ad valorem* court-fee must be paid. (*Roe, J.*) GOBIND DUBE *v.* PARAMESHWAR DUBE. **49 I. C. 115.**

——Sch. II, Art. 17 (vi)—*Kyaung—Sanghika property—Money value.*

As Kyaung cannot be transferred by sale, mortgage or gift, it has no market value and the plaint in a suit by Hypongyi to recover possession of Kyaung should under Sch. II, Cl. 17, subclause (vi) bear a stamp of Rs. 10 (*Rigg, J.*) KONMA *v.* EINDA.

57 I. C. 953 : 13 Bur. L. T. 40.

COURT OF WARDS.

——Sch. II, Art. 17 (vi)—*Partition — Suit by person in joint possession—Denial of plff.'s possession by deft.—Court-fee—Appeal.*

Under Sch. II, Art. 17, cl. (vi) a Court-fee stamp of Rs. 10 is necessary for a plaint in a suit for partition and separate possession by a person claiming to be in joint possession of the property. 8 Cal. 757 ; 16 I. C. 771, Foll. A decision as to the amount of Court-fee should be founded solely on a consideration of the cause of action on which the plff. is suing on and not pleas of deft. (*Pratt, J. C. and Crouch, A. J. C.*) MANGHANMAL *v.* TOLARAM. **16 I. C. 773 : 6 S. L R. 72.**

——Sch. II, Art. 17 (vi)—*Partition, suit for—Plff. in joint possession—Court-fee.*

An *ad valorem* Court-fee is not necessary for a suit for partition by a person claiming to be already in joint possession. The suit is for a benefit which it is not possible to estimate at money value; the proper Court-fee is a stamp of Rs. 10 under Sch. II, Art. 17, Cl. (vi). 18 Bom. 209 ; 8 Cal. 757, Foll. (*Pratt, J. C.*) HAJI YUSUF *v.* GHULAM HUSSAIN.

16 I. C. 771 : 6 S. L. R. 74 (Note).

——Sch. III, Annexure B—'*Property held in trust'—Meaning of.*

Property held in trust within Annexure B in the form set out in Sch. III, is property held in trust by the testator and not one as to which the testator has created a trust. (*Das and Ross, JJ.*) DEPUTY COMMISSIONER OF SINGHBHUM *v.* JAGADISH CHANDRA DEO. **2 Pat. L. T. 683 : 62 I. C. 513 : 6 P. L. J. 411.**

——Sch. III, Annexure B (4)—*Probate duty—Trust created by will.*

Trusts created by the will of a testator are not exempted from the payment of probate duty. The exemption contemplated by the Act refers to trusts held by the testator as a trustee in his lifetime and which were not beneficial to him but beneficial to others. (*Sharfuddin and Roe, JJ.*) CHANDRABATI KUER *v.* THE COLLECTOR OF DARBHANGA. **45 I. C. 578 : 2 P. L. J. 611.**

COURT, JURISDICTION OF.

See JURISDICTION.

COURT OF APPEAL.

See (1) APPEAL.
(2) C. P. CODE, O. 41.

COURT OF WARDS.

See also LOCAL COURT OF WARDS ACTS.

——*Disqualified proprietor—Liability.*

Where a disqualified proprietor enters into a contract, at a time when his property was under the management of the Court of Wards and subsequently the property is released from its superintendence, the property is not liable to be sold in execution of a decree obtained thereafter. (*Lord Shaw.*) DEBI BAKHSH *v.* SHADI LAL.

38 All. 271 : 43 I. A. 69 : 14 A. L. J. 477 : 24 C. L. J. 15 : 20 M. L. T. 53 : 19 O. C. 55 : 20 C. W. N. 770 : 18 Bom. L. R. 412 : 3 L. W. 525 : 31 M. L. J. 72 : 4 O. L. J. 1 : 33 I. C. 681 : (1916) 1 M. W. N. 425 (P. C.).

COURT OF WARDS.

———*Joint family property—Power over.*

A Court of Wards can take under its administration the joint family properties of Hindus on the application of the managing member. (*Sir John Edge.*) GULAB SINGH *v.* RAJA SETH GOKULDAS. **40 Cal. 784 : 40 I. A. 117 : 17 C. L. J. 619 : 17 C. W. N 918 : 15 Bom. L. R. 613 : 14 M. L. T. 55 : 9 N. L. R. 117 : 25 M. L. J. 179 : 19 I. C. 521 : (1913) M. W. N. 542 (P. C.).**

———*Ward under the superintendence of the Court of Wards—Application for leave to appeal rejected—Second application after removal of superintendence—Revival.*

Where an application for leave to appeal to His Majesty in Council was rejected on the ground that the applicant was incompetent to apply by reason of his estate being under the superintendence of the Court of Wards and two years later, after the release of his estate from the superintendence of the Court of Wards, he made a second application for leave to appeal to His Majesty-in-Council: *Held*, that the second application could not operate to revive the earlier application, and even if it did the previous application would remain an application by a disqualified person, and as such could not benefit the applicant. (*Stuart and Kanhaiya Lal, A. J. Cs.*) NARENDRA BAHADUR SINGH *v.* OUDH COMMERCIAL BANK. **46 I. C. 68 : 5 O. L. J, 153.**

COURT OF WARDS ACT.
See LOCAL ACTS.

COURT SALE.
See (1) EXECUTION.
(2) CIVIL P. CODE, O. 21.

COURT'S PROCESS.
See (1) PRACTICE.
(2) CIVIL P. CODE, S. 151.

COVENANT.
See T. P. ACT, Ss. 10, 40, 55, 72, 76 and 108.

COVENANT, BREACH OF.
See T. P. ACT, S. 55.

COVENANT FOR TITLE.
See (1) C. P. CODE. O. 21, R. 93.
(2) EXECUTION SALE,
(3) T. P. ACT, S. 55.

COVENANT IN RESTRAINT OF TRADE.
See CONTRACT ACT, S. 27.

COVENANT NOT TO ALIENATE.
See T. P. ACT, Ss. 10 AND 11.

COVENANT RUNNING WITH LAND.
See (1) LANDLORD AND TENANT.
(2) T. P. ACT, S. 40.

CO-WIDOW.
See (1) HINDU LAW—ADOPTION.
(2) HINDU LAW—WIDOW.

CREATION OF ENDOWMENT.
See (1) CHARITY.
(2) CHARITABLE ENDOWMENT.
(3) HINDU LAW—RELIGIOUS ENDOWMENT.
(4) MAHOMEDAN LAW—WAQF.

CROWN.

CREDITOR.
See DEBTOR AND CREDITOR.

CREDITOR AND DEBTOR.
See DEBTOR AND CREDITOR.

CREDITOR'S INTEREST.
See DEBTOR AND CREDITOR.

CROSS-CLAIMS.
See C. P. CODE, O. 8, R. 6 ; O. 21, R. 19.

CROSS-DECREE.
See C. P. CODE, O. 21, R. 18.

CROSS-EXAMINATION.
See EVIDENCE ACT, SS. 137 TO 161.

CROSS-OBJECTIONS.
See C. P. CODE, O. 41, R. 22.

CROWN.

———*Right of, to the soil—Grantee from Crown.*

There is no room for assuming that the sovereign in India possessed only the *melwaram* or the right to the revenue and not to the soil itself. Accordingly there is no presumption that the grantee of an *Inam* from the Crown gets only the *melwaram*. The grantee however takes the lands subject to the rights of others existing at the time of the grant. (*Sir John Edge.*) SURYANARAYANA *v* PATANNA. **41 M. 1012 : 25 M. L T. 30 : 23 C. W. N. 273 : 9 L. W. 126 : 29 C. L. J, 153 : 1 U. P. L. R. (P. C.) 11 : 36 M. L. J. 585 : 21 Bom. L. R. 547 : 45 I.A. 209 : 48 I.C. 689 : (1918) M.W.N. 859: 1919 M. W. N. 463. (P.C.)**

———*Islands—Beds of tidal and navigable rivers—Territorial waters— Right to islands formed.*

The ownership of the beds to tidal and navigable rivers and of the bed of the sea within three miles of the mainland vests in the Crown and carries with it the right to islands arising within those limits. The law is the same both in England and in India. R. *v.* KLYN, L. R. 2 Ex Div. 63, Dist. *Lord Fitzgerald v Purscell*, (1908) L. R, 2 Ch. D. 139 ; *Lord Advocate v. Wemyss* (1900) A. C. 48, Rel. (*Lord Shaw.*) SECRETARY OF STATE *v.* CHELIKANI RAMA RAO. **39 Mad. 617 : 20 C. W. N. 1311 : 14 A. L. J. 1114 : 20 M. L. T. 435 : 4 L. W. 486 : 18 Bom. L. R. 1007 : 25 C. L. J. 69 : 43 I. A. 192 : 35 I. C, 902 : (1916) 2 M. W. N. 224 : 31 M. L. J. 324 (P.C.).**

———*Duty of, to obey law—Executive.*

Obiter :—Though there is no remedy in India similar to Petition of Rights in England, the Executive Government must ascertain what the true law is, and obey it (*Sir George Farewell.*) EASTERN TRUST CO. *v.* MIKENZIE MAN AND CO., LTD. **20 C. W. N. 457 : 35 I. C. 378 (P. C) : 84 L. J. P. C. 152.**

———*Debts of—Priority—Extent and limits of.*

It is only when the claims of the Crown and the claims of 'common persons' concur or come into operation, that the Crown is preferred. But

the Crown has no more right than a "common person" to seize one man's property and apply it in or towards the discharge of a debt due from another. (*Lord Macnagten.*) RAGHO PROSAD *v.* MEWALAL. **34 A. 223 : 39 I. A. 62 : 11 M. L. T. 193 : 14 Bom. L. R. 212 : 16 C. W. N. 438 : 16 C. L. J. 327 : 9 A. L. J. 401 : 22 M. L. J. 457 : 15 I. C. 177 : (1912) M. W. N. 311 (P. C.).**

——*Escheat—Right of Zemindar—House on the abadi—Death of resident without legal heirs.*

On a question arising as to whether the Crown was entitled by escheat to certain *abadi* house and sites on the death of D. and M. the residential tenants thereon, *Held*, upon the facts and the evidence in the case that D and M were limited owners of the house and that the effect of the settlement of 1850 A. D. was to grant the Bharatpur State proprietary rights in the *abadi* of mauza Sakitra, and that therefore the Bharatput State was entitled to the house and the site of the house. 31 All. 111, appl. (*Piggott and Walsh, JJ.*) THE BHARATPUR STATE *v.* THE SECRETARY OF STATE FOR INDIA. **47 I. C. 823 : 16 A. L. J. 653.**

——*Who is—Officers of State.*

The Crown is not bound by any Act unless expressly or by necessary implication referred to therein and for this purpose the Crown not only means King but also Officers of State in discharge of their executive duties. The Bom. Rent Act, therefore, does not affect the powers of the Government and their officers under the Land Acqn. Act. (*Setalwad, J.*) BOMBAY MUNICIPALITY *v.* M. DAMODAR BROS. **45 Bom. 725 : 60 I. C. 571 : 23 Bom. L. R. 35.**

——*Debts— Priority— English mortgage—Puisne mortgagee—The Crown is not entitled to priority over a mortgagee under an English mortgage.*

In such a mortgage the ownership is wholly transferred to the creditors which is however liable to be divested by repayment of the loan on the appointed day. He has no debt provable in insolvency until his security has been proved or realised. The ownership of the property passes to the first mortgagee in an English mortgage, and not to the puisne mortgagee, and he is not entitled to priority over the Crown. Shares merely deposited and not actually transferred do not create a right in favour of the depositee superior to the right of the Crown. According to English Law whenever the right of the Crown and the right of the subject with respect to payment of debt of equal degree come into competition, the Crown right prevails. This rule is of universal application except in so far as the legislature has thought fit to interfere with it. (*Choudhury, J.*) THE BANK OF UPPER INDIA *v.* THE ADMINISTRATOR-GENERAL OF BENGAL. **45 Cal. 653 : 47 I. C. 529 : 22 C. W. N. 793.**

——*Service under—Dismissal—Enquiry.*

In the absence of a statutory provision to the contrary all public officers and servants of the Crown hold their appointments at the pleasure of the Crown. (1896) 1 Q. B. 116, Rel. They are

subject to dismissal at any time without cause assigned. No action for damages for wrongful dismissal can be entertained against the Crown. *Per Mookerjee, J.*—Before a person is dismissed from Govt. service, he is entitled to be heard in his defence. Unless a public servant has been convicted at a judicial trial he can defend himself departmentally against any imputation that he may have incurred at the trial. As the plff. was dismissed without a hearing as required by the rules, each party should bear his own costs throughout the litigation. (*Mookerjee and Beachcroft, JJ.*) RAM DAS HAZRA *v.* SECRETARY OF STATE. **18 C. W. N. 106 : 16 I. C. 922 : 17 C. L. J. 75.**

——*Unauthorised acts—Effect.*

The doctrine of equitable estoppel does not apply to Government in the case of unauthorised acts or omissions on the part of its agents and so if the Secretary of State exceeds the authority delegated to him, he can plead *ultra vires*. (*Mookerjee and Teunon, JJ.*) SRINIBAS PRASAD SINGH *v.* KESHO PRASAD SINGH. **38 Cal. 754 : 13 C. L. J. 365 : 9 I. C. 862 : 15 C. W. N. 475.**

——*Escheat—Government's right to.*

Government's right to claim escheat is different from the personal law of the deceased or custom. (*Dowie and Meredith, F. Cs.*) WAZIRA *v.* MANGAL. **3 P.W.R. 1911 (Rev.): 2 P.R. 1911 (Rev.): 10 I. C. 294 : 188 P. L. R. 1911.**

——*Applicability of Transfer of Property Act, S. 108 (b) to—Construction.*

Though T. P. Act does not apply to Crown grants, the principles laid down in S. 108 (*b*) of the Act may be referred to, for construing them regarding the nature of the ordinary covenants by which the lessors and the lessees are bound. (*Coutts-Trotter and Srinivasa Aiyangar, JJ.*) SECRETARY OF STATE *v.* POMMARAYA VENKAYYA GARU. **40 Mad. 910 : 19 M. L. T. 318 : 3 L. W. 443 : 30 M. L. J. 575 : 35 I. C. 254 : (1916) 1 M. W. N. 342.**

——*Debts—Priority.*

A debt due to the King takes priority over the other debts except possibly those due to Brahmins. (*Wallis, C. J., and Seshagiri Aiyar, J.*) SUBBARAYA GOUNDAN *v.* RANGANATHA MUDALIAR. **30 M. L. J. 387 : 40 M. 93 : 3 L. W. 273 : 32 I. C. 971 : (1916) 1 M. W. N. 216.**

——*Escheat—Onus of proof—Crown claiming by escheat should prove failure of heirs.*

It lies upon the Crown to prove at least *prima facie* that the deceased left no heirs before there can be an escheat. 12 M. I A. 448 : 8 M. I. A. 502, Foll. (*Wallis, C. J., and Seshagiri Aiyar, J.*) SECRETARY OF STATE *v.* SUBAYA KARANTHA. **18 M. L T. 504 : 2 L. W. 1175 : 31 I. C. 590 : (1915) M. W. N. 962.**

——*Drift wood salvage—G. O. No. 586, dated 3—11—1896—Whether Govt. is the owner of drift wood—Rules relating thereto.*

Drift wood salvage rules allowing Govt. to collect salvage on drift wood floating in the rivers are *ultra vires* as ownership of the river

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does not necessarily imply ownership of the drift wood. 1 C. W. N. 249, Dist (*Ayling and Oldfield, JJ.*) MANDAVILLI SUBBA ROW *v.* GUDDA LAKSHMAYYA. **23 I. C. 371 : 15 M. L. T. 121.**

———*Judicial functions—Delegation—Resumption.*

Per Fawcett, A. J. C.—Where judicial functions have been delegated to any person, they can, subject to any statutory provision to the contrary, be resumed by Government in exercise of its sovereign power. It follows that there is also a right of putting limitations on the exercise of judicial powers conferred. (*Pratt, J. C. and Fawcett, A. J C.*) RAM RATAN CHAND *v.* PIRU KHAN MAHOMED. **52 I. C. 891 : 20 Cr. L. J. 731 : 13 S. L. R. 93.**

CROWN GRANTS.

See CROWN GRANTS ACT.

CROWN GRANTS ACT (XV OF 1895).

———*Easement.*

In Bengal Crown has conferred no market franchise or right of holding markets. Therefore, a proprietor cannot acquire such a right by prescription, as the right is treated as an incident to the ownership of land, under these circumstances he has no remedy at law if any competitor holds a market in his proximity, entailing thereby diminution in the profits. A trader, usually haunting one market for the sale of his goods, can take the same to another, without committing any unlawful act. (*Richardson and Greaves, JJ.*) HAMCHANDRA ROY CHOWDHURY *v.* KRISTO CHANDRA SAHA SARDAR. **24 C. W. N. 800 : 58 I. C. 879 : 47 C. 1079.**

———S. 2—*Crown—Subject—Right to grant property on novel tenure.*

The Crown in British India has power to grant or transfer lands and limit their descent in any way it pleases ; but a subject has no power to impose on lands or other property, any limitation of descent at variance with the ordinary law applicable. (*Sir John Edge.*) RAJENDRA BAHADUR SINGH *v.* RAGHUBANS KUNWAR. **40 All. 470 : 21 O. C. 106 : 24 M L. T. 282 : 5 O. L. J. 401 : 8 L. W. 570 : (1918) M. W. N. 831 : 28 C. L. J. 456 : 23 C. W. N. 101 : 45 I. A. 134 : 48 I. C. 213: 20 Bom. L. R. 1075 (P. C.)**

———Ss. 2 and 3—*T. P. Act, S. 107—Registration Act, Ss. 17, 90—Applicability and scope*

The provisions of Ss. 2 and 3 do not exclude all leases executed by or on behalf of Government from the operations either of S. 107 of the Transfer of Property Act or of the Indian Registration Act which provides for the cases of documents exempt from registration when executed by or on behalf of Government. (*Ryves and Piggott, JJ.*) MUNSHI LAL *v.* GOPI BALLABHA. **36 All. 176 : 22 I. C. 933 : 12 A. L. J. 219.**

CUSTOM (GENERAL).

———Ss. 2 and 3—*Lease by Government—Stipulation against erection of buildings by lessee—Validity of.*

A proviso, in a lease granted by Government of land situate in Malabar that the lessee will not erect buildings on the ground, is not consistent with S. 19 of the Malabar Com. for Ten. Impr. Act and is saved by S. 3 of the Crown Grants Act. The expression "grant" in S. 2 of the Crown Grants Act denotes not only the transfer of prerogative rights possessed by the Crown but also transfers of land of every description. (*Seshagiri Aiyar and Bakewell, JJ.*) HALLINGAL MOOSA KUTTI *v.* SECRETARY OF STATE. **43 Mad. 65 : 53 I. C. 345 : 37 M. L. J. 332.**

———S. 3—*Lease of Government land in Malabar—Ejectment suit — Compensation for improvements by tenant.*

Where a Crown grant consists of a lease of land in the Malabar district containing a reservation of the right to terminate the tenancy on six months' notice and the lessee expressly covenanted to surrender, *Held*, that under S. 3, the lease must take effect according to its tenor and the Government is entitled to a decree for ejectment without paying for improvements. (*Wallis, C. J. and Krishnan, J.*) ULLATTUTHODI CHOYI *v.* THE SECRETARY OF STATE. **14 L. W. 386 : 41 M. L. J. 494 : 69 I. C. 475 : (1921) M. W. N. 694.**

CRUELTY.

See RESTITUTION OF CONJUGAL RIGHTS.

CULPABLE HOMICIDE.

See PENAL CODE, Ss. 299—304.

CURRENT ACCOUNT.

See (1) ACCOUNTS.
(2) BANKER AND CUSTOMER.

CURRENCY NOTE.

See PAPER CURRENCY ACT.

CUSTODIA LEGIS.

See CIV. PRO. CODE, O. 40, R. 1.

CUSTODY.

See (1) GUARDIAN.
(2) GUARDIAN AND WARD.
(3) LUNACY ACT.
(4) MINOR.
(5) POSSESSION.

CUSTOMARY EASEMENT.

See EASEMENTS ACT.

CUSTOMARY RIGHT.

See EASEMENTS ACT.

CUSTOM (GENERAL).

See also HINDU LAW—CUSTOM.

Abandonment of.
Adoption.
Applicability.
Burden of proof.
Burial.
Communal Custom.
Error of Law.
Essentials of validity.

CUSTOM (GENERAL)—Abandonment of.

Evidence of.
Family Custom.
Immoral and Illegal.
Landlord and Tenant.
Local Custom.
Malikana.
Marriage.
Mercantile Usage.
Office.
Pleading and Proof.
Succession.
Usage.
Validity.

Abandonment o .

———*Abandonment of—Grazing right over jungle land—Suspension of grazing for two months in a year, if an interruption.*

Where a customary right of grazing over jungle land was, by arrangement, suspended for a period of two months in the year, such suspension is not an interruption of the right but only a limitation of the period of its duration. (*Piggott, J.*) MOTI CHAND *v.* JAGGU AHIR. 11 I. C. 88.

———*Abandonment of—Non-user.*

If a custom has been in existence for a long series of years, it could not be extinguished by non-user. Non-user is only a ground for doubting its existence. (*Ashworth, A. J. C.*) HAMID FATIMA *v.* BHOLA. 52 I. C. 869: 6 O. L. J. 349.

Adoption.

———*Adoption—Lands for maintenance—Reversion by custom—Adoption by a widow of the last holder does not affect custom.*

Reversion by custom of the subject-matter of a grant for maintenance is not affected by the adoption by the widow of the last maintenance holder. (*Scott, C. J. and Batchelor, J.*) AGAR SINGJI *v.* BAI NANIBI. 28 I. C. 529 : 17 Bom. L. R. 273.

———*Adoption—Gift to adopted son--Who can challenge.*

Where a person makes a gift in favour of another alleging him to be his adopted son, a declaration made at the time of mutation and also at the time of suit by collaterals to impeach the alienation is sufficient proof of adoption. If the gift is declared invalid in such suit, the donor alone can appeal against the decree. (*Chevis, J.*) TOTA *v.* MUKHA. 60 I. C. 448 : 3 Lah. L. J. 89.

———*Adoption—Daughter's sons—Hindu Jats of Mauza Liddar, Tahsil and District Jullundur.*

Held, that, it was not proved by that custom among Hindu Jats of Mauza Liddar, Tahsil and District Jullundur, the gift of ancestral property to daughter's sons is valid. (*Leslie Jones and Abdul Raoof, JJ.*) KHUSHAL SINGH *v.* KANDA. 5 Lah. L. J. 63 : 56 I. C. 931 : 2 U. P. L. R. (L.) 110.

———*Adoption—Widow—Authority of husband—Wajib-ul-arz.*

If an entry in a Wajib-ul-arz empowers a Hindu widow to adopt a son but is silent on the point of the authority of her husband, the proper construction of the entry is that the widow was given the ordinary power to adopt with the authority of her husband. (*Lyle and Ashworth, A. J. Cs.*) BAL MUKUND *v.* BISHWA NATH SINGH. 52 I. C. 851 : 6 O. L. J. 337.

CUSTOM (GENERAL)—Burden of Proof.

Applicability.

———*Applicability—Necessity — Question of fact or law.*

The question of valid necessity may be one of law, or of customary law or one of fact according to the peculiar circumstances of the case. (*Johnstone, C. J. and Rattigan, J.*) RAJA *v.* ALLAH DITTA. 112 P.W.R. 1915: 110 P. R. 1915: 29 I. C. 802 : 37 P.L. R. 1916.

———*Applicability of—Change of residence—Effect.*

Though persons carry their own customs with them wherever they go, it does not necessarily follow that they retain those customs unchanged after long residence amongst other tribes holding different customs. (*Johnstone and Chevis, JJ.*) KHAIRE KHAN *v.* GHULAM CHAUSE. 32 P. R. 1911: 238 P. L. R. 1911: 10 I. C. 387: 46 P.W.R. 1911.

———*Applicability of—Hindu Law—Law of joint family applicable equally with the law of inheritance.*

Cutchi Memons in Madras Presidency are governed by Hindu Law in matters of succession. A member of a Cutchi Memon family cannot bequeath by will his share in the property. (*Kumaraswami Sastri, J.*) SIDDICK HAJEE ABOOBUCKER SAIB *v.* EBRAHIM HAJEE ABOOBUCKER SAIB. 31 M. L. T. 183 (H. C.).

———*Applicability.*

Custom must be sufficiently defined for its application to the facts of the case to be clear and undoubted. (*Ashworth and Simpson, A. J. Cs.*) THAKUR RUDRA PRATAB NARAIN SINGH AND OTHERS *v.* THAKUR NIRMAN PRASAD SINGH AND OTHERS. 9 O. L. J. 552 : 1923 Oudh 61.

Burden of Proof.

———*Burden of proof—Jains—Adoption of orphan.*

The onus of proving the antiquity and the invariability of a custom contrary to the normal law is on the party averring its existence. The adoption of an orphan boy is valid by custom among Jains. (*Macleod, C. J. and Fawcett, J.*) PARSHOTTAM GANPAT *v.* VENICHAND GANPAT. 45 Bom. 754 : 61 I. C. 492 : 23 Bom. L. R. 227.

———*Burden of proof—Opposition to Hindu law and agricultural custom.*

In Punjab onus of proof of a custom which is contrary both to the Hindu Law and the agricultural custom of the province is on a litigant who sets it up. 4 Lah. 297 : 1924 L. 116.

———*Burden of proof—Caste—Rajput—Mohal.*

There are no persons in the Punjab who have any real right to be described as Mohals except Rajputs and some Jats who rightly or wrongly claim that they are really of a Rajput origin. *Held*, that plff. had failed to prove that he was a

CUSTOM (GENERAL)—Burden of Proof.

Rajput by caste. (*Chevis and Scott-Smith, JJ.*) SECRETARY OF STATE FOR INDIA *v.* GHULAM RASUL KHAN. **4 Lah. L. J. 79 : 1922 Lah. 323.**

———*Burden of proof.*

Any person who relies on a particular custom has to prove that the custom exists and it applies to circumstances of the case. (*Chevis and Dundas, JJ.*) SHAH MAHOMED *v.* FAZL ILLAHI.
2 Lah. L. J. 475 : 56 I. C. 913 : 2 U. P. L. R. (Lah.) 103.

———*Burden of proof.*

The onus of establishing a special custom overriding the personal law of the parties lies on the person who alleges it. (*Shadi Lal and Jones, JJ.*) MURAD KHATUM *v.* MUHAMMAD BAKSH.
84 P. R. 1916: 33 I. C. 742 : 85 P. W. R. 1916.

———*Burden of proof—Renunciation of world—Presumption.*

On becoming a *Suthra faqir* a person renounces the world and abandons all rights to ancestral property ; the burden of proving the contrary rests with the person setting up the same. (*Chevis, J.*) LACHHMAN DAS *v.* RALIA.
106 P. L. R. 1911 : 11 I. C. 378 : 237 P. W R. 1911.

———*Burden of proof—Custom at variance with law—Onus.*

The person who sets up a custom must establish it to the whole length of abrogating the law under which the opposite party claims title and if this is not done the general law must prevail. Possible inferences or probable implications cannot uphold a custom. (*Simpson and Wazir Hasan, A. J. C.*) BALBHADDAR PRASAD *v.* NARAYAN DAS. **9 O. L. J. 518 : 1923 Oudh 102.**

———*Burden of proof—On person setting up.*

The burden of proving a custom in derogation of ordinary Hindu Law rests upon the person asserting it. (*Pratt, J. C., Crouch and Fawcett, A. C. J.*) MANGHIRMAL *v.* VITHALRAM.
13 I. C. 225 : 5 S. L. R. 107.

Burial.

———*Burial—Right to bury dead in another's land—If can be acquired.*

Burial right is a customary one and must be proved if it is sought to be enforced by a Court. (*Po Han, J.*) MG. SHWE KYE *v.* MG. PO THA.
2 Bur. L. J. 186 : 1 Rang. 702 : 1924 R. 61.

———*Burial—Cremation—Ponnas in Lower Burma.*

Among Ponnas, cremation is preferred to burial. If the dead bodies are buried, the graves are not consecrated. Even the site may be lost sight of. No peculiar respect is attached to graves, which may be dug out and the remains of the interred bodies may be removed to another place for internment. (*Robinson, J.*) MAUNG AUNG MYAT *v.* MA YWET. **10 I. C. 780 : 4 Bur. L T. 76.**

Communal custom.

———*Communal custom—Proof of.*

In dealing with the custom of an entire community it is more important to look to the history of the main body than of the less important branches. (*Chapman and Atkinson, JJ.*) SAHDEO NARAIN DEO *v.* KUSUM KUNWARI. **46 I. C. 929.**

CUSTOM (GENERAL)—Essentials of Validity.

———*Communal custom—Gosais in Bombay Deccan—Succession to guru.*

Among Gosais, a set of religious mendicants in Bombay Deccan, a custom exists that private property passes from *guru* to *chela*. (*Kincaid and Raymond, A. J. Cs.*) GOVERDAN GHIR *v.* VISHINGIR. **63 I. C. 370 : 15 S.L.R. 38.**

Error of Law.

———*Error of law—Custom based on*

An erroneous view of law though held for a considerable time cannot form the basis of an independent custom when the error is discovered and set right. (*Sadasiva Aiyar and Napier, JJ.*) RAJA KUMARA VENKATA PERUMAL RAJU *v.* UDDAGIRI PAPA NAIDU. **41 I. C 208 : 21 M. L. T. 351.**

Essentials of validity.

———*Essentials of validity—Reasonableness.*

A reasonable custom proved to be immemorial and continuous may be presumed to have a legal origin. Custom founded on wrong and usurpation and not on people's consent is invalid. A custom excluding females from inheritance which originated from usual dissensions and quarrels among her husband's family and father's family is invalid as unreasonable, A custom must be proved by clear and unambiguous evidence. A custom excluding unmarried daughters and sisters and leaving them to depend on distant relations for support is unreasonable. A custom must be certain as to the persons or class of persons who are to be affected by it. A custom applicable only to 'Respectable Baluchis and Sirdhars' is too vague, and improper. (*Pratt, J.C. and Crouch, A. J. C.*) BIBI SONA *v.* MIR ABDUL HUSAIN KHA. **16 I. C. 641: 6 S. L. R. 1.**
[On Appeal see 45 Cal. 450: 45 I. A. 10: 43 I. C. 306 (P.C.)].

———*Essentials of validity — Custom and prescription—Limitation.*

A custom must be immemorial, reasonable, continuous and certain in its nature and in its locality. Custom differs from prescription in that prescription is the making of a right while the custom is the making of a law. (*Mookerjee and Panton, JJ.*) GOPALKRISHNA *v.* ABDUL.
66 I. C. 640 : 34 C. L. J. 319.

———*Essentials of—Ancient, uniform, etc.*

A custom to be valid should be ancient, uniform, reasonable, certain, consistent and not immoral. As regards its being ancient it must have existed "so long that the memory of man runneth not to the contrary". (*Chaudhuri and Cuming, JJ.*) NITYA GOPAL BANERJEE *v.* PROVAS CHANDRA MUKHARJI. **24 C. W. N. 309: 56 I. C. 19 : 31 C. L. J. 37.**

———*Essentials of—Ancient, certain, etc.*

A custom must be ancient, certain, reasonable, and being, in derogation of the general rules, of

CUSTOM (GENERAL)—Essentials of validity.

law must be construed strictly. (*Sanderson, C. J., Woodroffe and Mookerjee, JJ.*) MARIAM BIBEE *v.* SHEIKH MAHAMMAD IBRAHIM. 48 I. C. 561 : 28 C. L. J. 306.

———*Essentials of —Reasonableness of—Test of—Landlord and tenant—Rent—Suspension of—Inundation.*

A custom suspending the entire rent due from a holding on inundation, irrespective of its extent or injurious character is unreasonable. A custom prejudicial to a class and beneficial only to an individual is repugnant to the law of reason. The reason in this context is not every unlearned man's reason but artificial and legal reason warranted by authority of law. (*Mookerjee and Walmsley, JJ.*) SIVANARAYAN MUKHOPADHYA *v.* BHUTNATH GUCHAIT. 45 Cal. 475: 22 C. W. N. 422: 45 I C. 289 : 28 C. L. J. 148.

———*Essentials of—Reasonableness—Test of.*

It is wrong to hold that a custom permitting the tenant to appropriate the timber on his land is unreasonable. When there is nothing unfair or dishonest or contrary to public good in a custom, the custom is not unreasonable. (*Chapman and Walmsley, JJ.*) GURAI KAR *v.* KUARMONI SINGHA. 29 I. C. 312 : 19 C. W. N. 1188.

———*Essentials of — Immemorial — Reasonable, etc.*

A custom to be valid must be immemorial, reasonable, must have continued without interruption since its immemorial origin and must be certain in respect of its nature, generally as well as in respect of the locality, where it is alleged to obtain. The fact of its inconsistency with the common law of the realm is no ground for holding the custom unreasonable and bad. (*Mookerjee and Beachcroft, JJ.*) MAHAMAYA DEBI *v.* HARIDAS HALDAR. 42 Cal. 455 : 20 C. L. J. 183 : 27 I. C. 400 : 19 C. W. N. 208.

———*Essentials of—Ancient, invariable, etc.—Onus.*

It is of the essence of a special usage as to succession that it should be ancient and invariable and proved to be so by clear and unambiguous evidence by the party alleging it. 14 M. I. A. 570, Ref. (*Mookerjee and Beachcroft, JJ.*) HAZARIMALL *v.* ABANINATH. 17 C. L. J. 38 : 18 I. C. 625 : 17 C. W. N. 280.

———*Essentials—Deductions not permissible.*

Custom is not always logical and the Courts should guard against the danger of seeking to extend custom by logical processes, *e. g.*, by analogy. (*Broadway and Campbell, JJ.*) NAJMUDDIN *v.* ABDUL HAMID. 1923 Lah. 175.

———*Essentials of valid custom—Proof of instances where custom has applied.*

"Custom" implies, not that in a given contingency a certain course would probably be followed, but that that contingency has arisen in the past and that a certain course has been followed, and it is not at all within the province of Courts to extend custom by the process of deduction from the principles which seem to underlie customs which have been definitely established. (*Shadi Lal, C.J. and Le Rossignol, J.*) DALIPA *v.* DALLU. 4 Lah. L. J. 336.

———*Essentials of validity—Family custom.*

A custom to be legally binding, must be ancient, certain and invariable and a family custom at variance with a general custom, requires stronger evidence than a general custom. (*Chevis and Le Rossignol, JJ.*) CHARANGIT SINGH *v.* AMIR ALI. 64 I. C. 892 : 2 Lah. 243.

———*Essentials of—Unlawful usage.*

A usage not accepted as lawful or invariable by a party, cannot be recognised as a reasonable custom having the force of law. (*Sadasiva Aiyar and Napier, JJ.*) MEECHEL PILLAI *v.* J. M. BARTHE. 39 Mad. 1056 : 19 M. L. T. 249 : 30 M. L. J. 423 : 3 L. W. 348 : 34 I. C. 557 : (1916) 1 M. W. N. 307.

———*Essentials of—Compulsory force.*

One test to find out the existence of a valid custom is to see whether the right claimed was ever contested and whether the persons who but for such custom would under the general law be entitled to certain property, abandoned the contest and suffered themselves to be excluded, thus consciously accepting the custom as having the force of law. 16 A. 221 ; 8 M. 464, Foll. ; 2 M. H. C. R. 47, Ref. (*Sankaran Nair and Spencer, JJ.*) ALAGU CHETTY *v.* PALANIAPPA CHETTY. 2 L. W. 272 : 28 I. C. 278 : (1915) M. W. N. 221.

———*Essentials of — Immemorial — English Law.*

The rule of English law that a custom must be immemorial does not apply in India. 17 A. 87 ; A. W. N. (1895) 10, Foll. (*Ayling and Seshagiri Aiyar, JJ.*) PATINHARKURU *v.* RAMAN VARMA. 24 I. C. 519 : 28 M. L. J. 669.

———*Essentials of—Reasonableness—Right of Zemindar to eject occupants of houses in town area.*

A custom entitling the Zemindar of a town to eject the occupants of houses built in the town area at any time on payment of the cost of the materials of their houses is unreasonable and unenforceable in a Court of law. (*Lindsay, J. C.*) RABIUNNISSA *v.* MUHAMMAD ALI. 43 I. C. 189 : 20 C. C. 299.

———*Essentials of.*

A custom to be valid, must be ancient, continuous, reasonable and definite of which unambiguous and clear proof must be given. A custom cannot be held valid in law, if it is established to be of a few years standing, and followed by a few individuals in a few instances only for it is not sufficient to establish its continuity. (*Rafique, A. J. C.*) SUBHADRA *v.* TRIBHUAN DAT. 15 I. C. 247.

———*Essentials of—Ancient, reasonable, etc.*

A valid custom must be immemorial reasonable, certain and continued without interruption since its immemorial origin. 1 M. 235 (P.C.) ref. to. (*Sharfuddin and Roe, JJ.*) PUNCHA *v.* BINDESWARI. 37 I. C. 960.

CUSTOM (GENERAL)—Essentials of validity.

———*Essentials of— Ancient, certain, etc.——Strict proof.*

A custom should be construed strictly and must be shown to be 'ancient', 'certain' 'invariable' and 'continuous' by means of 'clear and unambiguous evidence.' (*Hayward, A. J. C.*) MUKHI GUZI *v.* MASTAN SHAH.

36 I. C 951 : 10 S. L. R. 126.

Evidence of.

———*Evidence of*—Wajib-ul-arz—*Ambiguous statement—Evidentiary value.*

A custom is not established by an ambiguous statement of it in a *Wajib-ul-arz*. But when it is not shown by reliable evidence that the Settlement officer neglected to perform his duty or was misled in recording a custom, and it does not appear that the statement of the custom is ambiguous, the record in a *Wazib-ul arz* of a custom is most valuable evidence of the custom, much more reliable evidence than subsequent oral evidence given after a dispute as to the custom has arisen. (*Sir John Edge*) BALGOBIND *v.* BADRI PRASAD.

45 M. L. J. 289 : 26 O. C. 217 : 45 A. 413 : 38 C. L. J. 302 : 33 M. L. T. 317 (P. C): (1923) M. W. N. 799 : 9 O. & A. L. R. 581 : 10 O. L. J. 368 : 50 I. A. 196 : 21 A. L. J. 578 : 1923 P. C. 70 (P. C.).

———*Evidence of— Custom in derogation of Hindu or Mahomedan law.*

If is of the essence of special usages modifying the ordinary law of succession that they should be ancient and invariable and it is further essential that they should be established to be so by clear and unambiguous evidence It is only by means of such evidence that the Courts can be assured of their existence and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends. (*Sir Lawrence Jenkins.*) MAHOMED IBRAHIM ROWTHER *v.* SHAIK IHRAHIM ROWTHER. **45 Mad. 308 : (1922) M. W. N. 470 : 36 C. L. J. 64 : 24 Bom. L. R. 944 : L. R. 3 P. C. 149 : 26 C. W. N. 793 : 30 M. L. T. 85 : 15 L. W. 354 : 49 I. A. 119 : 43 M. L. J. 69 : 1922 P. C. 59 (P. C.).**

———*Evidence of— Judicial recognition, sufficient to dispense with proof in individual case.*

When a custom or usage, whether in regard to a tenure or a contract or a family right is repeatedly brought to the notice of the Courts of a country, the Courts may hold that custom or usage to be introduced into the law without the necessity of proof in each and individual case. It becomes in the end truly a matter of process and pleading. (*Lord Dunedin.*) GANGADHAR RAMRAO *v.* RAJA OF PITTAPUR.

41 Mad. 778 : 35 M. L. J. 392 : 24 M. L. T. 276 : 16 A. L. J. 833 : 28 C. L. J. 428 : 5 P. L. W. 267 : 20 Bom. L. R. 1056 : 23 C. W. N. 173 : (1918) M. W. N. 922 : 47 I. C. 354 : 45 I. A. 148 (P. C.).

———*Evidence of*—Wazib-ul-arz, *entry in—If a record of custom.*

Where there is an entry of a single proprietor of a *Mahal* in a *Wazib-ul-arz*, there can be no custom of pre-emption. Even if the custom existed. it came to an end, when the *Mahal* vested in a single proprietor. (*Tudball and Sulaiman, JJ.*) KARIMULLAH *v.* ATMA RAM.

63 I. C. 295 : 19 A. L. J. 614.

CUSTOM (GENERAL)—Evidence of.

———*Evidence of*—Wajib-ul-arz—*Entry in.*

A vague entry in a *Wajib-ul-arz* is not enough to prove a custom. (*Richards, C. J. and Tudball, J.*) MUHAMMAD RAZI-UD-DIN *v.* RAGHUBIR.

46 I. C. 82 : 16 A. L. J. 507.

———*Evidence of* — Wajib-ul-arz — *Evidentiary value of.*

A *Wajib-ul-arz* is not conclusive as to the existence or otherwise of a custom of pre-emption which should depend upon the opinion of the Court after considering the evidence adduced and not upon the mere construction of particular words and expressions in the *Wajib-ul-arz.* (*Richards, C. J. and Tudball, J.*) RAMA NAND *v.* HARJAS.

14 I. C. 572.

———*Evidence—Nature of.*

A person seeking to prove a custom at variance with the Hindu Law applicable to the community must plead the custom and all its incidents and must prove it by unmistakeable evidence. The custom must also be established to be ancient and invariable. (*Richards, C. J. and Banerjee, J.*) LACHHMI *v.* SANGARAM.

14 I. C. 322 : 10 A. L. J. 136.

———*Evidence of—Clear and cogent.*

Clear and cogent evidence is necessary to establish a custom. To prove a right of transfer by a tenant, several sale-deeds of houses in the village are of no value unless the circumstances under which the deeds were executed are also proved. (*Stanley, C. J. and Banerji, J.*) MUHAMMAD USMAN *v.* BABU.

9 I. C. 314 : 8 A. L. J. 61.

———*Evidence of—Long enjoyment.*

Custom can be inferred from long enjoyment not exercised by permission, stealth or force provided it is not unreasonable. 17 All. 87. Ref. (*Richards and Tudball, JJ.*) SHADI LAL *v.* MUHAMMAD ISHAQ KHAN.

33 All. 257 : 9 I. C. 198 : 8 A. L. J. 10.

———*Evidence of—Personal law—Conflict.*

Where custom conflicts with the personal law of the parties it is not advisable to extend the custom unless there is evidence to show that the custom has been adopted. (*Macleod, C. J. and Fawcett, J.*) JAGJIVAN *v.* KALIDAS.

45 Bom. 604 : 60 I. C. 901 : 23 Bom. L. R. 81.

———*Evidence of—Non-exercise of right.*

Mere non-exercise of a right of cow-killing will not defeat it and the abstention will not ripen into a custom. (*Coxe and Mullick, JJ.*) MAHADEO PRASAD *v.* NABI BAKSH.

25 I. C. 104.

———*Evidence of—Several instances.*

A custom to be valid, must be proved to be ancient, continuous, certain and reasonable, and being in derogation of the general rule of law must be construed strictly. 9 Mad. 44 ; 17 W. R. 543 (P. C.) ; 25 W. R. 5, Rel. on. A custom must be satisfactorily proved by specific instances so

CUSTOM (GENERAL)—Evidence of.

numerous as to justify the Court in finding in favour of the custom. One solitary instance or even four modern instances are insufficient to prove the custom. 27 All. 203 ; 3 Bom. 273, Foll. (*Mookerjee and Beaolcroft, JJ.*) DURGA CHARAN MAHTO *v.* RAGHUNATH MAHTO.
18 C. L. J. 559 : 20 I. C. 810 : 18 C. W. N. 55.

———*Evidence of—Court's duty.*

In cases where a custom is alleged, a duty is imposed on the Court to endeavour to ascertain the existence and nature of that custom. (*Broadway and Zafar Ali, JJ.*) MT. DIYAN *v.* HIRA NAND.
4 Lah. 202 : 1923 Lah. 448.

———*Evidence of.*

Proof of custom is not confined to judicial precedents alone and the fact that no contest has taken place in the past may well raise a presumption that the custom was so well recognised that no one thought of contesting it. Custom is not a matter of inference but of proof, and it is the evidence adduced in support of the custom set up that can, and must, alone be looked to ascertain whether or not it has been proved to exist. 29 C. 433 (P. C.) Foll. and 77 P. R. 1904 Foll. (*Broadway and Campbell, JJ.*) NAJIM-UD-DIN *v.* ABDUL HAMID.
1923 Lah. 175.

———*Evidence of.*

A rule of custom may be established and held to be of binding force even where no instance is forthcoming, if there is an overwhelming preponderance of oral testimony of those governed by it and likely to know of its existence in its favour. (*Abdul Raoof and Abdul Qadir, JJ.*) MT. CHANNI BIBI *v.* AHMAD KHAN.
69 I. C. 331.

———*Evidence of.*

Custom must be proved by evidence and courts cannot deduce the existence of one custom from that of another. It is not the function of a court to say what a custom ought to be, but its duty is confined to enforcing such customs as known to exist. (*Chevis and Campbell, JJ.*) DHANNAN *v.* BHAGWAN.
67 I. C. 555.

———*Evidence*—Riwaj-i-am.

Statements in *riwaj-i-am* contradicting a custom and unsupported by instances are of very little weight. (*Scott-Smith and Abdul Qadir, JJ.*) MANOHAR *v.* NANHI.
66 I. C. 399 : 2 L. 366.

———*Evidence of—Succession—Instances not supported by documents.*

To establish a custom of exclusion of females at variance with Hindu law it must be shown by clear and cogent evidence that there was actually an assertion of her claim by the female and a denial by the male. Mere inaction which may be due to various causes, *e.g.*, mutual good will or ignorance of the law, affords no indication of the fact that the rule of Hindu law has been abrogated and a custom at variance with it has taken its place. Instances not supported by documentary evidence are not satisfactory. (*Shadi Lal and Broadway, JJ.*) GANESH DEVI *v.* DARESHAN SINGH.
2 Lah. L. J. 377 : 56 I. C. 478 : 2 U. P. L. R. (Lah.) 100.

CUSTOM (GENERAL)—Evidence of.

———*Evidence of—Entry in* Riwaj-i-am *setting up special custom.*

A mere entry in a *Riwaj-i-am* describing a special custom opposed to the general custom of the province does not raise a presumption in its favour. 44 Cal. 749 P. C., Dist. 42 I. C. 358, Foll. (*Scott-Smith and Martineau, JJ.*) KHUDA BAX *v.* FATTEH KHATUN.
140 P. W. R. 1918 : 46 I. C. 679 : 13 P. R. 1919.

———*Evidence of—Strict proof.*

Very strict proof of a custom which is plainly inequitable should be required before it is acted upon. (*Broadway, J.*) KISHAN SINGH *v.* NUR DIN.
42 I. C. 193 : 156 P. W. R. 1917.

———*Evidence of—Opinions—Instances.*

Where a claim is based on custom the plaintiff must lead clear evidence of instances in which the custom has been followed ; opinions however numerous, that the custom ought to have been followed are not sufficient to entitle the Court to hold that the custom had been established. Where a custom on which a claim is based is not proved the plaintiff cannot rely on any provision of Hindu Law in support of his case which he did not press at the first hearing. (*Chevis and Le Rossignol, JJ.*) DALIPA *v.* SURAJ KAUR
48 P. R. 1916 : 34 I. C. 581 : 142 P. W. R. 1916.

———*Evidence of—Succession—Males excluding females.*

A mere practice of males excluding females from succession does not establish custom unless it is proved to have been uniform and existing for a long time. (*Shadi Lal and Jones, JJ.*) MURAD KHATUM *v.* MUHAMMAD BAKSH.
84 P. R. 1916 : 33 I. C. 742 : 85 P. W. R. 1916.

———*Evidence—New custom—Strict proof.*

A novel custom must be proved by clear and cogent evidence and the Court must be satisfied that the custom has been generally recognised and followed by the community. (*Chevis and Shadi Lal, JJ.*) GHULAM JILANI KHAN *v.* IMDAD ALI.
13 P. R. 1916 : 33 I. C. 215 : 196 P. W. R. 1915.

———*Evidence of—Actual instances.*

A custom should be established by instances and inductively and not deductively. It cannot be extended by logical process. (*Chevis and Le Rossignol, JJ.*) AMIN CHAND *v.* BEEJHA.
107 P. R. 1915 : 32 I. C. 29 : 208 P. W. R. 1915.

———*Evidence of—Instances.*

A custom cannot be proved by logical process actual instances only can prove it. (*Sha Din and Le Rossignol, JJ.*) PUALASINGH *v.* LACHAMI.
105 P. R. 1915 : 32 I. C. 16 : 192 P. W. R. 1915.

———*Evidence of—Decisions.*

Custom must be proved by authoritative pronouncement or by instances in which it has been followed ; it cannot be established by dialectics. (*Chevis and Le Rossignol, JJ.*) GULAB KHAN *v.* MT. CHIRAGH BIBI.
43 P. R. 1916 : 31 I. C. 909 : 131 P. W. R. 1916.

CUSTOM (GENERAL)—Evidence of.

———*Evidence of*—Riwaj-i-am —*Opposed to general custom.*

A special custom recited in a *riwaj-i-am*, opposed to general custom and unsupported by instances, is insufficient to prove its existence. In cases where an entry in a *riwaj-i-am* has been attested by people for whom it has been prepared, the Courts have to see what the real custom is and not what the people think to be the custom. (*Chevis and Le Rossignol, JJ.*) DEWA SINGH *v.* LEHNA SINGH. **45 P. R. 1916 : 44 P. L. R. 1916 : 31 I. C. 740 : 8 P. W. R. 1916.**

———*Evidence—Oral evidince of instances.*

Instances in support of an alleged custom are not always to be treated as of little or no value because they are supported only by oral testimony; if the deponents have means of knowledge and the opposite party makes no attempt to rebut the facts stated, it may often be accepted as proved. (*Johnstone and Shah Din, JJ.*) RAHIM BAKSAH *v.* UMER DIN. **49 P. R. 1915 : 111 P. W. R. 1915 : 29 I. C. 382 : 243 P. L. R. 1915.**

———*Evidence of—No instances.*

A rule of custom may be established even when no instance is forthcoming if there is an overwhelming preponderance of oral testimony of those governed by it and likely to know of its existence. The proof of custom should not be confined to judicial precedents and definite instances. 55 P. R. 1903 (F. B.) Foll. 110 P. R. 1906 (F. B.) not Foll. (*Shah Din, J.*) RAM LAL *v.* GOPI. **24 P. R. 1914 : 58 P. W. R. 1914 : 25 I. C. 710 : 196 P. L R. 1914.**

———*Evidence of—Entry in* riwaj-i-am.

An entry in *riwaj-i-am* is a strong proof of custom even in absence of instances. (*Rattigan and Shadi Lal, JJ.*) RANJHA *v.* MT. JENDWADDI. **104 P. R. 1914 : 122 P. W. R. 1914 : 24 I. C. 942 : 221 P. L. R. 1914.**

———*Evidence of*—Wajib-ul-kur *and* Riwaj-i-am—*Weight of entry in.*

A record of custom in a *riwaj-i-am* in which the custom of one part of the district carefully differentiated from that of the other parts thereof has some weight though ordinarily an entry of custom in the *riwaj-i-am*, has not the same evidentiary value as an entry in a village, *wajib-ul-arz*; and is of little or of no value unless supported by instances. (*Johnstone and Shah Din, JJ.*) MILKHI *v.* RAM DAS. **133 P. L. R. 1914 : 55 P. R. 1914 : 24 I. C. 477 : 148 P. W. R. 1914.**

———*Evidence of—Instances based on admission—Value of.*

Instances based upon admissions are not valueless in all cases though the weight to be attached to them would depend upon the circumstances of each case. (*Agnew and Shadi Lal, JJ.*) KANHAYA SINGH *v.* PREMI. **166 P. W. R. 1913 : 20 I. C. 876 : 322 P. L. R. 1913 :**

———*Evidence of—Instances.*

Mere assertion of a power in the absence of instances are useless to prove a custom. (*Rattigan and Chevis, JJ.*) KHUDA BAKSH *v.* AHMAD KHAN. **114 P. R. 1913 : 151 P. L. R. 1913 : 19 I. C. 459 : 124 P. W. R. 1913.**

CUSTOM (GENERAL)—Evidence of.

———*Evidence of — Decisions— Rulings of Chief Court.*

Questions of custom should be decided on evidence, and not upon rulings of Chief Court, which have great weight but are not conclusive. (*Reid, C. J. and Robertson, J.*) LALL SINGH *v.* GURCHARAN SINGH. **62 P. W. R. 1913 : 131 P. L. R. 1913 : 19 I. C. 730 : 54 P. R. 1913 : *Also* 61 P. R. 1916 : 161 P. W. R. 1916 : 35 I. C. 561 : 5 P. L. R 1917.**

———*Evidence of—Opinions — Irresponsible expression of opinion.*

In order to prove a custom irresponsible expression of opinion not supported by instances is of no value and an instance of succession of daughters is insufficient to prove a custom of a sister inheriting in preference to collaterals. 41 P. R. 1895. Foll. ; 134 P. R. 1907, Foll. (*Johnstone and Chevis, JJ.*) HARNAMON *v.* SANTASING. **98 P. W. R. 1912 : 13 I. C. 711 : 122 P. L. R. 1912.**

———*Evidence—Instances.*

A single instance is not sufficient to prove a custom. (*Kendal, A. J. C.*) BULCHAND *v.* LEKHU. **139 P. W. R. 1911 : 12 I. C. 435 : 242 P. L. R. 1911.**

———*Evidence of* Riwaj-i-am — *Entries in* Riwaj-i-am.

An entry in *riwaj-i-am* opposed to the general custom of the province and unsupported by instances, is of no value as evidence of a custom. (*Rattigan and Chevis, JJ.*) ABDUL RAHMAN *v.* BURE KHAN. **196 P. L. R. 1911 : 11 I. C. 96 : 173 P. W. R. 1911.**

———*Evidence of—Impartibility.*

Evidence of witnesses to the effect that they had never known a case of partition does not afford in law sufficient proof of a valid custom of impartibility. (*Schwabe, C. J. and Wallace, J.*) VAZHAYIL PARKUM THATTAM KUNHI KUTTY *v.* RAMAN. **46 Mad. 597 : 44 M. L. J. 274 : (1923) M. W. N. 173 : 18 L. W. 525 : 1923 Mad. 452.**

———*Evidence of—Instances* — Quantum *of proof.*

Ordinarily the Court requiries proof of at least more than one instance in which an alleged customary right has been exercised, but there is no hard and fast rule. The Court would not insist on the same *quantum* or nature of proof when the custom or usage set up is not at variance with any law as when the alleged custom is opposed to existing law ; again proof of numerous instances of the alleged custom will not be required when such instances are of rare occurrence. Even only one solitary instance may do. (*Abdur Rahim and Phillips, JJ.*) RAGHUBHUSHANA *v.* VIDIAVARIDHI. **34 I. C. 875.**

———*Evidence of—Decisions.*

In deciding questions as to customary laws, Courts should follow texts or series of decisions bearing on custom if there are any ; otherwise evidence is the only guide. (*Sankaran Nair and Coutts Trotter, JJ.*) PARUKUTHI *v.* KELLAPU NAIR. **31 M. L. J. 479 : 34 I. C. 818 : (1917) M. W. N. 106.**

CUSTOM (GENERAL)—Evidence of.

———*Evidence of—Judicial notice when taken.*

In the case of customs, facts showing that they have the force of law and govern the rights of the parties and that they have been uniformly followed by the parties, must be proved. The Court cannot take judicial notice, unless it has been proved so often as to make further proof unnecessary. (*White, C. J. and Tyabji, J.*) SECRETARY OF STATE *v.* SANTRAJA.

25 M. L. J. 411 : 14 M. L. T. 348 : 21 I. C. 432 : 1914 M. W. N. 333.

———*Evidence of—Impartibility—Proof.*

The fact that for a number of generations a particular estate has remained undivided, though other properties of the family has been undivided would not by itself show the existence of a family custom or a custom attaching to a tenure of the estate. (*Dhobley, A. J. C.*) KRISANAJI *v.* NILKANTH. **18 N. L. R. 163: 5 N. L. J. 25 : 1922 Nag. 52.**

———*Evidence of.*

Where no particular custom is proved to prevail in a particular family, no amount of evidence which can prove its prevalence in other families in the tribe would be of any avail. (*Stuart, J. C. and Kanhaiya Lal, A. J. C.*) NARAIN SINGH *v.* DEPUTY COMMISSIONER OF PARTABGARH. **55 I. C. 896 : 7 O. L. J. 93.**

———*Evidence of*—Wajib-ul-arz.

Actual instances of succession must be proved in order that a scheme of inheritance in *wajib ul-arz* may be evidence of custom. (*Lindsay, J.C.*) SADRUNNISSA *v.* RAMBHAROSE. **55 I. C. 873 : 7 O. L. J. 78.**

———*Evidence of—Entries in* wajib-ul-arz.

A custom grows out of instances acquiesced in by persons interested so invariably, and for such a long time as to become a rule of law recognised is binding on those affected by it. Such a custom must be certain and definite. (*Kanhaiya Lal, A. J. C.*) RAM SAMUGH ; SINGH *v.* BIKRAMJIT SINGH. **50 I. C. 876 : 6 O. L. J. 142.**

———*Evidence of*— Wajib-ul-arz — *Construction of.*

Nothing short of the most cogent evidence can be accepted as proof of a custom repugnant to the ordinary rule of succession or power of disposal empowered by it. If a construction can be put on a *wajib-ul-arz* which is compatible with the rules of the personal law of the parties, that is a construction to which a Court should adhere. (*Kanhaiya Lal, A. J. C.*) BAHADUR SINGH *v.* AUSERI SINGH. **48 I. C. 357.**

———*Evidence of—Ikrarmalikan—Statement in—Value of.*

A custom that a ryot holding a grove had no right to plant new trees therein without the proprietor's permission was held to be sufficiently proved by a statement to that effect in the *Ikrarmalikan* of the village. (*Lindsay, J. C.*) RAGHUBAR *v.* SURAJ BAKSH. **46 I. C. 357 : 5-O. L. J. 237**

———*Evidence of* wajib-ul-arz.

A *wajib-ul-arz* is admissible to prove a custom and suits may be decreed on entries found in a

CUSTOM (GENERAL)—Evidence of.

wajib-ul-arz. But where it does not record the fact of a well-established custom but only views of certain individuals as to how a practice should be, it is of very little value. 5 Cal. 744 (P. C.) ; 32 All. 363 (P. C.); 26 Cal. 81 (P. C.) ; 31 All. 457 (P. C.), 15 Cal. 20 (P. C.) : Ref. to. (*Kanhaiya Lal and Kendall, A. J. Cs.*) SURAJ BAKSH *v.* CHAB KUAR. **26 I. C. 98 : 1 O. L. J. 532.**

———*Evidence of—Single instance.*

One instance is not sufficient to prove a custom. (*Kendall, A. J. C.*) RAM DAT *v.* SUKHIA. **25 I. C. 869 : 1 O. L. J. 470.**

———*Evidence of—Entry in* wajib-ul-arz.

An entry in *wajib-ul-arz* signed and verified by the parties to the effect that "a sonless widow succeeds to her husband's estate and has no power to alienate and on her death the share devolves on husband's heirs" records and proves a family custom which while giving the widow only a life estate confers on her absolute power of alienation. The interpretation of one *wajib-ul arz* does not govern another. (*Stuart, A. J. C.*) MUSSAMMAT PUNNI *v.* CHET RAM. **24 I. C. 640 : 1 O. L. J. 319.**

———*Evidence of—Question of law or fact—Second appeal.*

Whether a custom exists or not is a question of fact. But whether the evidence let in to prove the essentials of a binding custom, such as ancientness, continuity, etc., is adequate proof of what the law requires, is a question of law. (*Lindsay, A. J. C.*) LALMAN *v.* NAND LAL. **20 I. C. 894 : 17 O. C. 1.**

———*Evidence of*—Wajib-ul-arz—*Entries in—Evidence necessary to prove a custom in derogation of ordinary law.*

The entries in a *wajib-ul-arz* are not by themselves proof of the existence of a custom though they are admissible as evidence of a custom. A custom in derogation of ordinary law must be proved by very cogent evidence. (*Lindsay, A. J. C.*) CHANDIKH SINGHA *v.* RAM DULAI. **12 I. C. 403.**

———*Evidence of—Custom set up to be precisely proved—Proof of different custom.*

Evidence to prove a custom must not only be consistent with the custom which is alleged but must also prove a custom which is not wider than that alleged. If the evidence tends to prove a custom wider than that which is alleged, the party seeking to establish the custom is not at liberty to adopt part only of the evidence and to reject the rest. But this does not necessarily establish the converse, namely, that if a broad custom is pleaded the existence of a lesser custom could not if proved be found. The defendants alleged a custom which they failed to prove ; but from evidence given on behalf of the plaintiff to rebut the evidence given on behalf of the defendants, the Courts considered that it was apparent that a custom had been proved, of the same type as that which the defendants had alleged but of a narrower compass. *Held* that in modern times a court could have little hesitation in finding that although the entire custom alleged by the defendant did not exist but a

material part of it did. (*Bucknill and Ross, JJ.*) NATHUNI RAI *v.* MAHARAJADHIRAJ SIR RAMESHWAR SINGH BAHADUR. **1 Pat. L. R 289 : 1924 P. 147.**

———*Evidence of—Value of entry in Record-of—Rights.*

A custom or right established with regard to any estate is established in its entirety with regard to the whole estate and not as to a part (*Atkinson, J.*) DEBI RAUT *v.* ASHUTOSH BHATTACHARJEE. **39 I. C. 561.**

———*Evidence of—Succession—Primogeniture—Compromise of suits for partition by younger brothers.*

Where younger sons have in various contested suits invariably failed to establish their right to a share by partition and that in each case they compromised their claim by accepting a mere grant for maintenance, it is some evidence to support the right of the eldest son to take the entire property by primogeniture, 16 All. 221 : 36 Cal. 590 Ref. (*Mullick and Atkinson, JJ.*) BALVADRU SAMANT SINGH *v.* BIMBADHAR ROY.

1 Pat. L. J. 509 : 38 I. C. 343 : 2 Pat. L. W. 396.

Family Custom.

———*Family custom—Requisites of—No presumption in favour of custom—Bom. Reg. (IV of 1872) S. 26—Effect of.*

When either party to a suit sets up a 'custom' as a rule of decision, it lies upon him to prove the custom which he seeks to apply. Custom binding inheritance in a particular family, although foreign to the spirit of English Law is recognised in India; and if the custom is well-established in one particular family or district the fact that it might apply to other familes or districts will not make it void. Special usages modifying the ordinary law of succession must be (1) ancient, (2) invariable, and (3) established to be so by clear and unambiguous evidence. Where a large number of conditions have to be fulfilled to test a custom and a number of instances are adduced in proof of that custom, it is necessary that one or more examples of each condition should be established, but it is not necessary that all the conditions should be proved in each instance. The latter requirement would greatly weaken the evidence by tradition to which in certain cases great weight is due. The best evidence as to custom of inheritance is generally found in connection with the division of land and the revenue records may therefore be of great value. No presumption in favour of custom against the general or personal law is created by S. 26 of Bombay Regulation (IV of 1872) or S. 5 of the Punjab Laws Act ; it is only when the custom is proved that it is made the rule of decision. 41 P. R. 1906. Appr. (*Lord Buckmaster.*) ABDUL HUSSAIN KHAN *v.* BIBI SONA DERO

45 Cal. 450 : 45 I. A. 10 : 16 A. L. J. 17 : 4 P. L. W. 27 : 34 M. L. J. 48 : 22 C. W. N 353 : 23 M. L. T. 117 : 27 C. L. J. 240 : 1 P. L. R. 1918 : 20 Bom. L. R. 528 : 43 I. C. 306 : 12 S. L. R. 104. (P.C.)

[On appeal from 16 I. C. 641 : 6 S. L. R. 1.]

———*Family custom—Proof.*

On a question of a family usage under which certain members of a family claim to have acquired by succession ownership of the family property, the fact that the female members who were in possession of the properties for the time being made transfers and otherwise dealt with the properties as if they were owners thereof is relevant. To establish a *kulachar* (family custom) it must be shown that the custom has existed from time immemorial and where the custom set up is peculiar to a single family, the rule is more strictly enforced than in other cases. (*N. R. Chatterjee and Walmsley, JJ.*) AMBALIKA DASSI *v.* ARPANA DASSI

45 Cal. 835 : 23 C. W. N. 160 : 47 I. C. 402 : 29 C. L. J. 264.

———*Family custom—Primogeniture—Validity.*

A custom of descent according to primogeniture may exist by *kulachar* or family custom though the estate may not be a raj. 1 Cal. 153 Foll. (*Caspersz and Doss, JJ.*) SARAT KUMAR DAS *v.* AKSHOY NARAIN DAS. **9 I. C. 961 : 13 C. L. J. 305.**

———*Family custom—Maintenance—Hindu keeping Muhammadan concubines—Illegitimate children.*

Where the Muhammadan concubines of a Hindu and their illegitimate children claimed maintenance from the legitimate son of the Hindu after his death, under a family custom. *held*, that no such custom was proved. (*Chevis and Le Rossignol, JJ.*) CHARANJIT SINGH *v.* AMIR ALI. **64 I. C. 892 : 2 Lah. 243.**

———*Family custom—Proof.*

To prove a family custom either it must have been prevalent for a long period and must have become a distinct tradition or there must be a long series of instances from which it may be inferred, 17 All. 87. A. W. N. (1895) 10 ; 29 I. A. 70 ; 6 C. W. N. 425 ; 24 All. 273 (P. C.) Foll. (*Ayling and Seshagiri Iyer, JJ.*) PATNIHARKURU *v.* RAMAN VARMA. **24 I. C. 519 : 28 M. L. J. 669.**

———*Family custom—Evidence of.*

Where a custom prevails in some branches of a family, it is a good evidence to show the probability of a similar custom in other branch of the family. (*Stuart and Kanhaiya Lal, A. J. Cs.*) MUHAMMAD ALI KHAN *v.* GHAZANFOR ALI KHAN. **60 I. C. 147 : 7 O. L. J. 474.**

———*Family custom—Evidence of—Tribal custom.*

When only a family custom is set up, evidence as to a tribal custom may sometimes be relevant as showing that a family belonging to that tribe observed the same. (*Kanhaiya Lal, J. C.*) CHAURAS KUNWAR *v.* JAGANNATH SINGH.

7 O. L. J. 147 : 56 I. C. 287 : 2 U. P. L. R. (J. C.) 89.

———*Family custom — Succession — Widow succeeding to her husband's property in joint family—Custom as to—Proof of—Wajib-ul-arz—Interpretation of.*

A family custom that a widow succeeds to the property of her husband even though he is a member of joint Hindu family requires very strong and cogent evidence to prove it. Where a *wajib-ul-arz* stated that a widow of a co-sharer

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succeeds to the property of her husband. *Held* that the statement referred to the case of a separated co-sharer and not to one in a joint Hindu family. (*Stuart and Kanhaiya Lal, A. J, Cs.*) SURAJ BAKSH v. SUKHDEI. 32 I. C. 291 : 2 O. L. J. 502.

———*Family custom—Proof—Evidence of its existence in another branch.*

Where a custom prevails in one branch of a family it is strong evidence to be relied on, that it applies with equal force to another branch of the same family. 23 All. 37 Foll. (*Chapman and Atkinson, JJ.*) LAL GAJENDRA NATH SAHI DEO v. LAL MATHURLAL NATH SAHI DEO.
1 Pat. L. J. 109 : 35 I. C. 383 : 20 C. W. N. 876.

Immoral and Illegal.

———*Immoral and illegal—Brothel keeper—Right to succeed.*

A custom by which a brothel keeper succeeds to the property of a Natchi or slave kept for the purpose of prostitution could by reason of its immorality have no legal force. (*Scott Smith and Le Rossignol, JJ.*) MUHAMMAD BAKHSH v. NAWAZISH ALI. 183 P. W. R. 1918 : 48 I. C. 73 : 75 P. R. 1918.

———*Immoral and Illegal—Body of person engaged to perform temple duties—Custom that those present, also represent the absent—Agreement.*

Where seven persons were employed by a person, to recite *mantrams* in a temple, but some of them did not attend on certain days and pleaded a custom by which the recitation of any one or more (less than seven) was to be treated as valid and pleaded also an agreement that any one of them present should represent all those that were absent, *held*, that the custom pleaded was immoral and opposed to public policy. (*Sadasiva Aiyar and Spencer, JJ.*) KRISHNA AIYANGAR v. RAMAN CHETTIAR. 69 I. C. 469 : 14 L. W. 329.

———*Immoral and illegal—Dancing girls.*

A custom regulating rights of property among dancing girls is not immoral on that ground alone. (*Oldfield and Seshagiri Iyer, JJ.*) MEENAKSHI v.-MUNIANDI PANNIKKAN. 38 Mad 1144 : 1 L. W. 704 : (1914) M. W. N. 672 : 16 M. L T. 270 : 25 I. C. 957 : 27 M. L. J. 353.

Landlord and Tenant.

———*Landlord and tenant—Transfer of rights by tenant—Effect.*

The claim of a tenant to transfer his right of residence really amounts to a change of right of tenancy into a right of permanent tenancy. (*Stanley, C. J. and Banerji, J.*) MUHAMMAD USMAN v. BABU. 9 I. C. 314 : 8 A. L. J. 61.

———*Landlord and tenant—Thana District—User by rice land tenants.*

The right of user of tenants of rice lands in the Thana District, over the adjoining waste lands of their superior holder is confined to the use of portions of the waste for obtaining manure without which the rice lands cannot be cultivated or

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the assessment thereon earned and paid. (*Scott, C.J. and Russell, J.*) VASUDEO LAXMAN v. GOVIND MAHADEO. 14 Bom. L. R. 124 : 14 I. C. 473 : 36 Bom. 315.

———*Landlord and tenant—Burden of proof.*

A tenant setting up a claim in derogation of general law must prove it. An allegation in a plaint that the plff. landlord is claiming only half share of the timber, though he is entitled to the whole, because his predecessors were getting only half, is an admission in deft. tenant's favour and does not amount to setting up a new custom. (*Ross, J.*) JANKI KUAR v. USMAN SAIN.
62 I. C. 417.

Local Custom.

———*Local custom*—Haq-i-chaharum—*Zamindar's right to recover—Vendees liability.*

A Zamindar claimed a right to a fourth share in the sale proceeds of a house built on a site belonging to him, by virtue of a long established custom : *Held*, if the right is based on custom then it is the duty of the vendee to see that *haq-i-chaharum* is paid to the Zamindar. The vendee cannot get rid of his liability by merely proving that he has paid the whole consideration of the vendor. (*Stuart and Sulaiman, JJ.*) KEDAR NATH v. DATTA PRASAD SINGH.
4 U. P. L. R. (A) 197 : 44 All. 739 : 20 A. L. J. 646 : 1922 All. 370.

———*Local custom—Ryots of Tissa—Tahsil Muzaffarnagar, District Meerut—Transfer of house with right of residence is valid.*

The custom that the ryots of Tissa in Muzaffarnagar, in the Meerut District can validly transfer houses with a right of residence, exists and is recognized by law and should be given effect to. (*Rafique and Piggott, JJ.*) FAIYAZ ALI v. REKHAB DAS. 61 I. C. 24 : 19 A. L. J. 104.

———*Local custom*—Wajib-ul-arz *of other villages—Proof by.*

When the *wajib-ul-arz* of a village in which the land in dispute is situate is silent about a particular custom, the *wajib-ul-arz* of other villages does not prove it. (*Chamier, J.*) MUSSAMMAT NIHALI v. KANAK SINGH. 25 I. C. 617.

———*Local custom—Proof of—Right of way—Antiquity—Open user.*

A Court should not find a local custom unless it is satisfied of its reasonableness and its certainty as to extent and application and is further satisfied by the evidence that the enjoyment of the right was not by leave granted or by stealth or force and that it had been openly enjoyed for such a length of time as suggests that originally by agreement or otherwise, the usage had become a customary law of the place in respect of the persons and things with which it is concerned. The evidence must be sufficient to show that the right has been openly enjoyed for such a length of time as suggests that originally by agreement or otherwise the usage had become customary law of the locality. The doctrine of lost grant is applicable to private rights claimed by prescription. It is inapplicable to a right claimed on the basis of immemorial custom. The question of

legal origin is only of importance where it is suggested that the right claimed might have originated within the time of memory, whatever that time may be. In the case of a custom its legality depends on such considerations as its reasonableness and its certainty. As to the length of user or enjoyment which must be proved before a local custom may justifiably be inferred no definite rule can be laid down. But if the existence of the custom depends on oral evidence, and the user of enjoyment is taken back as far as living memory can be expected to go, then in the absence of rebutting evidence it is not unreasonable to say, *presumintur retro* or to infer an immemorial enjoyment of theright, or say, in Bengal, an enjoyment from the time of the Permanent Settlement. (*Richardson and Suhrawardy, JJ.*) ALIMAHOMED *v.* SHEIKH KATU.
1923 Cal. 200 : 36 C. L. J. 280.

———*Local custom— Proof— Transferability of occupancy holdings.*

To prove a custom or usage that occupancy holdings are transferable in any locality, it is not sufficient to show simply that such holdings are sold in the village or neighbouring villages, as the essence of usage of transferability is that transfers made to the knowledge of, but without the consent of, the landlord are valid and must be recognised by him. (*Mookerjee and Beachcroft, JJ.*) KAILAS CHANDRA DUTT *v.* PADMA KISHORE ROY. 25 C. L. J. 613 : 21 C. W. N. 972 : 41 I. C. 959 : 45 C. 285.

———*Local custom—Proof.*

Where a similar custom prevails in several villages, expressions of mere opinions as to its existence are of great importance. (*Johnstone and Shahdin, JJ.*) ISHAR KUAR *v.* RAJASINGH.
29 P. R. 1911 : 94 P. L. R. 1911 : 9 I. C. 608 : 124 P. W. R. 1911.

———*Local custom—South Canara—Tenant, rights of.*

Under the Customary Law of South Canara a tenant is entitled to the value of improvements effected by him, on ejectment by the landlord. (*Ayling and Coutts-Trotter, JJ.*) RAMAPPA *v.* ABDULLA. 69 I. C. 282 : 41 M. L. J. 127.

———*Local custom—Validity—Isolated cases —Value of.*

A custom to be effective must be a territorial custom and isolated cases are of little value. (*Collins, C. J. and Parker, J.*) ALLAREDDI SUBBAMMA *v.* NALLAPAREDDI.
11 M. L. T. 124 (1912) M. W. N. 178 : 13 I. C. 870 : 22 M. L. J. 260.

———*Local custom*—Riwaj-i-am, *Weight of.*

A local custom binds all the families of the class indicated who reside in the locality where the custom prevails. It is not necessary to prove that the custom applies to the particular family under consideration. (*Lindsay, A. J. C.*) JAGDEO *v.* BHAWANI. 61 I. C. 920 : 8 O. L. J. 116.

———*Local custom—Proof—Tribal or family custom.*

If a local custom pertaining not only to the sub-caste of the parties but also to the persons

belonging to the other sub-castes is alleged to exist it is sufficient to prove the custom so far as the particular sub-caste under consideration is concerned. Where a local or tribal custom is pleaded and it is proved that it exists in the tribe of the locality there is a very strong presumption that any particular family of the tribe in that locality is bound by that custom though no evidence may have been adduced to prove that the custom pertains to that particular family. In such a case the onus of proving that the custom does not obtain in that particular family lies on the person who says so. (*Kanhaiya Lal, J. and Lyle, A. J. C.*) MAKUND SINGH *v.* KALKA SINGH.
54 I C. 856 : 6 O. L. J. 704.

———*Local custom—Nature of.*

Custom is an encroachment on the general law and, hence a legal finding of a custom must define the geographical area within which it prevails. (*Chapman and Roe, JJ.*) JAGDAMBA KUMARI *v.* WAZIR NARAIN SINGH.
2 Pat. L. J. 239 : 38 I. C. 255 : 3 Pat. L. W. 437.

———*Local custom—Proof of—Evidence necessary.*

A local custom need not be shown to be immemorial, if it is sufficiently certain and reasonable to satisfy the requirements of a valid custom. 17 A. 87 foll. (*Fawcett, J. C. and Kemp, A. J. C.*) SHAH MAHOMED *v.* RAMZAN. 66 I. C. 833.

Malikana.

———*Malikana—Proof.*

There is no custom in *monza* Gharwa whereby *maliks* in the village can realize *malikana* at 25 per. cent. on every sale of house in the village. Though plff. claimed 25 per. cent. and defts. admitted 2 per. cent. the plff. must prove the custom. On failure of such proof suit will be dismissed. (*Roe and Jwala Prasad, JJ.*) AMAR DAYAL SINGH *v.* BISHUN CHAND SAHU.
38 I. C. 158.

Marriage.

———*Marriage—Divorce—Capricious divorce —Custom invalid.*

A custom by which the marriage tie can be dissolved either by husband or wife against the wish of the other capriciously and on no condition except the payment of a sum of money fixed by the caste is opposed to public policy. (*Scott, C. J. and Batchelor, J.*) KESHAV MAR GOVAN *v.* BAI GANDI. 39 Bom. 538 : 29 I. C. 952 : 17 Bom. L. R. 584.

———*Marriage*—Lalungs *custom requiring son-in-law to reside in father-in-law's house— Restitution of conjugal rights.*

A suit for restitution of conjugal rights by a *Lalung*, a member of a semi-aboriginal tribe, against his wife is not maintainable. A tribal custom requiring a son in-law to reside in the family of his father-in-law is not opposed to public policy. Nor is it in conflict with any express law of the country. It may be otherwise in the case of Hindus or Musalmans governed by the Hindu or Muhammadan Law. 28 Cal. 751 ; 17 Cal. 670 ; 2 Bom 140 ; 6 Mad. 374, Ref. The marriage relation of *Lalungs*, if they are assumed to be Hindus, is governed by customs which

prevail amongst the tribe, provided that the customs are neither immoral nor opposed to public policy. (*Mookerjee and Roe, JJ.*) LENGA LALUNG *v.* PENGURI. 20 C. W. N. 406 : 30 I. C. 796 : 22 C. L. J. 92.

——— *Marriage—Sudras—Sagotras.*

When there is a custom permitting marriage between persons of the same *gotra* and when the marriage is recognised by the caste as proper, the onus of proving invalidity lies on the persons asserting it. 80 P. R. 1917. (*Shadi Lal and Le Rossignol, JJ.*) AMAR SINGH *v.* JAI SINGH. 80 P.R. 1917: 42 I C. 351: 138 P.W.R. 1917.

——— *Marriage—Validity.*

A custom allowing a woman to marry during the litetime of her husband before the marriage is dissolved according to defined rules is contrary to public policy. (*Sadasiva Aiyar and Spencer, JJ.*) BADHANSAD ROWTHER *v.* FALANA BEE. 26 M. L.J. 260 : 15 M. L T. 107 : 22 I. C. 697 : (1914) M. W. N. 278.

Mercantile Usage.

———*Mercantile usage—Unreasonable—Not to be recognised.*

A trade custom to be recognised by a Court of law must be universal as well as reasonable. A custom allowing an agent to turn himself into a principal and thereby profit himself at the expense of the principal, is unreasonable, and cannot be implied in a contract of agency. (*Piggott and Walsh, JJ.*) KISHORI LAL *v.* JIWAN LAL. 4 U. P. L. R. (A.) 59 : 1923 A. 242.

———*Mercantile custom — Bombay silver market.*

The custom of the Bombay Silver market for forward contracts is that only shroffs are the outside buyers and sellers, though shroffs may have and often do have outside principals for whom they are acting The shroffs when acting for principals work sometimes for *kachchi adat* and sometimes for *pakyi adat*. In the case of the former the *adatia* shroff guarantees the performance of the contract to the other shroff, but does not guarantee its performance to his principal. In the case of the latter, *adatia* shroff who then acts for a higher rate of commission is liable as a principal both to his own employer and to the other shroff. In the silver market of Bombay the custom does not obtain whereby the selling shroffs are exempted from personal liability to the principal of the buying for *adatia* damages for breach of a contract entered into by them. (*Scott, C. J. and Heaton, J.*) ABRAHAM, E. J. ABRAHAM *v.* SARUPCHAND HAKAMCHAND. 42 Bom. 224 : 41 I. C. 256 : 19 Bom. L R. 608.

——— *Mercantile Usage—Proof—Oral evidence.*

Usage is proved by the oral evidence of persons who must become cognizant of its existence by reason of their occupation in the particular trade or business and the evidence establishing custom or usage must be clear, convincing and consistent, and to prove an usage in a particular trade it must be shown that the usage is consistent and reasonable and was universally acquiesced in and that everybody acknowledged it in the trade and

knew of it or might know of it if he cared to enquire. (*Greaves, J.*) WITTENBAKER *v.* J. C. GALSTAUN. 36 C. L. J. 256.

——— *Mercantile custom—Proof of.*

A trade usage is proved by the evidence of persons cognizant of its existence by reason of their occupation in the particular trade or business and the evidence must be clear convincing and consistent and it must show that everybody in the trade acknowledged and knew of it. (*Greaves, J.*) WITTENBAKER G. H. *v* J. C. GALSTAUN. 43 I. C. 11 : 44 Cal. 917.

——— *Mercantile usage—Proof of.*

To establish a mercantile usage, it is enough if the usage appears to be so well-known and acquiesced in, that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into their contract. 7 M. I A. 263, (P. C.) Rel. (*Shadi Lal and Bevan Petman, JJ.*) PANNA LAL LACHMAN DAS *v.* HARGOPAL KHUBI RAM. 1 Lah. 80 : 55 I. C. 931 : 94 P. L. R. 1920.

———*Mercantile custom—Presumption- Proof.*

An usage is proved by the oral evidence of persons who know it because of their occupation, trade or position. The evidence must be clear and convincing and consistent. It is a clear principle of law that a person ignorant of the existence of usage or to whom knowledge thereof cannot be imputed cannot be bound by it. (*Maung Kin, J.*) MAUNG PO THU *v.* MAUNG PO MIN. 39 I. C. 149.

Office.

——— *Office—Village office—Vatandar Joshi—Right of suit.*

A vatandar joshi is entitled to sue both the *yajaman* and an usurper of his functions for the recovery of fees paid to such usurper. (3 N. L. R. 47, 11 Bom. H. C. R. 6, 3 Bom. 232 Fol. (*Hallifax, O.A.J.C.*) PANDURANG *v.* NAGOJI. 17 I. C. 138 : 8 N. L. R. 133.

———*Office—Pahan—Duties of—Election of—Pahan phani lands.*

The duty of a *pahan* is to exercise spirits and prevent them from attacking the cattle and people of the village. The custom governing the election of a *pahan* is that some villager shall carry on his head a basket : he is blindfolded and the house before which he stops indicates the family whom the spirits desire to be their priests, Until the old *pahan* has been superseded by a new *pahan* no landlord not even the government has any power to give his lands to other persons. (*Chapman and Roe, JJ.*) KHARET PAHAN *v.* BISRA PAHAN. 4 P. L W. 119 : 43 I. C. 70 : 1917 Pat. 283.

———*Office*—Puja *and* Panda—*Share in* chhatrabhog—*Temple of Lingaraj at Bubneswar.*

Puja Pandas have no right to claim *Chanda* in respect of *Chhatrabhog* (a kind of offering) at the temple of Lingaraj at Bhubaneswar. (*Mullick and Atkinson, JJ.*) SAPNESWAR PUJAPANDA *v.* RATKANAR MAHAPATRA. 1 P L. J. 514 : 38 I. C. 351 : 3 P. L. W. 38.

CUSTOM (GENERAL)—Pleading and Proof.

Pleading and Proof.

———*Pleading and proof—Ancient and invariable onus.*

Where a plff. governed by the Hindu Law asserts that a rule of Hindu Law does not apply to the parties owing to a custom at variance with Hindu Law, he must state the custom and all its incidents and establish by unmistakable evidence not only its existence, but also that it is ancient and invariable. (*Richards, C. J. and Banerjee, J.*) LACHHMI *v.* SANGRAM.

14 I. C. 322 : 10 A. L. J. 136.

———*Proof.*

A growing usage of transferability is of no effect against the landlord and that the usage to be effective must be already grown up. (*Mookerjee and Beachcroft, JJ.*) KAILAS CHANDRA DUTT *v.* PADMA KISHORE ROY. **25 C. L. J. 613 : 21 C. W. N. 972 : 41 I. C. 959 : 45 C. 285.**

———*Pleading and proof—Law applicable.*

When no definite custom is proved the personal law of the parties must be followed. 4 P. R. 1888 ; 89 P. R. 1888, 117 P. R. 1901, Foll. (*Scott Smith and Martineau, JJ.*) KHUDA BAX *v.* FATTEH KHATUN. **13 P. R. 1919 : 46 I. C. 679 : 143 P. W. R. 1918.**

———*Pleading and proof—Nature of custom—Pleadings.*

Though as a general rule, party who relies upon a custom must allege it with distinctness and certainty, it is not possible nor desirable in India in all cases to pin down the parties to the precise form of their pleadings. The mere fact that a deft. did not object to witness for the plff. giving evidence in support of a custom set up does not estop him from objecting to similar evidence being given by another witness on a subsequent date on the ground that it was beyond the scope of the case in the fact of the wording of the issue on the point. As a matter of scientific pleading, an issue in a case regarding a custom set up therein and the allegations in the plaint on which the issue is based ought to contain particulars of the custom on which the plff. seeks to rely at the trial. (*Wallis, C. J. and Srinivasa Aiyangar, J.*) VISVANATHASWAMI NAICKER *v.* KAMULUAMMAL. **30 M. L. J. 451 : 19 M. L. T. 296 : 2 L. W. 1214 : 31 I. C. 833 : (1915) M. W. N. 968.**

———*Pleading and proof—Variation—Evidence of—Judicial decisions.*

Although a custom must be sufficiently defined for its application to the facts of the particular case in which that custom is pleaded, so that it may be clear and undoubted, yet the party pleading the custom can be allowed to prove the same in a sense narrower than that stated in the pleadings. Decisions by courts on questions of custom afford valuable evidence as to the existence of the custom. 45 C. 450 ; 49 I. A. 119 Ref. A usage of recent date cannot be regarded as a custom. A custom must be proved by clear and unambiguous evidence to be ancient and invariable, In this respect there is no difference between a family custom and local custom, 14 M I. A. 570 ; 45 C. 450, 461 ; 3 C W.N. 21 Ref. (*Ashworth and Simpson, A. J. C.*) THAKUR RUDRA PRATAP NARAIN SINGH *v.* THAKUR NIRMAN PRASAD SINGH. **9 O L. J. 552 : 1923 Oudh 61.**

CUSTOM (GENERAL)—Succession.

———*Pleadings and proof—Change of.*

Plea of one particular custom should not be altered into another during progress of suit. (*Lindsay, J. C.*) SURAJ BALI *v.* TILOK CHAND. **36 I. C. 66 : 3 O. L. J. 327.**

Succession.

———*Succession — Exclusion of daughters—Proof of custom.*

Where instances are adduced in support of an alleged custom of exclusion of daughters from the inheritance in a Muhammadan family the position and relationship of the different members of the family must always be considered in determining whether claims were not met because the rights to which they relate did not exist or they are put on one side because in the circumstances, there was no need for their assertion. 8 Mad. 464, Appr. (*Lord Buckmaster,*) ABDUL HUSSAIN KHAN *v.* BIBI SONA DERO. **45 Cal. 450 : 16 A. L. J 17 : 4 P. L. W. 27 : 34 M. L J. 48 : 22 C. W. N. 353 : 23 M. L. J 117 : 27 C. L. J. 240 : 20 Bom. L. R. 528 : 12 S. L. R. 104 : 45 I. A. 10 : 43 I. C. 306 : 1 P. L. R. 1918 (P.C.). [On Appeal from 16 I. C. 641.]**

———*Succession— Females — Exclusion of—Impartible estate.*

In the case of impartible estate descending by primogeniture the widow of a separated holder dying issueless is entitled to inherit and a custom of exclusion of females has to be specially proved. (*Sir John Edge.*) TARA KUMARI *v* CHATURBHUJ NARAYAN SINGH. **42 Cal. 1179 : 42 I. A. 192 : 19 C. W. N. 1119 : 29 M. L. J. 371 : 18 M. L. T. 228 : 2 L. W. 843 : 13 A. L. J. 1034 : 17 Bom. L. R. 1012 : 22 C. L. J. 498 : 30 I. C. 833 : (1915) M. W. N. 717 (P.C).**

———*Succession—Exclusion of female heirs—Family custom—Babuana and Schag grants.*

Babuana and Sobag grants are grants made to the junior members of the Dharbanga Raj by the Raja for the time being. Reverter to the grantor on failure of male issue in the male line of the grantee and exclusion of a divided member from inheritance are customary incidents of the grant. (*Sir John Edge.*) EKRADESHWAR SINGH *v.* JANESHWARI BASIR BUASIN. **42 Cal. 582 : 41 I. A. 275 : 18 C. W. N. 1249 : 27 M. L. J. 373 : 16 M. L. T. 382 : 1 L. W. 863 : (1914) M. W. N. 807 : 21 C. L. J. 9 : 17 Bom. L. R. 18 : 24 I. C. 417 : 12 A. L. J. 1217 (P. C.). [On appeal from 3 I. C. 207.]**

———*Succession—Thakorate of Gamph—Grants for maintenance—Reversion.*

A village was granted by a Thakor of Gamph to one of his junior sons for maintenance.

CUSTOM (GENERAL)—Succession.

As a result of a long litigation between the successor of the grantor and the grantee's sons, a settlement was arrived at and a large part of the village was given to the sons of the grantee and their descendants who were to enjoy the same as *maliks*, *mukhtiars*, and *dhanies*. The sons of the grantee died without issue and the village was claimed back by the right of reversion. The whole estate was at that time under the management of Talukdari Settlement Officer. On an objection by an adopted son of the widow of the last descendant of the grantee, to the claim by reversion *Held*. that the succession to the Thakorate was by primogeniture and according to the custom prevalent villages for maintenance were granted to junior members but upon failure of male issues those villages were to revert to the Thakore. The estate was impartible and ordinary rules applicable to a co-parcenary property had no application in the present case. The alienation under the compromise deed which did not confer an absolute estate was invalid according to S. 12, Talukdari Act, and that neither the adoption nor the existence of the female could affect the reversion. (*Scott, C J. and Batchelor, J.*) AGAR SINGJI RAISINGJI *v.* BAI NANIBI. **28 I. C. 529 : 17 Bom. L. R. 273.**

———*Succession — Chudasama Girasias — Wives and daughters excluded from inheritance.*

According to a custom existing among Chudasama Girasias wives and daughters cannot succeed as heirs. (*Scott, C. J, and Batchelor, J.*) AGARSINGJI RAISINGJI *v.* BAI NANIBI.
28 I. C. 529 : 17 Bom. L. R. 273.

———*Succession — Grant — Special rule of devolution—Burden of proof.*

On a question arising as regards the succession to certain paikan lands (lands granted for the maintenance of paiks in a temple) *held* that the burden of proving that the daughters were excluded from inheritance was on the person alleging such custom. (*Chatterjee and Pearson, JJ.*) SRIMAT DHARINI KALITANI *v.* SISURAM KALITA.
39 C. L. J. 100 : 1924 Cal. 530.

———*Succession—Mahomedan Law.*

If a custom as to succession is found to prevail among a sect of Mahomedans and is valid in other respects, the court will give effect to it although it differs from the rules laid down in the Koran. (*Kumaraswami Sastri, J.*) SIDDICK HAJEE ABOOBUCKER SAIT *v.* EBRAHIM HAJEE ABOOBUCKER SAIT. **70 I.C. 715 : 31 M. L. T. 183.**

———*Succession—Proof.*

Where a special custom is set up as regards succession, it must be proved by strong evidence. A custom can be inferred from analogous instances, when the similarity between the classes of cases justifies the inference. (*Oldfield and Hughes, JJ.*) KARUPPATIYAL K. P, RAMAN *v.* RAMULATHA PARUKKAL V. MUTHU.
40 M. L. J. 301 : 13 L. W. 218 : 62 I. C. 534: (1921) M. W. N. 233.

———*Succession—Law applicable to a particular class of people—Proof of.*

CUSTOM (GENERAL)—Succession.

When the question is what is the law of succession governing a particular class of people, the way in which the property has been held, or the past conduct of the parties, or the fact that the parties themselves or their ancestors have in previous litigation set up that they are governed by this or that system, all these are strong evidence to show what law the parties have followed. If again the parties belong to any particular religion it may be inferred that there would be a tendency to follow the rules of that religion as ragards inheritance. (*Tyabji and Spencer, JJ.*) KUNHAMBI *v.* KALANATHAR.
16 M. L. T. 17 : 27 M. L. J. 156 : 24 I. C. 528 : 38 Mad. 1052.

———*Sucoession—Contrary to law—Nellore district.*

There is no custom in Nellore district that two familes living together and having inter-marriages have equal rights in the property held by them unless it is proved that the families have agreed to that effect. (*Collins, C. J. and Parker, J.*) ALLA REDDI SUBBAMMA *v.* NALLEPAREDDI.
11 M. L. T. 124 : 22 M. L. J. 260 : 13 I. C. 870 : (1912) M. W. N. 178.

———*Succession—Estate not absolutely owned.*

It is hard to see how a family custom of succession to an estate not absolutely owned by the family could ever exist. 36 Cal. 590 (598) Foll. (*Ashworth and Simpson, A. J. Cs.*) THAKUR RUDRA PRATAP NARAIN SINGH *v.* THAKUR NIRMAN PRASAD SINGH.
9 O. L. J. 552 : 1923 Oudh 61.

———*Succession—Exclusion from—Exclusion of daughters—Scope of the rule.*

A custom of exclusion of daughters and their issue from inheriting their father or maternal grandfather's property does not necessarily lead to the inference that they are excluded from inheriting to their mother or maternal grandmother's property. (*Wazir Hasan, A. J. C.*) BIJAI BAHADUR SINGH *v.* MATHURA SINGH.
9 O. L. J. 327 : 4 U. P. L. R. (O. C.) 66 : 25 O. C. 345 . 1922 Oudh 278.

———*Succession—Exclusion — Female heirs—Daughters—Sisters and Sister's sons.*

Where under a family custom daughters are excluded from inheritance, there is a presumption that sisters and sister's sons are also excluded from the category of heirs. So held in the case of a family of Saraura in Oudh. (*Dalal and Wazir Hasan, A. J. Cs.*) DILDAR HUSAIN *v.* FATEH BAHADUR.
8 O. L. J. 554 : 1922 Oudh 105.

———*Succession —Sisters—Exclusion—Wajib-ul-arz.*

Held, on a construction of the wajib-ul-arz in the case that a custom was established whereby a brother excluded his sister and step-sister from succession to property. (*Daniels, J. C. and Dalal, A. J. C.*) MUMTAZUNNISA BEGAM *v.* WAZIR ALI.
65 I. C. 308 : 8 O. L. J. 569.

———*Succession — Mohammadan Law — Widow getting possession for life.*

CUSTOM (GENERAL)—Succession.

A custom, if proved, supersedes the general law and all customs must be proved by clear and unambiguous evidence. A custom exists among certain Mohammadans, whereby on the death of a proprietor without issue his widow gets possession of the estate during her litetime and succession by the heirs opens only on her death. (*Lindsay, J. C.*) FARZAND ALI *v.* KARIM BAKHSH.
61 I. C, 964 : 8 O.L.J. 138.

———*Succession—Daughters—Exclusion of—Sankal Dipi Brahmans.*

There is a custom among Sankal Dipi Brahmans by which daughters are excluded from inheritance. (*Daniels and Lyle, A. J. Cs.*) KESRI KUMAR *v.* RAM RANI. **53 I. C. 725 : 6 O. L. J. 431.**

———*Succession—Eunuch—Presumption.*

Ordinarily succession to a eunuch is governed by the personal law to which he is subject, and the mere fact that the heirs did not trouble themselves to claim the property but permitted it to go to another eunuch is not sufficient to defeat it. (*Stuart, A. J. C.*) DADHIJ SINGH *v.* BASTI.
46 I. C. 77: 5 O. L. J. 189.

Usage.

———*Usage—Difference.*

Usage should never be used as synonym for custom, it has two distinct legitimate meanings but neither of them should be confused with custom. It is used to denote what is done by people uniformly and consistently. Used in this sense usage has not the force of law. It would only obtain the force of law when it is proved to be reasonable, invariable, ancient, etc., in which case it becomes what is known as custom It is also used to denote what is done uniformly and has been so done in a certain locality or by a certain trade or profession, etc., for a period sufficient to make it probable that people in their contract and in their contractual relationships adopt it as an implied term or condition. Where this is the case a court which has to put a construction upon a contract, the trade or local usage, (here again usage has not the force of law nor will it be sanctioned by the courts if it is contrary to positive law, where a well-established recent usage is proved and the proof is carried back for a period which may be regarded as covering the period of living memory), a presumption is thereby raised that this usage is in reality the exercise of an ancient and valid custom. If there is no rebutting evidence a decision in favour of the custom may be based on this evidence alone. If the presumption raised by recent usage is rebutted by proof that an ancient custom could not have come into existence then the usage fails to possess any legal effect. A family custom is not likely to be as the Hindu or Mahomedan Law it supersedes. There is no sound authority for holding that custom in India need not be proved to be ancient. Special usages modifying the ordinary law of succession should be established by clear and unambiguous evidence to be ancient and invariable. (*Ashworth and Simpson, A. J. Cs.*) THAKUR RUDRA PRATAP NARAIN SINGH *v* THAKUR NIRMAN PRASAD SINGH.
9 O. L. J. 552 : 1923 Oudh 61.

CUSTOM (PUNJAB.)

Validity.

———*Validity—Right of privacy.*

The existence of the right of privacy does not depend on the caste or creed of the person owning it or on the fact that it was used by the ladies. It is a custom of country and has, as such, to be protected. 10 All. 358 and 13 A. L. J. R. 361 Ref. (*Gokul Prasad, J.*) BOHRA TARA CHAND *v.* MUST. RAYAZI BEGUM. **1923 A. 404 (1).**

———*Validity reversion—Not affected by mortgage—Grant for maintenance.*

A mortgage by a maintenance holder does not affect an estate granted for maintenance, when such estate reverts to the grantor on the death of the maintenance holder (*Scott, C.J. and Batchelor, J.*) AGARSINGJI RAISINGJI *v.* BAI NANIBA.
28 I. C. 529 : 17 Bom. L. R. 273.

———*Validity of—Inconsistency with law or other custom.*

It is no objection to the validity of a custom that it is opposed to what might appear to be the necessary consequence of other rules or customs binding on the parties. (*White, C. J. and Tyabji, J.*) SECRETARY OF STATE *v.* SANTE RAJA SHETTY *alias* BOJAPHARASA BINNANI.
25 M. L. J. 411 : 14 M. L. T. 348 : 21 I. C. 432: (1914) M. W. N. 333.

———*Validity of—It can override provisions of law.*

A custom may overrule the ordinary provisions of law. (*Stuart, A. J. C.*) PUNNI *v.* CHETRAM.
24 I. C. 640 : 1 O. L. J. 319.

———*Validity—Reasonableness—Right to pass over land to worship tree or idol.*

Whether a particular custom is reasonable or not must be ascertained at the time of its inception . A custom setting up a right to pass over a land to worship a tree and idol, is not unreasonable or invalid. (*Das and Adami, JJ.*) MANGREE MIAN *v.* BEHARI LAL. **6 P L. J. 11 : 61 I. C. 132 : 2 P. L. T. 160.**

———*Validity of—Market—Collection of dues by Zemindar.*

A custom entitling a Zemindar to collect certain dues from merchants or traders resorting to a market and doing business there is neither unreasonable nor opposed to public policy. It is only in exceptional cases that an ancient custom can be said to be unreasonable. (*Chapman and Jwala Prasad, JJ.*) RADHA PRASAD SINHA *v.* DINANATH MISSIR. **43 I. C, 451 : 1 P. L. W. 608.**

———*Validity of-Preference over ordinary law.*

A custom conclusively proved and established can override or modify the ordinary law. (*Chapman and Atkinson. JJ.*) LAL GAJENDRA NATH SAHI DEO *v.* LAL MATHURLAL NATH SAHI DEO.
20 C. W. N. 876 : 35 I. C. 383 : 1 P L. J. 109.

CUSTOM (PUNJAB). *See also* **RIWAJ-I-AM.**

Adoption
Alienation.
Alluvion and diluvion.
Applicability.
Gift.
Lambardar.
Landlord and Tenant.

CUSTOM (PUNJAB)—Adoption—Affiliation.

Marriage.
Partition.
Religious office.
Shamilat.
Succession
Village community.
Widow.

Adoption.

Affiliation.
Ceremonies.
Eligibility.
Evidence of.
Rights of Adoptee.
Right to Adopt.
Right to Contest.

Adoption—Affiliation.

———*Adoption—Affiliation* — Khanadamadi—Jat *Hindus of Bottar.*

There is no general custom of *Khanadamadi* among Hundus in any *tashil* of the Gujrat District. The onus of proving custom lies on those who assert it. (*Sco't-Smith and Martineau, JJ.*) HARI CHAND *v.* MATHRA DAS. **3 Lah. L. J. 256: 54 I. C. 900 : 164 P. R. 1919.**

———*Adoption—Affiliation*—Khanadamad.

The practice of making a *Khanadamad* is recognized among the *Langaryal Jats* of Tahsil Kharian, Gujarat District. An authorised widow has full power to appoint a *Khanadamad.* (*Rattigan, C.J.*) ALAM BI *v.* LATTU.
57 I.C. 204: 1 Lah. 245.

———*Adoption—Affiliation*—Khanadamad.

The custom of *Khanadamad* is prevalent among Gujars of Gujarat District. (*Rattigan, J.*) AISHAN *v.* MUHAMMAD DIN.
37 I. C. 119 : 94 P. R. 1916.

Adoption—Ceremonies.

———*Adoption—Ceremonies for—Rights of son to proceed to collaterals.*

In the Punjab no specific ceremonies or formalities are provided under the customary law for adoption. The validity will depend on whether it was intended that the adopted boy should be altogether taken out of his natural family and introduced into the adoptive family as son. If there was a complete adoption the right of collateral succession will be presumed till the contrary is shown. (*Abdul Raoof and Martineau, JJ.*) WARYAMAN *v* KANSHI RAM. **3 Lah 17 : 1922 Lah. 105.**

———*Adoption—Ceremonies—Formalities of—Treatment.*

No formal ritual or religious ceremony is necessary to the validity of an adoption in the Punjab. But mere treatment as adopted son unaccompanied by either a formal document expressing the adoptor's intention of giving and taking of the child does not create a valid adoption. (*Le Rossignol and Wilberforce, JJ.*) RATTAN DEVI *v.* MUNO. **48 I. C. 776 : 117 P. R. 1918.**

CUSTOM (PUNJAB)—Adoption—Eligibility.

———*Adoption—Ceremonies.*

No elaborate ceremony except formal giving and taking of the child is necessary to a valid adoption in the Punjab. (*Rattigan, C. J. and Le Rossignol, J.*) GOPICHAND *v.* MALAN.
48 I. C. 373 : 106 P. R. 1918.

———*Adoption — Ceremonies — Giving and taking.*

In the Punjab the strict Hindu Law ceremonies are rarely observed in full, and the giving and accepting a child in adoption are all the essentials of the ceremony. (*Shadi Lal and Le Rossignol, JJ.*) NIKKI *v.* GUJAR MAL.
34 I. C. 478 : 152 P. W. R. 1916.

——— *Adoption— Ceremonies — Jains—Adoption by widow.*

Among jains a widow has power to adopt and no special ceremonies are necessary except that the fact should be apparent, and due publicity thereof given. (*Kensington and Beadon, JJ.*) SRI MANDARJI *v.* FATEH CHANDA.
149 P. W. R. 1913 : 20 I. C. 553 : 295 P. L. R. 1913.

———*Adoption—Ceremonies*—Datta Homam *if necessary.*

In the Punjab no elaborate ceremonial is necessary for an adoption and *Datta Homam* is not essential even from the point of view of strict Hindu Law. 3 C. 971 Rel. on. 7 Mad. 548 : 13 Mad. 214 Not foll. (*Kensington, O. C. J. and Beadon, J.*) DIWAN CHAND *v.* DWARKA NATH.
271 P. L. R. 1913 : 20 I C. 303 : 175 P. W. R. 1913.

———*Adoption—Ceremonies.*

The execution of an adoption deed before the brotherhood and its registration are sufficient and the non-performance of the ceremonies is immaterial to the validity of an adoption among Randhawagats of Amritsar District. (*Shahdin and Beadon, JJ.*) JIWAN SINGH *v.* PAL SINGH.
22 P. R. 1913 : 19 I. C. 747 : 214 P.L. R. 1913.

———*Adoption—Ceremonies—Requisites.*

Among Brahmin agriculturists an unequivocal intention to adopt, accompanied by treatment, is sufficient, and no elaborate ceremonies are necessary. Treatment of a boy as adopted son being only for a short time is immaterial when the suit contesting the adoption is filed soon after the adoption. (*Johnstone, J.*) PRABHU DAYAL *v.* KAHAN. **78 P. L. R. 1912 : 14 I. C. 479 : 41 P. W. R. 1912.**

Adoption—Eligibility.

———*Adoption — Eligibility — Sister's son—Hindu jats—Hoshiarpur District.*

Having regard to the fact that the *riwaj-i-am* of the Hoshiarpur District prepared in 1884 and 1915 declared that the adoption of a sister's son had the sanction of custom and that the entry was supported by instances, the Court held that the burden of proving that such an adoption was not valid lay on the plaintiff and that they had failed to discharge the same. 50 P. R. 1893 : 84 P. R. 1895 : 94 P. L. R. 1911 : 84 P. R. 1917 :

CUSTOM (PUNJAB)—Adoption—Eligibility.

45 P R. 1917 foll. (*Scott-Smith and Jafar Ali, JJ.*) NAMAN *v.* BATAN SINGH. **4 Lah 102 : 5 Lah. L. J. 253 : 1924 Lah. 37.**

———*Adoption—Eligibility— Brother's son — Punjab.*

A sonless proprietor has power to adopt his brother's son under the customary law governing the Mahomedan Bhatti Rajput Jats of Dasuya Tahsil in the Hoshiarpur district. (*Harrison, J.*) AMIR *v.* WAZIR. **26 P. W. R. 1923 : 1924 Lah. 192.**

———*Adoption—Eligibility—Daughter's son—Dhanoi Jats.*

Among Dhanoi Jats of Tahsil Kharar the adoption of a daughter's son is valid. 68 P. R. 1888 foll. 50 P. R. 1893 (F. B.) Ref : (*Le Rossignol and Campbell, JJ.*) GURBAKHSH SINGH *v.* MT. PRATAPO. **2 Lah. 346 : 1922 Lah. 234.**

———*Adoption—Eligibility—Brother's grandson—Naru Rajputs of Hoshiarpur.*

Under the customary law prevalent among Naru Rajputs of the Hoshiarpur Tahsil, the adoption of a brother's grandson is valid, the term *baradarzada qariti* being wide enough to include a brother's grandson. (*Chevis and Campbell, JJ.*) RAHMAT KHAN *v.* NAZIR AHMAD. **67 I. C. 374 : 57 P. L. R. 1922.**

———*Adoption—Eligibility—Daughter's son—Special custom—Punjab—Burden of proof—Bishnois of Hissar.*

Inasmuch as the right to adopt a daughter's son is equally opposed to Hindu Law and the general customary law throughout the Province of Punjab, the burden of proving this special custom is on the party alleging it. On the evidence the Court held that among *Bishnois* of the Hissar District the adoption of a daughter's son is not valid by custom. (*Shadi Lal, C. J. and Harrison, J.*) MOTI *v* BAGRAWAT. **64 I. C. 189.**

———*Adoption—Eligibility—Daughter's son.*

A Manj Rajput of the Nakodar Tahsil in Jullundur district can adopt his daughter's son who is also an agnate. (*Leslie Jones and Moti Sagar, JJ.*) SAMAND KHAN *v.* KHAWAJE KHAN. **64 I. C. 17 : 2 Lah. 193.**

———*Adoption—Eligibility for — Brother — Hindu Jats, Ludhiana District*—Riwaj-i-am.

Among Hindu Jats of the Ludhiana District a sonless proprietor who happens himself to have been an adopted son, is not debarred from exercising the general power of appointing one of his kinsmen to succeed him as his heir. 99 P. R. 1914 : 50 P. R. 1893 Dist. The plff.'s collaterals on whom the onus lay had failed to prove that the adoption of a brother is invalid among these Jats. 44 P. R. 1913; 205 P. L. R. 1913 Ref. The rule that no adoption can be valid in which the mother of the person adopted is debarred from marrying the adoptive father does not apply amongst agriculturists of Ludhiana (*Rattigan, C. J. and Dundas, J.*) JIWA SINGH *v.* CHANDI. **1 Lah. 39 : 73 P. L. R. 1920 : 55 I. C. 935 : 2 Lah. L. J. 119.**

CUSTOM (PUNJAB)—Adoption—Eligibility.

———*Adoption—Eligibility—Stranger—Jats of Tahsil Fatehabad—Hissar district—Onus.*

The onus of proving that the adoption of a stranger is valid by custom among Jats of Bangroom, Tahsil Fatehabad, District Hissar, rests on the adoptee. (*Broadway, J.*) MOMAN *v.* DHANNI. **1 Lah. 31 : 72 P. L R. 1920 : 55 I C. 869 : 60 P W. R. 1921.**

———*Adoption—Eligibility—Brother's daughter's son—Jats of Jullundur Tahsil—Onus.*

The plff. the adopted son on whom the onus lay had failed to prove that by custom among Jats of Mauza Manks, Tahsil and District Jullundur, the adoption of a brother's daughter's son is valid. 50 P. R. 1893: 20 I. C. 830: 94 P. R. 1913: 90 P. R. 1914 Ref. (*Shadi Lal and Dundas, JJ.*) JAMIAT SINGH *v.* UJAGAR SINGH. **1 Lah. 15 : 55 I. C. 838 : 71 P. L. R. 1920.**

———*Adoption—Eligibility--Daughter's son—Ghorewahar Rajputs of Gharshankar Tahsil, District Hoshiarpur* — Riwaj-i-am — *Entry in, value of.*

Notwithstanding the entry in the *Riwaj-i-am* of the last settlement to the contrary, the custom of adoption of a daughter's son exists among Ghorewahar Rajputs of the Gharshankar Tahsil. 136 P. W. R. 1913: 174 P R. 1883; 113 P. R. 1891 and 64 P. R. 1894 Ref. (*Shadi Lal and Le Rossignol, JJ.*) UMAR BAKSH *v.* SHONKHAN. **53 I. C. 404 : 110 P. R. 1919.**

———*Adoption—Eligibility—Daughter's son—Onus of proving validity.*

The adoption of a daughter's son, being opposed to Hindu Law as well as the general agricultural custom of the Province, the presumption is against its validity and a person relying upon a special custom or usage must prove it. (*Rattigan, C. J. and Le Rossignol, J.*) GOPI CHAND *v.* MUSSAMMAT MALON. **48 I. C. 373: 106 P. R. 1918.**

———*Adoption—Eligibility for—Sister's son—Gosewaha Rajputs.*

The adoption of a sister's son is not allowed by custom among Gosewaha Rajputs of Mauza Dodbala, Nawaneshwar Tahsil, Jullundur District. The onus of proving a special custom opposed to the general custom of the community is on the person pleading it. The omission of the reversioners to sue to declare an adoption invalid during the lifetime of the widow is no bar to their claiming the inheritance on her death ignoring the adoption. (*Scott-Smith and Shadi Lal, JJ.*) ABDULLA *v.* NABIA. **45 I. C. 9 : 25 P. W. R. 1918.**

———*Adoption—Eligibility for— Sister's son —Hindu jats of* Mouza *Shena Tahsil and District Ludhiana.*

Among Hindu jats of *Mouza* Shena Tahsil and District Ludhiana, the adoption of a sister's son is not valid by custom. (*Shah Din, J.*) BISHAN SINGH *v.* KISHNI. **38 I. C. 636 : 29 P. R. 1917.**

———*Adoption—Eligibility—Daughter's son—Khatris of Lahore.*

Among the Khatris of Lahore, by a rule of custom, the adoption of a daughter's son is valid. (*Shadi Lal and Le Rossignol, JJ.*) NIKKI *v.* GUJAR MAL. **34 I. C. 478 : 152 P. W. R. 1916.**

CUSTOM (PUNJAB)—Adoption—Eligibility.

———*Adoption— Eligibility — Sister's son — Bajwa Jats, Jullundur District—Onus.*

The adoption of a sister's son or a gift to him is not allowed by custom among the Bajwa Jats of Jullundur District and the onus of proving the contrary is on him who alleges it. (*Johnstone and Rattigan, JJ.*) NATHA SINGH *v.* MANGAL.

90 P. R. 1914 : 26 I. C. 812 : 237 P. L. R. 1915.

———*Adoption—Eligibility—Daughter's son and niece's son—Randhawa Jats of Jullundur—Onus.*

Among Randhawa Jats of the Jullundur District the daughter's son or niece's son cannot be validly adopted and the onus is on the person setting up any custom to the contrary to prove it. 50 P. R. 1893, Foll. : 159 P. R. 1890, Dist. (*Agnew and Shadi Lal, JJ.*) SURAIN SINGH *v.* JAWAHIR SINGH.

162 P. W. R. 1913: 20 I. C. 839: 281 P. L. R. 1913.

———*Adoption—Eligibility— Daughter's son —Awans of Sialkot.*

Among the Awans of Sialkot in the Punjab any one asserting that the adoption of a daughter's son is valid must prove a special custom to that effect. In the Sialkot District, the adoption of a daughter's son by an Awan is valid by custom. (*Agnew and Shadi Lal, JJ.*) MUHAMMAD ALI *v.* JAMITA.

9 P. R. 1914 : 267 P. L. R. 1913 : 20 I. C. 197 : 225 P. W. R. 1913.

———*Adoption—Eligibility—Collateral--Randhava Jat*—Riwaj-i-am.

The *Riwaj-i-am* of the Amritsar District (1865) allows a *Randhava Jat* to adopt a person from among his collaterals irrespective of his degree of relationship and age. (*Shah Din and Beadon, JJ.*) JIWAN SINGH *v.* PAL SINGH.

22 P. R. 1913 : 19 I. C. 747 : 214 P. L. R. 1913.

———*Adoption—Eligibility—Only son — Onus of proof.*

Ordinarily, it is no valid objection to an adoption that the appointed heir is the only son of his natural father. Where the custom of adoption prevails in the parties' tribe the onus of proving the invalidity of a particular adoption by reason of any restrictive custom lies upon the person who says that it is invalid. (*Shah Din and Scott Smith, JJ.*) WARYAMSINGH *v.* JIWANSINGH.

19 I. C. 254 : 205 P. L. R. 1913.

———*Adoption — Eligibility — Sister's son— Non-agricultural Banias.*

The adoption of a sister's son among non-agricultural Banias is valid for they are not governed by the customary law. 24 P. R. 1900 ; 69 P.R. 1907 ; 86 P. R. 1904 ; 99 P. R. 1909 Con. 34 P. R. 1885, Foll. (*Robertson, J.*) BRIJ INDAR SINGH *v.* BANSI LAL.

88 P. R. 1912 : 218 P. L. R. 1912 : 17 I. C. 36 : 230 P. W. R. 1912.

———*Adoption—Eligibility—Daughter's son— Muhammadan Rajputs of Hissar District—Gift.*

Among Muhammadan Rajputs of Hissar District, the burden of proving the validity of a gift to or adoption of a daughter's son lies upon the donee or adoptee because by custom a gift to and adoption of a daughter's son belonging to another caste is invalid. (*Chevis, J.*) ALIM ALI *v.* NABBU.

13 I. C. 314 : 12 P. W. R. 1912.

CUSTOM (PUNJAB)—Adoption—Evidence of.

———*Adoption—Eligibility for — Daughter's son—Validity—Burden of proof of special custom —Entry in a* Riwaj-i-am*— If sufficient proof.*

Proof of special custom is necessary for the validity of an adoption of a daughter's son on the part of the person asserting the same; an entry of such special custom in a *Riwaj-i-am* is insufficient to establish the same unless it is supported by instances in Court. Among Mussalman Jats of the Delhi District, there is no custom which favours the validity of adoption of a daughter's son. (*Arthur Reid, C. J. and Johnstone, J.*) NATHU *v.* RAHMAN.

44 P. R. 1911 : 198 P. L. R. 1911 : 11 I C. 11 : 85 P. W. R. 1911.

———*Adoption—Eligibility—Step-son, sonless Arian in Jullundur City, if can adopt.*

In Jullundur City a sonless Arian cannot adopt a step-son who does not belong to the same *got* as the adopting parent. (*Reid, C. J. and Johnstone, J.*) IZIM *v.* ISMAIL.

45 P. R. 1911 : 135 P. L. R. 1911 : 10 I. C. 416 : 106 P.W.R. 1911.

———*Adoption—Eligibility for —Wife's relations or stranger if may be adopted—Mussalman Khokar Rajput of Ferozpur District.*

In the matters of adoption Mussalman Khokar Rajput of Ferozpur District cannot make a valid adoption of the wife's relations or a stranger. According to the *Riwaj-i-am* the power is limited to Yak Jaddis of a Navasa who is also a Yak Jaddi. (*Shah Din and Chevis, JJ.*) NIAMAL *v.* NURA.

95 P. W. R. 1911 : 10 I. C. 338 : 169 P. L. R. 1911.

———*Adoption—Eligibility for—Sister's son— Khatri non-agriculturists.*

Non-agriculturists Khatris of a village do not follow strict Hindu Law in matters of adoption. So the adoption of a sister's son is generally valid. 86 P. R. 1904; 79 P. R. 1907 ; 24 P. R. 1900, Ref. (*Scott Smith and Ryves, JJ.*) SUHNA MAL *v.* NANAKCHAND.

4 P. W. R. 1911 : 9 I. C. 36 : 16 P. L. R. 1911.

———*Adoption—Eligibility— Orphan—Dhusars of Gurgaon—Central Provinces—Migration, Effect of.*

Dhusars of Gurgaon, a non-agriculturist tribe who settled in the Central Provinces, are governed by the customary law of the Punjab in matters of adoption and the adoption of an orphan is prevalent among them. (*Batten and Stanyon. J. Cs.*) JAI NARAIN DHUSAR *v.* RAM KISHORE

56 I. C. 822.

Adoption—Evidence of.

———*Adoption—Evidence of.*

In a case where the power of customary adoption by a sonless proprietor is not disputed all that is necessary to constitute an adoption is the cleat expression of an intention on the part of the adoptive father to adopt the boy concerned as his son, and a sufficient manifestation of that intention is the execution and registration of a deed of adoption coupled with a clear declaration in court and subsequent treatment as adopted son. The proof of such subsequent treatment cannot, however, be reasonably demanded in a case where very soon after the execution of the deed

CUSTOM (PUNJAB)—Adoption—Evidence of.

of adoption the reversioners of the adoptive father sue for a declaration that the adoption did not in fact take place. (*Scott Smith and Fforde, JJ.*) MEHAN SINGH *v.* KEHAR SINGH.
6 Lah. L. J. 39 : 1923 Lah. 523.

———*Adoption—Evidence of—Onus—Jats of Gurgaon District.*

The onus of establishing an adoption is on the person who claims to establish his status as an adopted son. An adoption among the Jats of Gurgaon District is presumed to be a formal one. Customary adoption is unknown in the territory forming part of Old Delhi. (*Shadi Lal, C. J. and Wilberforce, J.*) GIASU *v.* HAR DIAL.
59 I. C. 82 : 6 P. W. R. 1921.

———*Adoption—Evidence of—Agriculturists.*

According to the agricultural custom in the Punjab adoption is the customary appointment of an heir. (*Reid, C. J. and Beadon, J.*) JOT RAM *v.* HARDAWARI. 27 P. R 1914 : 23 I. C. 527 : 22 P. L. R. 1914.

———*Adoption — Evidence of— Subsequent conduct—Treatment by relatives.*

There should be a clear expression of an intention on the part of the adoptive father to adopt the boy concerned as his son. Such intention is sufficiently manifested by the execution and registration of a deed of adoption coupled with a clear declaration in Court and subsequent treatment of the adoptee as adopted son. If the collaterals of an adoptive father sue for a declaration in respect of an adoption without allowing him a reasonable opportunity of proving continuous subsequent treatment of the boy as his adopted son for a sufficiently long period, the Court will not grant them a declaration simply and solely because such subsequent treatment has not taken place. (*Shah Din, J.*) GURBACHNA *v.* BUJHA. 42 P. R. 1911 : 63 P. W. R. 1911 : 9 I. C. 821 : 99 P. L. R. 1911.

Adoption—Rights of Adoptee.

———*Adoption—Rights of adoptee—Muhammadan Rajputs of Hoshiarpur Tahsil—Rights of appointee's heirs.*

In the absence of a special custom among the Jats of Hoshiar Tahsil that, in the presence of descendants of the appointee's (adopted son's) natural father, the descendants of the appointee are excluded from inheritance in his natural father's family simply because he has succeeded to the property of his adoptive father, it must be held that the tie of kinship with the natural family was not dissolved and the fiction of blood relationship with the members of the new family has no application to the appointed (adopted) heir and that the descendants of an adopted son can succeed to the estate of the adopted son's natural family in the presence of the descendants in the natural family. (*Moti Sagar, J.*) ISHER *v.* HUKUM SINGH.
1923 Lah. 485.

———*Adoption—Rights of adoptee—Succession—Onus.*

A valid custom exists among theRoss of Sutana in the Panipat Tahsil of the Karnal District by which a widow can adopt a son and that son can

CUSTOM (PUNJAB)—Adoption—Rights of Adoptee.

succeed collaterally. The onus is upon the adoptee to prove the custom. (*Broadway, J.*) KANKAYA *v.* NAURANG. 1923 Lah. 374.

———*Adoption—Rights of adoptee in natural family.*

The ordinary rule under the customary law is that an adopted son does not lose the right of succeeding in his natural family. The mere appointment of an heir would not have the effect of depriving the appointed heir of his right to succeed in the natural family. 16 I. C. 712 foll. (*Abdul Raoof, J.*) NUR DIN *v.* ROSHAN DIN.
1924 Lah. 300.

———*Adoption—Rights of adoptee.*

Where no formal adoption has taken place, an appointed heir does not acquire the right to succeed to the collateral relation of the person who appoints him. (*Scott Smith, J.*) RAM KUMAR *v.* ACHRU. 35 P. L. R. 1918 : 47 I. C. 17 : 91 P. W. R. 1918.

———*Adoption—Rights of adoptee—Collateral succession.*

In Nurpur, Tahsil Garshankar, District Hoshiapur, a person adopted by a Brahman can succeed collaterally in the adoptive family. (*Shadi Lal, J.*) GOKAL CHAND *v.* MULKI.
65 P. R. 1916 : 157 P. W. R. 1916 : 35 I. C. 543 : 1 P L. R. 1917.

———*Adoption—Rights of adoptee—Inherits in natural family.*

In Punjab, an adopted son in the absence of all other lineal male descendants of the natural father, succeeds his natural father to the exclusion of collaterals of natural father. (*Chevis and Le Rossignol, JJ.*) DEWA SINGH *v.* LEHNA SINGH.
45 P R 1916 : 8 P. W. R. 1916 : 31 I. C. 740 : 44 P. L. R. 1916.

———*Adoption—Rights of adoptee—Appointment—Effect of.*

The customary appointment of heir in Punjab does not dissolve the natural tie as does adoption in Hindu Law and the appointor cannot be said to be the ancestor of the appointee's son. (*Chevis and Shadi Lal, JJ.*) MEHRA *v.* MANGAL SINGH.
99 P. R. 1914 : 8 P. W R 1915 : 27 I. C. 393 : 71 P. L. R 1915.

———*Adoption—Rights of adoptee—Collateral succession—Appointed heir.*

Among the agriculturists in the Punjab, an appointed heir, does not succeed collaterally in the family of the person appointing him because such heir, is not precluded from succeeding collaterally in the natural father's family. If his rights in natural family are put an end to by custom, his rights in the other family are given effect to. Therefore among Jats of Jargaon Tahsil, he cannot succeed collaterally in the family of the adoptive father. The entry in *Riwaj-i am* that he cannot succeed to the natural father, does not mean that he should also not succeed to the paternal uncle. (*Rattigan and Beadon, JJ.*) MUTSADDI SINGH *v.* NARAIN.
40 P. R. 1914 : 177 P. L. R. 1914 : 24 I. C. 894 : 71 P. W. R. 1914.

CUSTOM (PUNJAB)—Adoption—Rights of adoptee.

———*Adoption — Rights of adoptee—Succession to natural family.*

Among Bain Jats of Garshankar Tahsil of the Hoshiarpur District, an adopted son has no right of inheritance in his natural family. (*Johnstone and Shah Din, JJ.*) MILKHI *v.* RAMDAS.

55 P. R. 1914 : 133 P. L R. 1914 : 24 I. C. 477 : 148 P. W. R. 1914.

———*Adoption—Rights of adoptee—Adopted son dying without lineal descendants—Succession to ancestral and self-acquired property.*

According to general agricultural custom, on the death of an adopted son without lineal descendants the collaterals of the adoptor succeed to the ancestral property and the heirs of the adopted son succeed to the self-acquired property of the adoptor; and any proof to the contrary should be established by special custom. (*Reid, C. J. and Beadon, J.*) JOT RAM *v.* HARDWARI.

27 P. R. 1914 : 23 I. C. 527 : 22 P. L. R. 1914.

———*Adoption—Rights of adoptee.*

By the custom of the Hindu Jats of Jullundur, an adoption cannot deprive the adoptor's agnatic relations of their right to succeed to ancestral property, though the appointed heir will have the right to succeed to his self-acquired or non-ancestral property. (*Rattigan and Chevis, JJ.*) RULIA *v.* WARIAM SINGH. **94 P. R 1913 : 287 P. L. R 1913 · 20 I. C 454 : 177 P. W. R. 1913.**

———*Adoption—Rights of adoptee—Collateral succession*—Jat Sikhs *Tain Taram Tahsil.*

Among the *Jat Sikhs* of the Tain Taram Tahsil, Amritsar District, an heir appointed under Customary-Law does not acquire a right to succeed to the collateral relatives of the person who appoints him. (*Reid, C. J. and Kensington, J.*) CHITTU *v.* JAWANA SINGH. **107 P. R. 1913 : 239 P. L. R. 1913 : 19 I. C. 944 : 140 P. W. R. 1913.**

———*Adoption—Rights of adoptee—Collateral —Succession—Gujars of Ludhiana Tahsil.*

Among *Gujars of* Ludhiana Tashil, an adopted son does not succeed collaterally. (*Chevis, J.*) BUTA *v.* MOULA. **63 P. L. R. 1913 ; 19 I. C. 430 : 14 P. W. R. 1913.**

———*Adoption—Rights of adoptee —Bajwa Jats of Sialkot District—Effect of.*

Among Bajwa Jats of Sialkot District an adopted person does not lose his right of succession in his natural family as against collaterals, 68 P. R 1898 : 59 P. R. 1956 : 47 P. R. Foll. 100 P. R. 1806, Dist. (*Chevis, J.*) JIWAN *v.* DIT. **49 P. R. 1912 : 103 P. W. R. 1912 : 13 I. C. 549 : 135 P. L. R. 1912.**

———*Adoption—Rights of adopted son—Succession—Chamban Rajput of Mauza Madh.*

The adopted son of a *lambardar* can succeed in preference to cousin. Among Chanban Rajputs of Mouza Madh in Hissar District the adopted son of a deceased *lambardar*, who is a near relation of the deceased can succeed in preference to a cousin of the deceased. 14 P. R. 1880 : 2 P. R. 1883 : 14 P. R. 1886 : 13 P. R. 1892, 12 P. R. 1892, Rev. and Relied upon. 2 P. R. 1889 : 9 P.

CUSTOM (PUNJAB)—Adoption—Rights to adopt.

R. 1892, 10 P. R. 1892 Rev. and 11 P. R. 1892 Rev. Dis. (*Meredith, F. C.*) NURA *v.* NASIR DIN. **1 P. R. Rev. 1912 : 27 P. L. R 1912 : 13 I. C. 18 : 5 P. W. R. Rev. 1912.**

———*Adoption—Rights of adoptee— Bhabra Jains of Kaithal—Karnal District—Rights of—Adopted son.*

Custom recognises the adoption of collaterals, among Bhabra Jains of Karnal District. The adopted son becomes a co parcener with the adopter in the joint family property and the latter cannot thereafter alienate the property by gift or will. (*Johnstone and Rattigan, JJ.*) AKI *v.* KUNDAN LAL. **74 P. R. 1911 · 255 P. L R. 1911 : 11 I. C. 843 : 211 P. W. R. 1911.**

Adoption—Right to adopt.

———*Adoption—Rights to adopt*—Riwaj-i-am *—Adoption of a stranger.*

The burden of proof is thrown by an entry in the *riwaj-i-am* that *Shastras* are followed in the matter of adoption on the party alleging that an adoption of a stranger with reference to a collateral is invalid as according to the Hindu Law it is quite valid. A custom making the adoption invalid is extremely unlikely. (*Leslie Jones and Broadway, JJ.*) GANESH DAS *v.* KANSHI BAI. **3 Lah. L. J. 461.**

———*Adoption—Right to adopt — Widow—Maheśris of Delhi—Husband's authority or collateral's consent, if necessary.*

In the matter of adoption Maheśris follow custom and not the strict Mitakshara Law. Among them a widow can adopt to her deceased husband in cases as in the present one, where her husband had separate property and was not a member of a joint family. Neither the authority of her husband nor the consent of collaterals is necessary to validate the adoption. (*Shadi Lal, Bevan and Patman, JJ.*) KALU RAM *v.* PIARI LAL. **1 Lah. 92 : 55 I. C. 953 : 92 P. L R 1920.**

———*Adoption—Right to adopt—Mohal—Rajputs of Fazika—Ferozpore District.*

There is no custom of adoption among Mohal Rajputs of the Fazika Tahsil in the Ferozpore District. (*Broadway, J.*) RAM SINGH *v.* HARI SINGH. **115 P R 1919 : 49 I. C. 987 : 33 P. W. R. 1919.**

———*Adoption—Right to adopt — Widow—Authority of husband—Assent of Sapindas.*

A widow can adopt a son to her late husband only when she has been authorised by the latter or possibly where her late husband's kinsman assent to her adoption and there has been no express or implied prohibition by her husband. (*Rattigan and Scott-Smith, JJ.*) GOPI KISHEN *v.* GOPI KISHEN. **27 P. W. R. 1915 : 27 I. C. 701 : 57 P. L. R. 1915.**

———*Adoption—Right to adopt — Widow—* Pathans *of Kala Afghan.*

There is no recognized custom among the *Pathans* of Kala Afghan, Tahsil, Batala District, Gurdaspur, of adoption by a widow unauthorised in his behalf by her husband. (*Rattigan and Chevis, JJ.*) ABDUL RAHMAN *v.* RURE KHAN. **196 P. L. R. 1911 : 11 I. C. 96 : 173 P. W. R. 1911.**

CUSTOM (PUNJAB)—Adoption—Right to contest.

Adoption—Right to contest.

———*Adoption—Right to contest—Onus of proof.*

A party asserting that land is ancestral and therefore an adoption is bad is required to prove his assertion and conjectures cannot be accepted as a substitute for proof. (*Broadway and Abdul Quadir, JJ.*) MUNSHA SINGH *v.* UTTAM SINGH.

4 Lah. L. J. 31 : 4 U. P. L. R. (Lah.) 18 : 1922 Lah. 65.

———*Adoption—Right to contest—Collaterals*

Among the agricultural tribes of the Punjab, collateral can contest the validity of an adoption or alienation so far as non-ancestral property is concerned. The mere fact of cultivating a portion of the ancestral land under the adopted son or exchanging it does not amount to acquiescence on the part of the collateral. (*Agnew and Shadi Lal, JJ.*) SURAIN SING *v.* JAWAHIR SINGH.

162 P. W. R. 1913 : 20 I. C. 839 : 281 P. L. R. 1913.

———*Adoption—Right to contest.*

A collateral, among Laddu Rajputs of the Uma Tahsil, even if removed six decrees, from the adopter, has a *locus standi* to contest the adoption. (*Kensington, J.*) TULSI *v.* KIRPA RAM.

214 P. W. R 1912 : 15 I. C. 555 : 179 P. L. R. 1912.

———*Adoption—Right to contest—Objection by Agnates.*

According to the custom of agriculturists in the Punjab a power of adoption has the same effect as regards agnates and presumptive heirs as a valid transfer by him of his land by gift to the adopted son. The presumptive heirs of the adoptor can question its validity only in cases where a gift of the land which would go to the adopted son by virtue of his adoption can be impugned by those heirs. (*Robertson and Shah Din, JJ.*) SANT SINGH *v.* SADDA. **63 P. R. 1912 : 14 I. C. 23 : 222 P. W. R. 1912.**

———**Alienation.**

Abadi.
Ancestral property.
Burden of proof.
Exchange.
Father's power.
Gift.
Law Governing.
Necessity.
Proof.
Reversioner.
Right to contest.
Widow.
Will.

Alienation—Abadi.

———*Alienation—Abadi—Mortgage of house by non-proprietor.*

In general a non-proprietor cannot alienate the site and his right of residence in his house without the consent of the proprietary body and in case of alienation the proprietors are entitled to a decree for possession. (*Martineau, J.*) AHMAD YAR *v.* SAADULLAH. **56 I. C. 11.**

CUSTOM (PUNJAB)—Alienation—Ancestral property.

———*Alienation—Abadi—Sale of.*

Custom allows non-proprietors of Mauza Tuto Mazara in Hoshiarpur District to sell their sites. (*Jones, J.*) NANDU *v.* PUNJAB SINGH.

35 P. R. 1918 : 45 I. C. 96 : 62 P. W. R. 1918.

———*Alienation — Abadi — Wajib-ul-arz—Karampura village.*

According to the *Wajib-ul-arz* of the village Karampura Mailsi Tahsil District Multan, *Aroras* can sell their houses with a right of residence therein, but ordinary menials cannot. In that District a non-proprietor cannot sell his house with a right of residence therein. (*Scott-Smith, J.*) TAJ MUHAMMAD *v.* KANSHI MAL.

135 P.W.R. 1913 : 19 I. C. 864 : 237 P. L. R. 1913.

———*Alienation—Abadi—Malik Qabza—Position and power of.*

A Malik Qabza is in the position of a full proprietor with the exception that he has some times to pay Malikhana to the Government and has no share in the Shamilat in the village. Malik qabza has full powers including those of alienation in the houses and sites in a village Abadi as full proprietors. (*Robertson and Shah Din, JJ.*) SAWAN SINGH *v.* JAFFAR KHAN.

39 P. R. 1912 : 7 P. W. R. 1912 : 13 I. C. 405 : 13 P. L. R. 1912.

———*Alienation—Abadi.*

The onus probandi of contradicting the general custom of the Punjab that without the consent of the proprietors, non-proprietors cannot sell a site in a village, falls on him who wishes to contradict. The mere absence of any provision in the *Wajib-ul arz* forbidding such an alienation by the non-proprietors is immaterial. A special custom cannot be proved by citing few instances of the exercise of such a right in a large village. (*Chevis, J.*) ALI MARDAN *v.* MOHAR SINGH.

4 P. L. R. 1912 : 12 I. C. 532 : 210 P. W. R. 1911.

Alienation—Ancestral Property.

———*Alienation—Ancestral land—Gift to daughter—Nature of estate taken.*

On the evidence it was held that no family or tribal custom had been proved which limited the estate of a daughter in ancestral lands gifted to her, to a mere life-estate without power of alienation. (*Sir John Edge.*) MUHAMMAD UMAR KHAN *v.* MUHAMMAD NIAZ-UD-DIN

39 Cal. 418 : 39 I. A. 19 : 6 P. W. R. 1912 : 11 M. L. T. 76 : 9 A. L. J. 137 : 15 C. L. J. 172 : 12 P. L. R. 1912 : 22 M. L J. 240 : 14 Bom. L R. 182 : 16 C. W. N. 458 : 126 P. R. 1912 : 13 I. C. 344 (P. C.) : (1912) M. W. N 77 (P.C.).

[On appeal from 1 P. R. 1907.]

———*Alienation—Ancestral property—Sonless proprietor in Rohtak.*

A sonless proprietor of the Rohtak Tahsil of the Rohtak District has unrestricted powers of alienation in respect of ancestral land. (*Martineau and Moti Sagar, JJ.*) KALA *v.* MAM CHAND.

4 Lah. 282 : 5 Lah. L. J. 404 : 1924 Lah. 102.

CUSTOM (PUNJAB)—Alienation—Ancestral property.

———*Alienation—Ancestral property.*

Sale by non-proprietor of standing house *i.e.*, materials of house is ordinarily allowed by custom. (*Martineau, J.*) SARDAR DIN *v.* MT. AJAH BIBI. **1923 Lah. 394 (2).**

—— ——*Alienation—Ancestral land--Son's right.*

If a father *bona fide* and without collusion or intention to injure the reversioners gives consent to an alienation by a female in possession of property such consent is binding upon his son in a suit for a declaration that the alienation shall not affect his reversionary rights. But in the case of non-ancestral land to which his father is heir, he has no such right. (*Scott Smith and Zafar Ali, JJ.*) MT. JASWANT KAUR *v.* WASAWA SINGH, **5 Lah. L. J. 347 : 1923 Lah. 353.**

———*Alienation—Ancestral property — Property acquired by pre-emption.*

Property acquired by pre-emption is not ancestral property in the hands of the acquirer even though the property had at one time belonged to an ancestor of the acquirer. 59 P.R. 1909 followed. (*Martineau, J.*) PHUI *v.* DEVATIA. **1923 Lah 210.**

———*Alienation—Ancestral property—Sonless proprietor.*

In respect of alienation of ancestral land in the Robtak Tahsil, Rohtak District, a sonless proprietor has unrestricted powers. 45 P. R. 1917 Ref., 73 P. R. 1895 dist. (*Campbell, J.*) UGGAR SAIN *v.* TELU. **4 Lah. 113 : 1923 Lah. 193.**

———*Alienation—Ancestral property—Mortgage by agriculturist—Money borrowed for trade.*

Where the mortgage was for trading purposes, *held* : this would not justify an alienation of ancestral land by an agriculturist. The previous mortgage, (the money on which had also been borrowed for trading purposes) cannot be considered as an antecedent debt because it was in favour of the same mortgagee and was effected only a few days before the mortgage in dispute and the two mortgages formed practically one transaction. 19 P. R. 1915 Foll. (*Broadway and Brasher, JJ.*) MD. USMAN KHAN *v.* ATA MOHIUD-DIN. **5 Lah. L. J. 304 : 1923 Lah. 142.**

——*Alienation—Ancestral property—Proprietor and non-proprietor, rights of.*

Under the general customary law of the Punjab non-proprietors have no power of alienation of site in villages and there is no special custom to the contrary in mauza khanan in Jullundur District. The acquiescence of some of the proprietors of the alienations of sites of houses does not imply an abandonment of their right to the site. 13 P. R. 1889 50 P. R. 1889, 85 P. R. 1822 foll. The mere fact that there are number of houses, shops and wells in a village with a population of three thousand inhabitants and that it is also a place full of artisans whose wares were sold outside and there were Khatri Brahmins and other non-agricultural tribes as part of the population do not constitute the village into a town. (*Chevis and Campbell, JJ.*) RAM LOK *v.* BHAGWAN SINGH. **13 P. W. R. 1922 : 1922 Lah. 158.**

CUSTOM (PUNJAB)—Alienation—Ancestral property.

———*Alienation—Ancestral Property—Proof of.*

Where it is shown from the settlement papers that the plaintiffs and the last male owner were descended from a common ancestor and that there has been continued devolution by inheritance of the properties in question it is a legitimate inference that the property is ancestral. 72 P. R. 1913 : 9 P. R. 1914 : 35 C. 1039 foll. (*Chevis, J.*) PUNJABI SINGH *v.* GULAB SINGH. **69 I. C. 143.**

——*Alienation—Ancestral property.*

Where a Govt. lessee died without fulfilling certain conditions of his lease but subsequently the Govt. decided to grant and granted proprietary rights in the land to the son of the deceased. *Held*, that the land was not ancestral in the hands of the son. (*Leslie Jones and Moti Sagar, JJ.*) HARJI *v.* CHANNAN MAL. **63 I. C. 908 : 2 Lah. 195.**

———*Alienation—Ancestral property—Other land purchased—Land acquired, if ancestral.*

Where a proprietor sells a portion of ancestral property and buys another equal to that which was sold, and both are parts of the same transaction, it is an exchange, and the portion bought becomes ancestral. In such a case, if the new land is precisely the same in quality and extent as that sold, the son or reversioner cannot question it, as no question of necessity arises. (*Raoof and Harrison, JJ.*) MOKHA *v.* DHAN SINGH, **63 I. C. 719.**

——*Alienation—Ancestral property—Alienation of declaration suit for—Alternative grounds.*

Ordinarily ancestral property would be inalienable except for legal necessity and a collateral can challenge the alienation on the two grounds.

(1) That the mortgage had never been made and had no legal existence (2) that the alienation was null and void, as being without consideration and legal necessity, and if the plaintiff fails to prove the first ground, it is the duty of the court to enquire into the second ground. (*Shadi Lal, Kt. C. J. Moti Sagar, J.*) INDAR SINGH *v.* BASANTA. **63 I. C. 679.**

——*Alienation—Ancestral property—Extension of decree.*

Ancestral property does not cease to be ancestral merely because, the present owner acquired it not by descent but by gift from a collateral, the reason for the gift being the common descent of the donor and the donee from the same common ancestor. (*Abdul Raoof and Martineau, JJ.*) IMAM DIN *v.* RAM RATTAN. **62 I. C. 855.**

——*Alienation—Ancestral property—Part of the property proved to be ancestral.*

Where it is found on evidence that a part only of the property in suit is ancestral and it is not possible to distinguish which part is ancestral, the whole property should be considered as self-acquired. 35 Cal. 1039, Appl. (*Scott Smith and Leslie Jones, JJ.*) LEHNUN *v* GUPTA. **60 I. C. 520.**

———*Alienation—Ancestral property—Proof—Onus.*

CUSTOM (PUNJAB)—Alienation—Ancestra l property.

The plaintiff has to prove strictly that the land is ancestral. 42 P. R. 1910, (P. C.) Foll. (*Scott-Smith, J.*) FATEH MUHAMMAD *v.* IMAMUDDIN.
2 Lah. L. J. 188.

———*Alienation—Ancestral property--Pathans of Attock.*

The Pathans of Attock Tahsil have an unrestricted power of alienation over their property, whether ancestral or self-acquired. (*Broadway, J.*) SHER KHAN *v.* ALAF KHAN. 49 I. C. 391.

———*Alienation — Ancestral property—Exchange of—Reversioner—Suit to set aside.*

Land received in exchange for ancestral property is also ancestral, and the reversioner can sue to set aside the sale of the property. (*Scott Smith and Martineau, JJ.*) THAKUR *v.* RAM SINGH. **48 I. C. 793 : 120 P. R. 1918.**

———*Alienation—Ancestral property—Onus.*

The onus of proving that a particular property was ancestral in the hands of the last male owner lies on the person who claims it as such. (*Scott-Smith, J.*) RAM KAUR *v.* ACHHRU.
35 P.L.R. 1918 : 47 I. C. 17 : 91 P.W R. 1918.

———*Alienation — Ancestral property—Self acquired property—Moveables.*

Self-acquired property includes moveables acquired by income of the ancestral property. (*Chevis and Shadi Lal, JJ.*) GULAM JILANI KHAN *v.* IMDAD ALI. **13 P R. 1916 : 33 I. C. 215 : 196 P. W. R. 1915.**

———*Alienation--Ancestral property—What is.*

Ancestral property is that which has descended to the holder from a male ancestor. Hence a son of the adopted son cannot impeach alienations by the adoptee of property, which was ancestral in the hands of the adoptor. Property which is inherited by an adopted son from his adoptive father is self-acquired. (*Chevis and Le Rossignol, JJ.*) AMINCHAND *v.* BHUJHA.
107 P. R. 1915 : 32 I. C. 29 : 208 P.W.R. 1915.

———*Alienation—Ancestral property—Awans of Mauza Marir Hassain Tahsil, Rawalpindi.*

By custom among Awans of Mauza Marir Hassain *Tahsil*, Rawalpindi a childless proprietor has power to alienate his ancestral property in the presence of a first cousin, without necessity 53 P.R, 1899: 46 P.R. 1900 : 8 P. R. 1906 : 15 P.R. 1907 : 88 P. R. 1911 : 100 P. R 1912 : 114 P. R. 1913 : 72 P. R. 1914, Ref. (*Shah Din and Le Rossignal, JJ.*) NUR AHMAD *v.* GHULAM HUSSAIN.
56 P. R. 1915 : 51 P. L. R. 1916 : 30 I. C. 90 : 135 P. W. R. 1915.

———*Alienation —Ancestral property—Suit by sons to recover—Immorality—Necessity—Onus.*

Where a Hindu father sold his ancestral house to a third person and his son sued for recovery of possession, after the father's death. *Held*, that it lay on the plaintiff to prove the immorality of the transaction if he wanted to free himself from his liability to pay his father's debt; and that the sale could not be maintained as sale unless the vendee proved necessity. Where the sale had taken place some 20 years before suit, circumstantial evidence is sufficient to prove necessity. (*Shadi Lal and Le Rossignol, JJ.*) LABHAYA *v.* GOPAL DAS. **78 P. W. R. 1915 : 29 I. C. 891 : 151 P. L. R. 1915.**

CUSTOM (PUNJAB)—Alienation—Ancestral property.

———*Alienation—Ancestral land—Attachment of—Widow of deceased proprietor.*

Ancestral landed property, which has come into the possession of a widow as heir of a male proprietor governed by Customary Law is liable to be attached at the instance of the deceased proprietors's judgment-creditor in execution of a money decree against him. The onus of proving that the deceased's estate in the hands of his widow is not liable for his just debts lies heavily on the person asserting it. (*Shah Din and Le Rossignol, JJ.*) BHAMBUL DEVI *v.* NARAIN SINGH.
39 P. R 1915 : 103 P. W. R. 1915 : 29 I. C. 572 : 8 P. L. R. 1916.

———*Alienation—Ancestral property—Awans of Tahsil Talagang—Attock District.*

The general tendency has, no doubt, been to recognize very extensive powers of alienation among the Awans but when it comes to a question of alienation to strangers their powers are limited. 46 P. R. 1900 : 8 P. R. 1906 : 15 P. R. 407, Dist. (*Kensington, C. J.*) SHER MAHOMED *v.* ALI. MAHOMED. **60 P. W. R. 1914 : 25 I. C 715 : 151 P. L. R. 1914.**

———*Alienation—Ancestral property—Necessity—Proof of—Awans of Talagang Thasil, Attock District.*

Among *Awans* of Talagang Tahsil Attock District, a proprietor cannot alienate ancestral property to the prejudice of his sons except for a necessary purpose and the onus is on the person asserting the contrary to prove it. Evidence, that a number of alienations have taken place and have not been contested is, in the absence of particulars and details of those alienations, of little value to establish absolute power of disposal, over ancestral property. (*Rattigan and Scott-Smith, JJ.*) LAL KHAN *v.* NURA. **72 P L. R. 1914: 25 I. C. 556 : 233 P. R, 1914.**

———*Alienation—Ancestral property — Childless proprietor—Rohtak Distriot.*

In the Rohtak District, the burden of proof as to the restricted power of alienation of ancestral property by a childless proprietor rests upon the person alleging it. (*Scott-Smith, J.*) TELU *v.* CHUNI. **231 P. L. R 1913 : 20 I. C. 373 : 147 P. W. R, 1913.**

———*Alienation—Ancestral property—No evidence—Presumption.*

In the absence of evidence to the contrary, a house or other property must be presumed to be acquired, and not ancestral. (*Ratligan and Shah Din, JJ.*) MUHAMMAD HUSSAIN *v.* SHERU.
272 P. L. R, 1913 : 20 I. C. 274 : 224 P. W. R. 1913.

———*Alienation—Ancestral property—Unequal distribution among sons.*

Awans of Talagong Tahsil, Attock District, are not competent to distribute ancestral land unequally among their sons. The person alleging their

CUSTOM (PUNJAB)—Alienation—Ancestral property.

competency to do so must prove it. (*Rattigan and Chevis, JJ.*) KHUDA BAKSH *v.* AHMAD KHAN.
114 P. R. 1913 : 151 P. L. R. 1913 : 19 I. C. 459 : 124 P. W. R. 1913

———*Alienation—Ancestral property—Proof—Onus.*

The burden of proving that the entire estate left by a land owner is ancestral lies on the person who asserts that it is. (*Shah Din and Beadon, JJ.*) ALA SINGH *v.* KHARK SINGH.
253 P. W. R. 1912 : 17 I. C. 392 : 257 P. L. R. 1912.

———*Alienation--Ancestral property—Agriculturist—Powers of.*

An agriculturist in possession of ancestral property is only a life owner (with very restricted rights of alienation) and his reversioners have also their own rights of a very real nature with regard to such property. (*Rattigan and Shah Din, JJ.*) KADAR BAKSH *v.* SAHIB JAN.
75 P. R. 1912 : 192 P. W. R. 1912 : 16 I. C. 468 : 213 P. L. R. 1912.

———*Alienation — Ancestral property—Liability for debts of previous holder.*

The creditors of a male proprietor governed by customary rules have no charge against his ancestral landed property in the hands of the next holder even for a just debt, contracted by the deceased proprietor. The creditor cannot by obtaining a simple money decree either against the debtor himself in his life-time or after his death against the persons who are legal representatives *pro tanto* of the deceased execute his decree after the death of the debtor, by attaching the landed ancestral property, which at one time was in possession of the deceased 79 P. W. R. 1911 ; 80 P. W. R. 1911 ; Ref. 107 P R. 1887; 84 P. R. 898 ; 18 P. R, 1908 ; 26 P R. 1911, Rel. 24 P.R. 1894. Diss. (*Kensington, Rattigan and Chevis, JJ.*) JAGDIP SINGH *v.* NARAYAN SINGH. 4 P. R. 1913
173 P. L. R. 1912 ; 15 I. C. 866 : 160 P. W. R. 1912.

———*Alienation—Ancestral property—Proof.*

The history of the foundation of a village is sufficient proof, where no other proof, is available, whether a certain land therein is ancestral. (*Johnstone and Chevis, JJ.*) JWALA *v.* INDAR.
76 P. W. R. 1911 : 11 I. C. 372 : 181 P. L. R. 1911.

———*Alienation—Ancestral property.*

Awans of Talaganj Tashil of the Attock District are competent to alienate ancestral property even in the presence of a son. (*Shah Din, J.*) KHUDH BAKSH *v.* WAHAM ALI. 88 P. R. 1911 : 116 P. W. R. 1911 : 10 I C 36 : 144 P. L. R. 1911.

———*Alienation—Ancestral property—Aoqusitions.*

Immoveable property purchased from profits of ancestral immoveable property is not ancestral. Property acquired by female is not ancestral *qua* her father's collaterals. (*Johnstone and Shah. Din, JJ.*) ISHAR KUAR *v.* RAJA SINGH.
29 P. R. 1911 : 94 P. L. R. 1911 : 9 I. C. 608 : 124 P. W. R. 1911.

CUSTOM (PUNJAB)—Alienation—Father's Power.

———*Alienation—Ancestral land.*

A khattar of the Attock Tahsil cannot alienate ancestral land at pleasure and the burden of proving that he can do so is on the alienee. (*Chevis, J.*) FAIZL HUSSAIN *v.* AMIR HAIDER.
76 P. L. R. 1911 : 9 I. C. 588 : 73 P. W. R. 1911.

Alienation—Burden of Proof.

———*Alienation—Burden of proof—Gakhars of Malpur—Gift by sonless proprietor—Riwaji-i-am.*

Where the Riwaj-i-am contains an entry that among gakhars a sonless proprietor can alienate ancestral property as he liked, the onus is on the person who contests the validity of such a gift to prove it. *Held*, also on the other evidence in the case, such a right in the sonless proprietor was in accordance with the custom of the land. (*Martineau and Harrison, JJ.*) MT. SARDAR KHANAM *v.* AMIR ZAMAN KHAN.
3 Lah. 392 : 1923 Lah. 125.

———*Alienation—Burden of proof—Jats.*

The onus of proving unrestricted power of alienation of ancestral property of Jat proprietor lies originally on the alienee. 107 P. R, 1887 : 73 P. R. 1895, Foll. (*Richardson and Rattigan, JJ.*) GANPAT RAM *v.* BAHARA.
73 P. R. 1912 : 14 I. C 252 : 119 P. W. R. 1912.

Alienation—Exchange.

———*Alienation—Exchange—Suit to set aside—Burden of proof.*

Where ancestral land is given in exchange for other land by a male proprietor and the transaction is challenged by a reversioner, though the initial onus is on the transferee to show that the transaction was a prudent one the onus is easily discharged if the surrounding circumstances show that the transaction was beneficial. (*Shadi Lal, C. J. and Brasher, J.*) NAGINA SINGH *v.* MOTA SINGH. 1924 Lah. 335

———*Alienation —Exchange—Validity—Test.*

A male proprietor governed by the Customary Law may make an exchange to improve the estate or to benefit the person interested therein. The test of the validity of the transaction is whether it is a fair and *bona fide* one, such as may be regarded as an act of good management. (*Shadi Lal, J.*) NAZIR *v.* AMARCHAND. 9 P. W R. 1918 : 44 I. C. 224 : 156 P. L. R. 1917.

———*Alienation—Exchange.*

A deed of exchange of property of over Rs. 100 in value would be invalid for want of registration. (*Johnstone, J.*) DALIP SINGHRI *v.* MUNSHI.
74 P. W. R. 1914 : 24 I. C. 894 : 176 P. L. R. 1914.

Alienation—Father's Power.

———*Alienation — Father's power —Sonless proprietor.*

Custom recognises a distinction between cases where an alienation is by a proprietor having sons and by one who has no sons. (*Rattigan and Scott Smith, JJ.*) LAL KHAN *v.* NURA.
72 P. R. 1914 : 25 I. C. 556 : 233 P. L. R. 1914.

———*Alienation —Father's power*—Awans *of Talaganj Tahsil.*

CUSTOM (PUNJAB)—Alienation—Gift.

The powers of an Awan of the Talagamj Tahsil who has sons living are not unlimited when dealing with ancestral property. (*Rattigan and Smith, JJ.*) MUHAMMAD KHAN *v.* [illegible]ALEL.
42 P. L R. 1914 : 23 I. C. 934 : 177 P. W. R. 1914.

Alienation—Gift.

———*Alienation — Gift—Sonless proprietor—Ancestral land—Khulshra Jats—Hoshiarpur Dt.*

Among the Khulshrajats—Tahsil Garhshanker Hoshiarpur Dt. there is no custom by which a sonless proprietor could give away his ancestral land to his paternal aunt's grandson in the presence of collaterals. (*Scott Smith and Abdul Raoof, JJ.*) NATHU *v.* BANNA.
3 Lah. 344 : 1922 Lah. 426.

———*Alienation—Gift—Family arrangement—Effect of.*

Where as a result of a family arrangement effected with a sole object of preventing disputes between the sons and grandsons of a proprietor certain properties or alloted to them presumption could not be that the latter were ultimately intended to get more than the share they would be entitled to by succession according to custom. (*Leslie Jones and Wilberforce, JJ.*) AHMAD DIN *v.* MUHAMMAD TUFAIL. **4 Lah. L. J. 376.**

———*Alienation—Gift*—Aroras *of Taunsa.*

A sweeping provision in the *riwaj-i-am* that a gift cannot be made in favour of a daughter when there are near collaterals relating to all the Hindus was not intended to govern the Hindus of high caste or trading classes residing in towns. Plffs. had not succeeded in proving that the *aroras* of Taunsa are governed in the matter of alienation by agricultural custom. (*Shadi Lal and Wilberforce, JJ.*) ASA NAND *v.* ROSHINI BAI.
68 I. C. 92 : 2 Lah. L. J. 178.

———*Alienation—Gift.*

In the case of a gift made to a family, the heirs of the donor may succeed eventually to the estate on the extinction of the line of donees. (*Chevis and Campbell, JJ.*) DHANNUN *v.* BHAGWANI.
67 I. C. 555.

———*Alienation —Gift — Daughter's Sons—Hindu jats of Mauza Liddar Tahsil and District Jullundur.*

Held that it was not proved in the case that by custom among Hindu Jats of Mauza Liddar, Tahsil and District Jullundur the gift of ancestral property to daughter's sons is valid. 50 P.R. 1893: 94 P. R. 1913 ; 1 Lah 15 Rei. (*Leslie Jones and Abdul Raoof, JJ.*) KHUSHAL SINGH *v.* KANDA.
5 Lah. L. J. 63 : 56 I. C. 931 : 2 U. P. L. R. (L.) 110.

———*Alienation —Gift —Reverter to donor's heirs—Gift to son-in-law—Whether female line is excluded.*

Land gifted to a Khanadamad reverts to the donor when the line of the descendants of the donee both male and female has entirely become extinct. Where a daughter is entitled to succeed her sons or equally entitled to succeed except in the case of a daughter who succeeds as an unmarried daughter in which case she herself holds

CUSTOM (PUNJAB)—Alienation—Gift.

the property until her marriage. A custom to the contrary must be proved by the collateral. (*Chevis and Dundas, JJ.*) SHAH MAHOMED *v.* FAZUL ILAHI. **2 U. P. L. R. (Lah.) 103 : 56 I. C. 913 : 2 Lah. L. J. 475.**

———*Alienation—Gift—Reverter to donor.*

Any permanent fixtures made by the donee would on failure of his direct line, go to the reversionary owner of the land and not to his collaterals who are not also entitled to any compensation (*Rattigan, C. J.*) HARNAMAN *v.* DASONDHI.
1 Lah. 210: 56 I. C. 733 : 112 P. L. R. 1920.

———*Alienation—Gift—Consideration—Donee dying childless—Reversion to grantor's heirs.*

Where a gift is made to a stranger for consideration there should be no reversion of the land gifted to the donor's family. (*Broadway, J.*) NUR *v.* FATEH MUHAMMAD. **55 I. C. 187.**

———*Alienation—Gift—Oral gift followed by deed of confirmation—Delivery of possession.*

Where the donee never obtained possession either before or after the mutation of her name, the donor widow continued in possession in spite of the gift during her lifetime and that after her death the plaintiff reversioner had been in possession by receipt of rent from tenants and by payment of revenue to the Government the decision of the Lower Appellate Court declaring plaintiff to be owner was correct. (*Broadway and Abdul Raoof JJ.*) MUSSAMMAT NEM KUAR *v.* AMRIT SINGH. **1 Lah. L. J. 64.**

———*Alienation —Gift —Stranger—Reversion to donor's family.*

The doctrine of reversion of gifted land to the donor's family on the death of the donee childless, does not apply to gifts made to strangers. (*Shah Din, J.*) DASA *v.* MUSSAMMAT HIRAN.
72 P. L R. 1919 : 51 I. C. 441 : 47 P. R. 1919.

———*Alienation—Gift— Daughter —Virak—Jats of Mauza Harar—Thasil Gujranwala—Will—Resident son-in-law.*

A custom among Virak Jats of Mauza Harar in Thasi Gujranwala allows male proprietor to make a gift of his ancestral property in favour of his daughter in preference to collaterals in the 4th degree. A bequest of ancestral property by a male proprietor in favour of his resident son-in-law can be allowed so far as the testator's power of disposition is concerned, a gift for the benefit of his daughter and her issue. (*Shah Din and Le Rossignol, JJ.*) SHADI *v.* ALIA. **48 I. C. 842.**

———*Alienation—Gift—Ancestral property—Childless person—Gift to sister's son—Gujars.*

A gift of ancestral property to the sister's son by a childless proprietor, when there are collaterals, is not valid among the Gujars of the Jhelum Tahsil, the burden of proving that such a gift is valid being on the donee. (*Shah Din, J.*) MUHAMMAD ALAN *v.* MUHAMMAD HAYAT.
37 I. C. 762 : 127 P. R. 1916.

———*Alienation— Gift — Collaterals—Brahmins of Dighal village, Jhajjar tahsil, Rohtak District.*

CUSTOM (PUNJAB)—Alienation—Gift.

Among Brahmins of Dighal village in the Rohtak District a sonless proprietor cannot make a gift of ancestral property to a collaterals entitled to shares by inheritance. The question whether the property in dispute is ancestral or self-acquired cannot be raised in second appeal (*Leslie Jones, J.*) GHANSHAM *v.* BALAK RAM.
94 P.L. R. 1916: 36 I. C. 215 : 181 P. W. R. 1916.

———*Alienation—Gift by sonless proprietor.*

Among the Gujars of the Phillour Tahsil in the Jullundar district, a sonless proprietor can gift his land to a daughter whose husband was Khanadamad and to a daughter's son whom he had appointed as his heir. (*Johnstone, C. J. and Chevis, J.*) ISA *v.* SAMMAN. **34 I. C. 936: 216 P. W. R. 1915: 29 P. R. 1916.**

———*Alienation —Gift— Ancestral land to daughter in presence of collaterals—Quarashi of Hardosheikh.*

A quarashi of village Hardosheikh is empowered by custom to make a gift of his ancestral land to his daughter in the presence of his collaterals. (*Rattigan and Shah Din, JJ.*) BARKAT ALI *v.* SULTAN BIBI. **19 P. R. 1916 : 33 I. C. 787: 82 P. W. R. 1916.**

———*Alienation— Gift — Daughter —Akali Nihangs of Taru Taron.*

A gift by an Akali Nihang of his self acquired property to his daughter is valid. (*Shah Din and Le Rossignol, JJ.*) PALASINGH *v.* LACHMI.
105 P. R. 1915: 32 I. C. 16: 192 P. W. R. 1915.

———*Alienation—Gift—Sindhu Jats—Ancestral property.*

There is no custom among Sindhu Jats of Khabra Tahsil, Kasur District, Lahore, enabling a proprietor to make a gift of ancestral property in favour of a step son of a different *got* in the presence of 4th degree collaterals. (*Rattigan and Jones, JJ.*) NATHA SINGH *v.* GANDA SINGH,
95 P. R. 1915: 31 I. C. 493: 175 P. W. R. 1915.

———*Alienation — Gift — Sharai dower—Khakhi Jats of—Salihan mouza, Muzaffagar Tahsil.*

Among *Khaki Jats* of *Mauza*, Salihan in Tahsil Muzaffargarh, a sonless proprietor can validly transfer his holding to his wife in lieu of *sharai* dower. The wife has absolute power of disposal over property so transferred and a gift of it to her daughter cannot be challenged by the reversioners. (*Kensington., C. J. and Shah Din, J.*) NUR MAHOMED *v.* ALLAH WASAI.
5 P. W. R. 1915 : 27 I. C. 562 : 35 P. L. R. 1915.

———*Alienation—Gift—Gift to several persons—If creates joint tenancy.*

A gift by a proprietor in equal shares to the daughter, her son, and a son by another daughter does not create a joint tenancy. Such an incident of property is unknown to the customary law. (*Johnstone and Rattigan, JJ.*) NABI BAKSH *v.* MEHR BIBI. **89 P. R. 1914 : 26 I. C. 797 : 236 P. L. R. 1915.**

———*Alienation—Gift—Reverter to heirs of—donor—Extent of right.*

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The right of reversion in the heirs of the donor or appointer is limited to the property over which he had no absolute power of disposition. (*Reid, C. J. and Beadon, J.*) JOT RAM *v.* HARDAVARI.
22 P. L. R. 1914: 23 I. C. 527 : 27 P. R. 1914:

———*Alienation—Gift—Arains of the Hoshiarpur District—Gift by male proprietor to one reversioner to exclusion of others.*

Among the Arains of the Hoshiarpur District, a male proprietor cannot gift away his ancestral property to one reversionary heir to the exclusion of the others. (*Beadon and Scott Smith, JJ.*) MIRAN BAKSH *v.* NATHU. **11 P. R. 1914 : 22 I. C. 944 : 121 P. L. R. 1914.**

———*Alienation—Gift—By sonless proprietor—Estoppel.*

Where ancestral lands are gifted away by a sonless proprietor and the reversioners both by conduct and action acquiesce in the same, they cannot afterwards question the alienation. (*Rattigan and Beadon, JJ.*) KHAZANA *v.* WARYAMA.
105 P. W. R. 1914: 22 I. C. 607: 205 P. L. R. 1914.

———*Alienation—Gift—Arain of Tahsil and District Gujrat.*

Under the customary law, an Arain of Tahsil and District Gujrat is competent notwithstanding reversioners to gift his property to his daughter and her husband who lived with him. (*Reid, C.J. and Kensington, J.*) GHULAM MUHAMMAD *v.* DASWANDHI. **104 P. R. 1913: 21 I. C. 845: 272 P. L. R. 1914.**

———*Alienation—Gift—Ancestral property—Gift to daughter by sonless proprietor in presence of collaterals, if valid—Awans of Hoshiarpur District.*

Among Awans of Lamma in Hoshiarpur District a gift by a sonless proprietor of ancestral land to a daughter is valid even in the presence of collaterals in the 4th degree. (*Rattigan and Scott Smith, JJ.*) NATHU *v.* FATHU. **101 P.R. 1913: 8 P. L. R. 1914: 21 I. C. 722: 15 P. W. R. 1914.**

———*Alienation—Gift—Childless proprietor—Jats of Kazhia tribe—Shahpur District.*

Among Muhammadan Jats of the Kathia tribe a childless proprietor cannot make a gift of his ancestral property to his sister's son. (*Kensington and Beadon, JJ.*) TAJ MUHAMMAD *v.* ISLAM.
95 P. R. 1913: 343 P. L. R. 1913: 21 I. C. 681: 230 P. W. R. 1913.

———*Alienation —Gift—Daughter—Right to question—Agnates of 5th degree.*

Among the Khokars of the Shahpur District, to make a gift to a daughter binding on the reversionary heirs, it must receive the consent of the donor's sons or near agnates. When agnates in the 5th degree happen to be the immediate heirs, they cannot be excluded from the category of near agnates whose consent is necessary to make a gift valid. (*Kensington and Beadon, JJ.*) SAHIBAN *v.* MUHAMMAD. **72 P. R. 1913 : 294 P. L. R. 1913 : 20 I. C. 522: 214 P. W. R. 1913.**

———*Alienation—Gift—Nangial Rajputs of Rawalpindi Tahsil.*

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Among Nangial Rajputs of the Rawalpindi Tahsil a sonless prop ietor can make a valid gift of the whole of his ancestral property to his son-in-law in the presence of a first cousin. (*Reid, C. J. and Rattigan, J.*) KARM DIN *v.* KHATTAR

64 P. R. 1913 : 238 P. L. R. 1913 : 20 I. C. 481 : 186 P. W R. 1913.

———*Alienation—Gift—Reversion—Succession—Gifted property—Collaterals of donor—Khattars of Attock District.*

Among Khattars of the Attock District collaterals of the donor are excluded by the heirs male and female of the donee. 12 P. R. 1892 Rel.; 32 P. R. 1895 : 129 P. R. 1893 : 14 P. R. 1907 Dist. (*Agnew and Shadi Lal, JJ.*) SHAHANCHI KHAN *v.* BEGUM JAN. **286 P. L. R. 1913: 191 P. W. R. 1913: 20 I. C. 451 : 13 P. R. 1914.**

———*Alienation—Gift—Daughters son—Right of after born son to impeach.*

A sonless mahommedan agriculturist is perfectly competent to make a gift of one half of his non-ansestral property in favour of daughter's and sister's sons and it cannot subsequently be impeached by the donor's after born son, especially when a collusive suit is instituted by the father on behalf of his minor son. (*Kensington and Shahdin, JJ.*) DUR MUHAMMAD KHAN *v.* PIRRAN DITTA. **64 P. L. R. 1913 : 19 I. C. 434 : 13 P. W. R. 1913.**

———*Alienation—Gift by Widow to daughter's son—Jats.*

Among Jats of Mangat got at Jatana, a gift of ancestral property to a daughter's son consented to by the daughter accelerates his succession as her heir and collaterals in the 7th degree cannot question the gift. (*Reid, C. J. and Chevis, J.*) MUSAMMAT PARTAPO *v.* ASARAM.

208 P. L. R. 1913 : 221 P. W. R. 1913 : 19 I C. 211 : 96 P. R. 1913.

———*Alienation—Gift—Reversion to donor's family—Gift to* Khanadamad.

A gift to a *khanadamad* is for the benefit of the *khanadamad's* wife and her male issue. The property gifted would revert to the donor's family in all cases where the daughter's direct male descendant's have died out. (*Reid, C. J.*) FATEH ALI *v.* MUHAMMAD HAYAT.

68 P. W. R. 1913 : 18 I. C. 818 : 197 P. L. R. 1913.

———*Alienation—Gift—Reverter to donor's line.*

If the donee leaves any descendants, male or female, behind him, the collaterals of the donor cannot take it back. (*Kensington and Chevis, JJ.*) KAMAN *v.* SUMAND KHAN.

15 I. C. 99 : 228 P. W. R. 1912.

———*Alienation—Gift to a daughter—Formal delivery of possession unnecessary—Benefit of son in law.*

Where a Gujar in the Gujarat District executed and registered a deed in favour of his daughter, *held*, that there was an irrevocable gift to the daughter, that formal delivery of possession was not esstential, and that the gift enured to the

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benefit of the son-in-law if the daughter died issueless. 134 P.R 1894. Foll. 12 P.R. 1882 (F.B.) 22 P. R, 1893 and 54 P. R. 1897 Dist. (*Johnstone and Rattigan, JJ.*) RAJA *v.* JANNAT BIBI,

79 P. W. R. 1912 : 40 P, R. 1912 : 13 I. C. 409 : 94 P. L. R. 1912.

———*Alienation—Gift—Mahomedan law.*

A gift of ancestral land by a sonless muhamadan Jat of Mauza Taras Sahsil Issekhal to his wife and daughters is valid against collaterals in the 5th degree. (*Reid, C.J. and Johnstone J.*) TAJA *v.* JATTI.

72 P. R. 1911 : 12 I. C. 955 : 257 P. W. R, 1911.

———*Alienation—Gift—Ancestral property—Matrimonial alliance between children of donor and donee—Extinction of donee's family the last male holder leaving a widow—Property to whom reverts—Limitation for recovering such property.*

Ancestral property gifted on account of a matrimonial alliance between the children of the donor and the donee reverts to the former's reversioners on the extinction of the latter's family. A suit to recover such property is governed by Article 144 of Limitation Act, but if the last male holder leaves a widow article 141 applies, the period of limitation being 12 years from the death of the last male in the former cases and from the death of the widow in the latter. (*Johnstone and Chevis, JJ.*) JAWALA *v.* INDAR.

76 P. W. R. 1911 : 11 I. C. 372 : 181 P. L. R. 1911.

———*Alienation—Gift—Daughter's sons.*

Among Kalan Jats of Tahsil Shakargarh, District Gurdaspur, a sonless proprietor can make a valid oral gift of ancestral land in favour of his daughter's sons, whose father was his *jawaghari* or resident son-in-law. (*Ried, C. J.*) HORNAM SINGH *v.* LACHMAN SINGH. **16 P. R. 1911 : 38 P. W. R. 1911 : 10 I. C. 857 : 90 P. L. R. 1911.**

———*Alienation—Gift—Daughter.*

A sonless proprietor among Arains of Mauza Dholewala in the District of Ferozpore, has the power to make a gift of a portion of his ancestral land in favour of his daughter whose husband is the donors *ghar-jawi* or resident son-in-law. (*Shah Din, J.*) KARAMDIN *v.* JIS.

13 P. R. 1911 : 86 P. L R. 1911 : 10 I. C. 854 : 111 P. W. R. 1911.

———*Alienation—Gift—Gift of ancestral land by widow to daughter's son—Nara Rajputs of Tahsil Phillour, Jullundur District—Succession.*

Among Naru Rajputs of Tahsil Phillour in the District of Jullunder, daughters are excluded from inheriting ancestral property by collaterals related in the fifth degree. A gift by a widow of her husband's land in favour of his daughter's son is not valid without the consent of the collateral even if the donee be also a collateral of her husband. The assent to such a gift by the mother of a minor collateral does not bind him. A collateral by acting as a *Sarborah Lambardar* of the minor donee who has got the *Lambardari* in virtue of such gift, is not estopped from contesting its validity. But the collaterals who, before or after the death of the widow, agree that the mutation of names as regards the gifted property should be effected in favour of the donee cannot be allowed

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to challenge the gift. (*Johnstone and Chevis, JJ.*) KAHAIRE KHAN *v.* GHULAM. **238 P. L. R. 1911 : 46 P. W. R. 1911 : 10 I. C. 387 : 32 P. R 1911.**

——*Alienation— Gift—Sonless Arain.*

A gift by a sonless Arain proprietor of Tahsil Jullundur to his married daughter, in the presence of the 3rd degree of collaterals, is valid and is not invalidated by the unchastity of the donee. (*Rattigan, J.*) SANDAH *v.* RAHMETI.

100 P. L. R. 1911 : 9 I. C. 823: 75 P. W. R. 1911.

——*Alienation—Gift—Tharkhans of Sialkot —Dunlop Smiths compilation.*

Among the Tharkhans of the Sialkot District a male proprietor cannot give more than a 1*f*20 share of his ancestral immoveable property to his daughter to the prejudice of his collaterals of the fifth degree. The customary law of the Sialkot District compiled by Dunlop Smith in 1895 is more reliable than the *Riwaj-i-am* of 1865. (*Johnstone and Shah Din, JJ.*) RAHIM BUKSH *v.* NATTA. **23 P. R. 1911 : 60 P. L. R. 1911 : 9 I. C. 453 : 61 P. W. R. 1911.**

——*Alienation — Gift—Will— Pathans of Charsadda—Peshawar—Sonless proprietor—Bequest to daughters.*

The distinction under Customary Law between the power of gift *inter vivos* and the power of testation is a matter of degree and form only, and where the power of gift is shown to exist, an initial presumption arises that there is a co-extensive power of testation. Where the practice of gift-making has established itself, the effect must be to incline public opinion favourably towards the practice of testamentary bequests which are really in the nature of deferred gifts which are more easily revocable. They are undoubtedly special customs upon special points existing among the various Pathan tribes of the Charsadda and Peshawar Tahsils, but there is a strong presumption that their customs are substantially similar, unless some special reasons for divergence can be established. The power of a sonless proprietor to make a bequest in favour of his daughters, was held to be established among the Pathans. No restriction exists upon the testamentary power of a Mahammadzai proprietor except that which prohibits, in certain circumstances, the disinheritance of sons. (*Pipon, J. C.*) ABDUL MANAN *v.* MT. FAROQA.

73 I. C. 79.

Alienation—Law Governing.

——*Alienation—Law governing—Gift—Daughter—Sheik Ansaris.*

A limited right of a daughter in property gifted to her by her father, cannot be inferred from the fact that a widow has, by custom, only limited rights in her husband's property. Nor has evidence that a Muhammadan father is prevented by some local custom from giving the whole of his property to one of his sons, any bearing on his power to give the whole of his property to his daughter. The Sheikh Ansari Pathans of Basti Danishmandem, District Jullundur, are not governed by agricultural custom. A gift by a sonless man to his daughter conveys an absolute estate presumably. (*Sir John Edge,*) MUHAMMAD UMAR KHAN *v.* MAHAMAD NIAZUDDIN KHAN.

39 Cal 418 : 126 P. R. 1912 : 6 P. W. R. 1912 : 11 M. L. T. 76 : 9 A. L. J. 137 : 15 C. L. J. 172 : 12 P. L. R. 1912 : 22 M. L. J. 240 : 14 Bom. L. R. 182 : 16 C. W. N. 458 : 39 I. A. 19 : 13 I. C. 344 : (1912) M. W. N 77 (P. C.)

[On appeal from 1 P. R. 1907.]

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——*Alienation—Law governing—Brahmans of Gokalgarh—Ambala District—Hindu Law.*

The Brahmans of Gokalgarh in the Ambala District are not governed in the matter of alienation by agricultural custom but by Hindu Law. (*Shadi Lal, C. J. and Zafar Ali, J.*) SALIQ RAM *v.* BADHAWA. **4 Lah. 254 : 5 Lah. L. J. 471 : 1923 Lah. 501.**

——*Alienation--Law governing—Residential houses, transfer of.*

The custom as to transfer of tenancy without the consent of landlord was held to be not proved in this case with the following observation. There is a tendency in this province to set up in villages, customs which are subversive of the rights of property, as for example, in the present case a custom which, in fact, takes from the zamindar the right to the site of a tenant's holding on the determination of the tenancy. The claim of a tenant to transfer a right of residence really amounts to this, for it means that the tenant, may, by assignment, transfer to a stranger a right of residence without the consent of the zamindar to force upon the latter a tenant who may be distasteful to him. It prevents the landlord from resuming the occupation of his land when a tenant selected and approved of by him, chooses to give it up. It is the change of a right of a tenancy into a right of permanent occupancy. (*Abdul Raoof and Moti Sagar, JJ.*) SEWA SINGH *v.* GHULAM. **1923 Lah. 467.**

——*Alienation--Law governing--Rohtak Tahsil*—Riwaj-i-am.

In the Rohtak tahsil a proprietor has very wide powers of alienation and an alienation by him can be challenged only on grounds valid under Hindu Law. A very large part of the customary law regarding restrictions on alienation is purely case-made law and the law primarily applicable to Hindus is Hindu Law modified by custom. 20 I. C. 373 Appr. In the Rohtak tahsil the *riwaj-i-am* places upon the plff. the onus of proving that he has a right to attack the alienation. (*Le Rossignol, J.*) GIANI *v.* TEK CHAND. **11 P. L. R. 1922 : 1922 Lah. 69.**

——*Alienation—Law governing—Aroras of Taunsa town—Powers of alienation.*

Where the deceased belonged to a mercantile community and was a resident of a town he would be presumed to be governed by his personal law in the matter of alienation and the persons who claim to the contrary must establish the existence of custom overriding the personal Law. The *Riwaj-i-am* contains merely an expression of opinion. It cannot be raised to the dignity of a custom unless followed in practice for a sufficiently long period and recognised as binding by the members of the particular community. A provision in the *Riwaj-i-am* that a gift cannot be

made in favour of a daughter in the presence of near collaterals is too sweeping to govern all Hindus residing in towns. Aroras of Taunsa are not governed in the matter of alienation by agricultural custom. (*Shadi Lal and Wilberforce, JJ.*) ASA NAND *v.* MT. ROSHNI BAI. **68 I. C. 92 : 2 Lah. L. J. 178.**

——— *Alienation—Law governing—Saibalkhatris.*

Saibalkhatris of Dinga, Gujarat District, are not governed by agricultural custom in matters of alienation. (*Broadway, J.*) LACHMAN DAS *v.* GANGA RAM. **64 I. C. 264.**

——— *Alienation—Law governing—Gujrat—Khatris of Golpur.*

Khatris of Golpur, Tahsil Pind Dadan Khan, District Jhelum, are governed by agricultural custom in matters of alienation. Having regard to the facts (1) that the Khatris of Golpur formed a compact village community and (2) that all with very few exceptions earn their living by agriculture, tilling the soil with their own hands and that this has been the occupation of the Khatris of the village from the time when the village was founded, the onus is on those who allege that the Khatris of Golpur are not governed by agricultural custom to prove the assertion. 50 P. R. 1895; 51 P. R. 1901 ; 16 P. R. 1906 ; 23 P. R. 1914 ; 63 P. R. 1910 ; 107 P. R. 1901 ; 5 P. R. 1906 ; 12 P. R. 1906 : 59 P. R. 1908 Ref. (*Martineau, J.*) HIRA NAND *v.* HAYAT MOHAMMAD. **64 I. C 180 : 4 U. P. L. R. (Lah.) 6.**

——— *Alienation—Law governing—Sayads of Alawalpur.*

In matters of alienation Sayads of Alawalpur in the Jullundur District, are not governed by agricultural custom but by Mahomedan Law. (*Leslie Jones and Martineau, JJ.*) KHUSHI MAHOMED *v.* BARU MAL. **64 I. C. 8.**

——— *Alienation—Law governing—Arains of Jullundur City—Custom or personal Law.*

To apply the initial presumption against the power of alienation under the Customary Law it has to be proved not merely that the family belongs to an agricultural tribe but also that its main occupation is agriculture. There is no presumption in the case of a family which though originally belonging to an agricultural tribe has altogether drifted away from agriculture as its main occupation and has settled for good in urban life and adopts trade, industry or service as its principal occupation and means and source of livelihood. 55 P. R. 1908 Ref. There is no presumption that Arains of Jullundur City, are governed by custom 122 P. R. 1916 Ref. (*Petman, J.*) GHULAM MOHAMMED *v.* BURA. **2 U. P. L. R. (L.) 25 : 14 P. W. R. 1920 : 8 P. L R. 1920 : 54 I. C. 387 : 2 Lah. L. J. 27.**

——— *Alienation — Law governing—Sale by elder brother as guardian of minor—Arains of Muzaffargarh District* — Riwaj-i-am — *Mahomedan Law.*

The custom of alienability of land by an elder brother as guardian of his minor brother among Mahomedans set out in the *Riwaj-i-am* of the Muzaffargarh District, though unsupported by instances, was in accord with that prevailing

generally in the Punjab under which a guardian in the case of Hindus and the Sikhs can alienate his ward's property for a necessary purpose. As it could not be said in the present case that the *Riwaj-i-am* was imperfectly compiled, the entries are strong evidence of the existence of the alleged custom and shift the onus on to the plffs. although the custom is contrary to the personal law of Mahomedans and the entries are unsupported by instances. 44 Cal. 749 (P.C.) Foll. ; 7 P. R 1916 ; 84 P. R. 1917 Dist. (*Scott-Smith, J.*) SANUN RAM *v.* ALLA BAKSH. **53 I. C. 435 : 133 P. R. 1919.**

——— *Alienation—Law governing—Mukhatariдari rights—Tarkhans of Mouza Bhangi—Attock District.*

Tarkhans of Mauza Bhangi, Attock District, are governed by the ordinary agricultural custom and among them a mukhararidar has no right to sell his holding except for valid necessity even when the vendee is a representative of the superior landlord, who created the mukhararidar rights. 47 P. R. 1900, 101 P. R. 1906 Dist. (*Johnstone, C. J.*) AHMED *v.* SAMAND. **56 P. R. 1917 : 41 I. C. 814 : 131 P W. R. 1917.**

——— *Alienation—Law governing—Brahmins of Man village in Tahsil Phillour, District Jullunder.*

Presumably Brahmans of Man village are in matters of alienation governed by Hindu Law. Therefore the onus of proving a custom lies on the person asserting it. (*Shah Din, J.*) TULSI RAM *v.* NATHU. **39 I. C. 93 : 5 P. R. 1917.**

——— *Alienation—Law governing—Gift—Will—Distinction—Pathans of Mamanpur.*

Among the Pathans of Mamanpur in Attock District, there is no restriction on alienation by a male proprietor. Similarly there is no distinction in principle between a power to gift and a power to bequeath. (*Le Rossignol, J.*) AKBAR KHAN *v.* KHAN BAHADUR. **69 P. R. 1916 : 131 P. L. R. 1916 : 35 I. C. 335 : 120 P. W. R. 1916.**

——— *Alienation —Law governing —Khojas of District Jhang—Burden of proof.*

The burden of proving that the power of alienation of a Khoja of District Jhang is restricted by custom is upon him who alleges it as the Khojas are generally traders and not agriculturists. A deed where by a Khoja of District Jhang settled some landed and house properties upon his wife was held to be valid and operative. (*Shadi Lal and Jones, JJ.*) AMIR DIN *v.* SAHI BAN. **87 P. W. R. 1816 : 33 I. C. 752 : 90 P. R. 1916.**

——— *Alienation —Law governing — Kalal custom.*

The Kalas of Alawalpur depended on service from the time of their arrival there. One member of the small community gave land to a daughter and her son. The alienation was questioned by the donor's brother. The burden of proof that they were not governed by a personal law lay on the plaintiff which he failed to discharge. (*Shah Din and Chevis, JJ.*) DIWAN SINGH *v.* PARO. **89 P. R. 1916 : 33 I. C. 529 : 70 P. W. R. 1916.**

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———*Alienation—Law governing—Brahmans of Una Tahsil.*

Brahmins of Dangoh Khurd in the Una Tahsil of the Hoshiarpur District are governed in matters of alienation by agricultural custom and not Hindu Law. (*Shah Din, J.*) RAM LAL *v.* GOPI.

24 P. R. 1914 : 25 I. C. 710 : 58 P. W. R. 1914 : 196 P. L. R. 1914.

———*Alienation—Law governing—Test of—Application of custom.*

True test to determine whether Customary Law applies or not is to see whether agriculture is followed as a livelihood. Mere proprietorship of land for 6 or 7 generations does not raise presumption of agricultural custom in matters of alienation. Nor does investment of money in land raise such presumption. (*Ried, C. J. and Beadon, J.*) RUKMAN *v.* KIRPA DEVI. **338 P. L. R. 1913 : 22 I. C. 134 : 209 P. W. R. 1913.**

———*Alienation—Law governing—Custom—Personal Law—Pirzadas of Hansi*—Wajib-ul-arz—*Onus.*

The families of Pirzadas of Hansa, are not governed by agricultural custom in matters of alienation. The onus of proving the contrary is on those asserting it. The burden of proving that a family follows agricultural custom as regards alienation of lands is on those who set it up. There is no presumption that because a family has departed from its personal law in one such respect as, exclusion of daughters in inheritance it adopted agricultural customs in all other respects. A *Wajib-ul-arz* holds good only for a particular settlement and a recital in an old *Wajib-ul-arz* not repeated in later ones and unsupported by instances is not valuable. (*Kensington and Chevis, JJ.*) ISLAM *v.* HARI LAL.

7 P. W. R. 1914 : 21 I. C. 944 : 16 P. L. R. 1914.

———*Alienation—Law governing—Restrictions on alienation—Pathans of Kunjwara, District Karnal.*

The Pathans of Kunjwara are governed in matters of alienations, by Muhammadan Law and not by custom. The presumption in favour of a restricted power of alienation of ancestral property applies to members of agricultural tribes who are members of village communities. But where they have drifted away from agriculture as their main occupation, the presumption no longer applies. (*Agnew ana Shadi Lal, JJ.*) NATHU *v.* RAFIQ MUHAMMAD. **270 P. L. R. 1913 : 20 I. C. 207 : 171 P. W. R. 1913.**

———*Alienation—Law governing—Brahmans of Gujar Khan Tahsil—Gift.*

Brahmans of Gujar Khan Tahsil, Rawalpindi, are governed by agricultural custom, which limits alienation of ancestral property. A gift of ancestral property by blind grand-parents to their daughter's son, who with his mother lived with them, is valid. (*Reid, C. J. and Kensington, J.*) TALL DAS *v.* MALIK SINGH. **2 P. R. 1914 : 138 P. W. R. 1913 : 19 I. C. 855 : 236 P. L. R. 1913.**

———*Alienation—Law governing—Khattries of Mauntrilla in Gujar Khan Tahsil, Rawalpindi District.*

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Khattries of Mauntrilla in Gujar Khan Tashil, Rawalpindi District, are governed by Hindu Law and not agricultural custom in matters of alienation and inheritance and a gift by a widow of her husband's separate property in favour of her daughter and daughter's son cannot be impeached by the reversioner. (*Reid, C. J. and Robertson, J.*) LABH SINGH *v.* GURUCHARAN SINGH.

54 P R. 1913 : 62 P. W. R. 1913 : 19 I. C. 730 : 131 P. L. R. 1913.

———*Alienation—Law governing—Qureshi Sheikhs of Qasba Thoru, Tahsil Nuh, District Gurgaon—Gift by widow to collateral of husband.*

In the matters of succession the Qureshi Sheiks of Qasba Thoru, in Tahsil Nuh of the Gurgaon District are not governed by Muhamedan Law but by custom. A gift by a widow in favour of one of the collaterals of her deceased husband to the exclusion of others is invalid. (*Shah Din and Scott Smith, JJ.*) ZAKA-UDDIN *v.* SARAJUDDIN.

79 P. R. 1912 : 217 P. W. R. 1912 : 16 I. C. 772 : 221 P. L. R. 1912.

———*Alienation—Law governing—Conversion, if affects powers of alienation.*

An agriculturist, governed by the ordinary Customary Law, cannot by changing his religion, (*e.g.*, a Musalman Rajput embracing Christianity) deal with ancestral property in a manner different from that in which he would have been entitled to deal. (*Rattigan and Shah Din, JJ.*) BADAR BAKSH *v.* SAHIB JAN. **75 P. R. 1912 : 192 P. W. R. 1912 : 16 I. C. 468 : 213 P. L. R. 1912.**

———*Alienation—Law governing—Mahomedan Law—Kashmiris of Jhelum—Will.*

A bequest by a male proprietor a Mahomedan Kashmiri of Jhelum District of the whole of his self-acquired property in favour of his daughter or her issue to the exclusion of his widow and brother is valid by custom. Where a widow sues for possession of the entire property left by her husband on the allegation that the parties are governed by custom and it is proved that the property was the self-acquired property of her husband and was left by him by will to his daughter the widow is not entitled to a share of her husband's property according to Mahomedan Law. (*Shah Din and Scott-Smith, JJ.*) MEHTAB BIBI *v.* HUSSAIN BIBI. **17 P. R. 1913 : 249 P.L.R. 1913 : 15 I. C. 556 : 124 P. W. R. 1912.**

———*Alienation—Law governing—Kassars of Tahsil Chakwal, District Jhelum—Will in favour of sister.*

A childless kassar proprietor of Chakwal Tahsil, Jhelum District, has power to devise the whole of his ancestral property to his sister in the presence of his collaterals in the 6th degree. (*Robertson and Rattigan, JJ.*) RAHMTAN *v.* FATEH MUHAMMAD. **98 P. R. 1912 : 3 P. L. R. 1912 : 15 I. C. 106 : 233 P. W. R. 1912.**

———*Alienation—Law governing—Bukkhari Sayads of Mauza Shahwala—Powers of male holder.*

In matters of alienation Bukkhari Sayads Mauza Fatehullah Shahwala in the Ferozepore

District, are governed not by Mahomedan Law but by custom. The powers of a male holder are restricted in respect of alienation of ancestral property. (*Rattigan and Shah Din, JJ.*) JAFAR ALI SHAH *v.* SANT RAM. 92 P R. 1911 : 14 I. C. 409 : 206 P. W. R. 1912.

———*Alienation —Law governing—Jat proprietor—Unrestricted powers—Burden of proof —Multan District.*

The burden of proving that a Jat proprietor has unlimited powers of alienation lies upon the alienee who asserts it. 73 P. R. 1895 Fol. The presumption that the powers of alienation of a Jat are restricted can be rebutted by instances of unrestricted alienation. In the Multan District, Mahomedan proprietors have larger powers of alienation than elsewhere in the Punjab. *Held*, that among Mahammadan Jats of Mouza Champratha in the Multan District, a person has a right to alienate ancestral property irrespective of any question of necessity. 6 I. C. 936 Rel. on. (*Robertson and Rattigan, JJ.*) GANPAT RAM *v.* BAHARA. 119 P. W. R. 1912 : 14 I. C. 252 : 73 P. R. 1912.

———*Alienation —Law governing —Kalas of Kalal Hathi, Ambala District—Law applicable.*

In matters of alienation Kalas of Kalal Hathi, Ambala District, are governed by custom and not by Hindu Law. (*Rattigan and Shah Din, JJ.*) TULSI RAM *v.* RAM CHANDRA.
81 P. R. 1912 : 14 I. C. 239 : 223 P. W. R 1912.

———*Alienation—Law governing—Brahmans of village Chirah, Tahsil and District Rawalpindi.*

Brahmins of village Chirath, Tahsil and District Rawalpindi, are not governed by agricultural custom in the matter of alienations. Though they have ceased to do any priestly functions and have taken to agriculture it is not established that agriculture is their sole occupation. (*Chevis, J.*) FAKIRCHAND *v.* RAMCHAND. 62 P. W. R. 1912 : 13 I. C. 709 : 128 P. L. R. 1912.

———*Alienation—Law governing—Restriction of powers—Presumption—Qureshis of Midnapore, District Sialkot.*

There is no presumption, among the Qureshis of the Midnapore, that male proprietors are in matters of alienation of immoveable property, fettered by the restrictions applicable to ordinary Punjab agriculturists ; no such custom is proved to exist among them. (*Johnstone, J.*) MUHAMMAD ALI *v.* MUHAMMAD IKRAM. 63 P. R. 1911 : 194 P. L. R. 1911 : 11 I. C 63 : 171 P. W. R. 1911.

———*Alienation—Law governing*—Lex Loci.

Brahmans of Mauza Musapur, Jullundur District, follow agricultural custom in matters of alienation and not Hindu Law. (*Kensington, J.*) BHANA RAM *v.* HAKIM SINGH.
36 P. W. R. 1911 : 10 I. C. 725 : 178 P. L. R. 1911.

———*Alienation—Law governing—Succession —Daughter as collaterals of 4th degree—Sodhis of Mauza Bhamipura, Tahsil Jagraon, Ludhiana District—Law applicable—Presumption.*

The initial presumption in the case of *Khatris*, and especially of *sodhis*, is that they follow Hindu

Law. They are not essentially agriculturists and they have, as a rule and as a tribe, a priestly status. This presumption can be rebutted by proof of a special custom, or of special incidents and circumstances calculated according to the authorities to shift the burden of proof. Sodhis of *Mauza* Bhampura, Tahsil Jagraon, District Ludhiana, do not follow agricultural system in connection with alienations of, or succession to, ancestral immoveable property but follow Hindu Law and collaterals of the fourth degree do not exclude daughters. In cases in which it is presumed that persons, not essentially agriculturists by race, follow agricultural custom the question always is whether they form a compact village community, or at least a compact and considerable body of land owners in a more or less homogeneous village. If they do, and if they have been agriculturists for generations, the presumption aforesaid is made. But while the absence of the adoption of agriculture as a means of livelihood for several generations disproves that custom is followed it must not be supposed that in all cases the existence of this incident is sufficient in itself to prove that custom is necessarily followed. (*Johnstone, J.*) HARNAM SINGH *v.* HARDEVI.
43 P. R. 1911 : 137 P. L. R. 1911 : 10 I. C. 365 : 86 P. W. R. 1911.

———*Alienation—Law governing—Brahmans of District Hoshiarpur.*

In a question as to whether the Brahmans of Mauza Dharmsala, in Tahsil Una, District Hoshiarpur, are governed by Hindu Law or custom in matters of alienation it was held that the parties followed custom and not Hindu Law in view of the evidence in the case. (*Shah Din, J.*) DASWANDHI *v.* KRISHNA DEO. 34 P. R. 1911 : 109 P. L. R. 1911 : 9 I. C. 841 : 119 P.W.R. 1911.

———*Alienation—Law governing—Brahman agriculturists—Jagraon—Ludhiana.*

Brahmins are essentially Hindu and non-agricultural, and the burden of proving that they have, in any particular instance, discarded the principles of their personal law and adopted rules of custom obtaining among their agricultural neighbours rests upon those who assert it. In matters such as the alienation of land, Brahmans of Mauza Rumi, in the Jagraon Tasbil, Ludhiana District, are not governed by agricultural custom. (*Rattigan, J.*) BRIJ LAL *v.* SARJA NAND.
68 P. W. R. 1911 : 9 I. C. 829 : 105 P.L.R. 1911.

———*Alienation—Law governing—Madaris of Ludhiana.*

The fact that a tribe is not included among the agricultural tribes in the census report or in the District list complied for the purpose of the Land Alienation Act does not preclude them from adopting and rendering them subject to agricultural law. 107 P. R. 1901; 117 P. L. R. 1901 ; 12 P. R. 1906; 108 P.L.R. 1906; 5 P.R. 1906 ; 45 P..R. 1908 Dist. In matters of alienation Madaris of Ludhiana following agriculture as their livelihood are governed by custom. (*Reid, J.*) BHOLA *v.* RAZZAQ SINGH. 7 P. R 1911 : 75 P. L. R. 1911 : 9 I. C. 682 : 81 P. W. R. 1911.

CUSTOM (PUNJAB)—Alienation—Law Governing.

——*Alienation — Law governing — Sodhi Khatris.*

In the matter of alienation the Sodhi Khatris of the village Tharthikhara, Taru Taran Tahsil, Amritsar District, are governed by Hindu Law and do not follow agricultural custom. 79 P. R. 1909; 127 P.W.R. 1909 ; 3 I. C. 603 Ref. (*Shah Din, J.*) GANGU *v.* KANSHI RAM. **28 P. R. 1911 : 80 P. L. R. 1911 : 9 I. C. 649 : 72 P. W. R. 1911**

Alienation—Necessity.

——*Alienation—Necessity—Just debt—Onus.*

In cases governed by Customary Law the onus of proving necessity for alienation of ancestral property rests upon the vendee. An agriculturist male proprietor of lands may alienate ancestral lands as against the reversioners for valid necessity such as a "just debt". A "just debt" means a debt which is actually due and is not immoral, illegal or opposed to public policy and has not been contracted as an act of reckless extravagant or of wanton waste or with the intention of destroying the interest of the reversioners. (*Sir John Edge*) KIRPAL SINGH *v.* BALWANT SINGH.

40 Cal. 288 : 26 P. R. 1913 : 13 M. L. T. 5 : 11 A. L. J. 1 : 9 P. W. R. 1913 : 17 C. L. J 137 : 15 Bom. L. R. 79 : 17 C. W. N. 302 : 17 I. C. 686 : 28 P. L. R. 1913 : (1913) M. W. N. 58. : 24 M L. J. 318 (P. C.).

[On appeal from 2 P. L. R. 1909 : 4 I. C. 632 : 48 P. W. R. 1909].

——*Alienation—Necessity—Money borrowed for the purposes of subsistence.*

Where a Saiyed agriculturist alienates a serai for the purposes of his subsistence and he has no other means of livelihood, the alienation is justified by legal necessity (*Scott-Smith and Moti Sagar, JJ.*) MAHOMED HASSAN-UD-DIN *v.* SAIF ALI SHAH. **4 Lah. 122 : 5 Lah. L. J. 246 : 1924 Lah. 41.**

——*Alienation—Necessity--Agreement to sell —Failure of consideration—Mortgage—Validity.*

Where the vendor agrees to sell and receives part payment and there is failure of the consideration, the sale not being completed the mortgage in favour of the vendee in consideration of the part payment is not a mortgage in lieu of a debt voluntarily incurred. (*Abdul Raoof and Moti Sagar, JJ.*) AZAD KHAN *v.* NASIB GUL.

1923 Lah. 553.

——*Alienation—Necessity.*

It is not the duty of the alienee to see to the application of the money or to find out if the whole of the money due to the antecedent creditor was actually paid if a decree was in existence the payment of that decree constitutes a valid necessity. The fact that the decree-holder subsequently accepted only a portion of the amount due and gave up the rest of his claim is of no consequence and does not in any way affect the validity of the debtor of the alienation. When the amount of consideration for a sale of this kind which is found to be without necessity represents only a small portion of the entire consideration, it is not necessary to convert the sale into a mortgage. (*Moti Sagar, J.*) BALBIR SINGH *v.* GOBIND.

1923 Lah. 532.

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——*Alienation — Necessity — Payment of antecedent debts.*

There is no authority for the proposition that a male holder of land both ancestral and acquired, must charge his just antecedent debts on the non-ancestral land. Custom permits the alienation of ancestral land for the purpose of paying just antecedent debts and a provision that this cannot be done, if there is self-acquired land to alienate for that purpose would give the reversionary heirs a control over self-acquired property to which they are not entitled. A person has a perfect right to gift his self-acquired land to his daughter s son and to charge the ancestral land with debt. (*Campbell, J.*) ARJUN *v.* JUG LAL.

1923 Lah. 422.

——*Alienation— Necessity—Sale of portion beyond legal share.*

Where the vendor transferred without legal necessity properly beyond the share that would fall to him on partition. *Held*, the other reversioners can claim joint possession. (*Campbell, J.*) RAM NATH *v.* RAM SARUP. **1923 Lah. 395.**

——*Alienation—Necessity—Presumption.*

The mere lapse of time does not remove the need for proving necessity. Although it may render the quantum of proof comparatively small, it certainly cannot be presumed. (*Broadway, J.*) WALI MAHAMMAD *v.* FATEH KHAN.

1923 Lah. 307.

——*Alienation—Necessity.*

A widow can alienate her husband's land after his death to pay off his just debts. Every person having an interest in property whether absolute or as a life tenant, *e. g.*, widow, can sell or mortgage such property for a necessary purpose. (*Scott-Smith and Brasher, JJ.*) HASSAN MAHOMED *v.* MAHANDA. **5 Lah. L. J. 292 : 1923 Lah. 245.**

——*Alienation —Necessity —Decree —Effect of.*

That a decree especially *ex parte* has been obtained, does not amount to legal necessity for alienation. (*Leslie Jones and Abdul Raoof, JJ.*) BARIAM SINGH *v.* PHAGGU MAL. **5 Lah. L. J. 90.**

——*Alienation—Necessity —Consideration—* Bona fide *payment—Question of fact.*

Where there are several items of consideration for an alienation a finding regarding their genuineness and the necessity for them is one of fact and not open to question on second appeal. Where the alienee has made a *bona fide* payment to a previous mortgagee in order to obtain possession of the land he is entitled to credit for this amount. (*Le Rossignol and Wilberforce, JJ.*) HAKUMAT RAI *v.* WADHAWA SINGH.

4 Lah. L. J 243 : 1922 Lah. 398.

——*Alienation —Necessity— Small debt— Lapse of time.*

Where it is necessary to purchase food and clothing and pay for it subsequently and such payment becomes technically necessity, it is equally regular to borrow the sum necessary to purchase such supplies and it is not absolutely essential that a man should first come into debt and then borrow to pay his debts. Considering

CUSTOM (PUNJAB)—Alienation—Necessity.

the smallness of the sum taken, the fact that it was recited that it was taken on account of scarcity, that it was not shown that the vendor had any land beyond the small area which he sold and the long interval that had elapsed after the alienation without any objection being taken by the other collaterals, the Court held that the alienation was supported by necessity. (*Harrison, J.*) RAMJI LAL *v.* RAM SARUP. **48 P L. R. 1922 : 1922 Lah. 368.**

———*Alienation—Necessity—Decree debt.*

Where an alienee who is an outsider finds that there is a decree debt to discharge which, the property is sold he need not make any further inquiry and the alienation cannot be impeached by the reversioners by going behind the decree. But where the surrounding circumstances raise a suspicion or where the alienee is proved to have knowledge of the bad faith of the decree debt, he must prove necessity for the alienation. (*Chevis and Campbell, JJ.*) RAM SINGH *v.* RULIA. **3 Lah. 139 : 1922 Lah. 299.**

———*Alienation—Necessity—Proof of—Duty of alience.*

"It is not the duty of an alienee to see to the application of the money, but an alienee who deals with a person with a limited power of alienation, must satisfy himself that if money was required for the liquidation of an alleged debt, there was in fact such a debt in existence." In the first instance it is on the vendee to prove that the debts mentioned in the sale deed actually did exist and that there was necessity for the sale. 65 P. R. 1900 ; 104 P. R. 1887 foll. (*Abdul Raoof, J.*) SAHIB DIN *v.* RAJA. **1922 Lah. 257.**

———*Alienation —Necessity—Proof of—Old alienation—Onus—Ancestral property.*

The plff. has to prove the invalidity of alienation purporting to have been made for necessity and challenged a very long time afterwards. Property inherited through a female may be ancestral. 65 P. R. 1900 ; 18 I. C. 114 ; 101 P. R. 1916 ; 32 P R. 1895 Rel. (*Abdool Raoof and Beven Petman, JJ.*) SUHAWA *v.* DEBI DIAL **70 I. C. 1002 : 4 Lah. L. J. 516.**

———*Alienation—Necessity —Major portion supported by rights of presumptive reversioner.*

Where the debts to discharge which an alienation was effected were antecedent debts and except to a trifling extent the alienation was supported by necessity the alienation should be upheld the intervening holder being young and may have sons, is not a reason for refusing the next male reversioners a decree that an alienation is invalid and not being for necessity or consideration (*Chevis and Scott-Smith, JJ.*) MUSSAMMAT JOWALI *v.* NAND SINGH. **4 Lah. L. J. 351.**

———*Alienation—Necessity—Male proprietor.*

Under the Customary Law of the Punjab the position of a male proprietor as regards ancestral property is similar to that of a widow and he has no power to alienate the property in anticipation of future necessity 67 P. R. 1884 ; 11 P. R. 1885 Ref. (*Scott-Smith and Martineau, JJ.*) KHAZAN SINGH *v.* SUHEL. **4 Lah. L. J. 305.**

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———*Alienation—Necessity.*

An agriculturist governed by the Customary Law has no power to alienate his ancestral land for the purpose of trading capital where the borrower was a man of bad character and had squandered a large amount and had ample property for all his means the onus lies on the alienee to prove strictly the legal necessity even though the borrower wanted money for payment of revenue and for purchase of capital and for other needs of the alienor (*Scott-Smith and Abdul Raoof, JJ.*) KABUL SINGH *v.* KALA SINGH, **67 I.C. 737: 3 Lah. L.J. 259.**

———*Alienation—Necessity—Small portion of consideration not found necessary—Form of decree.*

When the amount of the consideration for a sale of ancestral property that is found to be without necessity represents only a small portion of the entire consideration and the sale itself is one entered into as an act of good management, the sale should be upheld, 8 P. R. 1908 ; 79 P. L. R. 1914; 130 P.R. 1906 Foll. (*Broadway, J.*) BIRU *v.* SAMANDA. **67 I. C. 276 : 2 L. L. J. 669.**

———*Alienation—Necessity—Sale by limited owner—Small portion of consideration not paid.*

A vendee should not be penalized simply because he puts as part consideration a certain item which may possibly wholly or in part be fictitious when that item is only a small fraction of the consideration and when the sale would be unobjectionable to the item that was left out of account. 27 P. R. 1909 Criticised. (*Chevis, J.*) GULAM MAHOMMED *v.* MAHOMMED SHAH. **66 I.C. 898 : 3 L. L. J. 8.**

———*Alienation—Necessity—Antecedent debt.*

Held, that an antecedent debt cannot legally be allowed without proof of necessity a debt given by the mortgagee with the knowledge that the mortgagor is of immoral character and spendthrift is not for necessity. (*Le Rossignol, J.*) JAGIR SINGH *v.* PAHARA SINGH, **37 P. W. R. 1921.**

———*Alienation—Necessity—Part payment of consideration.*

If, after the vendor's death, the vendee sues for possession of the property and only, a part of the consideration is proved to be paid for necessity, he can get possession with a charge for that portion of the purchase money only, which has been proved for necessity (*Abdul Raoof and Martineau, JJ.*) CHANAN KHAN *v.* RAJA. **63 I. C. 139.**

———*Alienation—Necessity—Antecedent debt.*

An alienee from a male proprietor, has only to prove the existence of debt and not the necessity for it, provided the debt is a just one. (*Martineau, J.*) MUHAMMAD BAKHSH *v.* BALANDA. **62 I.C. 811.**

———*Alienation—Necessity—Just debt.*

Where the alienor is a male, the only question to be decided is whether the purpose of alienation was a necessary one. A just debt need not be incurred for necessity. If the alienee is the antecedent creditor he need not prove necessity for all the previous debts. The distinction between the case where the alienee is the antecedent creditor and where the alienee is a third person arises

only where the previous debts are extravagant or unreasonable. (*Martineau, J*) KANSHI RAM *v.* MAULA BAKSH 60 I. C. 714.

———*Alienation—Necessity—Re-marriage.*

The re-marriage of a proprietor who has a son alive is not a necessity justifying the sale of ancestral land. Where a sale is held partly for necessity it should be allowed to stand subject to the provision that when succession opens, the heirs can recover the land on paying the sum found to be due on account of necessity ; but the sale should not be converted into mortgage. (*Chevis and Martineau, JJ.*) MAHAMDDIN *v.* THAKOR SINGH. 60 I. C. 461.

———*Alienation— Necessity—Fictitious items entered in sale deed—Effect of.*

Fictitious items are generally entered in sale-deeds but not necessarily for fraudulent purposes. They are generally resorted to for frightening pre-emptors or for enhancing the value of the bargain. (*Le Rossignol and Abdul Raoof, JJ.*) PUNJAB SINGH *v.* ARJUN. 2 Lah 22: 59 I C. 776 : 27 P. W.R. 1921.

———*Alienation—Necessity.*

In a suit by reversioner to contest a sale, if the amount found to be not for necessity is only a small part of the total consideration the sale should be upheld. Where the sale took place over 40 years ago. *Held,* that the long silence of the plaintiff may be taken into account and strict proof of necessity should not be expected and is not necessary. (*Broadway, J.*) GHAMANDI *v.* BUTA. 3 U. P. L. R. (Lah.)1 : 59 I. C. 592 : 30 P. W. R. 1921.

———*Alienation—Necessity—Small portion—Proof—Sale converted into mortgage.*

Where the vendor alienated by sale one canal ten marlas out of thirteen canals of land that he owned to discharge his debt and he was not proved to have been addicted to a riotous living or living in extravagance, *held,* the sale was *prima facie* advantageous to him and might be supposed to be an act of good management. In a case at least where only a small portion of the entire cultivation is not proved to be for necessity the sale should not be converted into a mortgage. 27 P. R. 1909 Dist. (*Broadway, J.*) BIRU *v.* SAMANDA. 2 Lah. L. J. 669.

———*Alienation—Necessity—Daughter's liability.*

A daughter is liable for the mortgage executed by the father. (*Shadi Lal, C. J. and Wilberforce, J.*) NATHU *v.* MURAD BIBI. 2 Lah. L. J. 450.

———*Alienation—Necessity—Onus.*

A usufructuary mortgagee leased the lands to the mortgagor enhanced the rates and obtained subsequent mortgages from the mortgagor for arrears of rent. *Held,* the onus was on the mortgagee to prove that the rent charged was fair and that there was necessity for enhancing the rates of rent after every three years. The mortgagor having been proved to be extravagant and it not being shown that he managed his property well and carefully the subsequent three mortgages

were not for necessity and were not binding on the sons of the mortgagor. (*Abdul Raoof, J.*) HAKO *v.* NIGA HIA. 55 I. C. 307.

———*Alienation — Necessity — Anticipating needs.*

A male proprietor is no more entitled to anticipate his needs than a widow, in order to establish a necessity to justify alienation. (*Smith and Martineau, JJ.*) KHAZAN SINGH *v.* SUHEL SINGH. 54 I.C. 923 : 156 P. R. 1919.

———*Alienation—Necessity—Antecedent debts—Knowledge of alienee.*

An alienee discharging an antecedent debt is not required to make an enquiry into the nature thereof. But he gets no advantage if he has knowledge of the true nature of the debt or acts in bad faith. An alienee who is identified with the antecedent creditor so that he and the creditor cannot be viewed as two separate persons is in the same position. Per *Le Rossignol, J.*—It is the duty of an alienee of ancestral land to make enquiry not merely as to the existence of antecedent debts but also as to their nature if the result of the first enquiry would raise doubts in the mind of an ordinary man and to the morality or reasonableness of debts. (*Shadi Lal and Le Rossignol, JJ.*) JHANDU *v.* NIAMAT KHAN. 54 I. C. 842 : 1 Lah. 472.

———*Alienation— Necessity — Consideration—Full payment not proved—Sale if liable to be set aside.*

A Court should not set aside a sale merely because the payment of an item of consideration recited in the deed of sale has not been made or because its payment is doubtful. This is especially where the consideration found to be actually paid represents a reasonable sale price. (*Scott-Smith and Le Rossignol, JJ.*) PIYARE LAL *v.* CHAKAR. 1 Lah. L. J. 215 : 6 P. L. R. 1920 : 2 U.P.L.R. (L.) 23 : 54 I.C. 362 : 13 P. W. R. 1920.

———*Alienation—Necessity—Sale of father's land for payment of debts—Suit by sons to set aside sale.*

A man who has sold a portion of his land to pay off his father's debts cannot undo the sale merely on the plea that the sale was not for necessity and, as regards the share of the alienor who was a major at the time, the sale must stand. The minor brother was not bound to recognise his father's debts as being a charge on the ancestral land and his mother was not authorized to alienate his share in the land in discharge of these debts and his share could, therefore, be recovered without any payment. The fact that the minor had died during the pendency of the appeal and was now represented by his elder brother, could not affect the decision in regard to the minor's share. 12 W. R. 427 Dist. (*Chevis, J.*) THAMMAN SINGH *v.* SANTA. 53 I. C. 457 : 119 P. R. 1919.

———*Alienation--Necessity--Occupancy tenancy—Creation of, if an alienation.*

The creation of an occupancy tenancy amounts to a permanent alienation and the Court should

decide whether the act is one of good management or merely a means of raising funds. (*Shadi Lal and Le Rossignol, JJ.*) BHAGWANA *v.* BALIK RAM. 51 I. C. 408 : 37 P. R. 1919.

———*Alienation—Necessity—Proof.*

The mere fact of a man owning a large area of land is no proof that he had no necessity to alienate. (*Scott-Smith and Shadi Lal, JJ.*) RAGHUBIR DAS *v.* MUNSHI.
46 I. C. 511 : 27 P. W. R 1918.

——— ———*Alienation—Necessity—Maintenance of —Widow.*

Where a widow has to sell her property for a legal necessity, *viz.*, for maintaining herself and her 3 defendants she would be justified in selling the whole of item of her immoveable property at a single time. It is obviously impossible to sell immoveable property piecemeal month by month to pay current bills. (*Leslie Jones, J.*) HOTU RAM *v.* SUKHA RAM. 4 P. L. R. 1918 : 45 I. C. 530.

———*Alienation—Necessity —Litigation—Expense—Criminal charge.*

According to the custom, money raised on ancestral lands for the purpose of the defence of the head of the family on a criminal charge is money raised for a valid necessity. 34 All. 4 Ref. (*Broadway, J.*) NARAIN SINGH *v.* KHAZAN SINGH.
22 P. R. 1918 : 44 I. C. 814.

———*Alienation —Necessity — Acquisition of proprietary right by occupancy tenants—Effect.*

Where the sons of a Government tenant having occupancy rights in the lands granted to him acquire full proprietary right therein, there is a merger and the persons having the proprietary right are entitled to alienate the lands without necessity. (*Scott-Smith and Leslie Jones, JJ.*) LAL *v.* GAUHAR. 44 I.C. 129: 5 P. R. 1918.

———*Alienation—Necessity— Proof of.*

When the actual consideration for a sale was reasonable the mere insertion of a fictitious item of consideration to scare of pre-emptors will not nullify the sale. (*Shadi Lal and Le Rossignol, JJ.*) ARURA *v.* AYA RAM. 81 P R. 1917: 42 I. C. 356: 137 P. W. R. 1917.

———*Alienation— Necessity— Proof of—Sale when not binding on alienor's successors.*

If a man is a notorious spendthrift and profligate a creditor lending him money will not be saved merely by saying that the money advanced was required to pay off antecedent debts. Knowing the character of the alienor, the alienee must make due enquiries about the necessity for the loan. Merely because the alienor stated that the money was required to pay Government revenue or to buy bullocks or to give presents at a marriage or for miscellaneous expenses the alienee will not be protected. A creditor lending money to a man possessed of ample income should make full enquiries as to the necessity for the loan. If he, however, had squandered his income in extravagance and wanton waste, the lendor would not be justified in advancing money for Government revenue. In his case, on suit of the grandson, the alienations of the grandfather were

all declared invalid. (*Scott Smith and Broadway, JJ.*) RAM KISHEN *v.* HASSI. 57 P. W. R. 1917: 39 I. C. 191: 76 P. R. 1917.

———*Alienation—Necessity—Prior mortgage.*

Money paid by purchaser to a prior mortgagee of the property purchased though in excess of purchase money is for necessity. (*Johnstone. C.J.*) JOWALA SINGH *v.* LAKHA SINGH. 81 P. R. 1916: 126 P. W. R. 1916: 35 I. C. 892: 39 P. L. R. 1917.

———*Alienation—Necessity—Proof of after 12 years.*

Very high standard of proof of necessity could not be insisted on when the alienation took place 12 years before. (*Le Rossignol, J.*) FATEH KHAN *v.* BAZ KHAN. 87 P. L. R. 1916: 35 I. C. 875: 165 P. W. R. 1916.

———*Alienation—Necessity—Debts.*

Where a person advances money to another on that other's assurance that the loans were required for business purposes, the person advancing the loan is not bound to see to the proper application of the money. (*Chevis and Le Rossignol, JJ.*) INDAR NARAIN *v.* NANAK CHAND.
58 P. R. 1917: 58 P. R. 1916: 32 I. C. 454: 74 P. W. R. 1916.

———*Alienation—Necessity—Antecedent debt.*

Where the antecedent creditor is a third person and the alienation is necessary for the discharge of those debts, it is binding on the family. (*Leslie Jones, J.*) ALI MAHOMED *v.* MAMURA.
7 P. L. R. 1916: 30 I. C. 507: 98 P. W. R 1915.

——— ———*Alienation—Necessity—Small portion not proved—Effect.*

In a suit to set aside a sale the Court should not interfere where the sale is a fairly prudent one and the consideration is found to be necessary except to a comparatively trifling amount. If a Lower Court overlooks these provisions the Chief Court is entitled to interfere in second appeal. (*Kensington, J.*) HAZARA SINGH *v.* ARUR SINGH.
29 I. C. 801: 118 P. L. R. 1915.

———*Alienation—Necessity —Selling aside—Form of decree.*

In case a considerable time elapses after the alienation the vendee cannot reasonably be in a position to give an accurate account and proof of the legal necessity of the transaction. A small sum of the consideration which could not be shown to come under necessity cannot vitiate the sale when an action has been brought to set aside the alienation after a considerable time. (*Rattigan, J.*) KISHEN SINGH *v.* SOHNA. 117 P. L. R. 1915: 29 I. C. 799 : 232 P. W. R. 1915.

———*Alienation—Necessity—Interest on debts —Payment of revenue—Costs of litigation.*

In the absence of any clear proof of reckless extravagance or immoral waste on the part of the alienor, strict proof of debts for which alienation is made is not necessary. This is so where the income of the estate is not sufficient to meet the family expenses. Interest on a just debt is also a necessity. Payment of revenue is also a necessity. Money spent on defending a criminal case

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can be validly charged on ancestral property. (*Johnstone and Le Rossignol, JJ.*) CHANDA SINGH *v.* MUKAND SINGH. **61 P. W R. 1915: 29 I. C. 761: 144 P. L. R. 1915.**

——*Alienation—Necessity—Onus.*

In a suit by a reversioner to set aside an alienation (mortgage) the onus of proving legal necessity for the alienations rests on the mortgagee. (*Shah Din and Scott-Smith, JJ.*) BHIM SINGH *v.* JOT RAM. **42 P. W. R. 1915: 26 I. C 530: 122 P. L. R. 1915.**

——*Alienation—Necessity—Question of fact.*

Necessity is almost always a question of fact and should rarely be treated as a question of law for purposes of second appeal. (*Kensington, C. J.*) SHER MUHAMMAD *v.* ALI MUHAMMAD. **60 P. W. R. 1914: 25 I. C 715: 151 P. L. R. 1914.**

——*Alienation—Necessity—Presumption.*

An alienation by a man of large family, and prudent habits, immediately following a famine, of his ancestral agricultural land, would be presumed to be one for necessity. (*Scott-Smith and Shadi Lal, JJ.*) AMAR DAS *v.* SUKH DIAL. **186 P. L. R. 1914: 25 I. C. 511: 86 P. W. R. 1914.**

——*Alienation — Necessity— Discharge of mortgage.*

Where a person in debt sells away part of his lands to redeem mortgages and to get back a part of the land, the sale is a prudent one and cannot be challenged by a reversioner. If the sale is otherwise a necessity, the amount required for meeting stamp and registration charges is also a necessary expenditure. Where necessity is shown as regards a portion alone, the decree will declare that the reversionary interest will be affected only to the extent to which the necessity is proved. (*Shah Din and Chevis, JJ.*) SHAN MUHAMMAD *v.* FAZAL HUSSAIN. **82 P. W. R. 1914: 24 I. C. 689: 192 P. L. R. 1914.**

——*Alienation—Necessity—Proof.*

In order to support the case of an alienation of ancestral agricultural land by a sonless proprietor, there must be proof of the passing of consideration and of the necessity for the same. (*Johnstone, J.*) KHOJU *v.* CHUHRU. **88 P W. R. 1914: 24 I. C. 682: 188 P. L. R. 1914.**

——*Alienation—Necessity—Antecedent debt.*

Among *Jat* agriculturists an alienation in lieu of money borrowed for the purposes of trade is not an alienation for necessity. (*Rattigan and Shadi Lal, JJ.*) SANTA SINGH *v.* WARYAM SINGH. **19 P. R. 1915 : 207 P L. R. 1914 : 24 I. C. 361: 147 P. W. R. 1914.**

——*Alienation— Necessity—Not proved as to small portion of consideration.*

A sale cannot be set aside on the ground that necessity has not been proved as regards a very small portion of the consideration. (*Johnstone and Chevis, JJ.*) RAM KARAN *v.* HUKMAN. **79 P. L. R. 1914: 22 I. C. 544: 51 P. W. R. 1914.**

——*Alienation—Necessity—Antecedent debt—Duty of creditor.*

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If there is an antecedent debt, a creditor is in no way bound to enquire into the nature of the debt. (*Kensington and Chevis, JJ.*) MUHAMMAD ISLAM *v.* HARI LAL. **7 P. W. R. 1914: 21 I. C. 944: 16 P. L. R. 1914.**

——*Alienation—Necessity—Limitation.*

Where the right to contest a mortgage was barred by limitation the next heir, when the estate devolves on him, cannot contest his liability to discharge a bond executed for interest that had accrued on the mortgage. (*Agnew and Shadi Lal, JJ.*) MRS. K. MANUAL *v.* PREM SINGH. **257 P. L R. 1913: 20 I. C. 665: 202 P. W. R. 1913.**

——*Alienation — Necessity — Old alienation—Strict proof.*

Strict proof of necessity should not be expected from the alienees from a widow where (1) the alienation is an old one, (2) no objection was ever made thereto by the husband's reversioners, (3) the reversioners had abandoned their land in the village of origin for many years, and (4) it had been decided in a suit, to which one of the reversioners was a party, that the sale was for necessity. (*Beadon and Smith, JJ.*) NAGINA SINGH *v.* RALLA. **251 P. L. R. 1913 : 20 I.C. 566 : 187 P W. R. 1913.**

——*Alienation— Necessity — Proof — Lapse of time.*

In the case of old alienations, strict proof of legal necessity should not be called upon. (*Shah Din and Chevis, JJ.*) JOWALA *v.* NAND SINGH. **18 I. C. 114 : 56 P. L R. 1913.**

——*Alienation — Necessity — Mortgage by conditional sale.*

A sale cannot be held to be necessary, where a mortgage could have been easily effected. A transfer by way of mortgage with a clause of conditional sale is worse. (*Reid and Robertson, JJ.*) KUDHA BAKSH *v.* NARAIN DAS. **51 P. L. R. 1913 : 18 I. C. 44 : 81 P. W. R. 1913.**

——*Alienation—Necessity—Benefit.*

Sale of ancestral property for discharging the mortgage thereof and for getting a new valuable tenancy is justifiable and cannot be set aside by the sons and reversioners of the vendor. (*Chevis, J.*) NABI BAKSH *v.* BHAGAT SINGH. **176 P. W. R. 1912 : 17 I. C. 251 : 214 P. L. R. 1912.**

——*Alienation—Necessity — Partial—Mortgagee's suit for possession against sons of mortgagor—Duty of mortgagee.*

In a suit for possession as mortgagee against the sons of an agriculturist the mortgagee must show the mortgage was with consideration and for necessity. Where the minor's uncles undertake to pay the father's debts by including it in their bonds and afterwards mortgage his share as well as theirs in the ancestral land in consideration of the bond debt, such alienation is not for the mortgagor's benefit. (49 P. R. 1911, Foll.) A mortgage by the guardian of a minor is not valid unless it is proved to be for benefit. Where a portion of the consideration is not for necessity, the mortgage is incomplete as

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far as the mortgagor's reversioners are concerned. (*Shah Din and Beadon, JJ.*) HIRA SINGH *v.* LALHORI MAL. **174 P. W. R. 1912: 17 I. C. 247 : 217 P. L. R. 1912.**

———*Alienation—Necessity—Partial — Effect —Fair price.*

If a transaction is mainly for necessity it is valid one hundred times the jama is fair price for a sale. It is a valid necessity to raise money for satisfying a decree for pre-emption of land. If the principal mortgage money is shown to have been borrowed for legal necessity the interest added in advance and also the compound interest charged under the mortgage bond constitutes a valid charge. Heavy interest cannot always be regarded as unnecessary if the principal sum is proved to be for necessary purposes. It is enough if the alienee satisfies himself that the alienor wants the money for a necessary purpose. Strict proof of necessity is not required if the alienation is to satisfy a decree passed on a book account apparently for ordinary expenses and interest especially when the records of the case are destroyed. (*Robertson and Chevis, JJ.*) YAKUB KHAN *v.* RAGEPAT RAI. **165 P. W.R. 1912: 17 I. C. 235: 192 P. L. R. 1912.**

———*Alienation—Necessity—Awans of Talaganj Tahsil.*

The alienation to a near collateral was held void in the presence of the father and step brothers of the alienor. (*Robertson, J.*) NUR KHAN *v.* SAKFRAZ. **249 P. L. R. 1912 : 238 P. W. R. 1912 : 16 I. C. 21 : 100 P. R. 1912.**

———*Alienation — Necessity — Proof of — Maintenance.*

An alienation by a *Jat* of his ancestral land is strongly supported, if in a suit by his grandson and one of his sons, it is established that the suit was delayed and that other sons and grandsons not only refused to be parties but also had admitted its validity, and that the *holding* was incapable to support the large family of the alienor. (*Rattigan, J.*) GURMUKH SINGH *v.* PUNJAB SINGH. **15 I. C. 877 : 95 P. W. R. 1912.**

———*Alienation—Necessity—Dower--Pathans.*

An agricultural Pathan in the Rawalpandi District can only give his wife in payment of her dower a part of his ancestral and more or less equal in value to her dower as fixed or promised. He cannot give what he likes to his wife out of the landed property. (*Reid, C. J. and Johnstone, J.*) HAMID ULLAH *v.* SAHIBJI. **76 P. L. R. 1912 : 58 P. W. R. 1912 : 14 I. C. 624: 12 P. R. 1912.**

———*Alienation—Necessity—Antecedent debt —Proof.*

In a suit by a son to set aside an alienation of the suit ancestral property by his father in favour of the antecedent creditor himself, the onus is on the latter to prove necessity in respect of all previous debts. (*Robertson and Shah Din, JJ.*) MANGAL SINGH *v.* DULA. **81 P. L. R. 1912 : 14 I. C. 477 : 40 P. W. R. 1912.**

———*Alienation—Necessity—Mortgage by conditional sale — Mortgagor selling equity of redemption.*

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In the case of an alienation of land mortgaged by conditional sale the sons of the alienor cannot question the sale on the ground of there being no necessity for such sale. The sale of the equity of redemption by the mortgagor in the case of land mortgaged by way of conditional sale cannot be questioned by the sons on the ground that there was no necessity for the sale if it can be shown that the land yielded little profit and the mortgagor foresaw that it would be impossible for him to redeem it. (*Johnstone and Rattigan, JJ.*) CHET SINGH *v.* ALLAHDITTA. **31 P. W. R. 1912 : 13 I. C. 877 : 47 P. L. R. 1912.**

———*Alienation—Necessity—Father's alienation.*

Where land lying at some distance from the village was alienated apparently for family expenses indicating no extravagance or reckless waste, the sons cannot impeach the alienation on the ground that there was no necessity.(*Kensington, J.*) KHAN *v.* FATEH KHAN. **5 P. W. R. 1912 : 13 I. C. 861 : 87 P. L. R. 1912.**

———*Alienation—Necessity—Father's alienation—Burden of proof.*

In a suit by a son contesting an alienation of the father, where it is found that the debts are not imaginary and that the father was not extravagant or immoral, the burden of proving want of consideration lies upon the son. But the onus of proving necessity for the debts is on the alienee (*Chevis, J.*) MIRANBAKSH *v.* GOUDERAM. **13 I. C. 556: 89 P. W. R. 1912.**

———*Alienation — Necessity — Absence of— Effect.*

An alienation by a male holder otherwise than for necessity is only voidable and not void. (*Johnstone and Rattigan, JJ.*) ZENAB *v.* SHAH NAWAL KHAN. **47 P. R. 1912 : 103 P. L R. 1912 : 13 I. C. 526 : 145 P W. R. 1912.**

———*Alienation—Necessity—Decree debt.*

If an alienation be for discharge of a decretal debt,the alienee need not make further enquiry as to the necessity therefor but he will not be protected if his suspicions had been aroused by the surrounding circumstances or where he had knowledge of the bad faith of the decretal transaction. (*Johnstone and Shah Din, JJ.*) UMAR DIN *v.* BUDHE KHAN. **21 P. L. R. 1912 : 13 I.C. 58 : 23 P. W. R. 1912.**

———*Alienation—Necessity — Litigation expenses*

Where a widow raised a loan for the expenses of a litigation started by her husband's reversioners for which she herself was to blame the money was not required for a legal necessity. Alienation by a widow to maintain her mother-in-law is invalid. (*Kensington, J.*) ARJAN SINGH *v.* INDAR SINGH. **233 P. L. R. 1911 : 12 I. C. 429 128 P.W. R. 1911.**

———*Alienation—Necessity—Debt due by son —Alienor's heirs—If can resist suit by alienee for possession.*

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An alienation by a landowner of a portion of his ancestral land for paying up a decree against one of his sons, is binding on the other sons; the heirs of the alienor can resist a suit for possession by the alienee on the ground of absence of consideration. (*Reid, C. J. and Johnstone, J.*) JAIMAL *v.* LAL SINGH. **88 P. W. R. 1911 : 11 I. C. 408.**

———*Alienation—Necessity—Guardianship—Sister's marriage—Reasonable expenditure.*

Reasonable expenditure on the marriage of a sister who has not taken a share in her father's property, is a necessity in Muhammadan Law and an alienation of the family property to the extent of such necessity alone would bind minor members. (*Chevis, J.*) SHANKAR DAS *v.* MUHAMMAD AMIN. **77 P. W. R 1911 : 11 I. C. 373 : 183 P. L. R. 1911.**

———*Alienation--Necessity—Conversion—Sale and mortgage.*

In a suit by reversioner to set aside an alienation of which the consideration consisted of debts due on a mortgage not assailable on account ofthe law of limitation, the Court directed conversion of the sale into a mortgage. (*Kensington, J.*) GOKULCHAND *v.* RAJI. **67 P. W. R. 1911 : 10 I. C. 841 : 73 P. L. R. 1911.**

———*Alienation — Necessity — Burden of proof.*

The onus of proving that a sale which took place 20 years ago in payment of antecedent debts, was made without legal necessity, rests upon the person contesting it. The burden of proving want of power to alienate lies on the person who alleges the absence of such power. (*Shah Din, J.*) KHUDA BAKSH *v.* WAHAMALI. **88 P. R. 1911 : 116 P. W. R. 1911 : 10 I. C. 36 : 144 P. L. R. 1911.**

———*Alienation--Necessity—Sale or mortgage—Validity.*

Where a limited owner can raise the amount required by a mortgage, a sale of the whole property is a piece of bad management and the sale ought to be converted into a mortgage even if the whole amount were for necessity. Strict proof of necessity cannot be insisted on in the case of an old debt. Where it has not been proved that the alienor has wasted his property or spent money in an extravagant way the full consideration stated though it is composed partlyof old debts may be accepted as being for necessity. (*Clerk C. J. and Reid, J.*) FATEH SINGH *v* NANAK CHAND. **9 I. C. 927 : 20 P. W. R. 1911.**

Alienation—Proof.

———*Alienation — Proof — Proprietors—Consent of—Necessity for.*

Held on the evidence that in Mauza Raja Jang, Tahsil Kasur, District Lahore, which was a village and not a town, non-proprietors had no right to transfer their rights of residence without the consent of the proprietors. Acquiescence of the proprietors in past sales does not mean that they are precluded from objecting to future sales (*Campbell, J.*) MAHOMED DIN *v.* LABH SINGH. **1924 Lah 246.**

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———*Alienation—Proof.*

In the Rohtak District agricultural proprietors cannot do as they please with their ancestral property. The onus of proving so exceptional a custom is on the party alleging it. 148 P. L. R. 1914 ; 131 P. W. R. 1914 ; 76 P. R. 1914. (*Alfred Kensington, C. J. and Rattigan, J.*) BUDAL *v.* KIRPA. **148 P. L. R. 1914 : 76 P. R. 1914 : 23 I C. 211 : 131 P. W. R. 1914.**

Alienation—Reversioner.

———*Alienation—Reversioner.*

Grandfather's brother's sons cannot seek a declaration as reversioners in the presence of uncle. No one can ask for a declaration of a non-existing right but of a *spes successionis, i. e.*, the chance or possibility of acquiring a right in the future. It will be open no doubt to him when succession opens out to sue for possession of the property if possession is denied him. (*Abdul Raoof and Moti Sagar, JJ.*) LALU *v.* FAZIL DIN. **4 Lah. 106 : 1923 Lah. 403.**

———*Alienation— Reversioner — Declaratory suit—Alienation by widow—Daughter.*

Even a remote reversioner is entitled to maintain a declaratory suit regarding a widow's alienation in the lifetime of the daughter. A gift to a son-in law, by any widow (whether the wife or mother of the last male holder) is not sanctioned by custom. 149 P. R. 1908 ; 4 P. R. 1890 followed. (*Campbell, J.*) LUDHAR *v.* MT. RANSI. **1923 Lah. 28.**

———*Alienation — Reversioner — Limited owner.*

The alienation of a female limited owner can be challenged by another female who is the next reversioner. (*Le Rossignol and Martineau, JJ.*) MAWAZ KHAN *v.* MT. ZOHRA JAN. **1924 Lah. 187.**

———*Alienation—Reversioner— Consent of—Sons of reversioners when bound.*

The assent of the plaintiff's father to the alienation by a female in possession, if made *bona fide* without collusion or intention to injure the reversioners, is binding upon the plaintiff in a suit for a declaration that the alienation shall not affect his reversionary rights. (*Abdul Raoof, J.*) MAKHAN SINGH *v.* KISHEN SINGH. **1924 Lah. 213.**

———*Alienation— Reversioner — Occupancy rights—Consent of landlord—Status of reversioners to challenge alienation.*

It is competent to the reversionary heir of an occupancy tenant to dispute the validity of its alienation in favour of a stranger of his ancestor's occupancy rights although such alienation had received the assent of his landlords It is not necessary for plff. in such a case to prove that the common ancestor held the land as an occupancy tenant. All that they have to prove is that they are the reversionary heirs of the alienor and that if the land had been the ancestral property of the plffs. they could have contested the alienation. 98 P R. 1907 (F. B.) Foll. ; 12 P. R. 1904 ; 115 P. R. 1901 Ref. (*Scott-Smith and Harrison, JJ.*) BAGGU *v.* MT. DANI. **3 Lah. 69 : 1922 Lah. 278.**

CUSTOM (PUNJAB)—Alienation—Reversioner.

———*Alienation—Reversioner—Setting aside —Form of decree.*

Where in a suit by a reversioner to set aside an alienation or for declaration that the sale is not effective against the plaintiff's reversionary interest, the court finds that the alienor had full power of alienation, the court could not declare the sale to be not binding on the plaintiffs merely because a portion of the consideration for the sale had not been paid. (*Wilberforce and Martineau, JJ.*) KHULLU *v.* LIKAL.

4 Lah. L.J. 22 : 1922 Lah. 117.

———*Alienation— Reversioner—Consent of— Consent given beforehand—Effect of.*

A consent given to a contemplated alienation by a sonless proprietor is as binding and as valid as a consent given to a completed transfer and the assent of the nearest reversioner makes the alienation good against the world 59 P. R. 1904; 7 P. R. 1905; 78 P.R. 1908, Foll. The onus of proving bad faith on the part of the reversioner lies on these alleging it. An undertaking given by a reversioner not to contest an alienation which a sonless proprietor might make in the future does not require registration. (*Scott Smith and Harrison, JJ.*) GULAB *v.* MEHNDI.

3 Lah. 112 : 4 L. L. J. 52 : 1922 Lah. 95.

———*Alienation—Reversioner.*

The sons of the daughters of the collaterals in the 5th degree of the last male holder are *bandhus* and heirs when there are no agnate collaterals and will succeed to an absolute estate and can restrict the enjoyment of an intervening limited owner within proper limits. (*Leslie Jones and Broadway, JJ.*) DIYAL KUAR *v.* MAHTAP SINGH. **3 Lah. L. J. 458.**

———*Alienation—Reversioner—Right to get declaration.*

Where ancestral property has been alienated by a proprietor a reversioner's right to obtain a declaratory decree is dependent on the vested rights on his alienated property and on the probability of the inheritance opening in his favour. Were the alienor is appointed an heir to a distant collateral he has a right to possession superior to that of the nearer collaterals. (*Leslie Jones and Wilberforce, JJ.*) PADAM NATH *v.* KANSHI RAM. **66 I. C. 913 : 3 Lah. L. J. 20.**

———*Alienation—Reversioner.*

Daughter's sons of the last male holder must prove that they have a *locus standi* to contest the alienation by the mother of the last male holder made in the lifetime of their own mother or by their mother's sister, the daughter of the last male holder. (*Scott-Smith, J.*) GOBINDA *v.* NANDU. **3 Lah L. J. 465 : 1922 Lah. 217.**

——*Alienation—Reversioner.*

Mortgagee rights are, under the Punjab Customary Law, immoveable property and a suit by a reversioner to contest an alienation of such a right by a widow, is maintainable. (*Broadway and Harrison, JJ.*) PHULLO *v.* DAKHAN.

63 I. C. 787.

CUSTOM (PUNJAB)—Alienation—Reversioner.

——*Alienation— Reversioner— Time-barred mortgage—Objection to.*

A reversioner has no right to challenge a mortgage beyond the period of limitation, merely because, it is included in a sale-deed which he can challenge. (*Wilberforce and Abdul Qadir, JJ.*) BUR SINGH *v.* HAZARA SINGH.

63 I. C. 760.

———*Alienation—Reversioner—Decree obtained—Death of decree-holder pending appeal—Widow—Legal representative.*

Where a reversioner obtains a decree for possession of land and dies pending an appeal therefrom, his widow is entitled to the benefit of the decree and represents her husband to that extent. (*Abdul Raoof and Martineau, JJ.*) RAM KOUR *v.* JIWAN SINGH. **63 I. C. 540 : 2 Lah. 189.**

——*Alienation—Reversioner—Rights of.*

The reversioners challenge the acts of a widow holding a widow's interest such as creation of occupancy rights or other acts prejudicing estate. They are not bound to do so during the widow's lifetime. (*Scott-Smith and Dundas, JJ.*) NAND SINGH *v.* MUSSAMMAT. **2 Lah. L. J. 573.**

———*Alienation—Reversioner—Creating of occupancy rights by limited owner.*

Reversioners can challenge the creation of occupancy rights if being a transfer of valuable rights. (*Scott-Smith and Martineau, JJ.*) ISHAR *v.* SUNDAR. **48 I. C. 808: 125 P. R. 1918.**

——*Alienation—Reversioner—Suit by to contest—Pre-empt or position of.*

Pre-emption is not re purchase either from the vendor or from the vendee and in a suit by reversioners for a declaration that the sale shall not affect their reversionary rights, the pre-emptor must show consideration and necessity if it is to be binding on the reversioner. (*Rattigan, C. J.*) LAL *v.* MILKHI. **54 P R. 1918 : 46 I. C. 454: 122 P. W R. 1918 : 121 P L. R, 1918.**

———*Alienation—Reversioner—Consent given* bona fide, *whether binding on sons.*

Where the collaterals of the 5th degree are doubtful about their right of inheritance in the presence of daughters of the owner holding ancestral property and consent *bona fide* to the disposition by the latter of the property by a will in favour of his daughters, their consent is binding on the sons when they have kept quiet for many years. (*Shadi Lal and Leslie Jones, JJ.*) SHERA *v.* GANHAR KHAN.

33 I. C. 738 : 83 P. W. R. 1916.

———*Alienation—Reversioner—Right to contest—Remote reversioners—Marriage expenses of daughter's daughter and daughter's son, legal necessity.*

An improper ratification made by a nearer reversioner does not bind remote reversioner especially when *mala fides* on the part of the nearer reversioner is established in which case he will not be bound even by a decree Under the customary law a son has an independent right in his ancestral property and has thus an independent right of suit with regard to the ancestral property

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and cannot be said to be "claiming under" his father within the meaning of S. 11 of the C. P. Code, and is not bound by alienations by his father with regard to such property. The expenses incurred by a widow for the marriage of a daughter's daughter and a daughter's son out of her husband's property are not for valid necessity. (*Johnstone, C.J. and Leslie Jones, J.*) SOHAN LAL *v.* SARDAR KHAN. 25 P. R. 1915 : 32 I. C. 121 : 16 P. W. R. 1916.

———*Alienation—Reversioner — Transfer of right to a stranger or to one of the other reversioners—Right to contest—Estoppel.*

Among the agriculturists governed by customary law, a reversioner of a deceased male proprietor whose widow is in possession cannot transfer his rights to a stranger, but can transfer them to another reversioner. A reversioner bringing a suit for pre-emption based on a sale by the widow would be deemed to have admitted the validity of the sale and would be estopped from afterwards questioning its validity. (*Shah Din and Chevis, JJ.*) GUJAR *v.* AULIGA. 184 P. L. R. 1914 : 119 P. W. R. 1914 : 23 I. C. 835 : 78 P. R. 1914.

———*Alienation—Reversioner—Estoppel.*

A reversioner who recognizes an alienee's right is estopped from disputing the validity of the alienation. (*Rattigan and Beadon, JJ.*) KHAZANA *v.* WARYAMA. 205 P. L. R. 1914 : 22 I. C. 607 : 105 P. W. R 1914.

———*Alienation—Reversioner—Setting aside —Burden of proof.*

The burden of proving that a reversioner is competent to an alienation of ancestral property made by a sonless male proprietor, lies on the reversioner. 231 P. L. R. 1913, Cons. 63 P. L. R. 1908, Foll. 28 All. 424 Not foll. (*Agnew, J.*) SHEOJI *v.* FAZAR ALI KHAN. 230 P. L. R. 1913: 20 I. C. 475 : 148 P. W. R. 1913.

———*Alienation--Reversioner—Acquiescence by sonless brother in his brother's acts—Effect on reversioners.*

An acquiescence of a sonless brother in his brother's act does not bind the reversioners by custom. (*Reid, C. J. and Johnstone, J.*) NATHU *v.* RAHMAN. 44 P. R. 1911 : 198 P. L. R. 1911 : 11 I. C. 11 : 85 P. W. R. 1911.

———*Alienation—Reversioner— Right to set aside gift.*

In order to succeed in setting aside a gift by a widow to her daughter, the reversioners must establish the custom of excluding her when she is alive ; and especially so when she has a son (*Rafique, A. J. C.*) SUBHADRA *v.* TRIBHUAN DAT. 15 I. C 247.

Alienation—Right to contest.

———*Alienation—Right to contest—Suit by collateral challenging.*

A collateral governed by the Customary Law of the Punjab does not derive his right to sue from or through his father but from or through the common ancestor who owned the land. (*Scott-Smith and Fforde, JJ.*) SARUP SINGH *v.* PAL SINGH. 1923 Lah. 642.

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———*Alienation—Right to contest — Son unborn at the time.*

A son has powers to challenge an alienation made by his father before his death, if at the time of the alienation there were heirs who could challenge it and the transaction was not satisfied before his birth. (*Moti Sagar, J.*) BHUP SINGH *v.* PREM SINGH. 5 Lah. L J. 384 : 1924 Lah. 362.

———*Alienation—Right to contest—Remoter reversioners*

Where a male proprietor who has alienated ancestral land has adult sons living it is not open to the remote reversioners to sue to challenge the alienation in the absence of proof that the adult sons of the alienor waived their right to impeach the alienation. 84 P.R. 1918 Ref. (*Abdul Qadir, J.*) SUBA SINGH *v.* GOPAL SINGH. 1924 Lah. 386.

———*Alienation--Right to contest--Collaterals —Sale in execution of decree.*

Under the Customary Law of the Punjab it is open to a collateral to challenge a sale *invitum*, *e.g.*, a sale in execution of a decree. 18 P. R. 1908, Rel. (*Abdul Raoof, J.*) GHANYA *v.* HAZARA SINGH. 1922 Lah. 224.

———*Alienation—Right to contest.*

Persons who are heirs to an estate are entitled to challenge alienations effected by females who are holding on life tenure under custom. Para. 23 of Rattigan's Digest of Customary Law runs counter to the principle of Hindu Law and custom does not exclude a daughter's son from inheritance on the ground of his mother having predeceased her father or grandmother. Under the Hindu Law a female takes only a life interest in the property inherited by her from a male and the nature of her interest does not depend upon the existence or otherwise of persons having a right to succeed to the property after her death.

An estate of a widow under the customary law is subject to the same restriction as that of a widow under Hindu Law. Where the persons contesting the alienations are males whose right to inherit the estate is beyond dispute there is no custom which prevents them from impugning such alienations, they are entitled to contest. C. A. No. 128 of 1917 Ref. Where there is no custom applicable to a case the plaintiffs can fall back on their personal law. (*Shadi Lal, C. J. and Martineau, J.*) GOBINDA *v.* NANDU. 3 Lah. L. J. 465 : 1922 Lah. 217.

———*Alienation—Right to contest—Religious endowment- Dohli tenure.*

The dohli tenure is a peculiar kind of tenure to be found in the south-eastern districts of the Punjab. It is a rent-free grant of a small plot of land by the village community for the benefit of a temple mosque or shrine or to a person for religious purposes. In the Revenue records the proprietary body are recorded as the owners of the property and the grantee is recorded as a tenant in the column of cultivation. So long as the purpose for which the grant is made is carried out, it cannot be resumed, but should the holder fail to carry out the duties of his office, the proprietors

can eject him and put in some one else under a like tenure. Such a tenure cannot be sold or mortgaged and there can be little doubt such an alienation made by the dohlidar is absolutely void and can be challenged by his successor. (*Shadi Lal, C. J. and Harrison, J.*) SEWA RAM *v.* UDEGIR. **2 Lah. 313 : 25 P. L. R. 1922 : 1922 Lah. 126.**

———*Alienation—Right to contest—Property inherited from husband—Right of reversioners to impeach.*

Under the general Customary Law of the Punjab females in possession of property inherited from relations, but not given as a free and absolute gift, have no right to alienate such property permanently. The heirs of reversioners have a right to contest the validity of such an alienation and have it declared that their rights would not be affected in any way. (*Abdul Raoof and Martineau, JJ.*) JHANDHA *v.* MT. JIVAN. **67 I. C. 522.**

———*Alienation—Right to contest—Inaction of father—Son's rights not affected.*

Where the plaintiff's father was absent from the village in which the land was situated and took no steps to have the alienation set aside but at the same time there was no collusion between the alienor and alienee and the plaintiff's father and no acquiescence on the part of the plaintiff's father, the plaintiff as reversioner could sue to set aside the alienation. The plaintiff does not claim from or through his father but directly from the last holder. (*Broadway, J.*) FEROZ *v.* GHULAM SARWAR. **67 I. C. 379.**

———*Alienation—Right to contest—Widow of predeceased son when can challenge alienation.*

The widow of a predeceased son who desires to challenge an alienation made by her father-in-law must prove not merely that she is an heir to her father-in-law but that she has a right to contest the alienation effected by him. (*Scott-Smith and Martineau, JJ.*) HARNAMAN *v.* MUSSAMMAT DEWAN. **71 P. W. R. 1921 : 1 Lah. L. J. 32: 54 I. C. 908 : 160 P. R. 1913.**

———*Alienation—Right to contest— Daughter's son, if can control alienation by females—Onus of proof.*

Among Ghirths of Kangra District, a daughter's son has no *locus standi* to control alienations by the female heirs of the last male holder. As a rule the right to such control only extends to agnatic heirs of the last male holder and the burden of proving any extension of this right beyond the agnatic heirs lies on the person asserting it. (*Scott-Smith, J.*) GOBINDA *v.* NANDU. **3 Lah. L. J. 465 : 1922 Lah. 217 :**

———*Alienation—Right to contest—Date of alienation.*

A sale of the reversionary rights during the lifetime of the widow is no more than a mere agreement to sell which takes effect immediately on the death of the widow. The date of the alienation is therefore the date of the death of the

widow. (*Shadi Lal, C. J. and Wilberforce, J.*) BUTA SINGH *v.* JHANDU. **3 Lah. L. J. 211 : 61 I. C. 375 : 3 U. P. L. R (Lah.) 49.**

———*Alienation—Right to contest—Harrals of Dt. Shahpur.*

Male proprietors have an unrestricted power of alienation among Harrals of Dt. Shahpur. (*Scott-Smith and Leslie Jones, JJ.*) BAHADURI *v.* QUADU. **60 I. C. 526 : 3 Lah. L. J. 150.**

———*Alienation—Right to contest.*

A widow allowed an occupancy tenant to exchange one of his occupancy fields with a non-occupancy one. Plaintiff, who was one of the collaterals of the last male holder and a *lambardar*, did not object to the exchange but affixed his seal to the patwari's report at the time of mutation. Subsequently the occupancy tenants sank a well in the field obtained by him under the exchange but the plaintiff did not object. Six years after the exchange, he sued for a declaration that the exchange would not effect his reversionary rights. *Held*, that the plaintiff having acquiesced in the exchange and having failed to object to the sinking of the well was estopped from objection to the exchange. (*Abdul Raoof, J.*) ILLA UD-DIN *v.* AMIR-ULLAH. **56 I. C. 874 : 2 U.P.L.R. (Lah.) 105.**

———*Alienation—Right to contest—Collaterals—Awans of Mouza Photriwala—Jullundur District.*

The general custom of the Punjab does not recognise the right of a collateral, however remote, to challenge alienations and the burden in case of distant collaterals, of proving a right to control rests on the person challenging. Among Awans there is no custom entitling collaterals of the 10th degree to contest an alienation by childless proprietor. (*Shadi Lal and Le Rossignol, JJ.*) KASIM ALI *v.* GHULAM MUHAMMAD. **138 P. R. 1919 : 54 I. C. 961 : 2 Lah. L.J. 76.**

———*Alienation—Right to contest—Widow's estate—Reversioner.*

A widow's estate is only limited for the benefit of the reversioners and the widow to all intents and purposes is the full owner when there are no reversioners and the onus lies upon the proprietors of a "Patti" to establish their right to contest an alienation by such a widow. (*Shadi Lal, J.*) GIANI RAM *v.* MARI. **40 I. C. 61 : 24 P. R. 1917.**

———*Alienation—Right to contest— Telis of Mouza Bhudial, Tahsil Chakwal, District Jhelum.*

The Telis of Mouza Bhudial have no right of control over alienations, by occupancy tenants, by custom. (*Johnstone, C. J.*) SHER *v.* ALLAL DAD. **39 I. C. 96 : 6 P. R. 1917.**

———*Alienation— Right to contest — After-born son—Ratification by nearest collateral made after the son's birth—Effect.*

An after-born son can impeach alienations by his father made before his birth and his right i

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not lost though his father's brother ratified the sales after the son's birth. 55 P. R. 1903, Ref. (*Shadi Lal and Le Rossignol, JJ.*) GHULAM NABI *v.* MOHKAM. **105 P. R. 1916 : 36 I. C. 672 : 79 P. L. R. 1917.**

———*Alienation—Right to contest—Females.*

The right of a Hindu female to challenge the alienations of an earlier female life incumbent must be decided on the evidence adduced in each particular case and no general proposition can be laid down to cover all cases. (*Chevis and Le Rossignol, JJ.*) DALIPA *v.* SURAJ KAWR. **48 P. R. 1916 : 34 I. C. 581 : 142 P. W. R. 1916.**

———*Alienation—Right to contest—Mutation—Assent of father—Effect on other members.*

The assent of a father who intends to be governed by Muhammadan law in future, to the mutation, is not *bona fide* and not binding on sons and other members of the family. (*Chevis and Le Rossignol, JJ.*) MUSAMMAT JANNAT *v* ABDULLA. **4 P. R. 1916 : 32 I. C. 817 : 25 P. W. R. 1916.**

———*Alienation — Right to contest—Remote collaterals.*

The remote collaterals may sue for a declaration that an alienation was invalid or, in the alternative, for pre-emption where the nearer collaterals took no steps to protect the estate but only subsequently instituted a suit for pre-emption. (*Chevis and Shadi Lal, JJ.*) BAHADUR SINGH *v.* BHAGAL SINGH. **104 P. R. 1915 : 32 I. C. 11 : 208 P. W. R. 1915.**

———*Alienation— Right to contest— Declaratory suit by collaterals after death of alienor—Punjab—Limitation (Ancestral Land Alienation) Act of* 1900.

A declaratory suit by the collaterals that a bequest by a sonless Gujar in favour of his mother and maternal uncle is invalid after the death of the alienor, does not offend against the provisions of the Punjab Limitation Act of 1900 and can be maintained. (*Chevis and Le Rossignol, JJ.*) GHULAB KHAN *v.* CHIRAGH BIBI. **43 P. R. 1916 : 31 I. C. 909 : 131 P. W. R. 1916**

———*Alienation—Right to contest—Alienation by widow—Daughter—Agnates*

A daughter's power to contest an alienation of the properties of last male owners by a widow is unusual. The burden, therefore, lies on her to prove such a power according to custom, since usually only agnates have the power. (*Johnstone, C. J. and Chevis, J.*) PARTAPI *v.* HAZARA SINGH. **31 I. C. 794 : 33 P. R. 1916.**

——*Alienation—Right to contest—Sials of Jhang District.*

Among the Sials of the Jhang District the position of females is very strong and collaterals in the 10th degree have no status to contest alienations made by a daughter except in respect of property which the latter held in her capacity of widow of

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her first husband. (*Johnstone and Le Rossignol JJ.*) MUHAMMAD BAKSH *v.* MUHAMMAD. **90 P. R. 1915 : 31 I. C. 533 : 170 P. W. R. 1915.**

———*Alienation—Right to contest—Estoppel.*

Where the vendee defts. had rebuilt the house without any objection of the plffs., whom it was open to object to the alienation on the ground that the house sold was not alienable property, *Held* that the plffs. were estopped by acquiescence in the sale. (*Leslie Jones, J.*) NARAIN SINGH *v.* KALA SINGH. **192 P. L. R. 1915 : 138 P. W. R. 1915.**

——*Alienation—Right to contest—Acquiescence—Abandonment—Entry in mutation proceedings*

In a suit by collaterals for possession of property left by an extinct branch of a family the father of the last male owner, unsuccessfully resisted in 1882 an application by the predecessor of the defts. for having the name of the former expunged from the Mutation Register. Defts. continued in possession since 1882, *Held*, that the acceptance, in 1882 of the adverse decision in the mutation proceedings, by the father of the last male owner and his subsequent conduct amounted to abandonment of his right. Defts having been since then in adverse possession of the property, were absolutely entitled to it. (*Shah Din and Le Rossignol, JJ.*) MAYYA *v.* NIHALA. **141 P. L. R. 1915 : 28 I. C. 234 : 58 P. W. R. 1915.**

——*Alienation—Right to contest—If follows right to succeed.*

The right to succeed does not necessarily carry with it the right to impeach alienations. The onus lies on the person claiming the right to prove it. (*Shah Din and Chevis, JJ.*) GOBINDRAM *v.* SURAJ KAUR. **131 P. L. R. 1914 : 24 I. C. 470 : 114 P. W. R. 1914.**

——*Alienation —Right to contest—Collaterals—Pathan of Jullundur District—Gift by sonless proprietor to his niece.*

Among Pathans in the Jullundur District the presumption is against the right of a collateral of the 6th degree to question gifts even of ancestral and by a sonless proprietor to a niece with whose father the donor has always been joint. Among the important tribes of the District, the presumption is in favour of the collateral succession of widows. (*Johnstone and Rattigan, JJ.*) SULTAN BIBI *v.* GHULAM HAIDER KHAN. **206 P.L R. 1914: 24 I. C. 358 : 32 P. L. R. 1915.**

——*Alienation—Right to contest—Collaterals' right to challenge alienations, if recognised —Onus.*

Under the general custom of the Punjab it is not all collaterals, however remotely related, that can challenge alienations, and in the case of very distant collaterals, the onus of proving a right to control rests on the persons challenging the alienations. An alienation even to a co-sharer, may, under the general custom of the Punjab, be questioned by the collaterals who have a right to control the alienation. But a gift to a collateral for services rendered is however good

and valid. (*Rattigan and Chevis, JJ.*) PAL SINGH *v.* GANDA SINGH. **40 P. L. R. 1914: 29 P W.R. 1914: 22 I C. 319 : 37 P. R. 1914**

——— *Alienation—Right to contest—Alienation effected by compromise—If sons or reversioners can contest.*

An alienation of immoveable property effected by a compromise of a suit cannot be contested either by the son or other reversioners of the alienor. 5 I. C. 589 Foll. (*Agnew, J.*) KALU *v.* SAWARIYA. **154 P. W. R. 1913: 20 I. C. 567 : 300 P. L. R. 1913.**

——— *Alienation—Right to contest—Declaratory suit by reversioner—Vendee, if can stand in the shoes of a previous mortgagee whom he has paid off.*

In a declaratory suit by a reversionary heir that a sale-deed is not binding on them, the Court has to determine if the sale is binding as such ; and the vendee cannot urge that, because he has paid off a prior mortgage on the land, he can retain the land during the lifetime of the alienor and also stand in the shoes of the previous mortgagee whom he has paid off. (*Rattigan, J.*) PARTAPA *v.* ATTAR SINGH. **37 P. R. 1913 : 20 I. C. 289 : 262 P. L. R 1913.**

——— *Alienation—Right to contest—Acquiescence.*

Mere acquiescence in previous sales will not imply a renunciation of the discretionary right of the proprietors to object to a subsequent sale. (*Scott-Smith, J.*) TAJ MUHAMMAD *v.* KANSHI MAL. **135 P.W.R. 1913 : 19 I. C. 864 : 237 P. L. R. 1913.**

——— *Alienation—Right to contest—Son—Old alienations—Necessity—Proof.*

The sons and grandsons of a person cannot contest the alienations of their father and uncles where the latter acted in concert In the case of old alienations where the alienor has been recklessly extravagant. it would be nothing but right to put the alienee to proof of the necessity therefor. (*Shah Din and Chevis, JJ.*) ATAR SINGH *v.* ALLAH DIN. **126 P. L. R. 1913: 18 I.C. 445 : 93 P. W. R. 1913.**

——— *Alienation—Right to contest—After-born reversioner.*

When at the time of the alienation a reversionary heir competent to challenge it existed, an after-born reversioner has no *locus standi* to question its validity. (*Reid, C. J. and Rattigan, J.*) BABU KHAN *v.* MIR KHAN. **108 P. L. R. 1913 : 18 I.C. 283 : 113 P. W. R. 1913.**

——— *Alienation—Right to contest—After-born son.*

In Punjab a son begotten though not born can contest an alienation by his father, the date of birth in such cases being antedated to the begetting, and an afterborn son can contest an alienation if there was a collateral entitled at the date of the transfer to object if such alienation be not ratified prior to the birth. (*Chevis, J.*) KEHAR SINGH *v.* HAZARA SINGH. **14 I. C. 60 : 173 P. W. R. 1912.**

——— *Alienation—Right to contest—If transferable*

The right of a reversioner to contest an alienation is not a transferable right. 66 P. R. 1897 ; 22 P. R. 1900; 67 P. R 1909 ; 2 I.C. 954, Foll. 93 P.R. 1905; 19 P. R. 1906 ; 12 P. R 1901, Dist. (*Johnstone and Rattigan, JJ.*) ZENAB *v.* SHAH NAWAZ KHAN. **47 P. R. 1912 : 103 P. L. R. 1912: 13 I. C. 526 : 145 P W.R. 1912.**

——— *Alienation— Right to contest—Right of collateral of the 11th degree to impeach alienation.*

Where no special custom exists in his favour, a collateral of the 11th degree cannot dispute an alienation of the present holder even if the property has descended from a common ancestor, though he may have a right to succession superior to that of the Crown in case where escheat is the alternative to succession. 35 P. R. 1906 not foll.; 93 P.R. 1906; 23 P. R. 1907; 162 P. L. R. 1901; 94 P.L.R. 1903 : 20 P.R. 1890, Rel. on. (*Reid, C. J. and Rattigan, J.*) HAZARA SINGH *v.* HARNAM SINGH. **24 P. R. 1912 : 22 P. W. R 1912 : 13 I. C. 180 : 44 P.L.R. 1912.**

——— *Alienation—Right to contest—Gift by widow—Suit by reversioner to set aside gift—Compromise—If binds a minor not properly represented.*

A compromise in a suit by a reversioner to set aside a gift by a widow will not bind a minor who is not properly represented by a next friend and he can on attaining majority follow the property wherever it is, by ignoring the suit. (*Johnstone and Chevis, JJ.*) JAWALA *v.* INDAR. **76 P. W. R. 1911 : 11 I. C. 372: 181 P.L R. 1911.**

——— *Alienation — Right to contest—Collaterals.*

An alienation of ancestral property cannot be questioned by collaterals in the presence of the alienor's sons. (*Kensington, J.*) BHANA RAM *v.* HAKIM SINGH. **36 P. W. R. 1911 : 10 I.C. 725 : 178 P. L. R. 1911.**

——— *Alienation—Right to contest.*

The last male holder's father's sister's son has no right to contest alienations made by the person, whether male or female, in possession of the property. Where such a right is claimed by custom it must be proved. Unless the custom of a tribe recognized a female and her issue as heirs, the right of controlling even a female's alienations does not extend beyond the line of agnatic heirs. 93 P. R. 1906 ; 61 P. R. 1906. Foll. Even a trespasser cannot be ousted unless the plff. proves that he is entitled by law or custom to eject him. (*Rattigan, J.*) ALI MAHAMMAD *v.* SURAJUDDIN. **162 P. L. R. 1911 : 199 P. W. R. 1911 : 10 I. C. 236 : 13 P. R. 1912.**

——— *Alienation—Right to contest—Joinder of causes of action—Estoppel.*

The heir of a deceased agriculturist, and alienor of ancestral property can attack all alienations to different alienees in one suit for possession, as his right to sue for possession accrues when succession opens on the death of the alienor. The fact that a son got certain land from his father in the latter's lifetime, does not estop the son from

challenging his father's alienations when the latter dies and the son comes into possession of the whole of his father's estate. (*Chevis, J.*) FAZL HUSSAIN *v.* AMIR HAIDER. **76 P. L R 1911 : 9 I. C. 588 : 73 P. W. R. 1911.**

——*Alienation — Right to contest—Collaterals.*

A transfer of ancestral occupancy rights without necessity or consideration is liable to be contested by the alienor's collaterals whose rights to object to the alienation remain intact. (*Johnstone, J.*) KIKKA *v.* GURDAI. **52 P. L. R. 1911 : 9 I. C. 292 : 201 P. W. R. 1911.**

Alienation—Widow.

——*Alienation — Widow—Gift to daughter and son-in-law.*

Under the customary law it is not competent to a widow to make a gift of her husband's non-ancestral land in favour of her daughter and son-in-law jointly. (*Le Rossignol and Martineau, JJ.*) SANDHI *v.* BUDHA SINGH.

5 Lah. L. J. 178 : 1924 Lah. 25.

——*Alienation—Widow.*

The powers of a widow in possession of her husband's property to make an alienation by way of gift is not wider under the customary law of the Punjab than under the Hindu Law. (*Abdul Raoof, J.*) MT. DURGO *v.* PREM SINGH.

1924 Lah. 196.

——*Alienation—Widow.*

A widow who holds a life interest in an estate under custom has no wider powers of alienation than a widow who holds a similar estate under Hindu Law and the limited nature of her life interest can never alter even though there be a complete want of heirs. (*Leslie Jones and Broadway, JJ.*) DIAL KAUR *v.* MEHTAB KAUR.

74 I. C. 639 : 3 Lah L. J. 458

——*Alienation—Widow—Gift of portion of estate to nearest reversioner—Effect of.*

The rule of Hindu law that a widow cannot make a valid gift of a portion of the estate in favour of the next male reversioner is not applicable to cases governed by customary law. 50 I. C. 498, Dist. (*Scott-Smith and Dundas, JJ.*) JAGGA *v.* BHAG MAL. **4 Lah. L. J. 432**

——*Alienation—Widow — Tarar Jats of Chakwal—Sisters if entitled to question alienation*—Riwaj-i-am, *entries in.*

Among the Tarar Jats of Chakwal, sisters are heirs in the absence of collaterals and are entitled to contest the validity of an alienation made by the widow. An entry in the *Riwaj-i-am* which is not opposed to general custom is a strong piece of evidence. (*Scott-Smith and Harrison, JJ.*) AHMAD D. MT. BANO. **3 Lah. 40 : 1922 Lah. 114.**

——*Alienation —Widow— Necessity—Debts of husband—Future maintenance.*

A widow in possession of ancestral property inherited from her husband has only a limited right therein and she cannot alienate the estate in anticipation of future expenses Where the debts of her husband are not charged on ancestral property the widow is not justified in alienating the

property for the discharge of such debts. Nor is the widow justified in alienating the property for raising money for her future maintenance. 4 P. R. 1913 ; 17 P. R. 1919, Followed. (*Broadway, J.*) SUCHA SINGH *v.* PAL SINGH.

1924 Lah. 298.

——*Alienation—Widow—Husband's property—Self-acquired.*

A widow has no right to alienate the property of her husband, even if the property was not ancestral except for necessity. (114 P.R. 1907 ; 14 I. C 71 ; 23 I. C. 127, Ref.) (*Broadway, J.*) FATTU *v.* PARTAPI. **39 I. C. 642 : 15 P. W. R. 1917.**

——*Alienation—Widow—Debts of husband.*

Under Customary Law, unlike Hindu Law, a widow is not bound to pay debts due by her husband which have become barred by limitation. Nor can she alienate the estate for payment of her husband's debts when she could pay it out of the income of the estate. (*Shadi Lal, J.*) INDAR *v.* MOTI RAM. **75 P. W. R. 1915 ; 29 I. C. 780 : 112 P L. R 1915.**

——*Alienation—Widow—Absence of collaterals—Owners of Pattli belonging to different tribes—Entry in* Riwaz-i-am*—Value of-Nature of limitation—Reversioners.*

Where owners of a *Patti* belonging to miscellaneous tribes contesting the alienation of a widow set up the plea that the widow could not alienate except for necessity and that in the absence of collaterals, they were entitled to succeed the onus of proving it lay on the plaintiffs, and in the absence of any instance, the entry in the *Riwaz-i-am* is not a sufficient proof thereof. A widow's estate is limited only for the benefit of reversioners and where there are none, she is to all intents and purposes an absolute owner, and an entry in a wajib-ul-arz limiting her powers of alienation bas no effect in the absence of collaterals. (*Rattigan and Scott-Smith, JJ.*) ALLAH DITTA *v.* GANHRA.

3 P. R, 1914 : 23 I. C. 127 : 129 P. L. R, 1914.

——*Alienation—Widow—Right to contest.*

On the death of a widow who is in possession of a life estate in a gifted property, the property passes to the lineal descendants of the donee in the female line, and the descendants of the donor have no manner of right to question any alienation of the same by the widow. (*Johnstone and Shah Din, JJ.*) SUKHAN *v.* NARAIN SINGH. **99 P. L. R. 1914 : 22 I. C. 792 : 138 P. W. R. 1914.**

——*Alienation—Widow—Ancestral property—Surrender by vendee from widow in favour of reversioner.*

Where on objection by reversionary heir to an alienation by a widow, the widow, waiving her life interest in favour of the reversionary heir surrendered the property to the reversioner, such property is not self-acquired property in the hands of the reversioners. (*Kensington and Beadon, JJ.*) TAJ MUHAMMAD *v* ISLAM.

95 P. R. 1913 : 21 I.C. 631 : 343 P L. R. 1913 : 230 P. W. R. 1913.

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———*Alienation—Widow—Husband's property self-acquired.*

A widow governed by a customary law cannot alienate the property of her husband to which she has succeeded on the ordinary life tenure, even if such property was acquired by him. (*Rattigan, J.*) MUKANDI *v.* BAKHTAWAR SINGH.
210 P. L. R. 1913 : 19 I. C. 215: 219 P. W. R. 1913.

———*Alienation—Widow —Consent of reversioner.*

A reversioner's consent to an alienation by a female in possession is binding on his son, provided that it was *bona fide* and there was no collusion, or intention to injure the reversioners, or any other circumstance invalidating the consent then given. (*Rattigan, J.*) HABIB KHAN *v.* MUHAMMAD. **68 P.R. 1912: 194 P.W R. 1912 : 16 I C. 463: 210 P. L. R 1912.**

———*Alienation—Widow—Reversioner's right—Powers of.*

The reversioners of the husband are not debarred from succeeding to the property after the death of the donee though they had tacitly consented to the alienation by the widow. 19 P. R. 1903 ; 12 P R. 1892, Foll.; 46 P. R. 1890 ; 53 P. R. 1882, Overruled.

A widow's powers as regards permanent alienation of landed property differ from those of her husband. 103 P.R. 1907, Rel. on. A gift by a male proprietor of his self-acquired property to his daughter with the intention of making her the full owner, confers on her the full ownership, but if she merely inherits such property she takes only a limited estate for herself and her issue. 121 P. R. 1908, Rel. on. Property whether self-acquired or ancestral *qua* reversioners, received by a widow on her husband's death, cannot be alienated by her against the wishes of the reversioners unless she alienates it to the next heir. 76 P. R. 1883 ; 63 P. R. 1895 ; 58 P. R. 1899, Rel. on. Where the donee's line dies out the reversioners of the donor's husband and not the reversioners of the donee that are entitled to succeed to the property gifted. 19 P. R. 1903; 12 P. R. 1892 ; 144 P.R 1893, Fol ; 46 P.R. 1890 ; 53 P. R. 1882 Overruled ; 137 P. R. 1908 ; 84 P. R. 1909, Dist. (*Johnstone and Rattigan, JJ.*) NUR AHMAD *v.* RAHIM BAKHSH.
52 P. R. 1912 : 14 I. C. 71 : 177 P. W. R. 1912.

———*Alienation—Widow—Settlement in lieu of dower—Widow's right— Chaddar Jats of Alipore Tahsil.*

Under the custom prevailing among the Chaddar Jats of Alipore Tahsil, a widow succeeding to property settled on her in lieu of dower without objection from the collaterals gets an absolute estate therein with full rights of alienation. (*Kensington and Shah Din, JJ.*) SOHAURA *v.* SAHIB.
225 P. L. R. 1911 : 11 I. C. 513 : 154 P. W. R. 1912.

———*Alienation—Widow—Right to challenge—Husband's brother.*

Among Sayads of Sialkot City brothers of the husband can attack an alienation by the widow of

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house property inherited from her husband. (*Johnstone, J.*) MIR HAIDAR *v.* MUHAMMAD ALI.
14 P. R. 1911 : 44 P. W. R. 1911 : 10 I. C 855 : 88 P. L. R. 1911.

———*Alienation— Widow — Necessity—Consent—Exchange.*

A widow, in possession of her husband's estate, cannot effect an exchange of the land except for necessity or with the consent of the reversioners. A widow cannot make the exchanges even for the purposes of improving the estate. (*Shah Din and Chevis, JJ.*) NIHALI *v* LEHNA. **2 P. R. 1911 : 46 P. L. R. 1911 : 9 I. C. 675 : 27 P. W. R. 1911.**

Alienation—Will.

———*Alienation—Will by sonless proprietor—Khot Sarang of Talagang Tahsil, Attock District.*

A sonless *awan* of Khot Sarang, Tahsil Talagang, has not a free power to dispose of his ancestral property by Will. (*Broadway, J.*) MT. RAKSHI *v.* BAZA. **1923 Lah. 305.**

———*Alienation—Will—Gift of reversion to daughter—Gift by mother to daughter—Marriage of daughter with khatri.*

A jatti daughter marrying subsequently with a khatri is not deprived of her rights under her father's will giving the reversion after the death of his wife in favour of his daughter (*Le Rossignol and Wilberforce, JJ.*) NARAIN SINGH *v.* MT. DIAL KAUR. **4 Lah. L. J. 469.**

———*Alienation—Will— Sonless proprietor—Mair minhas, Chakwal Tahsil, Jhelum District — Bequest to daughter—Suit by reversioner—Decision—Value of as evidence.*

Among Mair Minhas, Chakwal Tahsil, Jhelum District, a sonless proprietor can bequeath his properties by will absolutely in favour of the daughter The daughter can in her return will away the property. A proprietor bequeathed his lands and house to his daughter and she in her turn made a will in 1886 leaving the property to the deft., her sister's son, and son-in law. The daughter died and the plff., collateral of the deceased male owner, sued for possession of his property contending that it reverted to them and that the daughter had no power to make a will in favour of the deft. It was found that in a prior suit to contest the will instituted by the brother of the last male owner, the will was found to be valid and that the daughter had full powers of alienation. There was no appeal against that decision which became final. *Held*, in the present suit that though the prior decision did not operate as *res judicata* it was very strong evidence in favour of the will and that the daughter took an absolute estate under its terms. (*Shadi Lal and Martineau, JJ.*) ANWAR KHAN *v.* NUR KHAN.
67 I. C. 272 : 2 L. L J. 666.

———*Alienation—Will—Right of son's widow—Jats of Ludhiana District.*

A son's widow suing to contest an alienation by her father-in-law must prove not only that she is heir to the latter but also she has by custom a right to contest his alienations. The burden is the more heavily on her where the alienees are the alienor's agnates. 30 P.R. 1909 and 72 P. R. 1909, Dist, The widow had failed to prove the

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existence of such a custom among Jats of Ludhiana and that it was consequently unnecessary to inquire into the validity of the Will. (*Scott-Smith and Martineau, JJ.*) HARNAMAN *v.* MUSSAMAT DEWAN. **160 P. R. 1919 : 54 I. C. 908 : 1 L. L J. 32.**

———*Alienation—Will — Sonless proprietor —Daughter in presence of brother and nephew—Validity--Mair Rajputs--Chakwal Tahsil, Jhelum District.*

The initial presumption in the Punjab is against the power of alienation in respect of ancestral land in village communities but it is not of weight among the Mahomedan tribes of Jhelum. By custom among Mair Rajputs of the Chakwal Tahsil of the Jhelum District a sonless proprietor is competent to devise the whole of the ancestral estate in favour of his daughter in the presence of his brother and nephew. (*Shadi Lal, J.*) HAYAT *v.* MUSSAMMAT GULLAM. **87 P. R. 1918 : 99 P. L. R. 1918 : 47 I. C. 931 : 172 P.W.R. 1918.**

———*Alienation—Will—Muhammadzais of—Peshawar District—Bequest to widow to exclusion of son not valid.*

By custom a Muhammadzai proprietor cannot will away his entire estate to his widow to the exclusion of his son. (*Barton, J. C.*) SAIDAN SHAH *v.* MT. DURANI. **84 P. L. R. 1916.**

———*Alienation—Will—Awan of Fatlehsing Tahsil.*

A sonless Awan is not entitled to bequeath by custom his property to the prejudice of the reversioner. (*Chevis, J.*) SHER WAMAN *v.* KARAM BAKHSH. **32 I. C. 806 : 76 P. W. R. 1916.**

———*Alienation—Will—Bequest by Gujars of Gujar Khan Tahsil to mother and her brother in presence of collaterals—Validity.*

A bequest among the Gujar Khan Tahsil, in the Rawalpindi District, by a sonless proprietor of the whole of his property to his mother and her brother in the presence of the collaterals is invalid. (*Chevis and Le Rossignol, JJ.*) GULAB KHAN *v.* CHIRAGH BIBI. **43 P. R. 1916 : 31 I. C. 909 : 131 P. W. R. 1916.**

———*Alienation—Will—Gulfarosh Arains of Lahore—Custom—Onus of proof.*

Among the *Gulfarosh Arains* of Lahore City there is a custom of will making contrary to Muhammadan Law. The burden of proving such a custom is on the person who asserts it, but in view of the fact that the tribe is a mere fragment of a very large body of *Arains*, who are agriculturists and follow, except as regards certain things ordinary Punjab custom, the burden is not a heavy one. (*Johnstone and Shah Din, JJ.*) RAHIM BAKSH *v.* UMAR DIN. **49 P. R. 1915 : 111 P. W. R. 1915 : 29 I. C. 382 : 243 P.L.R. 1915.**

———*Alienation—Will—Gift—Restrictions.*

Where the power of gift is restricted, the power of disposing of property by will must be equally restricted. (*Kensington and Beadon, JJ.*) SAHIBAN *v.* MUHAMMAD. **72 P. R. 1913 : 294 P. L. R. 1913: 20 I. C. 522 : 214 P. W. R. 1913.**

CUSTOM (PUNJAB)—Alluvion and Diluvion.

———*Alienation — Will — Awans of Attock Tahsil—Collaterals—Rights of.*

Among Awans of Attock Tahsil it is not competent to a sonless proprietor to will away the whole of his properties in the presence of near collaterals. The Court could not uphold the will as to a part but must reject the whole. (*Rattigan and Scott-Smith, JJ.*) YAKUB KHAN *v.* FATEH KHAN. **5 P. R 1914 : 253 P. L. R. 1913 : 20 I. C. 14 : 161 P. W. R. 1913.**

———*Alienation—Will—Sonless Bargal Jat of Jhelum District.*

A Bargal sonless Jat of the Jhelum District cannot bequeath his property to his daughter's son in the presence of agnate collateral. (*Robertson, J.*) FATHE DIN *v.* ALLAH DITTA. **19 P.W.R. 1912 : 13 I. C. 77: 53 P. L. R. 1912.**

———*Alienation—Will—Self-acquired property—Peshawar District.*

The practice of will making in the Peshawar District is of comparatively recent date and it must be regarded as a growth of customary law. In other words, Courts are faced with a custom which not only have developed in the past but is developing and will continue to do so in the future. The whole Pathan community though it follows its own custom in preference to Mahomedan law, continued attempts are made by Courts to introduce features borrowed from Mahomedan law. As regards will making in general and in particular in the Kamalzai tribe an owner, who has sons, can make a will subject to two known restrictions : (*a*) he cannot disinherit a minor son, and (*b*) he cannot disinherit an adult son except for disloyalty. (*Pipon, J. C.*) FIRDANS KHAN *v.* SHAH SOWAR. **69 I. C. 853.**

Alluvion and Diluvion.

———*Alluvion and Diluvion—Girote, Tahsil Khushab, Shahpur Dist.—Submersion of Malik Gabza's land—Effect after reappearance—Burden of proof.*

In the village of Girote, Tabsil Khushab, Shahpur District, there is a special custom where by a *Malik Gabza* whose land is submerged, loses all his proprietary rights in the land and on its reappearance it becomes the exclusive property of the full owners of the village; the onus of proving such custom lies on those who affirm it. (*Shah Din and Agnew, JJ.*) MAHOMMAD CHIRAG KHAN *v.* AMEERCHAND. **18 P. R. 1914 : 38 P.W.R. 1914: 23 I. C. 276: 110 P. L. R. 1914.**

———*Alluvion and Diluvion—Alipur Tahsil—Muzaffargarh District*—Wajib-ul-arz.

A plot of land in the village Bet Punnumban, Tahsil Alipur, Muzaffargarh District which belonged to some of the *ala* proprietors before submersion and of which possession was taken by them on reappearance cannot be regarded as the joint property of all the *ala* proprietors on the strength of the *wajib-ul-arz*, which relates only to land belonging to *adna* proprietors and has nothing to do with the rights of *ala Maliks inter se* in such a case. (*Shah Din and Agnew, JJ.*) KAURA *v.* MUHAMMAD BAKSH. **137 P. W. R. 1913: 19 I. C. 851: 233 P. L. R. 1913.**

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———*Alluvion and Diluvion—Occupancy tenant—Right to submerged land after reappearance thereof—Agreement contrary to custom, if valid.*

The general custom in the Punjab is that an occupancy tenant does not lose his right by reason of the land of his holding being submerged. Therefore, he has the same rights after alluviation as he had before diluviation of the holding. If a custom to the contrary is alleged it must be very strictly proved by the landlord. An entry to the contrary in a *wajib-ul-arz* of a village is inoperative because the agreement on which it was based was void for want of consideration. The parties to the agreement who were subject to the customary law in alluvion matters, were not at liberty to enter into a contract providing that they and their descendants shall not in future be subject to that rule. (*Fenton, F. C.*) JANGI *v.* DALIPA. **4 P. R. 1912 (Rev.): 15 I C. 942: 8 P.W.R. 1912 (Rev.).**

Applicability.

———*Applicability—Agricultural community—Law governing—Hindu Law—Burden of proof.*

In the case of a community like the Rai Brahmans whose occupation is agriculture the presumption is that they are governed by custom the onus lies upon the party asserting that they are governed by Hindu Law to prove the same. (*Martineau and Moti Sagar, JJ.*) BASHU RAM *v.* PIARA RAM. **4 Lah. 434 : 1924 Lah. 365.**

———*Applicability—Sodhies--Debts of ancestor—Liability for.*

Sodhies are governed by customary law in matters of alienation and in respect of the liability of sons for debts contracted by their father, (*Broadway and Harrison, JJ.*) LABH SINGH *v.* THE FIRM RUR CHAND TULSI RAM. **4 Lah. L. J. 64: 1922 Lah. 122.**

———*Applicability of—Khatris of mauza Salima Taksilmoga—Ferozepore Dt.*

The initial presumption in the case of Khatris is that they followed the Hindu Law and the onus of displacing it is on those alleging they are governed by custom. A custom without instances is inconceivable. (*Abdul Raoof and Campbell, JJ.*) SUNDAR SINGH *v.* SUNDAR SINGH. **1922 Lah. 431.**

———*Applicability—Maintenance — Illegitimate children of—Mahomedan concubine by Hindu father.*

The plaintiffs, the two Mahomedan concubines and their illegitimate sons by a deceased Hindu gentleman, brought a suit against the legitimate son of the latter for arrears of maintenance. *Held*, that plaintiffs had failed to prove any claim to maintenance by family custom. The plaintiffs could not appeal to Hindu Law, nor could the case be decided upon general considerations of equity merely because Hindu Law is silent as to the claims of illegitimate Mahomedan progeny of a Hindu. (*Chevis and Le Rossignol, JJ.*) CHARANJIT SINGH *v.* AMIR ALI KHAN. **64 I. C. 892: 2 Lah. 243.**

CUSTOM (PUNJAB)—Applicability.

———*Applicability of—Khatris —Presumption.*

The initial presumption in the case of a khatris is that they follow Hindu Law. (*Broadway, J.*) LACHMAN DAS *v.* GANGA RAM. **64 I. C. 264.**

———*Applicability—Personal law when applied.*

If in a case, a custom is not established, personal law should be applied, although the parties rely upon custom. (*Le Rossignol and Wilberforce, JJ.*) FATIMA BIBI *v.* SHAH NAWAZ. **2 Lah. 98: 60 I C. 509: 3 Lah. L. J. 152.**

———*Applicability of—High Caste Hindus—Ambala.*

High caste Hindus in Ambala are not ordinarily presumed to be governed by agricultural custom. (*Scott-Smith and Leslie Jones, JJ.*) TANI *v.* RIKHI RAM. **1 Lah. 554: 2 Lah. L. J. 481: 56 I. C. 742: 114 P. L. R. 1920.**

———*Applicability—Pathans in cities—Non-agriculturist residents of cities*

Where there are Pathans and non-agriculturists in Punjab Mahomedan Law prevails in matters of inheritance. The Pathan residents of Ludhiana city are therefore governed by Mahomedan Law and a special family custom regarding inheritance must be strictly proved. Disregard of the rights of females in the family to a large extent is not sufficient to prove general or special custom. (*Shadi Lal, C. J. and Wilberforce, J.*) NATHU *v.* MURAD BIBI. **2 Lah. L, J. 450.**

———*Applicability of—High Caste Hindus—Kapur Khatris of Jhelum District.*

High caste Hindus not depending upon agriculture for their livelihood are presumed to be governed by Hindu Law and the onus rests heavily on the party denying this to establish the existence of a custom at variance with that law. Kapur Khatris of Jhelum District are governed by Hindu Law in matters of partition. (*Shadi Lal and Broadway JJ.*) MUSSAMMAT GANESH DEVI *v.* DASHAN SINGH. **2 U. P. L. R (Lah.) 100: 56 I. C. 478 : 2 Lah L. J. 377.**

———*Applicability—Jat agriculturists.*

The presumption is that the parties being Jat agriculturists and residents of the village are governed by custom and not Hindu Law. (*Chevis, A.J.C. and Wilberforce, J.*) MAHA RAM *v.* BASU. **2 Lah. L. J. 370.**

———*Applicability—Test—Agricultural custom.*

The tests for determining whether a community has adopted agricultural custom are (*a*) whether it forms a compact agricultural community by itself, (*b*) whether their source of livelihood is wholely or almost solely agricultural, and (*c*) whether the members of the community have given up their old customs under the personal law and adopted the customs of their agricultural neighbours in matters of succession and alienation. (*Abdul Raoof and Martineau, JJ.*) HARBANS LAL *v.* ATRA. **53 I.C. 858.**

———*Applicability— Khatris of Amritsar—Joint family—Ancestral property— Son's right to partition during his father's lifetime—Onus.*

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Under the Mitakshara Law a son can enforce a partition even during his father's lifetime, 5 C. 148; 21 Cal. 111, Ref. The initial presumption no doubt is that non-agricultural high caste Hindus follow their personal law. As the strict rules of Hindu Law are not in force in the principal caste the onus of proving that among Khatris of Amritsar the son has such a right is on the son. (*Scott-Smith, Leslie Jones and Broadway, JJ.*) HARI KISHAN *v.* CHANDU LAL.
43 I C. 667 (F.B.) : 105 P. R. 1917.

———*Applicability of—Brahmins of Man, Tahsil Phillour—Jullundur District.*

In general Brahmins and especially those at Man are governed by Hindu Law in matters of alienation and not by custom. (*Shah Din, J.*) TULSIRAM *v.* NATHU. 39 I. C. 93 : 5 P. R. 1917.

———*Applicability—High Caste Hindus.*

High caste Hindus not maintaining themselves on agriculture will be first presumed to be governed by Hindu law and not by custom. (*Shah Din, J.*) SHIB DIAL *v.* MATHRA DAS.
61 P. R. 1916 : 161 P. W. R. 1916 : 35 I. C. 561 : 5 P. L. R. 1917

———*Applicability—Aroras of Sialkot.*

The Aroras of Sialkot are probably governed by Hindu Law. (*Rattigan and Shah Din, JJ.*) RUKMAN DEBI *v.* SHIB DEBI. 10 P. R. 1916: 69 P. L. R. 1917 : 32 I. C. 526 : 204 P. W. R. 1915.

———*Applicability—Aroras of Mouza Vidor—Succession.*

Aroras of Mouza Vidor are generally governed by Hindu Law, but they have adopted the rule observed by their agricultural neighbours which gives the father the ordinary estate for life enjoyed by an agricultural proprietor in the province but they have not otherwise adopted other rules. The claim for grandsons to succeed to a share in the property of their grandfather along with the father is untenable among them. (*Rattigan and Leslie Jones, JJ.*) BUDHA RAM *v.* MUHAMMAD DIN. 86 P. R. 1915 : 196 P. L. R. 1915 : 32 I. C. 315 : 165 P. W. R. 1915.

———*Applicability — High-class Hindus — Presumption—Onus.*

The high class Hindus of the Punjab are governed by their personal law and the party setting up a custom must prove that he is governed by it. (*Shah Din and Scott-Smith, JJ.*) ISHAR DEVI *v.* BIND RABAN. 5 P. R. 1915 : 26 I. C. 686 : 137 P. L. R. 1915.

———*Applicability of— Dhillon Jats— Evidence of custom.*

Unless it is proved that the Dhillon Jats follow the same custom throughout the Punjab no reliance can be placed on the evidence of witnesses from other districts. (*Shah Din and Chevis, JJ.*) GOBIND RAM *v.* SURAJ KUAR. 131 P. L. R. 1914 : 24 I. C. 470 : 114 P. W. R 1914.

———*Applicability— Adoption of custom by tribe once following personal law—Onus.*

The onus of proving that a tribe once following a personal law has adopted custom is on the party asserting it. Proof that the tribe has adopted this

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or that rule or custom followed by another tribe is not enough to hold that it must follow all other rules of that tribe, except where the other rules are so inseparably connected with the rules adopted, that the adoption of one would necessarily imply the adoption of the others. (*Johnstone and Rattigan, JJ.*) SULTAN BIBI *v.* GHULAM HAIDER KHAN. 32 P. R. 1915 : 24 I. C. 358 : 206 P. L. R. 1914.

——— *Applicability of—Onus—Burden of proof.*

A party setting up a custom can, on failure to establish the same, fall back on the general law. (*Shadi Lal, J.*) NIHALA *v.* BHUTI.
29 P. L. R. 1914 : 23 I. C. 416 : 10 P. W.R. 1914.

———*Applicability*—Khatri *traders, Jullundur District—Presumption.*

The mere fact of owning land for 6 or 7 generations by *Khatri* traders in Jullundur District does not raise any presumption that they are governed by agricultural custom, the true test being whether agriculture is followed by them as a chief means of livelihood, in which case only custom applies. The initial presumption in their case is that they follow Hindu Law. 4 I. C. 947, Dist. (*Agnew and Shadi Lal, JJ.*) HAKIKAT RAI *v.* RAM SARAN DAS. 16 P. R. 1914 : 23 I. C. 154 : 130 P. L. R. 1914.

———*Applicability—Sahgal Shaikhs of Jullundur City—Presumption if general custom is followed.*

There is no presumption that the Sahgal Shaikhs of Jullundur City, who are not an agricultural tribe, follow the general agricultural custom in matters of alienation merely because they do not follow Muhammadan Law. (*Johnstone and Chevis, JJ.*) RAHIM BAKSH *v.* BUDHAN.
74 P. R. 1914 : 92 P. L. R. 1914 : 22 I. C. 712 : 141 P. W. R. 1914.

———*Applicability—Khatris of Rahon and Nurmahal—Presumption.*

Khatris of Nurmahal and Rahon of Jullundur District settled in agricultural villages are governed by Hindu Law. The mere fact of having invested money in land does not raise a presumption that they have altered their personal law. (*Reid, C. J. and Beadon, J.*) RUKMAN *v.* KIRPA DEVI. 338 P. L. R. 1913 : 22 I. C. 134 : 209 P. W. R. 1913.

———*Applicability of—Neighbouring districts.*

A custom prevailing in a particular district cannot be presumed to obtain in a village on its borders in another district. (*Rattigan and Smith, JJ.*) NATHU *v.* FATHU. 101 P. R. 1913 : 8 P. L. R. 1914 : 21 I. C. 722 : 15 P. W. R. 1914.

———*Applicability of—Tribal and local.*

Custom is primarily tribal, though the custom of a particular tribe may, and often does, differ in different localities. (*Rattigan and Chevis, JJ.*) RULIA *v.* WARIAM SINGH. 287 P. L. R 1913 : 177 P. W. R. 1913 : 20 I. C. 454 : 94 P. R 1913.

———*Applicability — Agricultural family—Education of members—Notification—Effect.*

A family mainly agricultural does not cease to be bound by the customary law of agriculturists

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by the education and service under Government of some of its members, Notification as an agricultural tribe for the purpose of the Punjab Land Alienation Act, though not conclusive proof of the tribe being subject to the ordinary rules of customary law, cannot be left entirely out of consideration. (*Rattigan, J.*) MUKANDI *v.* BAKHTA WAR SINGH. **210 P. L. R. 1913 : 19 I. C. 215 : 219 P. W. R. 1913.**

———*Applicability—Non-agricultural Banias.*

Non-agricultural Banias residing in towns are not governed by customary law. (*Robertson, J.*) BRIJ JUDAR SINGH *v.* BANSI LAL. **88 P. R. 1912 : 218 P. L. R. 1912 : 17 I. C. 36 : 230 P. W. R. 1912**

———*Applicability—Brahmins—Presumption.*

In the case of Brahmins, the initial presumption is that they are governed by their personal law and not by custom ; the question whether they have given up the personal law and adopted custom depends upon the fact whether they are dependant mainly upon agriculture. (*Chevis, J.*) FAKIRCHAND *v.* RAMCHAND. **62 P. W. R. 1912 : 13 I. C. 709 : 128 P. L. R. 1912.**

———*Applicability—Brahmins.*

Brahmins living in towns and having kist as well as revenue-paying land are not agriculturists, and are governed by the Hindu Law as regards succession. (*Anderson and Robertson, JJ.*) RALLA RAM *v.* MALAW RAM. **12 I. C. 308 : 123 P. W. R. 1911.**

———*Applicability—Khatri Sikhs of Ambala Tahsil—Agricultural custom, if prevails among.*

Khatri Sikhs of Ambala, though practising money-lending incidentally, are governed by agricultural custom, as they depend mainly on agriculture. (*Chevis, J.*) BHAG SINGH *v.* NARAIN SINGH. **11 I. C. 406 : 87 P. W. R. 1911.**

———*Applicability of—Sayads of Sialkot City—Muhammadan Law.*

Non-agriculturist Sayads dwelling in cities follow Mubammadan Law. So, where, in defiance of Muhammadan Law, widows take the whole of their husband's immoveable estate, they do so as life-holders only subject to control by male reversioners. 18 P. R. 1906, Foll. (*Johnstone J.*) MIR HAIDAR *v.* MUHAMMAD ALI. **14 P. R. 1911 : 44 P. W. R. 1911 : 10 I. C. 855 : 88 P. L. R. 1911.**

Gift.

See also **Alienation.**

———*Gift by male proprietor to collaterals—Gilatar Jats of Jhang District.*

Among the *Gilatar Jats* of the Jhang District there is a custom by which a male proprietor is empowered to make a gift in favour of a collateral (*Broadway and Moti Sagar, JJ.*) SAMAIL *v.* AHMADA. **4 Lah. 189 : 1923 Lah. 517.**

———*Gift—Sister and collaterals—Jats of Issan mahar.*

It is open to a male sonless proprietor among the Makwal Jats of Issan mahar) Tahsil and

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District Muzaffargarh to make a gift of the property to a sister or sister's son in the presence of collaterals. (*Broadway, J.*) HAYAT *v.* ALI MAHOMED. **1924 Lah. 195.**

———*Gift—Khanadamad—Mussalman Gujars of Kharar Tahsil—Ambala Dt.*

It is not competent to a proprietor belonging to the sect of Mussalman Gujars of Kharar Tahsil in Ambala Dt. to make a gift of ancestral land in favour of a *Khanadamad* in the presence of collaterals. (*Le Rossignol, J.*) CHANAN *v.* NUR DIN. **12 P. W. R. 1922 : 1922 Lah. 121.**

———*Gift—Gift to two donees without defining shares—Tenants-in-common.*

Among the Mahomedan agriculturists of the Punjab a gift in favour of two or more persons without defining their shares creates a tenancy-in-common and not a joint tenancy among the donees without benefit of survivorship (*Abdul Qadir, J.*) MUSA *v.* GUL MUHOMED. **1924 Lah. 289.**

———*Gift in favour of daughter—Jats of Jhelum District—Validity of.*

A gift or bequest by a sonless *Jat* of the *Jhelum District* ; of ancestral property in favour of a *Khanadamad*, in the presence of collaterals, is valid by custom. (*Martineau, J.*) ALAM DIN *v.* SARDAR BIBI. **63 I. C. 675.**

———*Gift—Reversion, doctrine of.*

The doctrine of reversion does not mean that in the case of the donee's line becoming exhausted the reversioners of the original donor would be entitled to the property gifted even if third parties have acquired title to it in good faith by purchase or otherwise more than 12 years before the opening out of the succession. A gift in lieu of services rendered and a gift pure and simple stand on the same footing so far as the applicability of the doctrine is concerned. (*Leslie Jones and Moti Sagar, JJ.*) LABHU *v.* ARJAN. **63 I. C. 568.**

———*Gift—Gift to daughter—Kahuts of Adharwal.*

A kahut sonless proprietor in Taluk Chakwal, District Jhelum, can gift away his property to his daughter even in presence of brothers and other collaterals. (*Leslie Jones and Wilberforce, JJ.*) MAHOMED KAN *v.* KHESRAN. **2 Lah. 170 : 62 I. C. 841 : 3 Lah. L. J. 475.**

———*Gift—Sials of Muzaffargarh—Doctrine of Mushaa—Delivery of possession—Gift over—Validity.*

Sials of Muzaffargarh have, by custom, unlimited powers of alienation by gift in respect of ancestral property. Females are not competent to object to an alienation by a male proprietor. Where a Tribal Custom says that the consent of heirs is required it can only refer to those heirs, who according to custom are entitled to grant or withhold consent. The doctrine of Mushaa has no application to gifts in the Muzaffagarh District. Where the donor supports a gift and the person disputing it claims adversely to both the donor and the donee, the gift is not invalid for the mere

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reason that the donor has not delivered possession. A gift over is not invalid under Customary Law. (*Leslie Jones and Broadway, JJ.*) RAHIM BAKSH KHAN *v.* GHULAM NABI KHAN.
61 I. C. 395 : 3 U. P. L. R 55 (Lah.).

—— — *Gift—Completed gift—Revocation.*

Deft. an occupancy holder of a land, agreed to gift to plff., if the plff. provided the money required to acquire the proprietary rights ; plff. was put in possession under the gift but on acquiring the proprietary rights the defts. refused to be bound by the gift as plff. had not paid the money agreed to be paid. *Held*, the deft. could not revoke the gift as the gift had been acted upon, although the plff. did not pay the money. (*Broadway and Abdool Raoof, JJ.*) BARKAT BIBI *v.* KARAM BIBI. 60 I. C. 450.

———*Gift — Sonless Awan — Sister's son donee.*

A gift by a sonless Awan proprietor to his sister's son and mother's sister's son is valid. (*Broadway and Wilberforce, JJ.*) ABDULLA *v.* KHAIR DIN. 2 U. P. L. R. (Lah.) 141 : 57 I. C. 248 : 2 Lah. L. J. 546.

———*Gift—Delivery of possession necessary.*

The test of an oral gift is the giving of possession, and the placing of the rents and profits of the property at the disposal of the donee is sufficient that possession was given. (*Johnstone and Chevis, JJ.*) RAHIM BAKHSH *v.* BUDHAN. 74 P. R. 1914 : 92 P. L. R. 1914 : 22 I. C. 712 : 141 P. W. R 1914

———*Gift—Reversion to donor—Succession in the line—"Lawald," meaning of.*

The donor and his descendants are not entitled, in the absence of a special custom, on the donee's death, to oust the female descendants of the donee in the direct line, 84 P. R. 1909, Foll The daughters and sons, in other words, both the male and female descendants of a donee hold not only for their own lifeti e, but also pass the succession to their children, and it is only in the event of the total extinction of the donee's descendants that the property reverts to the donor's line. The word "*Lawald*" is often used of a man who has no sons. (*Shah Din and Chevis, JJ.*) LACHMAN *v.* BHAGWAN SAHAL. 68 P. R 1911 : 160 P. L. R. 1911 : 10 I. C 277 : 208 P. W. R. 1911.

Lambardar.

———*Lambardar—Dues—Nature and collection of—Kangra District.*

Lambardar dues are customary dues appurtaining to a Mill which a Lambardar whenever entitled ought to collect from the person to whom the Mill workers pay their dues, but not from the workers themselves. (*Kensington, J.*) SURAT SINGH *v.* SUDAMAN. 107 P. W. R 1911 : 11 I. C. 511 : 219 P. L. R. 1911.

——— *Lambardar.*

The Sangal Brahmins of *Kaithal* are entitled to ½th of the Kudi Kamini or hearth tax from the Lambardars. (*Mr. Dounie.*) BADHA RAM *v* NET RAM. 10 I. C. 299 : 4 P. W. R. 1911 (Rev).

CUSTOM (PUNJAB)—Marriage.

Landlord and Tenant.

———*Landlord and tenant— Inferior proprietorship—Alla adna maliks.*

The onus is on the plff. to establish their claim to inferior proprietorship to *adna maliks* (and to prove that the defts. are mere superior proprietors entitled to recover only 25 per cent. of the land revenue). The mere fact that the tenants had been located by the village officers is no adequate ground for depriving the defts. of their ownership when the entries with regard to that matter had all along been in their favour. (*Scott-Smith and Shadi Lal, JJ.*) AHMAD YAR *v.* MUHAMMAD KHAN. 44 I. C. 534 : 63 P. W. R. 1918.

———*Landlord and tenant—Makbuza tenure—Recognition by Civil Courts—Custom of the Punjab.*

Makbuza tenure, peculiar to the Punjab, exists as an established custom capable of enforcement though it is not definitely recognized by Civil Courts. (*Rattigan and Beadon, JJ.*) SANGHAM LAL *v.* MUNICIPAL COMMITTEE OF DELHI.
51 P. R. 1914 : 22 I. C. 824 : 101 P. L. R. 1914.

———*Landlord and tenant —Cess —*Kudhi Kamini—*Biswadar—Liability to pay exemption —Presumption—Burden of proof as to liability to pay.*

In the Rohtak District a Biswadar, whatever his caste, is not liable to pay *kudhi kamini* cess. There is no presumption of a custom by which a man is exempt from payment of this cess only when he becomes the owner of the ground on which this house stands, and if a Collector assumes such a custom his financial Commissioner will interfere on the Revision Side. The burden of proving that a Biswadar should pay cess lies upon the Lambardars. (*Maynard, F. C.*) LAHRI *v.* SHIV NATH. 13 I.C. 865 : 2 P. W. R. 1912 (Rev.).

Marriage.

———*Marriage—Chadar and Dasi.*

The legitimacy of the issue of the marriage cannot be denied by the near collaterals if they led by their action as Hindu Sikh *Jat* to believe that they would recognize his offspring by a Mahomedan woman by *Chadar* and *Dasi* marriage performed according to the Hindu rites. (*Leslie Jones and Broadway, JJ.*) LACHMAN SINGH *v.* PARTAB SINGH. 67 I. C. 937 : 3 Lah. L. J. 366.

———*Marriage—Jats— Long co-habitation—Presumption.*

Where a man and a woman have long cohabited and have been treated by their acquittances, and have treated each other as man and wife and not as master and concubine, such long co-habitation *plus* such treatment is sufficient among Jats to establish marriage and legitimacy of the offspring. (*Le Rossignol, J.*) PARTAB SINGH *v.* PARTAPI. 44 I. C. 893 : 146 P. L. R. 1917.

———*Marriage—Christian and Chamar.*

The mere fact that an Indian Christian betrothed his daughter to a *Chamar* did not warrant the interference that he renounced the Christian religion. (*Scott-Smith, J.*) ALLUNT *v.* BADAMO.
32 I. C. 897 : 46 P. W. R. 1916.

CUSTOM (PUNJAB)—Marriage.

——*Marriage—Dower—Khattars of Attock District—Ornaments—Ancestral property.*

Among the Khattars of the Attock District the wife should be allowed only the customary dower though very high amounts are usually fixed by the parties with no real intention of giving effect to it. Among the Khattars tribe ornaments given at marriage to the wife are usually regarded as part of her dower. The ancestral property of a deceased Khattadar is not liable for the payment of unsecured dower debt due to his widow. 150 I. C. 866, App. (*Kensington and Ratligan, JJ.*) GANHAR KHANUM *v.* NAWAB KHAN

19 P. R. 1914 : 304 P. L. R. 1913 : 20 I. C. 777 : 199 P. W. R. 1913.

——*Marriage—Re-marriage—Sikh Jats of Shakargarh Tahsil, Gurdaspur District—Rights of woman repudiated.*

Among the *Sikh Jats* of *Chakkotla*, Tahsil Shakargarh, Gurdaspur District, a woman expelled and repudiated by her husband is, by custom, free to re-marry. She may become the lawful wife of another without even the ceremony of *Chadarandazi*. (*Ratligan and Chevis, JJ.*) ISHAR SINGH *v.* BUDHI.

177 P. L. R. 1913 : 19 I. C. 460 : 125 P. W. R. 1913.

——*Marriage—Chadarandazi—Ceremonies.*

For a marriage by *chadarandazi* spreading of a sheet, the four corners of which are dyed, over the couple and distribution of *parshad* are the only requisites. (*Reid and Rattigan, JJ.*) DALIP KAUR *v.* FATTI. **99 P. R. 1913 : 41 P. W. R. 1913 : 18 I. C. 930 : 100 P. L. R. 1913.**

——*Marriage—Dower—Presumption.*

When it is not proved that any particular sum was fixed is the dower of a wife, the presumption is that Sharai Dower was the dower fixed for wife. (*Reid, C. J. and Johnstone, J.*) HAMIDULLAH *v.* SAHIBJI. **12 P. R 1912 : 76 P. L. R. 1912 : 14 I. C. 624 : 58 P. W. R. 1912.**

——*Marriage — Dadupathi Fakirs — Property given for maintenanoe—Forfeiture.*

Among the Dadupathi fakirs of the Ferozepore District, a chela does not, by marriage, forfeit his right to the property to which he has succeeded or which is given to him as such chela. (*Rattigan and Shah Din, JJ.*) RAM LAL *v.* RAM KISHEN.

77 P. R. 1912 : 14 I. C. 122 : 199 P. W. R. 1912.

Partition.

——*Partition—Widow's right — Jullundur District—Entry in* Rivaj i-am— *Burden of proof.*

Where the *Rivaj-i-am* of the Jullundur District is in favour of the widow's right to ask for partition of the joint estate of her husband the onus is on the person who denies it to prove that she is not entitled to partition. (*Le Rossignol and Abdul Qadir, JJ.*) SHADI *v.* MT. JEONI.

3 Lah. 236 : 1922 Lah. 362

——*Partition—Widow of deceased--Co-parcener has right to claim.*

It is within the rights of a widow of a deceased co-parcener to demand a partition of the joint holding and though she once agreed to take a certain sum as maintenance from the co-sharers of the deceased she is not debarred thereby from claiming partition of the holding. (*Abdul Raoof and Martineau, JJ.*) MUSSAMMAT THAKRI *v.* SADHU SINGH. **67 I. C. 356 : 54 P. L. R 1922.**

CUSTOM (PUNJAB)—Partition.

——*Partition—Abadi—Suit for ejectment—Failure to prove exclusive title.*

A decree for joint possession of joint property can be given where plaintiffs alleged but failed to prove exclusive title to certain fraction of the joint estate and where the defendants asserted their exclusive title but it was found that they have no such exclusive title, 29 P. R. 1918, Dist. The question whether a co-sharer occupying a portion of the joint land without denying the joint character thereof should be allowed to retain it until partition in the case of *abadi* land when that land has been reduced to a minimum area barely sufficient for the common purposes of the village was raised but was not decided. The highest Court of Appeal may allow an amendment of the plaint. (*Shadi Lal, C. J. and Leslie Jones, J.*) MAUJI ASHAQ ALI *v.* GHULAM MAHOMED.

3 Lah. L. J. 75.

——*Partition—Descendants of one branch if can succeed to estate of member of another.*

The descendants of one brother who had separated himself by partition from his other three brothers are not debarred from taking their share in the estate of another brother out of the three, who died subsequent to the partition. (*Abdul Raoof, J.*) KARTAR SINGH *v.* LAL SINGH.

11 P. L. R. 1921 : 59 I. C. 238 : 9 P. W. R. 1921.

——*Partition—Abadi--Village common land if liable to partition.*

The *abadi* of a village being joint property is liable to partition except portions occupied by houses of the villagers or used for public purposes, 150 P. R. 1890 (p. 488) and 117 P. R. 1894, Ref. 2 P. L. R. 1912, not foll. (*Martineau, J.*) MOHAMMAD KHAN *v.* FAZAL DAD.

55 I. C. 14 : 149 P. R. 1919.

——*Partition—Widow claiming a share—Burden of proof.*

When a widow claims partition, and the parties are governed by custom, the widow must prove her right to partition. (*Rattigan and Chevis, JJ.*) PARSHOTAM *v.* RAJ DEVI.

129 P. W. R. 1913 : 19 I. C. 702 : 219 P. L. R. 1913.

——*Partition— Son's right—Aroras.*

An Arora son has no right to compel partition during the lifetime of the father or to have his share separated and allotted to him. The Mitakshara doctrine of son's right by birth does not apply to the Punjab. (*Shah Din and Beadon, JJ.*)

5 P. R. 1913 : 19 I. C. 11 : 228 P. L. R. 1913.

——*Partition--Division of status.*

An Arain agriculturist of Kasur Tahsil, Lahore District, being dissatisfied with one of his sons, separated him off by giving his share of the family estate as it then stood. *Held*, that he could exclude that son from further participation in the family estate and could bequeath his remaining estate with its subsequent accretions to his other

sons. 52 P R, 1895; 17 P R. 1886, Dist. (*Kensington and Johnstone, JJ.*) KARIM BAKSH *v.* CHIRAGH DIN. **66 P. R. 1911 : 104 P. L. R. 1912: 12 I. C. 862 : 190 P. W. R. 1911.**

———*Partition—Co-sharers.*

A mortgagee acquiring part of the mortgaged property is not entitled to rely on custom for opposing a suit for redemption of a part of the property as he holds possession as mortgagee. (*Reid, C. J. and Johnstone, J.*) SHANKAR DAS *v.* GOBIND RAM. **62 P. R. 1911 : 197 P. L. R. 1911 : 11 I. C. 100 : 206 P. W. R. 1911.**

Religious Office.

———*Religious office -- Successive —Miran Hayat Khankah Muzaffargarh Tahsil--Gaddinashin's property—Balka.*

In *Miran Hayat Khankah* situate in *Pan-Garahin, Tahsil Muzaffargarh.* a *gaddinashin's* property devolves upon the *Balka* and not upon a natural son and it is open to *Gaddinashin* to appoint one of his own sons or grandsons as his *Balka.* (*Rattigan and Chevis, JJ.*) TAWAKAL SHAH *v.* JIVA SHAH. **56 P. W. R. 1913 : 18 I. C. 511 : 129 P. L. R. 1913.**

———*Religious office— Succession —Court, duty of.*

In matters of succession to Mahantship the Court should ascertain the rule obtaining in a shrine and the mere fact of the plaintiff's descent in a particular family being of no effect. 49 P. R. 1892 ; 3 P. R. 1899, Foll. (*Chevis, J.*) PREM SINGH *v.* MOHAND SINGH. **30 P. W. R. 1912 : 13 I. C. 62 : 22 P. L. R. 1912.**

———*Religious office—Mujawass—Rights of —Muhammadan Law.*

The rule governing Mujawass in the Attock District is that they are mere servants liable to dismissal, even though they have a record of long service and they have built houses in the neighbourhood of the shrine to which perhaps they might be entitled to compensation. (*Reid, C. J.*) FAKIRA *v.* MEHR SHAH. **6 P. R. 1911 : 49 P. L. R. 1911 : 9 I. C. 680 : 47 P. W. R. 1911.**

Shamilat.

———Shamilat—*Partition* —"Hasab Rasad khewat"—*Village subject to river action—Assessed to fluctuating revenue.*

In the case of a village subject to river action and assessed to a fluctuating revenue the phrase the *hasab rasad khewats* applied to *Shamilat,* means according to the area of the *khewat* at the time of the settlement, and not according to the revenue payable at the time of partition (*Shah Din and Chevis, JJ.*) SAHIB KHAN *v.* MUSAMMAT LADIANI. **69 P. R 1913 : 57 P. L. R. 1913 : 18 I. C. 187 : 86 P. W. R. 1913.**

———Shamilat—*Grazing rights.*

Non-proprietors enjoying grazing rights over *Shamilat* land can have only a reasonable area for that purpose. 119 P. R. 1889, Rel. on. (*Scott-Smith, J.*) GUR DITTA *v.* DHERU. **150 P. W. R. 1912 : 14 I. C. 562 : 160 P. L. R. 1912**

Succession—
Agnates.
Ancestral Property.
Brother.
Chandawand or Pagwand.
Cognates.
Co-Heirs.
Collaterals.
Daughter
Daughter's Son.
Escheat.
Females.
Half and Full Blood.
Husband.
Immoveable Property.
Khanadamad.
Law Governing.
Maternal Uncle.
Mother.
Sister.
Son.
Special Custom.
Widow.

Succession—Agnates.

———*Succession—Agnates——Persons of the same caste and* Got—*Inference.*

The mere fact that plaintiff is of the same caste and *Got* as the alienor does not necessarily lead to the inference, that he is descended from the same common ancestor and is his heir. (*Moti Sagar, J.*) KIRPA *v.* MT. CHINTI. 1923 Lah. 530.

———*Succession—Agnates.*

Prima facie agnates of a deceased are entitled to a share in his estate even though they live in another village and own no land in the village in which the land in dispute is situate. 143 P. R. 1888; 64 P. R. 1893 ; 73 P. R. 1896, Dist. (*Scott-Smith and Shadi Lall, JJ.*) NANDA *v.* HIRA. **47 P. R 1917 : 41 I. C. 230 : 117 P. W. R. 1917.**

———*Succession— Agnate – Paternal aunt's son.*

There is no custom in any tribe in the Punjab that the paternal aunt's son has *prima facie* a better right of succession than a near agnate even where the property is self-acquired. (*Johnstone, C. J.*) ALLAH DIN *v.* SALAM DIN. **96 P. R. 1915 : 31 I. C. 497 : 169 P. W. R. 1915.**

———*Succession—Agnates —Right of, when daughter's descendants die out.*

Where ancestral land passes temporarily to the daughter it reverts to the agnatic heirs in the absence of her descendants die out. (*Kensington and Johnstone, JJ.*) ISHAR *v.* DALIP SINGH. **21b P. W. R. 1912 : 18 I. C. 218 : 111 P. L. R. 1913.**

———*Succession—Agnate—Cognate—Proprietary body.*

The mere fact that two persons belong to the same *got* or sub-caste is insufficient to prove that they are related to each other as agnates. In the absence of all agnates of a propositus, any cognate can claim to succeed to his property. The rights of the proprietary body cannot as a rule be regarded as superior to the claim of persons who are related by blood to the last male owner. 141 P. R. 1893 Dist. ; 63 P. R. 1908 ; 126 P. R. 1908,

CUSTOM (PUNJAB)—Succession—Agnates.

Rel. Land gifted by the founders of the village would not revert to the village proprietary body or the heirs of the original donor unless there are left no descendants, male or female, of the donee. 84 P.R. 1909 ; 68 P.R. 1911, Rel. (*Chevis and Kensington, JJ.*) JHINDU *v.* GOPALA.
135 P. W. R. 1912 : 15 I. C. 266 : 235 P.L.R. 1912.

———*Succession — Agnates — Daughters and daughter's sons v. near agnate—Brahmins of Gurdaspur.*

No special custom among Brahmins of the town of Gurdaspur exists whereby near agnates not joint with the deceased, exclude daughters and daughter's sons from succession. (*Robertson, J.*) TALOKNATH *v.* JAGANATH. 240 P. L. R. 1911: 12 I. C. 51 : 117 P. W. R. 1911.

Succession—Ancestral Property.

———*Succession— Ancestral property — Presumption—Equal shares.*

Where two branches of a family were found holding equal areas of property, while some were still joint, the presumption is that the properties was originally ancestral. This is also probablised by the fact that a pedigree table mentions a common ancestor to whom the properties must have belonged. (*Shadi Lal, C. J. and Fforde, J.*) MT. MARYAM BIBI *v.* GHULAM MAHOMED.
5 L. L. J. 446 : 1924 Lah. 175

———*Succession—Ancestral property.*

In 1865, the proprietors stated at the time of Settlement that the village had been founded by their common ancestor several generations before and since then it has never been abandoned or deserted. *Held*, that the land acquired by a proprietor by descent was ancestral in his hands. (*Broadway and Wilberforce, JJ.*) UMRA *v.* KHOTU.
62 I. C. 984.

———*Succession—Ancestral property—Liability of successor for debts of last male holder—Onus of proof.*

The general law is that ancestral landed property left by a deceased male proprietor governed by custom is not liable in the hands of the next holder for a debt, unless the debt has been expressly charged on the land. But it is always open to a litigant to plead a special custom and prove that the person in possession of the ancestral property, which it is sought to attach, is the legal representative of the deceased debtor and that the property is deemed to be the property of the said debtor. The onus of proving special custom is on the party alleging it, at any rate in the case of the parties who have not complete control over their ancestral holding. (*Ratligan, C. J. Chevis, Scott-Smith, Le Rossignol and Broadway, JJ.*) MIKER *v.* CHAJU RAM. 17 P. R. 1919 : 49 I. C. 281 : 6 P. W. R. 1919 (F. B).

———*Succession—Ancestral property—Adopted son v. Collaterals—Ancestral and absolute property.*

Where an adopted son dies issueless, the property over which his adoptive father had absolute power of dispo ition goes to the heirs of the adopted son, while the property over which the adoptive father had a qualified or limited power of disposition, *i.e.*, his ancestral property goes to the collaterals of his adoptive father. His own self-acquisition goes to his own heirs. (*Reid, C. J. and Beadon, J.*) JOT RAM *v.* HARDAWARI.
27 P. R. 1914 : 23 I. C. 527 : 22 P. L. R. 1914.

CUSTOM (PUNJAB)—Succession—Chandawand or Pagwand.

Succession—Brother.

———*Succession—Brother— Widow — Arains of Lahore.*

Among the Arains of Lahore brothers and sons are not heirs *ab intestato* in the presence of the widow and, the daughter's sons. (*Rattigan and Shadi Lal, JJ.*) MIRAN BAKSH *v.* MEHR BIBI.
41 P. L R. 1916 : 31 I. C. 693 : 6 P. W. R. 1916.

Succession—Chandawand or Pagwand.

———*Succession—Chandawand and Pagwand.*

In matter of inheritance the Gakhars of Bara Gowah village follow the rule of *Chandawand*. (*Scott Smith, J.*) SAKHI MAHOMED KHAN *v.* MAIZ ALI KHAN, 1923 Lah. 604.

———*Succession — Chandawand and Pagwand—Whole blood and half blood.*

In cases of collateral succession arising under the customary law of the Punjab, where the dispute is as regards the property of a common ancestor of the deceased and of the claimants, if the *Chunduwand* rule of distribution prevails the whole blood excludes the half blood ; if the *Pagwand* rule prevails both succeed together. (*Abdul Raoof, J.*) RIZK RAM *v.* SANWAT. 1923 Lah. 65.

———*Succession—Chandawand and Pagwand —Per capita or per stirpes—Jats of Mauza Gurdaspur.*

The normal custom in the Punjab undoubtedly prescribes a division according to the *Pagwand* rule, and the onus lies heavily upon the person who relies upon the *Chandawand* rule *i.e.*, division *per stirpes*. Not only is there a general presumption in favour of the division of property *per capita* but there are judgments relating to the Jats of Gurdaspur Tahsil in which the rule *Chandawand* was held not to be proved and the rule of *Pagwand* was followed in the matter of inheritance. *Held* also defendant failed to prove a family custom or to discharge the onus. (*Shadi Lal, C.J. and Abdul Qadir, J.*) SHANKAR *v.* BAHADUR.
5 L. L. J. 212 : 1923 Lah. 37.

———*Succession—Chandawand and Pagwand —Swathis.*

Among Swathis, the whole blood excludes the half blood. It is not always the case that under the *Pagwand* rule whole blood should succeed along with half blood relations. Under the *Chandawand* rule, the whole blood excludes the half blood. (*Pipon, J. C.*) GUL AHMAD *v.* GHULAM KABANI KHAN.
73 I. C. 675.

———*Succession—Chandawand or Pagwand—Gagianis of Peshawar.*

In the case of parties following the *Pagwand* rule of succession, if a party sets up that whole blood excludes half blood he must prove it. Among the *Gagianis* in Peshawar such a rule of

CUSTOM (PUNJAB)—Succession—Chandawand or Pagwand.

exclusion exists. General dicta on nature of custom, and duty of Courts laid down. (*Pipon, J. C.*) SAFDAR KHAN *v.* MUHAMMAD ZAMAN.
73 I.C. 577.

———*Succession- Chandawand or Pagwand—Jaswal—Rajputs—Test.*

In deciding whether Jaswal Rajputs observe the *Pagwand* or *Chandawand* rule of succession, the safest guide is the rule which is proved to have been observed in the family of the parties. (*Le Rossignol, J.*) NANAK CHAND *v* MUNSHI RAM.
1922 Lah. 492.

———*Succession— Chandawand or Pagwand Mekans of Kot Bhai Khan, Shahpur District —Groups—Presumption — Collateral succession —Whole blood and half blood.*

Among Mekans of Kot Bhai Khan in the Tahsil and District of Shahpur, the rule of distribution is the *Pagwand* one and there being no provision in the *Wajib-ul-arz* for any specific rule in the case of collateral succession the presumption would be that they would succeed together on a footing of equality When subsequent to a distribution according to the *Pagwand* rule the whole blood brothers, form into separate groups becoming joint in food and cultivation among themselves and entirely separate from their half brothers, the whole blood excludes the half blood in subsequent collateral successions. (*Broadway and Martineau, JJ.*) AHMAD KHAN *v.* NABI BAKSH.
2 Lah. L. J. 489 : 28 P. W. R. 1920 :
55 I. C. 171 : 117 P. L. R. 1920.

——*Succession— Chandawand or Pagwand Gondals of Tahsil Bhera and Sarghoda.*

The plaintiffs on whom the onus lay had failed to prove that Gondals of Tahsils Bhera and Sarghoda follo v the rule of *Chandawand.* (*Scott-Smith and Wilberforce, JJ.*) JAHANA *v.* WALI.
53 I. C. 595 : 98 P. R. 1919.

———*Succession--Chandawand or Pagwand—Custom of Sardan—Awards of Mouras Chakra wala and Thamevali, Mianwali District--Burden of proof.*

A special custom of *sardaru* obtains in the family of Awans of Mouzas Chakrawala and Thamevali, Mianwali District, and among them the rule of succession from father to son is governed by the *Pagwand* rule and in the case of collateral succession, the whole blood and half blood succeed together. The onus of proving any other custom *e.g.,* Yakmadri lies on the party alleging it (*Scott-Smith and Broadway, JJ.*) GHULAM MUHAMMAD KHAN *v.* NUR KHAN. 65 P. R. 1917:
41 I. C. 897 : 105 P. W. R. 1917.

———*Succession—Chandawand— Rindwanas —Shahpur District.*

A custom of *Chandawand* in the Shahpur District is exceedingly rare and there is no trace of such a custom amongst *Rindwanas* who form a sub-division of the *Mekan* tribe. (*Scott-Smith and Leslie Jones, JJ.*) SULTAN *v* GHULLA.
68 P. W. R. 1917 : 41 I. C. 283 : 139 P. L.R. 1917.

CUSTOM (PUNJAB)—Succession—Cognates.

——*Succession—Chandawand or Pagwand.*

Jats of *Kakrola* village follow *Chandawand* rule of succession. (*Johnstone and Le Rossignol, JJ.*) SHER SINGH *v.* SALIG. 72 P. R. 1915:
31 I. C. 241: 149 P. W. R. 1915.

———*Succession—Chandawand and Pagwand —Malkotra Rajputs.*

In the Punjab plains the custom of *Chandawand* is slowly giving place to *Pagwand*; but it is not so in the hilly tracts of the province ; Among the *Malkotra* Rajputs of the village *Panjawar* of Tahsil Una in the Hoshiarpur District, the rule of succession is *Chandawand* and not *Pagwand.* (*Kensington, C. J. and Rattigan, J.*) GOPAL SINGH *v.* PRABH DIYAL SINGH.
50 P. R. 1915: 99 P. W. R. 1915:
29 I. C. 650 : 6 P. L. R 1916.

——*Succession—Chandawand or Pagwand—Rajwand and Chawinda and Dagranwali villages, Sialkot District.*

Ordinarily the presumption is in favour of *Pagwand* rule of succession, but the *Chandawand* rule was held to apply because the plaintiff contended that the latter rule applied to lands in Chawinda village, while admittedly it was the rule in Dagranwali, the deceased possessing lands in both villages and mutation being effected without contest. (*Chevis and Shadi Lal, JJ.*) HAKIM *v.* GHASITA. 28 I. C. 20: 26 P. L. R. 1915.

———*Succession—Chandawand.*

The *Chandawand* rule of succession does not prevail in the village of Bala in Karnal District. (*Robertson and Chevis, JJ.*) TIRKHA *v.* SINGH RAM.
22 P. L R. 1913: 18 I. C. 868:
82 P. W. R. 1913.

——*Succession — Chandawand — Salahriya Rajputs of Parel.*

Salabriya Rajputs of Parel, Tahsil Zafarwal, Dist., Sialkot, follow the *Chandawand* rule of succession and the practice in the tribe is division *per stirpes* and not *per capita.* (*Johnstone, J.*) SHAHB-UD-DIN *v.* MT. BARKATI. 27 P. R. 1912:
104 P. W. R. 1912: 14 I. C. 779: 139 P. L R. 1912.

———*Succession—Chandawand or Pagwand—Sindhu Musalman Jats of Tahsil Gurdaspur.*

Sindhu Musalman Jats of Gurdaspur Tahsil are governed by the *Pagwand* and not by *Chandawand* rule of succession. (*Shah Din, J.*) IDA *v.* RAHIM BAKSH 58 P. R. 1911: 45 P. L. R. 1912:
12 I. C. 857: 202 P. W. R. 1911.

Succession—Cognates.

——*Succession — Cognates — Childless proprietor—Construction of* Riwaj-i-am.

The general principle of the Customary Law of the Punjab is that in the absence of agnates of a childless proprietor, any cognate, however distant is entitled to succeed to his property in preference to the proprietary body of the village. The specific mention of sister and sister's issue in the *Riwaji-am* merely illustrates the principle that cognates have a right to succeed before the general body of proprietors. (*Shah Din, J.*) KAMAN *v.* KARIM BAKSH. 39 I. C. 113: 28 P. R 1917.

CUSTOM (PUNJAB)—Succession—Co-heirs.

——*Succession—Cognates—Mahomedan Jats of Lahore District.*

Among the agricultural tribe in the Punjab the last male holder's father's sister's son has generally no right of inheritance. (*Rattigan, J.*) ALI MAHAMMAD *v.* SURAJ-UD-DIN. **13 P. R. 1912: 162 P. L. R. 1911: 10 I. C. 236: 199 P. W. R. 1911.**

Succession—Co-heirs.

——*Succession— Co-heirs —Suit by some to recover whole estate not maintainable.*

Where some of the heirs of a deceased person sue to get possession of his property they are restricted to their own individual shares if they can be ascertained. They cannot recover the whole of his property even if the remaining heirs have declined to make any claim. (*Reid and Kensington, JJ.*) BUTA SINGH *v.* LAL SINGH. **5 P. W. R. 1915: 27 I. C. 565: 37 P. L R. 1915.**

Succession—Collaterals.

——*Succession — Collaterals v. daughter—Rajputs of Rohtak District—Self acquisitions.*

Though under the customary law of the Punjab a daughter succeeds to the self-acquisitions of the father in preference to the collaterals, among the Rajputs of Rohtak District the reverse is the case. The onus is on the collaterals to show the general custom did not apply, but the entries in the *Riwaj-i am* shifted the burden of proof. (*Broadway and Abdul Qadir, JJ.*) NANDOO SINGH *v.* BALJIT SINGH. **5 L. L. J. 203: 1924 Lah. 93.**

——*Succession— Collaterals—Agnates of a land owner.*

Prima facie agnates of a deceased person are entitled to a share in his estate even though they live in another village and own no land in the village in which the land in dispute is situated. 47 P. R. 1917, Foll. An entry in the *Riwaj-i-am* is a strong piece of evidence in support of the custom mentioned therein. (*Scott-Smith and Fforde, JJ.*) MT. SANT KAUR *v.* SHER SINGH. **4 Lah. 392: 1923 Lah. 476.**

——*Succession — Collaterals if exclude daughters.*

Among the agricultural tribes of the Sialkot Dt. the collaterals of a sonless proprietor do not exclude daughters from succession in the case of self-acquired property. (*Scott Smith and Zafar Ali, JJ.*) BUDHA *v.* MT. FATIMA BIBI. **4 Lah. 99: 1923 Lah. 401.**

——*Succession—Collaterals—Reversion—Descendants of donee alive.*

There is no reversion to the collaterals of the donor so long as the descendants of the donee whether male or female, are existing. 100 P. R. 1917 and 82 P.R 1918, Foll. (*Shadi Lal, C. J. and Brasher, J.*) MT. CHHOTO *v.* MT. SONA DEVI. **1923 Lah. 11 (2).**

——*Succession—Collaterals—Daughter and daughter's son— Beri sub-caste of Khatris—Hindu Law.*

Hindu Law is applicable to *Khatri Beris*, according to which the daughter and daughter's son excludes collaterals, *Held*, plaintiff's collaterals failed to prove that there was a custom among

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Beris (and specially the particular family) that the collaterals excluded daughter or her son. A single instance, however valuable, is inconclusive. (*Broadway and Harrison, JJ.*) BAL MUKAND *v.* MT. KISHEN DEVI. **1923 Lah. 6.**

——*Succession— Collaterals— Sister—Competition—Preference—Khots of Pind Dadan Khan Jhelum District.*

As between collaterals of the eighth degree and sisters the burden of proving that the sister has a preferential right is on her especially when the entry in the *Riwaj-i-am* is against their contention. So held in a case of succession to non-ancestral property among the Khots of Tahsil Pind Dadan Khan, Jhelum District. (*Abdul Raoof and Abdul Qader, JJ.*) HAYAT *v.* AHMUN. **1924 Lah. 321.**

——*Succession—Collaterals—Abadi.*

A first cousin twice removed is a near collateral and succeeds to an abadi in preference to the landlords, 116 P R. 1918, 106 P. R. 1919 Rel. (*Shadi Lal, C. J. and Campbell, J.*) HARJAS *v.* HARKE. **46 P. L R. 1922: 1922 Lah. 366.**

——*Succession—Collaterals—Rights of.*

Among the Jats of the Punjab who have migrated to Meerut, reversioners irrespective of degree, succeed equally to the last land-holder, and each branch takes its share *per stirpes*. (*Rafique and Lindsay, JJ.*) DHARAM SINGH *v.* HIRA. **44 All. 390: 20 A. L. J. 221: L. R. 3 A. 148; 1922 All. 141.**

——*Succession--Collaterals of fourth degree —Onus.*

Where the question is one of succession to a non-proprietor, remote collaterals are excluded and a collateral in the fourth degree has the onus upon him to prove that by custom he is entitled to succeed. (*Abdul Raoof and Martineau, JJ.*) SHER JANG *v.* MUNSHI RAM. **3 Lah. 33 : 22 P. W.R. 1922 : 1922 Lah. 115.**

——*Succession — Collaterals Janjuhas of Shadia Tahsil and District Meanwali.*

In case of collateral succession among Janjuhas of Shadia Tahsil and District Meanwali half blood is wholly excluded by the full blood. (*Le Rossignol and Qadir, JJ.*) KHUDAYAR *v.* AMIR. **1922 Lah 169.**

——*Succession—Collaterals—Exclusion—Collateral's daughter—Evidence of custom—Riwaj-i-am—Entries in—Value of—Meaning of extent of.*

The onus of proving that by custom among Gaur Brahmans of Mauza Chhapri in the Thaneswar Tahsil of the Kamal District collaterals in the ninth degree excluded daughters in succession to non-ancestral property rests on those alleging the custom. Entries in the *Riwaj-i-am* opposed to all principles of customary law and unsupported by instances do not operate to shift the onus of proof. 5 P. R. 1908 : 86 P. R. 1908 ; 84 P. R. 1917 ; 13 P. R 1917 Rel. The existence of entries in the *riwaj-i-am* was not a sufficient reason for depriving successful party of his cost. Near male collateral means a

collateral not more remote than the 5th or 6th degree, (*Scott Smith and Abdul Qadir, JJ.*) MANOHAR *v.* NANHI. 66 I. C. 399: 2 L. 366.

———*Succession—Collaterals of seventh degree —Daughters—Ancestral property—Preference—Onus.*

The burden of proof as to whether remote collaterals, such as of the sixth degree, exclude daughters, rests on the party who asserts its existence. 86 P. R. 1908. Foll. *Held*, on the evidence that among Bain Jats of Khera Garshankar Tashil, District Hoshiarpur, daughters can succeed to the ancestral property in the absence of collaterals of the fifth degree. Case law discussed.(*Wilberforce and Abdul Qadir, JJ.*) MUSSAMMAT MANO *v.* BASANT SINGH. 64 I. C. 243 : 3 Lah. L. J. 547.

———*Succession—Collaterals—Female cousin —Mahomedan Rajputs of Hindu Nawanshahr Tahsil, Jullundur District.*

Among Mahomedan Rajputs of Hindu Nawanshahr Tahsil, Jullundur District, a female cousin of the deceased male proprietor has no right of inheritance as against collaterals in the 7th degree. (*Shadi Lal and Wilberforce, JJ.*) SOHNE KHAN *v.* MINAN. 55 I. C. 26 : 2 Lah. L. J. 233.

———*Succession—Collateral—Abadi.*

In the absence of lineal descendant of an occupancy raiyat, a near collateral is preferred to the proprietor, in the case of succession to an abadi house. (*Scott-Smith, J.*) ATA ALI KHAN *v.* KELA. 50 I. C. 11 : 106 P. R. 1919.

———*Succession—Collaterals—House in Village abadi.*

According to ordinary village custom collaterals of a deceased *kamin* can retain possession of a house in the village abadi occupied by the deceased. (*Shah Din, J.*) BELLI RAM *v.* UMAR BAKHSH. 116 P. R. 1918 : 48 I. C. 723 : 25 P. L. R. 1919.

———*Succession—Collaterals—Onus of proof.*

Where on the death of an occupancy tenant his collaterals claim to succeed to the tenancy the onus lies on them to establish affirmatively that the common ancestor occupied the land. In such a case conjecture cannot be accepted as a substitute for proof. (*Shadi Lal, J.*) BHAGWAN DAS *v.* SHAMSHER SINGH. 33 P. L. R. 1918 : 44 I. C. 433 : 55 P. W. R. 1918.

———*Succession—Collaterals—Step-sister.*

The collaterals of the deceased are entitled to succeed to his properties in preference to the step-sister. (*Shah Din, C. J. and Le Rossignol, J.*) SAFA CHAND *v.* LAJWANTI. 42 I. C. 103 : 150 P. W. R. 1917.

———*Succession—Collaterals—Gift to daughter.*

On a gift of ancestral property to the daughter the property does not revert to the collaterals of the donor. 4 P. R. 1916 Dist., (*Shadi Lal and Le Rossignol, JJ.*) ATA AHAMED *v.* NIAZ ALI. 40 I. C. 72.

———*Succession — Collaterals — Jains of Buria, Tahsil Jagadhri, District Ambala.*

Held, that the onus lay on a collateral of the 6th degree to prove that by custom among Jains of Buria he would succeed to self-acquired property in preference to a daughter. (*Chevis and Scott-Smith, JJ.*) BHAGWAN DAS *v.* MUSSAMMAT BALWANTI. 74 P. R. 1916 : 173 P. W. R. 1916 : 36 I. C. 84 : 30 P. L. R. 1917.

———*Succession—Collaterals—Non-proprietor —Village abadi.*

Possession of a house in abadi owned by a non-proprietor passes after his death to his near collaterals in the absence of a special custom to the contrary. In this connection, occupation of the house by a common ancestor need not be proved. (*Leslie Jones, J.*) KALA *v.* HASHAN. 63 P. W. R. 1916 : 35 I. C. 291 : 127 P. L. R. 1916.

———*Succession—Collaterals —Relationship, degree of—How counted.*

In the absence of special custom to the contrary the ordinary way of counting the degree of relationship is that laid down in *Ladha* v. *Musammat Daulati* 126 P. R. 1890. (*Kensington and Beadon, JJ.*) MT. SAHIBAN *v.* MUHAMMAD. 72 P. R. 1913 : 294 P. L. R. 1913 : 20 I. C. 522 : 214 P. W. R. 1913.

———*Succession — Collaterals — Brother's daughter—Jats,*

Among Jats of Mangat Got Jatana a brother's daughter is not an heir of her paternal uncle but collaterals in the 6th degree are entitled to succeed. (*Reid, C. J. and Chevis, J.*) MUSAMMAT PARTAPO *v.* ASARAM. 96 P. R. 1913 : 208 P. L. R. 1913 : 19 I. C. 211 : 221 P. W. R. 1913.

———*Succession— Collaterals—Ancestral property.*

If the property in the possession of an adopted son is not ancestral, the collaterals of the adoptive father cannot succeed even though the adoption is invalid by custom. 63 P. R. 1912. (*Shah Din and Beadon, JJ.*) ALA SINGH *v.* CHARK SINGH. 253 P. W. R. 1912 : 17 I. C. 392 : 257 P. L. R. 1912.

———*Succession—Collaterals—Ala and Adna Maliks.*

If Adna Malik dies sonless, the holding goes to Ala Malik, *i.e.*, originally a sole proprietor of a village who settled the village by importing outsiders, and the holding does not go to an outsider collateral of the Adna Malik, in the village Tikka Arlu Gurmukk, Tahsil Hamipur, District Kangra. (*Chatterjea and Johnstone, JJ.*) HIRA *v.* CHANNU. 99 P. W. R. 1912 : 16 I. C. 116 : 129 P. L. R. 1912.

———*Succession—Collaterals—Fifth degree—Paternal aunt—Preference.*

Though a collateral does not reside or own land in the village where the proprietor owned property, he is not disentitled to succeed. A collateral in the fifth degree is a preferential heir to a sonless proprietor than the paternal aunt in the absence of a custom, the burden of proving which is on those who assert it. 64 P. R. 1893,

CUSTOM (PUNJAB)—Succession—Collaterals.

Dist.; 110 P. R. 1906 : 8 P. R. 1910. Rel. on; 103 P. R. 1900, Diss (*Shah Din and Chevis, JJ.*) SALAMAT ALI *v.* HAKIM ALI.
143 P. L. R. 1912 : 14 I C. 47 : 196 P. W. R. 1912.

——*Succession—Collaterals—When excluded—Descendants of last founder and village proprietors—Rights of.*

A collateral cannot be excluded from inheritance merely because he owns lands in another village or because he claims lands which had not been held by his ancestor. 110 P. R. 1906 ; 41 P. R. 1909 ; 134 P. R. 1907, Foll. In the presence of a collateral the descendants of the last founder and the proprietors of the village have no right of succession. (*Johnstone and Chevis, JJ.*) HARNAMON *v.* SANTA SINGH.
98 P. W. R. 1912 : 13 I. C. 711 : 122 P. L. R. 1912.

——*Succession—Collaterals—Appointed heir preferred to collaterals.*

Among the Hindu Jats of Mangot of Mawja Nangal, an appointed heir and his lineal descendants succeed to the property of a natural father in preference to collaterals. (*Robertson and Rattigan, JJ.*) DASAUNDHA *v.* CHANDA SINGH
45 P. R. 1912 : 45 P. W. R. 1912 : 13 I. C. 421 : 71 P. L. R. 1912.

——*Succession—Collaterals—Degree of relationship — Method of calculation—Mianwali Tahsil.*

Mianwali Tahsil must be presumed to be governed by the general Punjab rule of calculating the degree of relationship from the deceased to the common ancestor of the claimant, the deceased and the common ancestor each being counted as one. The rule prevailing in Bannu Tahsil cannot be applied to the Mianwali Tahsil. 74 P. R. 1906 ; 126 P. R. 1890; 106 P.R. 1892 foll. (*Robertson, J.*) MUHAMMAD *v.* BAKKO.
19 P. R. 1912 : 17 P L. R. 1912 : 13 I. C. 27 : 39 P. W. R. 1912.

——*Succession—Collaterals — Proprietor — Abadi.*

On the death of a non-proprietor in possession of a house in the village Abadi, his collaterals are preferred to the proprietor. (*Johnstone, J.*) KELU *v.* PIR BAKSH. **33 P. L. R. 1911 : 9 I. C, 735 : 34 P. W. R, 1911.**

Succession—Daughter.

Aroras of Multan.
Awans of Rawalpindi.
Bhuttu Tarkhans of Multan.
Collaterals.
Debts of Father.
Exclusion of.
First Cousin.
Gonewadarajput.
Married and Unmarried Daughter.
Nature of Estate.
Nephew.
Paternal Uncle.
Pathans of Chach.
Pattidars.
Rights of.
Sister.
Uncle.

CUSTOM (PUNJAB)—Succession—Daughter—Collaterals.

Succession—Daughter—Aroras of Multan.

——*Succession—Daughter—Aroras of Multan—Burden of proof.*

Aroras of Multan city are governed by Hindu Law in matters of succession and a daughter succeeds among them to deceased father. A person alleging a custom to the contrary must prove it. (*Chevis and Shadi Lal, JJ.*) MATAN DAS *v.* MORNI BAI. **33 P. R. 1915 : 37 P. W. R. 1915 : 26 I. C. 450 : 102 P. L. R. 1915.**

Succession—Daughter—Awans of Rawalpindi.

——*Succession—Daughter's son—Awans of Rawalpindi District.*

Among Awans of District Rawalpindi, a daughter's son succeeds to self-acquired property in preference to collaterals who must prove to the contrary to establish their right. (*Shadi Lal, J.*) FATEH DIN *v.* MARDAN ALI. **57 I. C. 78.**

Succession—Daughter--Bhuttu Tarkhans of Multan.

——*Succession — Daughters—Bhuttu Tarkhans of Multan—Muhammadan Law*

There is no custom by which the daughters are excluded from succession among Bhuttu Tarkhans of Multan who are governed by Muhammadan Law of Succession. (*Shadi Lal and Jones, JJ.*) MURADKHATUM *v.* MAHOMED BAKSH.
84 P. R. 1916 : 33 I. C. 742 : 85 P. W. R. 1916.

Succession—Daughter—Collaterals.

——*Succession—Daughter—Collaterals.*

A daughter excludes collaterals in the succession to self-acquired property according to the customary law of the Punjab unless a custom is proved as opposed to the customary law of the Province. (*Broadway and Abdul Qadir, JJ.*) GURDIT SINGH *v.* MT. ISHAR KAUR.
3 Lah. 257 : 1922 Lah. 392.

——*Succession—Daughter — Collaterals of 6th degree exclude daughters.*

Collaterals of sixth degree exclude daughters from succession among the Hindu Jats of Ludhiana Dt In the case of collaterals remoter than the fifth degree the initial burden of proof is on them to show that they exclude the daughter. The more remote the collateral heavier is the onus. 86 P. R. 1908, 41 P. R. 1914 Rel. An entry in the *riwaj-i-am* that collaterals of the sixth degree succeed in preference to daughters shifts the onus. 45 P. R. 1917 Foll. (*Scott Smith and Broadway, JJ.*) MT. DHAN KAUR *v.* SUNDER.
3 Lah, 184 : 1922 Lah. 387.

——*Succession—Daughters—Collaterals.*

According to the general custom in Punjab daughters are usually preferred to collaterals so distantly related as the 6th degree even in regard to ancestral property ; while in the case of self-acquired property daughters usually exclude even nearer collaterals. It is quite opposed to all the principles of customary law that collaterals so distantly related as the 9th degree should exclude daughters in the case of property which is non-ancestral and therefore the mere entry in the *riwaj-i am* unsupported by instances that daughters can in no circumstances inherit their father's

CUSTOM (PUNJAB) — Succession — Daughter — Collaterals.

property, is of very little weight and it is quite insufficient to shift the onus on to the daughters. (*Scott-Smith and Abdul Qadir, JJ.*) MANOHAR *v.* NANHI. **66 I. C. 399 : 2 L. 366.**

——*Succession—Daughter—Collaterals--Self-acquired property—Jats of Lahore District.*

Among *Jats* of the Lahore District a daughter succeeds to the non-ancestral property of her father in preference to collaterals of the sixth degree. (*Chevis and Scott Smith, JJ.*) BUTA SINGH *v.* SEWAN. **3 Lah. L. J. 453 : 61 I C. 388 : 3 U. P. L R. (Lah.) 51.**

——*Succession—Daughter—Collateral in 7th degree—Birk Jats of Phillore Tahsil.*

Collaterals in the 7th degree must prove a custom among Birk Jats of the Phillore Tahsil excluding the daughters from succession to ancestral property, where the *riwaj-i-am* was against them. (*Chevis and Dundas, JJ.*) BHOLA SINGH *v.* BABU. **1 Lah. 464 : 59 I.C. 503 : 2 L. L. J. 431.**

——*Succession—Daughter—Collaterals--Self-acquired property.*

Daughters are generally preferred to collaterals in regard to the acquired property of their father, and no distinction is made between property acquired by the father and property acquired by his ascendants. By acquired property is meant property not necessarily acquired by the father himself; but property acquired by him or any of his ancestors short of the common ancestor. The agnatic theory reposes on the principle that collaterals descended from the common ancestor derive title from that common ancestor: but when the common ancestor had no interest in the property in dispute his descendants derive from him no more right than he had, *i, e.*, they acquire no right. Collaterals derive no right to the property from the common ancestor and in accordance with custom are not to be preferred to a daughter of the last male owner. Plaintiff was entitled to the whole property of her father, inasmuch as her sister, though arrayed as a defendant did not defend the suit. (*Chevis, C. J. and Le Rossignol, J.*) JAINAN *v.* NUR MUHAMMAD. **1 Lah.365 : 58 I. C. 793 : 2 Lah. L. J. 265.**

——*Succession—Daughter—Collaterals—Entries in* Wajib-ul-arz *and* Riwaj-i-am—*Self-acquired property.*

In the case of self-acquired property the general custom is, that daughters are preferred to collaterals. The portions of a *wajib-ul-arz* that refer to custom are not provisions intended to ensure for the duration of the settlements only, but are statements that a certain custom exists. (*Broadway and Petman, JJ.*) GULAM MUHAMMAD *v.* GUAHAR BIBI. **4 Lah. 284 : 10 P. L. R. 1920 : 54 I. C. 419 : 18 P. W. R 1920.**

——*Succession—Daughter—Collaterals of 5th degree—Jats of Jullundur District.*

Among Jats of the Jullundur District a daughter cannot succeed as against collaterals of the 5th degree. The widow of the last male owner cannot make a gift of the ancestral property to her

CUSTOM (PUNJAB) —Succession — Daughter — Collaterals.

daughter in the presence of such collaterals. (*Shadi Lal and Martineau, JJ.*) MUSAMMAT ISHRI *v.* BHOLA SINGH. **52 I. C. 152 : 1 Lah. L. J. 148.**

——*Succession — Daughter — Collaterals—Dhoni Brahmins.*

Among Dhoni Brahmins of Kamalia daughters and daughter's sons succeed in preference to collaterals to self-acquired property. In the absence of a clear statement to the contrary an entry in a *riwaj-i-am* or *wajib-ul-arz* must be taken to refer merely to ancestral property. (*Shadi Lal and Wilberforce, JJ.*) BUDHI PARKASH *v.* CHANDOR BHAN. **48 I. C. 813 : 123 P. R. 1918.**

——*Succession—Daughter—Collaterals—Jats in Lahore District.*

There is no custom among the Jats of *Mauza* Galwujza in the Lahore District preferring collaterals to daughters in succession to non-ancestral property. (*Shadi Lal and Broadway, JJ.*) MANGAL SINGH *v.* BUDHO. **46 I. C. 798 : 4 P. R. 1918.**

——*Succession— Daughters — Collaterals—Self-acquired property--Goriwal Jats of Ludhiana District.*

Among the Goriwal Jats of the Ludhiana District there is a special custom, contrary to general custom, whereby a daughter is excluded by collaterals of her father from her succession to his self-acquired property. (*Scott-Smith, J.*) HAZARA SINGH *v.* BISHEN SINGH. **71 P.L R. 1918: 44 I. C. 853 : 72 P. W. R. 1918.**

——*Succession — Daughter —Collaterals—Onus.*

The onus of proving a special custom that the daughter is excluded from succession to the self-acquired property of the father, is on the collaterals. (*Chevis and Leslie Jones, JJ.*) WAZIRA *v.* MARYAN. **84 P. R. 1917 : 151 P.W R. 1917 : 42 I. C. 358 : 3 P. L. R. 1918.**

——*Succession — Daughters—Collaterals—Khokars of Khalsa Hamid.*

Among Khokars of Khalsa Hamid in Montgomery District daughters are preferred by custom to collaterals as regards self-acquired landed property. A bare statement to the contrary by the last male holder does not disprove the custom. (*Shah Din, J.*) LASHKAR KHAN *v.* SHAH DIN. **33 I. C 997 : 26 P. W. R. 1916.**

——*Succession—Daughter— Collaterals—Jiljats of Mauza Lohara, District Ferozepore—Self-acquired property.*

There is no custom among Jiljats of Mauza Lohara, District Ferozepore, whereby the daughter of the deceased is excluded by the collaterals from succession to his self-acquired property. (*Johnstone, C. J.*) RAJ KUAR *v.* TALOK SINGH. **38 P. R 1916: 33 I C. 992 : 99 P. W. R. 1916.**

——*Succession—Daughter—Collateral—Self-acquired property.*

In succession to self-acquired property daughter is usually preferred to a collateral who, if he sets up a contrary custom, must prove it. (*Chevis and Shadi Lal, JJ.*) GULAM JILANI KHAN *v.* IMAD ALI. **13 P. R. 1916 : 33 I C. 215 : 196 P. W. R. 1915.**

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———*Succession—Daughter—Collaterals--Self-acquired property*—Gaur *Brahmins of Tahsil Palwal, District Guargaon.*

It is a well-established custom in the Punjab for a daughter or her son to succeed in preference to collaterals to the self-acquired property of the last owner. This custom prevails also among the *Gaur Brahmins* of Tahsil Palwal, District Guargaon in the Punjab. Statements in the *riwaj-i-am*, when opposed to the general custom carry little weight unless supported by instances. (*Chevis and Leslie Jones, JJ.*) CHHUTTAN *v.* HAZARI LAL. **7 P. R. 1916 : 46 P. L. R 1916 : 30 I. C. 22 : 129 P. W. R. 1915.**

———*Succession—Daughter—Collaterals of 5th degree—Gorewaha Rajputs.*

Among the Punjab agricultural tribes the daughter must prove her right to oust the collaterals, so far as succession to ancestral property is concerned. There is no custom among Hindu Gorewaha Jats of Garshankar Tahsil, Hoshiarpur District, by which a daughter can succeed to the ancestral property in preference to his collaterals in the 5th degree. (*Chevis and Le Rossignol, JJ.*) RADHI *v.* PUNNU, **29 I. C. 561 : 35 P. R. 1915.**

———*Succession — Daughter—Collaterals—Presumption—Burden of proof—Jullundur District.*

The presumption according to custom is that the collaterals exclude a daughter and she must prove the exception to this rule. (*Johnstone and Shadi Lal, JJ.*) ATA MUHAMAD KHAN *v.* JIWANI. **34 P. R. 1915 : 2 P. W. R. 1915 : 29 I. C. 492 : 33 P. L. R. 1915.**

———*Succession—Daughters—Collaterals in 3rd degree—Self-acquired and ancestral property—Khatters of Attock.*

Among Muhammadan Khatters of the Attock district, daughters get precedence over collaterals in the 3rd degree as regards self-acquired property but in the case of ancestral property, a sonless person cannot bequeath his property to his daughter when there are collaterals in the 3rd degree, though the daughter is married to one of such nearest collaterals. (*Johnstone and Chevis, JJ.*) MOWZA *v.* MT. GULAB JAN. **97 P. R. 1914 : 220 P. L. R. 1914 : 24 I. C. 920 : 121 P. W. R 1914.**

———*Succession—Daughters—Collaterals.*

Among Usmani Sheikhs of Gurgam District, who stand on the same footing as Quraishis, Sadiquis, Ansaries and other true Sheikhs, daughters are not excluded by collaterals eight degrees removed. (*Kensington and Shah, JJ.*) GOSAI BEGAM *v.* UMED ALI. **21 P. R. 1914 : 23 I. C. 541 : 137 P L. R. 1914.**

———*Succession—Daughter—Collaterals of 4th degree.*

The collaterals in the 4th degree of a deceased sonless proprietor have a preferential right to succeed to his property and a daughter and her sons must prove affirmatively a special custom to the contrary. The daughter-in-law of the deceased is entitled on his death to maintenance only. (*Rattigan and Beadon, JJ.*) MUSSAMMAT NUP DASI *v.* RAM DHAN. **85 P. L. R. 1914 : 22 I. C. 646 : 44 P. W. R. 1914.**

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———*Succession—Daughter—Collaterals of, than 7th degree.*

The collaterals more distantly related then the 7th degree must show that they have preference to a daughter of the deceased. (*Rattigan and Beadon, JJ.*) JIWAN SINGH *v.* HAR KAUR. **41 P. R. 1914 : 51 P. L. R. 1914 : 22 I. C. 415 : 34 P. W. R. 1914.**

———*Succession — Daughter — Collaterals Puchhrat Brahmins of Multan city.*

Among Puchhrat Brahmins of Multan city there is no custom whereby the collaterals succeed in preference to the daughters to property of which the deceased was the exclusive and absolute owner. (*Rattigan and Smith, JJ.*) JESA LAL *v.* GANGA DEVI. **81 P. R. 1913 : 321 P. L. R. 1913 : 20 I. C. 868 : 211 P. W. R. 1913.**

———*Succession—Daughter — Collaterals — Mairs of Tahsil Chakwal.*

Among Mairs of Tahsil Chakwal, the daughters, married or unmarried of a deceased sonless proprietor, exclude from inheritance collaterals beyond the 4th degree. (*Shah Din and Scott Smith, JJ.*) SARFRAZ KHAN *v.* MUHAMMAD. **290 P. L. R. 1913 : 20 I. C. 437 : 189 P. W. R. 1913.**

———*Succession—Daughter—Collaterals of 7th degree—Jats of—Jhelum District.*

Among the Jats in the Jhelum District collaterals of the 7th degree are not usually entitled to succeed as heir in preference to a daughter. 132 P. R. 1908, Not foll. 5 P. R 1908 ; 11 P. R. 1908 ; 86 P.R. 1908, Rel. (*Kensington, C. J. and Beadon, J.*) FAZAL *v.* MUSAMMAT UJI. **265 P. L. R. 1913 : 20 I. C. 300 : 173 P. W. R. 1913.**

———*Succession—Daughter — Collaterals — Ghorewaha Rajputs of Garshankar Tahsil—Burden of proof.*

Among the *Ghorewaha Rajputs* of Garshankar Tahsil, Hoshiarpur District, daughters and daughter's sons are not excluded from inheritance to the ancestral estate by collaterals more distantly related than the 7th degree. (*Rattigan and Scott Smith, JJ.*) RAHMAT KHAN *v.* BISHAN. **136 P. W. R. 1913 : 19 I. C. 850 : 234 P. L. R. 1913.**

———*Succession—Daughter--Collaterals of 7th degree—Chohan Muhammadans of—Jagadari Tahsil.*

Among the Chohan Muhammadan Rajputs of Jagadari Tahsil in the Ambala District there is no custom by which daughters are excluded by reversioners of the 7th degree though usually in the Punjab reversioners up to the 5th degree exclude daughters. 36 P. R. 1905, Dist. 80 P. R. 1875. Not app. (*Lalchand, J.*) ABDUL KARIM *v.* SAHIBJAN. **13 I. C. 947 : 13 P. W. R. 1912.**

———*Succession—Daughter—Collaterals of 6th degree—Pathans of Mianwali Tahsil—Burden of proof.*

Among the Pathans of Mianwali Tahsil daughters exclude collaterals up to the 6th degree and the burden of proving that by custom collaterals

CUSTOM (PUNJAB)—Succession—Daughter—Collaterals.

exclude daughters lies upon the collaterals. The mode of counting degrees of agnatic relationship is to count from the collateral to the common ancestor both included. 86 P. R. 1908 Foll.; 48 P. R. 1908 Foll. (*Chevis, J.*) TARI BAZ KHAN *v.* FATCH KHAN. **29 P. R. 1912 : 114 P. W. R. 1912 : 13 I. C. 316: 98 P. L. R. 1912.**

——*Succession—Daughter — Collaterals — Rajputs of Dasuya Tahsil.*

Among Rajputs of Dasuya Tahsil, Hoshiarpur District, a dughter is entitled to succeed to the property of her father in the absence of collaterals and a person claiming as an agnate must prove his actual relationship. (*Robertson, Johnstone, Ratligan and Chevis, JJ.*) RAMDEVI *v.* SHIB DEVI. **108 P. R. 1913 : 13 I. C. 290 : 1 P. W. R 1912.**

——*Succession — Daughter — Collaterals—Goriwal Jats of Ludhiana District—Burden of proof.*

Among Goriwal Jats of Ludhina District, there is a special custom by which collaterals of the 4th degree exclude daughters as regard succession to self-acquired property. 9 I. C. 698, Foll. ; 12 P.L. R. 1901 ; 11 P. R. 1908, Dist. (*Johnstone and Shah Din, JJ.*) PRATALE SINGH *v.* PANJABU. **25 P. R. 1912 : 41 P. L. R 1912 : 13 I. C. 177 : 125 P. W. R. 1912.**

——*Succession—Daughter — Collaterals — Bilach Khosas of Saughar Tahsil.*

Among Bilach Khosas of Saughar Tahsil, collaterals up to the 6th degree exclude a daughter. (*Chevis, J.*) SAHIB *v* USMAN. **13 I. C. 72 : 50 P. L. R. 1912.**

——*Succession — Daughter — Collaterals—Pathans.*

The collatrals of a Pathan are entitled to succeed to all his immoveable property, even though it is self-acquired in preference to a married daughter. (*Ratligan and Chevis, JJ.*) ABDUL RAHMAN *v.* BURE KHAN. **196 P. L. R. 1911 : 11 I. C. 96 : 173 P. W. R. 1911.**

——*Succession— Daughters — Collaterals—Self acquisition.*

Under the Hindu Law or custom collaterals cannot succeed to self-acquired property in the presence of the daughter. (*Reid, C. J. and Ratligan, J.*) BUA DUTTI *v.* WARIAM SINGH. **64 P L. R. 1911 : 10 I. C. 819: 212 P. W. R. 1911.**

——*Succession — Daughter — Collaterals — Arains of Nokoda Tahsil.*

Collaterals are preferred to daughters in succeeding to self-acquired landed property of their father among Arains of Tahsil Nakoda, District Jullundur. (*Ryves, J.*) FAJJE *v.* SHER MUHAMMAD. **10 I. C. 681 : 29 P. W. R. 1911.**

——*Succession— Daughter—Collaterals of—3rd degree—Goriwal Jats of District Ludhiana.*

Among Goriwal Jats of District Ludhiana third degree collateral of a sonless proprietor is preferred to a daughter even in non-ancestral property evidently a sister and her daughters are excluded. Among them a widow has no power of gift. A daughter does not get absolute owner-

CUSTOM (PUNJAB)—Succession—Daughter— Exclusion of.

ship. (*Johnstone and Shah Din, JJ.*) ISHAR KUAR *v.* RAJA SINGH. **29 P. R. 1911 : 94 P. L. R. 1911 : 9 I. C. 608 : 124 P. W. R. 1911.**

Succession—Daughter—Debts of Father.

——*Succession—Daughter—Debts of father—Liability for.*

As a daughter is not an agnate and derives her title not from the common ancestor but from her father, she represents her father and his estate in her hands is liable for his debts. (*Le Rossignol, J.*) KISHEN SINGH *v.* RAHMAT BIBI. **44 I. C. 561 : 12 P. R. 1918.**

Succession—Daughter—Exclution of.

——*Succession—Daughters—Exclusion from inheritance*—Balayan Jats.

Among *Balayan Jats* in Meerhut Division there is no custom excluding a daughter from inheritance. (*Tudball, J.*) NIADRI *v* KURA. **27 I. C. 707 : 13 A. L. J. 91.**

——*Succession — Daughters —Exclusion of Joshi Brahmans of Hoshiarpur.*

There is no custom among the Joshi Brahmans of Hoshiarpur District, under which the widow and daughter of a predeceased son are entitled to succeed in preference to the daughters of the deceased. (*Martineau and Zafar Ali, JJ.*) MT. BAL KUAR *v.* DEOKI. **4 Lah. 236 : 6 Lah. L. J. 69 : 1923 Lah. 579.**

——*Succession—Daughters—Exclusion of—Ancestral property.*

Persons alleging that the property is ancestral must prove that it is so. Their position a defendants does not shift the burden of proof on the plaintiff. No custom which excluded daughters having been proved, the collaterals failed and were excluded by daughters. (*Shadi Lal and Jones, JJ.*) DEVI DITTA *v.* INDAR DEVI. **56 P. R. 1916 : 35 I. C. 542 : 160 P. L. R. 1916.**

——*Succession—Daughters— Exclusion of—* Riwaj-i-am.

Where plaintiffs reversioners sue the daugters of a deceased collateral for decleration of title in exclusion of daughters on the evidence of a custom, the onus lies on the plaintiffs to prove that the land in dispute is ancestral. If they fail to discharge it they must show that they could exclude daughters. Entry in "*Riwaj-i-am*" that daughter are excluded by collaterals which applies to ancestral and not self-acquired prooerty is useless for their purpose when property is found not to be ancestral, (*Scott-Smith and Shadi Lal, JJ.*) LELU *v.* RAM CHAND. **23 P. R. 1916 : 31 I. C. 294 : 174 P. W. R. 1915.**

——*Succession—Daughter—Exclusion of—Biloch Khosas.*

In matters of succession among *Biloch Khosas* the burden of proving that collaterals of the 6th degree do not exclude a daughter lies upon the latter. (*Chevis, J.*) SAHIB *v.* USMAN. **13 I. C. 72 : 50 P. L. R. 1912.**

CUSTOM (PUNJAB)—Succession—Daughter— Exclusion of.

———*Succession—Daughters— Exclusion of—Evidence.*

Proof of custom in certain families of exclusion of daughters does not establish a custom for all families. (*Stuart, A. J. C.*) THAKURDIN SINGH *v.* BHAGWANTU KUAR.

32 I. C. 734 : 2 O. L. J. 629.

———*Succession—Daughter — Exclusion of—Alizai Pathans settled in United Provinces.*

The fact that a custom of exclusion of daughters amongst *Alizai Pathans* exists in Baluchistan and Waziristan, does not justify the presumption that the same custom exists in a family settled in the United Provinces for the last 300 years. 35 All. 391. (P. C.) Foll. (*Stuart, and Kanhaiya Lal, A. J. C.*). MUHAMMAD ABDUL RAJIB KHAN *v.* SALAMAT BIBI.

25 I. C. 680 : 1 O. L. J. 397.

Succession—Daughter—First Cousin.

———*Succession—Daughter — First cousin—Ram of—Jammal Patti of Mauzia Lalu Darya.*

The daughter of a Ram of the Jamal Patti Mauzia Lalu Darya, by her marriage with her first cousin does not by custom exclude her first cousin from the succession to her father's estate. (*Leslie Jones, J.*) SAHIB YADI *v.* ALLAH BAKSH.

31 I. C. 863 : 161 P. W. R. 1915.

Succession—Daughter—Gorewada Rajputs.

———*Succession — Daughter — Gorewada Rajputs.*

Among agricultural tribes in the Punjab, generally collaterals exclude daughters. Among Gorewada Rajputs of Grashnaker Thasil Hosiarpur District, there was no custom by which a daughter was entitled to succeed to the ancestral property of her father in preference to his collaterals in the 5th degree. (*Chevis and Le Rossignol, JJ.*) RADHI *v.* PUNNU.

29 I. C. 561 : 35 P. R. 1915.

Succession—Daughter—Married and Unmarried Daughter.

———*Succession—Daughter—Married or unmarried—Right of residence.*

Under the general custom of the Punjab daughters have a right to reside in their father's house until they marry or to whichever event first takes place. (*Broadway, J.*) MAHANDA *v.* MT. GAUHRE.

66 I. C. 433.

———*Succession—Daughters — Married and unmarried.*

Except where a daughter succeeds to her father's property only as an unmarried daughter entitled to hold it until her marriage there is no custom whereby a daughter entitled to succeed is not also entitled to pass the succession to her sons. (*Chevis and Dundas, JJ.*) SHAH MUHAMMAD *v.* FAZL ILAHI.

2 U. P L. R. (Lah.) 103 : 56 I. C. 913 : 2 Lah. L. J. 475.

———*Succession—Daughter—Married daughter—Succeeding father.*

Among the Dhillon Jats of the Ambala District, a married daughter succeeding to her father's estate can contest alienations effected by her

CUSTOM (PUNJAB)—Succession — Daughter — Rights of.

mother or step-mother. (*Chevis and Le Rossignol, JJ.*) DALIPA *v.* SURAJ KAUR.

48 P. R. 1916 : 34 I. C. 581 : 142 P. W. R. 1916.

Succession—Daughter—Nature of estate.

———*Succession—Daughter—Nature of estate.*

By the custom of the Punjab a daughter inheriting property from her father gets only the ordinary interest of a widow or any other female and not as *stridhanam*; and on the death of the daughter without male descendants the property descends to the father's heirs. (*Johnstone, J.*) INDAR *v.* MUSSAMMAT RAO.

4 P. R. 1912 : 201 P. L. R. 1911 : 11 I. C. 35 : 160 P. W. R. 1911.

———*Succession—Daughter—Nature of estate.*

Though when a daughter succeeds as absolute owner her daughter should also succeed absolutely, a daughter's estate is not ordinarily absolute. Any person asserting that it is so, must prove it. (*Johnstone and Shah Din, JJ.*) ISHAR KUAR *v.* RAJA SINGH.

29 P. R. 1911 : 94 P. L. R. 1911 : 9 I. C. 608 : 124 P. W. R. 1911.

Succession—Daughter—Nephew.

———*Succession—Daughter— Nephew—Barki Sayads of Jullundur District.*

Among Barki Sayads of Jullundur District a daughter succeeds in preference to nephew. (*Johnstone and Shadi Lal, JJ.*) ATA MUHAMMAD KHAN *v.* JIWANI.

34 P. R. 1915 : 2 P. W. R. 1915 : 26 I. C. 492 : 33 P. L. R. 1915.

Succession—Daughter—Paternal Uncle.

———*Succession—Daughter—Paternal uncle—Arians of Tahsil Sarkpur.*

Among the Arains of Tahsil Sarkpur, District Lahore, the daughter is preferred to the paternal uncle. (*Reid, C. J. and Rattigan, J.*) ZAINABA BIBI *v.* BADARUDDIN.

43 P. R. 1913 : 270 P. W. R. 1912 : 17 I. C. 187 : 20 P. L. R. 1913.

Succession—Daughter—Pathans of Chach.

———*Succession — Daughters — Pathans of Chach.*

Among Pathans of the Chach territory the collaterals of the 4th degree do not succeed in preference to daughters. (*Robertson and Beadon, JJ.*) AHMADJI *v.* SHAHANCHI.

46 P. R. 1913 : 17 I. C. 378 : 12 P. L. R. 1913.

Succession—Daughter—Pattidars.

———*Succession—Daughter—Pattidars.*

Pattidars do not exclude daughters. Person setting up a reverse custom, must prove it. Entry in *Riwaj-i-am* in favour of pattidars does not establish custom in absence of proof of special instances. (*Reid, C. J. and Johnstone, J.*) DEVI SINGH *v.* PREMI.

11 P. R. 1911 : 83 P. L. R. 1911 : 9 I. C. 683 : 57 P. W. R. 1911.

Succession—Daughter—Rights of.

———*Succession — Daughters—Rights of—Shaikh converts from Bahal Khatris.*

Among sheikhs who are converts from Bahal Khatris sons exclude daughters from succeeding to their father's estate. Sons exclude daughters from succession to their maternal estates

CUSTOM (PUNJAB) — Succession — Daughter— Rights of.

—Brothers exclude sisters from succession to a childless brother's estate. (*Broadway and Campbell, JJ.*) NAJM-UD DIN *v.* ABDUL HAMID.
1923 Lah. 175.

——— *Succession — Daughter— Rights of — Brother—Preference.*

Under the Customary Law prevailing among the agriculturists of the Punjab the daughter takes the self-acquired property of a deceased in preference to the brother. (*Chevis and Harrison, JJ.*) WAZIRI MAL *v.* GANGA RAM.
1924 Lah. 370.

———*Succession — Daughter — Rights of mother—Who is the preferential heir—Weavers of Bakli Ghuzan—Jullundur District.*

Village custom generally recognises the mother's right of succession in preference to that of the daughters of male collaterals. So held in a case which arose among the weavers of Basti Ghuzan, Jullundur Dt. 69 P.R. 1878 Dist. (*Chevis, J.*) MT. SULTAN BIBI *v.* ISMAIL. **69 I. C. 136.**

———*Succession — Daughter — Rights of— Salar Sayads of District Rohtak.*

In matters of succession, the Sayads do not strictly follow Mahomedan Law but are governed by family custom and in the absence of a son, a daughter succeeds just as if she were a son, and takes the share which her father could have taken. (*Scott-Smith and Wilberforce, JJ.*) AHMED-UL-NISSA *v.* NASIB-UL-NISSA.
62 I. C. 740 : 62 P. W. R. 1920.

Succession—Daughter—Sister.

———*Succession—Daughter—Sister— Preference— Jullundur District — Tashil Jullundur Arushal estate.*

Among Sayads of Tahsil Jullundur in the Jullundur District, the daughter of a daughter succeeding by custom to the ancestral estate of her father is not excluded by her mother's sisters. The onus of proving a custom is on those setting it up. (*Leslie Jones, J.*) AZIM BIBI *v.* UMTAN BIBI. **44 I. C. 979 : 21 P. W. R. 1918.**

Succession—Daughter—Uncle.

———*Succession—Daughter— Uncle — Kapur Khatris of Hafizabad.*

The Kapur Khatries of Hafizabad Tahsil specially the family in this case, living in villages are governed in matters of succession to property, whether ancestral or self-acquired, by customary rules obtaining among agricultural tribes in the Punjab and not by the ordinary principles of Mitakshara Law, and that the daughter is not entitled to succeed to her father's immoveable property, even if self-acquired. The father cannot alienate it to her by gift or will in presence of her uncle. *Wajib-ul-arz* and *Riwaj-i-am* are of great value when attested by ancestors of parties. The burden of proving that Khatris follow agricultural customs in matters of succession lies on the person asserting it. (*Rattigan and Le Rossignol, JJ.*) RUKMAN *v.* SAIN DAS.
71 P. R. 1916 : 32 I. C. 875 : 19 P. W. R. 1916.

Succession—Daughter's Son.

———*Succession—Daughter's son—Awans of Rawalpindi District.*

CUSTOM (PUNJAB)—Succession—Escheat.

Among Awans of District Rawalpindi, a daughter's son succeeds to self-acquired property in preference to collaterals who must prove to the contrary to establish their right. (*Shadi Lal, J.*) FATEH DIN *v.* MARDAN ALI.
57 I. C. 78 : 2 U. P. L. R. (L.) 142.

———*Succession—Daughter's son—Collaterals —Rajputs of Rupas—Tahsil—Ambala District.*

Among Rajputs of Rupar Tahsil, Ambala District, a daughter's son is not a preferential heir to collaterals in the 3rd degree. (*Johnstone and Rattigan, JJ.*) NUR AHMAD *v.* RAHIM BAKHSH. **52 P. R. 1912 : 14 I. C. 71 : 177 P. W. R. 1912.**

Succession—Escheat.

———*Succession—Escheat—Superior and inferior holder—*Ala *and* Adna Maliks.

In the case of the *Ala Malik* of Mauza Shalna in the Ludhiana Tahsil of the same district *held* that on the death of an *Adna Malik*, who has died heirless, the land held by him does not revert to the *Ala Malik* free of all encumbrances created by the former, if any. (*Campbell and Moti Sagar, JJ.*) DAL SINGH *v.* PLUIMAN.
1923 Lah. 626.

———*Succession—Escheat—*Got *people—Right of redemption on the death of mortgagor without heir.*

If a mortgagor dies without heir, his tribes men and *got* people had the right to redeem the mortgage as the mortgagees were not proprietors though they were distantly related. (*Rattigan and Jones, JJ.*) BUDHI SINGH *v.* MOHAN SINGH.
32 I. C. 768 : 40 P. W. R. 1916.

———*Succession—Escheat— Proprietor dying without heirs.*

The estate of a proprietor dying without leaving any heirs devolves upon the proprietors of the deceased's *patti* if the *patti* is owned by members of one *got* forming a compact and homogenous community. This right of the proprietory body is primarily based on real or assumed relationship to the holder of the land or to the member of the body from which his title was derived. (*Agnew and Shadi Lal, JJ.*) IBRAHIM *v.* BARKAT. **201 P. W. R. 1913 : 20 I. C. 879 : 323 P. L. R. 1913.**

———*Succession—Escheat—Co-sharer in* shamilat*—Community of interest.*

Where a *Kharod Jat* died without heirs, co-sharers in the *shamilat* who have a community of interest with the deceased are entitled to his land by escheat. (*Reid and Robertson, JJ.*) JOTU *v.* LEUNA. **18 P. L. R. 1913 : 18 I. C. 832 : 216 P. W. R. 1913.**

———*Succession—Escheat.*

The estate of a deceased proprietor dying without heirs, escheats to Govt. in the absence of a special contrary custom. (*Robertson and Chevis, JJ.*) CHAMBELA *v.* KUNDAN.
6 P. W. R. 1913 : 18 I. C. 611 : 142 P. L. R. 1913.

———*Succession—Escheat—Right of proprietors of thulla and patti.*

CUSTOM (PUNJAB)—Succession—Escheat.

In a suit for a declaration that plffs. are owners of a thulla or patti left by a proprietor who died without heirs, by relationship and that the defts. had no right to the land the Court must determine whether the plffs. have any right of succession by custom. The weakness of the deft.'s case should not be accepted as a proof of plff.'s title. As a general rule the pattidars do not succeed and the land escheats when pattidars are proprietors of different tribes or *got* of the same tribe and the deceased has left no heirs by relationship. (*Johnstone and Rattigan, JJ.*) BADAMAN *v.* NET RAM.

57 P. R. 1912 : 90 P. L. R. 1912 : 15 I. C. 507 : 161 P. W. R. 1912.

———*Succession—Escheat—Death of owner—Absence of heir*—Pattidar—*Position of.*

Where the *Riwaj-i-am* provides for succession of *pattidars* to the estate of a childless owner, all of them are entitled to succeeed whether they belong to the same or different tribes in such cases when the *pattidars* can succeed, there is no escheat to Government. 10 I. C. 294 Rel. upon. (*Shah Din, J.*) UMRA *v.* KARIM BAKSH.

16 P. R. 1912 : 140 P. W. R. 1912 : 14 I. C. 492 : 86 P. L. R. 1912.

——— *Succession—Escheat—Owner dying without heir in a* Thulla *or* patti.

Where a proprietor dies leaving no heir in a *thulla* or *patti* of a village the other branches of the owner are entitled to succeed even though some of them do not join in an appeal connected with mutation proceedings (*Kensington, J.*) SUNDAR SINGH *v.* DEVA SINGH. **2 P. W. R. 1912 : 13 I. C. 863 : 85 P. L. R. 1912.**

Succession—Females.

———*Succession— Females — Exclusion of — Tribal custom—Jats—Exception.*

Assuming that there is a general custom of agnatic or collateral succession in default of male issue to the exclusion of female heirs among the agricultural tribes of the Punjab, the rule is subject to exceptions. The *Riwaj i-m* of Jhang District recorded that among the Jats, the daughter of a sonless man, if she is married to a near relative, inherits her father's property in preference to collaterals. *Held*, that the *Riwaj-i-am*, in the absence of rebuttal, was sufficient evidence of the particular custom recorded and that the Dhabs, a small endogenous Mohamedan tribe of Jats, were governed by the special custom. (*Mr. Amir Ali.*) BEG *v.* ALLA DITTA. **45 P. R. 1917 : 44 I. A. 89 : 44 Cal. 749 : 12 P. W. R. 1917 : 21 M. L. T. 310 : 32 M. L. J. 615 : 19 Bom. L. R. 388 : 15 A. L. J. 525 : 21 C. W. N. 842 : 26 C. L. J. 175 : 38 I.C. 354 (P. C.).**

[On appeal from 48 P. R. 1909 : 122 P. L. R. 1909 : 2 I. C. 79 : 72 P. W. R. 1909].

———*Succession—Females—Brother's daughter—Sister—Rights of descendants.*

On a consideration of entire evidence it was held that plffs. have failed to prove a custom among Lamin, Rajputs of Tahsil Nurpur, District Kangra, that a brother's daughter and a sister and their descendants have a right of succession

CUSTOM (PUNJAB)—Succession—Females.

in the absence of all male collaterals. (*Shadi Lal, C. J. and Le Rossignol, J.*) DALIPA *v.* DALLU. **4 Lah. L. J. 336.**

———*Succession—Females—Sayads of Khakhanda*—Rhobak *District — Females— Right of representation.*

Though generally the Saiyads of Khakhanda, *Rhohak* Dt have for a long time followed custom in matters of succession they have recognised widely the right of females in accordance with their personal Law. 60 P. R. 1878 ; 82 P. R. 1887 ; 173 P. R. 1889 ; 46 P. R 1890 ; 143 P. R. 1893 ; 120 P. R. 1909 ; 143 P. W. R. 19 0 Foll. Both under the Hindu Law and custom, the whole estate of the last male owner vests in his widow and the husband's life is assumed to continue in her person. Succession to the husband opens at the date of the widow's death. Among Saiyads of Khakhanda the right of representation exists in favour of females, at any rate in the absence of near male heirs, 82 P. R. 1887 ; 143 P. W. R. 1910 ; 120 P. W. R. 1909 Foll. A daughter who succeeds by right of representation has in every way the right of a male including the right to contest alienations made by the widow. 135 P.R. 1908 Foll. (*Wilberforce and Martineau, JJ.*) MT. NASIB-UN-NISSA *v.* MUSSAMMAT AHMADI-UN-NISA. **66 I. C. 494 (2) : 2 Lah. 383.**

———*Succession—Females*— Vighmal Khojas *of Shahdara.*

There is no initial presumption that a family belonging to a non-agricultural tribe, is governed by custom. Among *Vighmal Khojas* of Shahdara, females are excluded from succession by custom. (*Le Rossignol and Abdul Raoof, JJ.*) UMDA BEGAM *v.* ZAIB-UL-NISA. **3 Lah. L. J. 91 : 59 I. C. 694 : 29 P. W. R. 1921.**

———*Succession—Females Arains of Lahore —Suit for declaration that sale will not affect plaintiff's reversionary right—Onus.*

The rights of females among the tribe of Arains in Lahore District, who succeed male proprietors as heirs in certain contingencies are wider than the rights possessed by females among most of the agricultural tribes in Punjab. An alienation by plaintiff's sister will not affect plaintiff's reversionary right in land which was inherited by both in equal shares, it cannot be assumed that the interest of the sisters is not that of a full owner, in the absence of custom limiting their right to a life estate and the onus is on the plaintiff to prove that she had a right to challenge the alienation and plaintiff cannot get the declaration if she fails to prove that defendant had only a life estate. (*Shahdin and Le Rossignol, JJ.*) AHMAED KHAN *v.* BAKHLWAR. **45 P. R. 1915 : 86 P.W.R. 1915 : 28 I. C. 951 : 180 P. L. R. 1915.**

———*Succession— Females — Muzaffargarh District.*

In the Muzaffargarh District especially among Muhammadan Jats and Pathans the right of females to succeed are very generally recognised. (*Rattigan and Shah Din, JJ.*) SULTAN *v.* ALI MUAMMAD. **23 I. C. 535 : 56 P. L. R. 1914.**

———*Succession—Females—Brother's daughter—Girths of Kangra.*

CUSTOM (PUNJAB)—Succession—Females.

Brother's daughters and their sons can succeed to the estate of a person among the Girths in Kangra District. (*Shadi Lal, J.*) NIHALA *v.* BHUTI. **29 P. L. R. 1914 : 23 I. C. 418 : 10 P. W. R. 1914.**

———*Succession—Females— Daughter-in-law —Sainis of Hoshiarpur.*

Among Sainis of Hoshiarpur a daughter-in-law is by custom entitled to succeed to her father-in law's estate to the extent of the share of her deceased husband (*Agnew and Shadi Lal, JJ.*) KANHA SINGH *v.* PERIMI.
166 P. W. R. 1913 : 20 I. C. 876 : 322 P. L. R. 1913.

———*Succession—Females— Daughter-in-law —Jhanda Jats of Hoshiarpur Tahsil—Widow of predeceased son.*

Among the *Jhanda Jats* of the Hoshiarpur Tahsil, the widow of a predeceased son cannot succed after her father-in-law's death to the share to which her husband would have succeeded, if he had been alive. But she would be entitled to hold possession of a sufficient portion of the property left by the father-in-law, for her maintenance. (*Shah Din and Chevis, JJ.*) DHAN KAUR *v.* LAKHA SINGH. **71 P. R. 1913 : 293 P. L. R. 1913 : 20 I. C. 519 : 182 P. W. R. 1913.**

———*Succession—Females—Unchastity— Forfeiture.*

Under the Customary Law of the Punjab the unchastity of the widowed mother who is in possession of the estate does not entail a forfeiture of her life-interest in the estate. (*Shahdin and Scott Smith, JJ.*) MUSAMMAT THAKRI *v.* GURDIT SINGH. **57 P. W. R. 1913 : 19 I. C. 253 : 120 P. L. R. 1913.**

———*Succession—Females— Daughter-in-law —Muhammadan Rajputs of Hoshiarpur District.*

Among the Muhammadan Rajputs of the Hoshiarpur District, the widow of a pre-deceased son succeeds with the brothers of her husband to a share of the estate of her father-in-law. 23 P. R. 1892 Foll. (*Kensington and Beadon, JJ.*) FATTEH MAHAMMAD *v.* SULTAN MAHAMMAD
97 P. W. R. 1913 : 19 I. C. 122 : 137 P. L. R. 1913.

———*Succession—Females — Niece — Gujars of* Kharian.

Among Gujars of *Kharian*, a daughter of the uncle of the last male owner is not entitled by custom, in the absence inherit proof to the contrary to his property. She has no right under Hindu or Muhammadan Law. 19 P. R. 1906 ; 135 P. R. 1908 ; 5 P. R. 1895 ; 61 P. R. 1906 ; 72 P. R. 1906 ; 60 P. R. 1910 Con ; 134 P. R. 1907 Foll (*Shah Din and Chevis, JJ.*) NIAMAT ULLAH *v.* SISHA BIBI **90 P. R. 1912 : 250 P. L. R. 1912 ; 17 I. C. 21 : 262 P. W. R. 1912.**

———*Succession— Females—Daughter-in-law —Childless widow and son by another wife— Widow of predeceased son and surviving son— Burden of proof.*

Among the *Gujars* in the presence of a son by another, a childless widow and the widow of a predeceased son are not entitled to succeed to the father's estate or to share equally with him and the burden of proving that they are so entitled lies upon the widow, they are only entitled to maintenance either by cash allowance of a holding in the case of large estates. 116 P. R. 1906 ; 107 P. R 1886 Rel. on. 75 P. R. 1888; 8 P. R. 1889 ; 23 P. R. 1892 not applied ; 6 I. C. 929 Dist. (*Kensington and Chevis, JJ.*) KARIMAN *v.* FAZAL MUHAMAD. **85 P. R. 1912 : 152 P W. R. 1912 : 14 I. C. 532 : 164 P. L. R. 1912.**

CUSTOM (PUNJAB)—Succession—Khanadamad.

———*Succession—Females—Paternal aunt— Position of.*

A paternal aunt of a sonless proprietor cannot be treated as if she were the daughter of the ante-penultimate male owner for the purposes of succession. 134 P. R. 1907 Rel. on. (*Shahdin and Chevis, JJ.*) SALAMAT ALI *v.* HAKIM ALI.
143 P. L. R. 1912 : 14 I C. 47 : 196 P. W. R. 1912.

———*Succession—Females—Daughter-in-law.*

Among Nigar Jats of Thashil Jullundur a widow of a deceased grandson takes equally with the son of a deceased proprietor, until remarriage or for life. (*Reid, C. J.*) ISHAR *v.* BESANTI. **19 P. R. 1911 : 53 P. L R 1911 : 9 I. C. 310 : 110 P. W. R. 1911.**

———*Succession—Females—Sadozi family.*

In the absence of proof of special custom, the personal law of parties must govern. The Sadozis are descendants of Shah Shuja and are governed by Mahomedan Law in matters of succession, and females are not excluded. (*Pipon, J. C.*) FATEH MAHOMMED KHAN *v.* MT. WAFA BEGUM. **73 I. C. 609.**

Succession—Half and full blood.

———*Succession—Half and full blood—Jats.*

Among Jats of Shadia full brothers exclude half brothers by custom (*Le Rossignol and Abdul Qadir, JJ.*) KHUDAYAR *v.* AMIR.
1922 Lah. 169.

———*Succession—Half and full blood—Half and full brothers*—Kaliar Jats *of village* Kaliarnawala—*Mianwali Tahsil.*

The defts. the half brothers on whom the onus lay, had failed to prove the existence among *Kaliar Jats* of *Kaliarnawala* of either a family or a tribal custom by which in succession among brothers those of the half blood succeed with those of full blood. (*Martineau, J.*) KHUDA YAR *v.* AHMAD. **51 I. C 298 : 33 P. R. 1919.**

Succession—Immoveable property.

———*Succession — Immoveable property— Mortgagee's right in occpuancy lands.*

A mortgagee's right in occupancy lands must be considered as immoveable property for purposes of succession. 18 P. R. 1909 Dist. (*Chevis, J.*) SUNDAR SINGH *v.* HAR KAUR,
75 P. W. R. 1912 : 13 I C. 444 : 77 P. L. R. 1912.

Succession—Khanadamad.

———*Succession—Khanadamad— Gifted property.*

CUSTOM (PUNJAB)—Succession—Khanadamad.

Gifted land reverts to the donor or his collaterals only when the line of descendants of the donee both male and female has been completely exhausted. The same rule applies in the case of gift to a *Khanadamad*. 68 P. W. R. 1913 overruled. (*Chevis and Dundas, JJ.*) SHAH MAHOMED *v.* FAZIL ILAHI. **2 Lah. L. J. 475 : 56 I. C. 913 : 2 U. P. L. R. (Lah.) 103.**

———*Succession*—Khanadamad—*Insidents.*

The custom of *Khanadamad* is designed to benefit the daughter and her issue. On the daughter's death without issue, the *khanadamad* succeeds to the property of her father for life and on his death the property reverts to the daughter's blood relations, his sons by another wife having no *locus standi* to claim it. (*Reid, C. J. and Robertson, J.*) NANDA SINGH *v.* KHETA **53 P. R 1913 : 65 P. L. R 1913 : 19 I. C. 441 : 10 P. W. R. 1913.**

———*Succession*—Khanadamad— *Hindu Jats of Kaithal Tahsil, Karnal District, Punjab.*

The jats of Kaithal Tashil are only governed by their Customary Law and not by Hindu Law. A khanadamad, according to custom, will not take his father-in-law's estate. A gift by a widow of her husband's land to his Khanadamad or adoption of his son is invalid (*Reid. C. J.*) SADAM *v.* TEJA. **154 P. W R 1912 : 16 I. C. 884 : 183 P. L. R 1912.**

———*Succession* — Khanadamad — *Muhammadan Jats of Nawanshahr Tohsil, Jullundur District—Son-in-law* versus *nephew.*

The Muhammadan Jats of Nawanshahr Tahsil in the Jullundur District do not follow the *Khanadamad* whereby a son-in-law succeeds to his father-in-law's property. A mere son-in-law is not necessarily a *Khanadamad* and if he claims to be so, he must establish a custom conferring those rights on a son-in-law. A son-in-law does not exclude the last male owner's nephew. (*Reid, C. J.*) FAIZA *v.* ATA MAHOMED. **72 P. R. 1912 : 14 I. C. 70 : 129 P. W. R. 1912.**

Succession—Law Governing.

———*Succession — Law governing — Partly Muh. Law and partly Custom.*

Although an heir may get inheritance according to Muh. Law his estate may be governed by custom. (*Martineau, J.*) RASUL KHAN *v* MT. HAWASI. **1923 Lah. 284 (2).**

———*Succession—Zargars of Batala — Law governing.*

The Zargars of Batala are non-agriculturists and *prima facie* they would follow Mahomedan and not agricultural custom. The onus is on the party who wants to set up succession by custom to show it. (*Broadway and Abdul Qadir, JJ.*) ABDUL KARIM *v.* MT. AMAT UL-HABIB. **3 Lah. 397 : 1923 L. 121.**

———*Succession—Koreshis—Law governing.*

In a suit between members of the Koreshi tribe, when neither party proves any custom affirmatively, recourse should be had to Mahomedan Law. (*Abdul Raoof and Campbell, JJ.*) MT. GHULAM ZOHRA *v.* NUR HASAN. **3 Lah. 278 : (1922) Lah. 406.**

CUSTOM (PUNJAB)—Succession—Law Governing.

———*Succession — Law governing—Jats of Raowal—Son and daughter in-law—Entry in* Rivaj-i am—*Onus of proof.*

Where the entiry in the *Rivaj-i-am* showed that among the Jats of Raowal in Tahsil Jagraon in the Ludhiana District a daughter-in-law succeeded along with a son, *held*, it was sufficient to throw the onus of proof on the son, if he wants to prove the daughter-in-law is excluded. (*Broadway and Martineau, JJ.*) JAGIR SINGH *v.* MT. SANTI. **3 Lah. 181 : (1922) Lah. 389.**

———*Succession—Law governing—Murderer and his son if excluded—Public policy.*

Where a person has been murdered with the sole object of securing his property, the murderer along with his son is excluded from inheriting the property of the deceased, in spite of the fact that the property is ancestral property, as their succession, would be opposed to public policy. The murderer's right in such a case is swept away and with it is carried away the right of every one who claims through and not merely from him. In such a case the vesting of the succession is not prevented but what was vested in accordance with the law is wrested away on the grounds of justice and equity. 41 P. R 1906 (1904) ; 27 Mad. 591, 600 : 18 P. R. 1908 (F. B.) distinguished. (*Broadway and Martineau, JJ.*) MT. JIND KUAR *v.* INDAR SINGH. **3 Lah. 103 : 23 P. W. R. 1922 : (1922) Lah. 293.**

———*Succession—Law governing—Koreshis of Taragarh—Onus of proof.*

Where Koreshis of Taragarh olaimed to be governed in matters of inheritance by the general custom of Punjab agriculturists and not by Mahomedan Law, the onus of proof is upon them to establish it. (*Abdul Raoof and Campbell, JJ.*) NUR HASAN *v.* GHULAM ZOHRA. **3 Lah. 274 : (1922) Lah. 222.**

———*Succession—Law governing—Awans of Taans.*

The deceased having belonged to a mercantile community and a resident of town the presumption is that he though possessed of some ancestral landed estate was governed by his personal law in the matter of alienation law. The burden of proving the existence of custom overridings personal law lies on the plff. (*Shadi Lal and Wilberforce, JJ.*) ASANAND *v.* MT. ROSANI RAI. **68 I. C. 92 : 2 Lah. L. J. 178.**

———*Succession—Law governing-Hindu Sikh —Marriage with a Muslim convert to Sikhism—Legitimacy of issues—Subsequent denial of.*

Where a Sikh land owner obtains the consent of his collaterals before contracting a chadar andazi in accordance with Hindu doctrines with an Arain convert to Sikhisam and the issue of such union is recognised as legitimate by all the near collaterils, they cannot deny his legitimacy on the death of the landowner, when the question of succession arises. (*Jones and Broadway, JJ.*) LACHHMAN SINGH *v.* PARTAP SINGH. **67 I. C. 937 : 3 L. L. J. 366.**

———*Succession—Law governing—Land gifted—Reverter.*

CUSTOM (PUNJAB)—Succession—Law Governing.

The rule of revision to the donor's line on the death of donee without lineal heirs under customary law is not applicable where the donee is a stranger to the donor. 137 P. R. 1908 ; 14 I. C. 73 Foll. 12 P. R. 1892. (F. B.) ; 127 P. R. 1907 dist. (*Martineau and Abdul Qadir, JJ.*) MULA SINGH *v.* AMIN CHAND. **64 I. C. 161 : 2 Lah. 284.**

———*Succession—Law governing—Brahmans of Kungiana District, Ludhiana—Custom or Hindu Law.*

The Brahmans of Kungiana and District Ludhiana are governed by Hindu Law in matter of alienation or succession as the mere fact that their putti is recorded as a separate one does not prove any inconsistent custom. 3 P.R. 1908 Dist. (*Abdul Raoof and Martineau, JJ.*) HARBANS LAL *v.* ATRA. **53 I. C. 858.**

———*Succession—Law governing—Khardis of Jullundur City.*

Custom and not Mahomedan Law governs the succession and questions of maintenance of Khardis of Jullundur City. Therefore a step-son must maintain his step-mother out of his father's estate. (*Shah Din, J.*) GULAM MAHOMMAD *v.* BHARI. **38 I. C. 597.**

———*Succession—Law governing*—Bhandari kbatris *of Mauza Jalalabad, Amritsar District.*

Bhandari khatris of Mauza Jalalabad of Amritsar District, are governed by custom as regards succession. (*Shah Din, J.*) SHIB DIAL *v.* MATHVA DAS. **61 P. R. 1916 : 161 P. W. R. 1916 : 35 I. C. 561 : 5 P. L. R. 1917.**

———*Succession — Law governing — Sodhi Khatris if governed by Hindu Law.*

In matters of succession Sodhi Khatris, village Samasar, Tah Mogu Dist. Ferozepur, are governed by Hindu Law and not by agricultural custom. (*Shadi Lal and Le Rossignol, JJ.*) HARCHAND SINGH *v.* MUNSHI RAM. **143 P. W. R. 1916 : 35 I. C. 471 : 142 P. L. R. 1916.**

———*Succession—Law governing—Parachas.*

Parachas of Makkadin, District Attock, are governed by custom in matters of succession. A widow taking whole estate of her husband is presumed to be only a life-tenant. (*Johnstone, C. J. and Chevis, J.*) NUR MUHAMMAD *v.* KHUDA BAKSHA. **125 P. R. 1916 : 93 P. W. R. 1916 : 34 I. C. 135 : 49 P. L. R. 1916.**

———*Succession—Law governing—Testamentary powers—Arains of Jullundur City.*

In matters of intestate and testamentary succession, the Arains of Jullundur City, follow the ordinary Customary Law of the Punjab. (*Shadi Lal and Le Rossignol, JJ.*) TAJ MUHAMMAD *v.* MUHAMMAD. **122 P. R. 1916 ; 94 P. W. R. 1916 : 34 I. C. 126 : 48 P. L. R. 1917.**

———*Succession—Law governing—Non-agriculturist Mussalmans residing in Peshwar suburbs if governed by custom or Muhammadan Law.*

Although many families of non-agriculturist Mussalmans even in the lower social grades residing in the Peshawar suburbs, adopt as best they can the law of inheritance as laid down in the Islamic Code, there are no indications that the practice is general. In the case of families which have been domiciled for three or four generations in Peshawar suburbs and which have acquired land, the probability is that as regards the devolution of land, custom is followed rather than the Muhammadan Law. 68 P. R. 1908 ; 93 P. W.R.1908 ; 56 P. W. R. 1908 ; 155 P. W. R. 1908 ; 183 P. W. R. 1908 ; 104 P. W. R. 1908 Ref. (*Barton, J. C.*) IQBAL JAN *v.* FIDA MUHAMMAD. **51 P. L. R. 1916.**

———*Succession — Law governing — Kapur Khatris of Hafizabad.*

Kapur Khatris of Hafizabad are governed by custom in succession and not by Hindu Law. (*Rattigan and Rossignol, JJ.*) RUKMAN *v.* SAIN DAS. **71 P. R. 1916 : 32 I. C. 875 : 19 P. W. R. 1916.**

———*Succession — Law governing — Bhati-Rajputs of Mouza Kum in Punjab.*

The Bhati Rajputs of Mouza Kum in Tahsil Pind Dadan Khan are governed by agricultural custom and not by Muhammadan Law. (*Chevis and Le Rossignol, JJ.*) MUSSAMMAT JANNAT *v.* ABDULLA. **4 P. R. 1916 : 32 I. C. 817 : 25 P. W. R. 1916.**

———*Succession — Law governing — Lodi Pathans of Amballa—Custom—Personal Law.*

Lodi Pathans of Ambala follow for purpose of inheritance not their personal law but the agricultural custom and daughters cannot succeed as against first cousin to the ancestral estate unless they prove a prior right. 29 P. R. 1012; 61 P. R. 1902. 157 P.R. 1890 Dist. (*Johnstone and Shah Din, JJ.*) ABDUL GHAFOR KHAN *v.* MUSHARRAF BAI. **47 P. R. 1915 : 89 P. W. R. 1915 : 29 I. C. 7 : 161 P. L. R. 1915.**

———*Succession —Law governing—Mahomedan law—Arains of Lahore.*

Arains of Lahore owning lands in the neighbourhood of the city and cultivating them and dependent entirely upon agriculture for their living, are governed by tribe custom and not the *shara* in matters of succession (*Rattigan and Scott-Smith, JJ.*) MAHAMMAD DIN *v.* AHMAD DIN. **26 P. R. 1915 : 27 I. C. 577 : 31 P. L. R. 1915.**

———*Succession—Law governing—Sobti Khatris of Gujerat District—Agricultural custom.*

Sobti Khatris of Gujerat District, are governed in matters of succession by custom prevailing among agriculturists and not by Hindu Law. (*Shah Din and Scott-Smith, JJ.*) ISHAR DEVI *v.* BINDRABAN. **5 P. R. 1915 : 26 I. C. 686 : 137 P L. R. 1915.**

———*Succession — Law governing — Shia Sayads—Amballa.*

Shia Sayads of Amballa City, are not governed by customs generaly followed by agricultural tribes. Among Shia Sayads of Amballa City, collaterals however near cannot exclude daughter and their children. Persons alleging to the

CUSTOM (PUNJAB)—Succession—Law Governing.

contrary must prove that they are governed by custom. (*Kensington and Beadon, JJ.*) AKBAR ALI *v.* ALLAH DI. **98 P. R 1913 : 22 I. C. 2 : 132 P. L. R. 1914.**

——*Succession -Law governing—Brahmins of Bahtiwal.*

Brahmins of Mouza Bahtiwal, Hoshiarpur District, though agriculturists are governed by Hindu Law in matters of succession (*Robertson and Shah Din, JJ*) SANTA *v.* MUSSAMMAT DAROPTI. **47 P. W. R. 1913 : 19 I. C. 612 : 191 P. L. R 1913.**

——*Succession — Law governing — Gour Brahmins—Mauza Kharkhanda—Rohtak District.*

In matters of succession the Gour of *Mauza Karkhand*, Rohtak District, do not follow Hindu Law, but are regulated by the rules observed by the agricultural community in the province (*Rattigan, J.*) MUKONDI *v.* BAKHTAWAR SINGH. **210 P. L. R. 1913 : 19 I.C. 215 : 219 P. W. R. 1913.**

——*Succession — Law governing—Bhatias —Hindu Law.*

Bhatias of Kangarh though owning agricultural land are governed by Hindu Law in the matter of succession. (*Robertson and Shah Din, JJ.*) AYA RAM *v.* THARI BAI. **78 P. R. 1913 : 34 P. W. R. 1913 : 19 I. C. 87 : 74 P. L. R. 1913.**

——*Succession — Law governing — Sasian Khatri.*

Sasian Khatris of Lahore are governed by Hindu Law, in matters of succession and there is no custom among them, contrary to Hindu Law. (*Clerk, C. J. and Reid, J.*) KAROORIMAL *v.* JAWALA DEVI. **17 I. C. 510 : 258 P. W. R. 1912.**

——*Succession—Law governing — Kanjars of Jagadhari—Right of representation.*

In matters of succession Kanjars of Jagadhari in the Ambala District are not governed by agricultural Customary Law nor by strict Mahomedan Law. The right of representation exists among those people. (*Shah Din and Beadon, JJ.*) SAHIBJAN *v.* AMIRAM. **196 P L. R. 1912 : 17 I. C. 214: 244 P. W R. 1912.**

——*Succession—Law governing— Kunjars of Jagadhari in Amballa.*

Kunjars of Jagadhari in Amballa District are not governed by agricultural Customary Law nor do they follow Mahomedan Law in matters of succession. The right of representation applies to them. (*Chandavarkar and Batchelor, JJ.*) BANDO KRISHNA KAMBARJI *v.* NARASINHA KONHER SESHPANDE. **14 Bom. L.R. 861 : 17 I. C. 210 : 37 Bom. 42.**

——*Succession—Law governing— Muhammadan Law—Teli of Adnala Tahsil, Amritsar District.*

When a person settled in a city, emigrating from a village where he owns no land and adopts a trade, there is no presumption that he is govened by the agricultural Customary Law. Recourse may be had to the personal law for

CUSTOM (PUNJAB)—Succession—Mother.

succession to his property. (*Rattigan and Shah Din, JJ.*) ALIA *v.* PIRAN DITTA. **147 P. W. R. 1912 : 16 I. C. 867 : 158 P. L. R. 1912.**

——*Succession—Law governing — Muhammadan Kashmiris of Jhelum—Will.*

In matters of succession, Muhammadan Kashmiris of the Jhelum town in general and the parties in particular do not follow Muhammadan Law. A bequest by a male proprietor of the whole of his self acquired property in favour of his daughter or her issue to the exclusion of his widow and brother is valid by custom. (*Shah Din and Scott-Smith, JJ.*) MEHTAB BIBI *v.* HUSANI BIBI. **17 P. R. 1913 : 124 P. W. R. 1912 : 15 I. C. 556 : 249 P. L. R. 1913.**

——*Succession—Law governing — Muhammadan Sheiks of Delhi City—Burden of proof.*

The Muhammadan Sheiks of Delhi City in matters of succession are governed by personal law and not by custom. The burden of proving a custom is on the party setting it. (*Reid, C. J. and Rattigan, J.*) ILAHI BAKSH *v.* RAHIM BAKSH **113 P. R. 1912 : 238 P. L. R. 1912 : 14 I. C. 752 : 162 P. W. R. 1912.**

——*Succession—Law governing — Sayyads of Kharakanda.*

The Sayyads of Kharakanda, District Rohtak, are governed in matters of inheritance by custom rather than by Muhammadan Law. (*Reid, C. J. and Kensington, J.*) MUHAMMAD UMAR ALI *v.* AMAN ALI. **170 P. W. R. 1911 : 12 I. C 140 : 251 P. L. R. 1911.**

Succession—Maternal Uncle.

——*Succession—Maternal uncle — Muhammadan Jats of Jullundur District — Muhammadan Law.*

Among Muhammadan Jats of the Jullundur District who are governed in matters of inheritance by the Customary Law of the Province, the rule of Muhammadan Law applies in the absence of a specific custom to the contrary, and the maternal uncle excludes the great-great-grandfather's grand-daughter's son. 134 P. R. 1907 ; 90 P.R. 1912, Foll. (*Shah Din and Agnew, JJ.*) RULIA *v.* SULTANI. **17 P.R. 1914 : 193 P. W. R. 1913 : 20 I. C. 532 : 336 P. L. R. 1913.**

Succession—Mother.

——*Succession—Mother—Aroras of Montgomery District—Presumption.*

There is no agricultural custom among the Aroras of Montgomery District by which a step-mother succeeds to her step-son. The fact that the tribe to which the parties belong have in many matters adopted agricultural custom is no doubt a fact to be considered in deciding whether or not the said tribe have adopted the particular custom set up by the plaintiff. But the fact by itself does not afford basis for the deduction that in the said tribe a custom exists by which a step mother succeeds to her step-son. (*Broadway and Zafar Ali, JJ.*) MT. DIYAN *v.* HIRA NAND. **4 Lah. 202 : 1923 Lah. 448.**

CUSTOM (PUNJAB)—Succession—Mother.

——*Succession — Mother — Ludhiana District—Hindu Jats — Mother and son by another wife.*

By custom among Hindu Jats of the Ludhiana District a widowed mother is entitled to succeed to the estate of her deceased childless son in the presence of a son by another wife. (*Shadi Lal and Wilberforce, JJ.*) PARTAP SINGH *v.* MUSSAMMAT JAI KUAR. **51 I.C. 417 : 43 P. R. 1919**

——*Succession—Mother—Nature of her right.*

Under the Customary Law, a mother succeeding to the son's property does not, strictly speaking, succeed as the mother of the son but as the widow of the husband. 46 P. R. 1891, Rel. upon. (*Agnew and Shadi Lal, JJ.*) IBRAHIM *v.* BARKET. **201 P. W. R. 1913 : 20 I. C. 879: 323 P L R 1913.**

——*Succession — Mother — Step-mother — Sainis of Hoshiarpur*

A 'step-mother' cannot either under the Hindu Law or the Customary Law be introduced as an heir under the word 'mother.' In the *Riwaj-i-am of the Sainis* of Hoshiarpur, 'mother' does not include 'step-mother.' (*Agnew and Shadi Lal, JJ.*) KHANYA SINGH *v.* PREMI. **166 P. W. R. 1913: 20 I. C. 876 : 322 P. L. R. 1913:**

——*Succession—Mother—Step-son— Sister—Mianwali District.*

According to the Customary Law of the Mianwali District the mother and step-mother of the last male proprietor succeed to his property to the exclusion of his sister. (*Shah Din and Beadon, JJ.*) MUSSAMMAT AMIRAN *v.* MUSSAMMAT JANO. **23 P. R. 1913 : 19 I.C. 750 : 216 P. L. R. 1913**

Succession—Sister.

——*Succession — Sister — Contest between sisters and cousins—Onus.*

Where the contest is between the sisters of the deceased landowner on the one hand and the uncle and cousins on the other, the onus lies on the sisters to prove that they have a better claim to succeed to the property in dispute than the uncle or cousins. (*Scott-Smith and Forde, JJ.*) MT. SANT KAUR *v.* SHER SINGH. **4 Lah. 392: 1923 Lah. 476.**

——*Succession—Sisters—Collaterals.*

The position of females generally, as has been established in many decisions, is very much stronger in the Western Punjab than elsewhere. According to the Customary Law of the Muzaffargarh District a sister or sister's son of a deceased Jat excludes his collaterals of the third degree in the matter of succession to the estate. (*Harrison, J.*) KADIR BAKHSH *v.* ALLAH DITTA. **1924 Lah. 232.**

——*Succession—Sister—Makwal Jats of Isanmahar, Muzaffargarh District.*

All the tribes of the Muzaffargarh District recognise that on a man dying without male lineal descendant and leaving neither widow nor daughters nor daughter's sons the property passes to his (1) father, (2) brothers or their descendants, and (3) sisters, or their descendants. The position of a sister, therefore, in this District in matters of succession is a strong one. (*Broadway, J.*) HAYAT *v.* ALI MAHOMED. **1924 Lah. 195.**

CUSTOM (PUNJAB)—Succession—Sister.

——*Succession—Sister.*

In case of succession, the sisters have right to inherit in the absence of collaterals. (*Scott Smith and Harrison, JJ.*) AHMAD *v.* MT BAND, **3 Lah. 40: 1922 L. 114.**

——*Succession—Sister—Khattars of Attock District.*

The sister of a childless male owner among the Khattars of Attock District is entitled to succeed to his non-ancestral property in preference to the collaterals of her father. (*Abdul Rooof and Abdul Qadir, JJ.*) MT. CHANDI BIBI *v.* AHMAD KHAN, **1924 Lah. 265.**

——*Succession—Sister—Ancestral property—Pathans of Ludhiana Dt.*

Under the customary law prevailing among the Pathans of the Ludhiana Dt. sisters and their sons do not succeed in the presence of any collaterals who can prove their relationship to the deceased. A female intervening in the line of descent acts as a conduit pipe to pass on the property as ancestral property to her sons and their descendants, 32 P. R. 1895 (F. B.) foll. (*Scott Smith and Abdul Qadir, JJ.*) KHWAJA MAHOMED *v.* AHMAD KHAN. **66 I. C. 482.**

——*Succession—Sister—Half-sister—Arains of Nawankote—Tahsil Lahore.*

Among Arains of Nawankote, Tahsil Lahore, a sister has a right of succession. Also half-sister succeeds to the property of her half-brother in preference to his mother's father's brother. (*Martineau, J.*) MAHTAB BIBI *v.* DIN MUHAMMED. **64 I. C. 155.**

——*Succession—Sister v. Collaterals—Non-ancestral property—Bodlas of Ferozepore District*

There is no general custom that sisters exclude collaterals as regards immoveable property of any kind. Among Bodlas of Ferozepore Dist. collaterals in the fourth degree exclude sisters of the last male holder from succession to non-ancestral property. (*Chevis and Le Rossignol, JJ.*) KAME SHAH *v.* MUHAMMED SHERIF. **63 I. C. 544.**

——*Succession—Sister—Mahomadan Jats of Jhelum District.*

Among Mahomadan *Jats* of Jhelum District there is no custom of succession to the acquired property of the last male holder, when the contest is between sisters and collaterals of the ninth degree. (*Le Rossignol and Wilberforce, JJ.*) FATIMA BIBI *v.* SHAH NAWAZ. **2 Lah. 98 : 60 I. C. 509 : 3 Lah. L. J. 152.**

——*Succession— Sister— Jullundur Dist.—Mussalman Rajputs.*

The customs of Jullunder District do not allow sisters preference even over their brother's self-acquired property, before the collaterals of the 6th degree.(*Le Rossignol and Broadway, JJ.*) JIWI *v.* SANDHI. **1 Lah. 433: 58 I.C.986: 2 Lah. L. J, 384.**

——*Succession—Sister— Collaterals—Muhammadan Rajputs of Tahsil Nokedar, Jullundur District—self-acquired property—* Riwaj-i-am.

In questions of succession to self-acquired property between collaterals of the 8th degree and sisters, the onus of proving that they have a

preferential right is in the first instance on the latter, 134 P. W. R. 1907; 98 P. R 1912, Rel.; 35 P. R. 1909, Dist. In regard to Muhammadan Rajputs of the Jullunder District the onus is on the sisters and in view of the entries in the *Riwaj-i-am* of the District they had failed to discharge that onus. 44 Cal. 749 (P. C.). Ref. (*Scott-Smith and Martineau, JJ.*) MUSSAMMAT HUSSAIN BIBI *v.* NIGAHIA.

1 Lah. 1: 1 Lah. L. J. 89: 70 P. L. R. 1920: 55 I. C. 828: 34 P. W. R. 1920.

——— *Succession — Sister — Proprietors of Thulla.*

Having regard to the fact that a sister's rights have been recognised in many instances under the Customary Law of the Punjab, sister is an heir. Consequently a clause in the *Wajib-ul-arz* which refers to proprietors dying "*Lawaris*" does not apply to the case of a proprietor who dies leaving a sister. When there are no collaterals, the proprietors of the Thulla are not entitled to exclude the sister of the last male owner. 63 P. R. 1908, Rel.; 141 P. R. 1893: 5 P.R 1910 Ref. (*Scott-Smith and Martineau, JJ.*) JAGAT SINGH *v.* PARTAB SINGH. **1 Lah. L. J. 46.**

———*Succession—Sister — Collateral of 9th degree—Onus.*

In absence of any proof of custom, a collateral of the 9th degree is not preferred to a sister in succession among Shiya Jats of Gujarat District in respect of non-ancestral property. The burden of proving that a collateral of 9th degree is preferential heir to sister lies on the collateral. Having failed in proving the custom plff. cannot rely on the personal law. (*Shadi Lal and Wilberforce, JJ.*) BHARI *v.* KHANUN. **50 I. C. 422: 20 P. R. 1919.**

———*Succession—Sister—Sister's son—Gondals of Deowal.*

Among Gondals of Mauza Deowal, Tahsil Bera, District Shahpur, a sister succeeds to the property left by her brother in the absence of her collaterals. A sister and a sister's son are heirs to property in cases governed by the general Customary Law of the Province. The onus is on them to prove their right as against near and possibly even remote collaterals. But in the absence of any agnatic heirs, their right to succeed is preferable to the rights of the proprietary body or Government, especially in villages which are not homogeneous and are composed of proprietors belonging to different religions, castes and tribes. (*Rattigan, C. J. and Le Rossignol, J.*) MUHAMMAD YAR *v.* UMAR HAYAT KHAN.

65 P. R. 1918: 14 P. L. R. 1918: 45 I. C. 924: 103 P. W. R. 1918.

———*Succession—Sister — Collaterals — Self-acquired property.*

Among Banias of Palwal Tashil, Gurgaon District, custom favours the succession of a sister in preference to collaterals in 4th degree. (*Scott-Smith and Shadi Lal, JJ.*) NARAIN *v.* MT. GAINDU. **83 P. L. R. 1918: 45 I. C. 183: 85 P. W. R. 1918.**

———*Succession—Sister — Collaterals—Mahwal Jats—Tahsil Alipur, Muzaffargarh District.*

Among Mahwal Jats of Tahsil Alipur, District Muzaffargarh, a sister does not exclude collaterals whether she be married in the family or not. 44 P. R. 1909; 25 P. R. 1895, Dist. (*Chevis, J.*) HAYAT *v.* RUSTAM. **48 P. R. 1917: 41 I. C. 239: 118 P. W. R. 1917.**

——— *Succession—Sister — Sister's son—Exclusion of.*

When a *Riwaj-i-am* contains an entry that if a man dies intestate leaving no relations, his immoveable properties devolve upon all the landowners of the *thula or patna, held*, that such entry does not exclude a sister or sister's son from succession in favour of a heterogeneous proprietary body. (*Shadi Lal, J.*) GIANI RAM *v.* MARI. **40 I. C. 61: 24 P. R. 1917.**

———*Succession—Sister—Collaterals— Ancestral property — Pathans of Kasba Shahabad, Tahsil Thanesar, Karnal District.*

Among Pathans of Kasba Shahabad, Tahsil Thanesar, District Karnal, preferential rights of succession are given to collaterals in the 5th degree, although there is a tendency to regard sister and sister's sons favourably and to prefer them to remote collaterals. (*Rattigan, J.*) MUSAMMAT NUR BHARI *v.* ABDUL GHANI KHAN.

36 I. C. 712: 100 P. R. 1916.

———*Succession—Sister—Sister's son — Proprietors of village—Rights to succeed in preference to—Burden of proof—Garhi Kangoyan, District Hoshiarpur.*

Where the heterogeneous body of proprietors of a village claim to succeed in preference to deceased's sister or her son in absence of customary heirs, the former must prove that the latter are excluded from succession. In Garhi Kangoyan, District Hoshiarpur, in absence of customary heirs of a deceased Hindu proprietor, his sister or her son succeed to his estate in preference to non-homogeneous proprietary body of the village. (*Shadi Lal and Jones, JJ.*) RALLI *v.* RALLA. **85 P. R. 1916: 33 I. C. 783: 79 P. W. R. 1916.**

———*Succession — Sister — Position of — Daughter.*

The position of a sister is not as strong as that of a daughter and hence though she inherits she is but a limited owner. (*Johnstone, C. J. and Le Rossignol, J.*) MUHAMMAD BAKHSH *v.* MUHAMMAD. **90 P. R. 1915: 31 I. C. 533: 170 P. W. R. 1915.**

———*Succession—Sister—Collaterals--Kakazai Sheiks of Hoshiarpur.*

Among Kakazai Sheiks of Hoshiarpur, a collateral cannot oust a sister or her descendants from property which was acquired by her brother and has, after his death, come into her possession. (*Rattigan and Chevis, JJ.*) TUFEL MUHAMMAD *v.* SHAHEB DIN. **67 P. R. 1915: 31 I. C. 85: 148 P. W. R. 1915.**

———*Succession—Sister—Exclusion of — Collaterals of 4th degree—Kureshi Sheikhs.*

There is no custom among *Kureshi Sheikhs* of the town of Gohana in the District of Rohtak by

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which a collateral of the 4th degree excludes a sister from succeeding to her brother's property. (*Chevis and Shadi Lal, JJ.*) AYAZUDDIN *v.* MAH FUZINNISSA. **53 P. R. 1915: 3 P W. R. 1915: 27 I. C. 542 : 32 P. L. R. 1915.**

———*Succession— Sister — Collaterals—Gurhamani Biloches of Muzaffargarh.*

Among the Gurhamani Biloches of the Muzaffargarh District a sister is given preference to collaterals in the 5th and 6th degrees though she has married outside her brother's family. The burden of proving the contrary is on the collaterals. (*Rattigan and Shah Din, JJ.*) RANJHA *v.* JINDWADI. **104 P. R. 1914 : 221 P. L. R. 1914 : 24 I. C. 942 : 122 P. W. R. 1914.**

———*Succession—Sister — Collaterals of 5th degree—Awans of Mianwali District—Sister and collateral in 5th degree—Mutation in sister's name—Acquiescence by collateral — Silence and conduct.*

Certain land of an Awan of Mianwali District was mutated by the Collector in favour of the sister. The reversioners in the 5th degree who were entitled to the property did not contest the correctness of the new entries though they were present before the Collector and acquiesced in certain other acts of the sister of the deceased. *Held*, that they had acquiesced in the title of the sister and therefore could not sue for recovery of the land. (*Rattigan and Shadi Lal, JJ.*) SHER KHAN *v.* SIS BANO. **225 P. L. R. 1914 : 24 I. C. 930 : 125 P. W. R. 1914.**

———*Succession—Sister — Collaterals —Jats, Mauza Bhadal—Lahore—Rights to properties of deceased brother—Preference—Burden of proof.*

Among Jats of Mauza Bhadal, Lahore District, a sister has no right to succeed to the non-ancestral property of a deceased brother in the presence of a collateral, however remote. 134 P. R. 1907, Rel. on ; 117 P. R. 1901 ; 44 P. R. 1909 ; 35 P. R. 1909 ; 71 P. R. 1892 Dist. The burden of proving that she is entitled to inherit in preference to a collateral lies upon her. 134 P. R. 1907 ; 72 P. R. 1907, Foll. (*Johnstone and Chevis, JJ.*) HARNAMON *v.* SANTASINGH. **98 P. W. R. 1912 : 13 I. C. 711 : 122 P. L. R. 1912.**

———*Succession—Sister— Collaterals — Self-acquired property.*

A sister of last male holder must give way to a collateral as regards succession to his self-acquired immoveable property. (*Chevis, J.*) SUNDAR SINGH *v.* HAR KHAN. **76 P. W. R. 1912 : 13 I. C. 444 : 77 P. L. R. 1912.**

Succession—Son.

———*Succession— Son— Grandson of first cousin.*

The grandson of a first cousin has no right to succeed under the Customary Law of the Punjab. (*Chevis, J.*) SHER DIL *v.* GULAB. **1922 Lah 471.**

———*Succession—Son of appointed heir.*

The son of an appointed heir who predeceased the appointer cannot succeed to the appointer's property in the absence of a special custom to that effect. (*Shadi Lal, C. J., Scott-Smith and Harrison, JJ.*) MELA SINGH *v.* GURDAS. **3 Lah. 362: 1922 Lah. 433 (F. B.).**

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———*Succession—Son—Adopted son—rights of.*

Where the adoption is complete, the right of adopted son to inherit to collaterals is presumed. (*Abdul Raoof, J.*) WARYAMAN *v.* KAUSHI RAM, **3 Lah. 17 : 1922 Lah. 105.**

———*Succession — Son — After-born son—Rights of, when commences.*

The rights of a son under Hindu Law in the estate left by his father commence at birth and not before, and the widow is consequently competent to alienate the property for necessity before the birth of the son. (*Scott-Smith and Martineau, JJ.*) HIRA *v.* BUTA. **1 Lah. 128 : 1 Lah. L. J. 36 : 56 I. C. 256 : 49 P. W. R. 1920.**

———*Succession—Son—*Pichlag *son—Adoption and alienation.*

Where members of a family do not object to a man's being succeeded by his *pichlag* son, the latter thereby gets no general right of collateral succession in the family, and as regards adoption and alienation he is in no better position than a stranger. (*Johnstone, C. J.*) RAM PRASAD *v.* HARNAM. **37 I. C. 137 : 116 P. L R. 1916.**

———*Succession—Son, eldest—Extra share.*

Among *Dakhna Aroras* of Multan there is a recognised custom of giving an extra one-fourth share of ancestral immoveable property to the eldest son. (*Kensington, C. J. and Shadi Lal, J.*) KHILANDA RAM *v.* NANDA RAM. **108 P. L R. 1915 : 29 I. C. 766 : 68 P. W. R. 1915.**

———*Succession—Son—Udasi Fakirs.*

Among the Udasi Fakirs of Tahsil Jagraon, District Ludhiana, a legitimate son is entitled to succeed in preference to the *Chela* of the deceased. (*Rattigan and Beadon, JJ.*) UTTAM DAS *v.* CHANAN DAS. **51 P. R. 1913: 283 P. L. R. 1913: 20 I. C. 462 : 200 P. W. R. 1913.**

Succession—Special custom.

———*Succession—Special custom—Sonless proprietor—Aptointment of heir.*

According to the customary law, a sonless proprietor has the power to appoint one of his kinsmen to succeed him as his heir. The appointment in order to be valid must be made in some unequivocal and customary manner and the execution of a deed coupled with a long course of treatment has always been recognised as one of the modes of manifesting such an appointment. 9 P. R. 1893 ; 4 P. R. 1892 ; 94 P. R. 1893 ; 3 P. R. 1901, and 40 P. R. 1905, Foll. (*Broadway and Moti Sagar, JJ.*) BAJ SINGH *v.* PARTAB SINGH. **1923 Lah. 497 (2).**

———*Succession—Special custom—Qureshis of Multan.*

Plaintiffs asserted a special custom according to which daughters in the family of the parties did not in the presence of the sons, succeed to the agricultural land, although, as regards surban immoveable property, they took their share according

to Mahomedan Law. The evidence on record did not show that a daughter or widow claimed her share but was refused *Held*, that the special custom was not proved. *See* MAH. LAW JUSTICE AND PARTIES **4 Lah. 85 : 1923 Lah. 184.**

——*Succession—Special custom.*

The onus of proving a special custom as to succession is on the person asserting its existence. (*Agnew and Shadi Lal, JJ.*) KANHAYA SINGH *v.* PREMI. **166 P. W. R. 1913 : 20 I. C. 876 : 322 P. L. R. 1913.**

Succession—Widow.

——*Succession—Widows—Sodhis—Rights of widows.*

Custom does not prevail among the Sodhis of Anandpur whereby widows get no rights of inheritance but can only get maintenance. (*Abdul Raoof and Campbell, JJ.*) RAM NARAIN *v.* MT. HAR NARINJAN KUAR. **4 Lah. 297 : 1924 Lah. 116.**

——*Succession—Widow—Nature of estate—Rights of reversioner.*

A widow succeeding to a limited interest in her husband's estate is treated equally as a widow holding a limited estate under the Hindu Law. In either case, the next heir has a right to protect the inheritance by challenging unauthorised alienations made by her. 135 P. R. 1908, Foll. (*Shadi Lal, C. J. and Le Rossignol, J.*) DALIPA *v.* DALU. **4 Lah. L. J. 336.**

——*Succession — Widow — Re-marriage — Effect on inheritanoe.*

On the re-marriage of a widow her rights in her deceased husband's estate come to an end according to the general custom of the Punjab as prevalent among agriculturists. (*Broadway, J.*) MAHANDA *v.* MT. GAUHRE. **66 I. C. 433.**

——*Succession — Widow — Jats of Tahsil Raya, Sialkot District—Widow—Inheritance.*

Among the Jats of Raya Tahsil of the Sialkot District a widow inherits her husband's estate with his son from another wife. (*Shadi Lal, C. J. and Le Rossignol, J.*) JASWANT SINGH *v.* HARKAUR. **61 I. C. 893.**

——*Succession—Widow—Nature of interest.*

Among Punjab agriculturists a widow invariably succeeds and gets a life-interest in her husband's estate. (*Shah Din, C. J. and Le Rossignol, J.*) MUHAMMAD BAKSH *v.* KARM ILAHI. **104 P. L. R. 1917: 82 P. W. R. 1917: 40 I. C. 246 : 101 P. R. 1917.**

——*Succession — Widow — Adopted son — Brahmins, Kangra District.*

The widow of an adopted son cannot by custom among Brahmins of the Kangra District succeed to the collaterals of the adoptive father of her husband. (*Rattigan and Leslie Jones, JJ.*) SANTU *v.* MUSSAMMAT JOK. **44 P. R. 1916: 36 I .C. 625: 84 P. L. R. 1917.**

——*Succession— Widow—Collateral succession—Pathans of Jullundur City.*

Among Pathans of Basti Mithu of Jullundur City, the widow of a deceased proprietor can

succeed to his collateral's estate in the same way as her husband would, had he been living. 32 P.R. 1916, Foll. 77 P. R. 1893. Diss. (*Johnstone, C. J and Shadi Lal, J.*) KHADIM HUSSAIN *v.* SHER MUHAMMAD. **121 P. R. 1916 : 185 P.W.R 1916: 36 I. C. 380 : 82 P. L. R. 1917.**

——*Succession—Widow—Daudzai Pathans, Peshawar District—Childless proprietor.*

Among Daudzai Pathans, the widow of a childless proprietor succeeds to a life estate in her husband's property but she has no right to claim partition of the joint holding. (*Barton, C. J.*) ZARIF *v.* MT. BAKHT NISA. **80 P. L. R. 1916.**

——*Succession—Widow—Collaterals—Chakral Rajputs of Guzarkhan.*

Among Chakral Rajputs of Mauza deir, Guzarkhan Tahsil, Rawalpindi District, the survivor of two widows of a sonless proprietor is entitled, whatever her caste or rights as against a co-widow may be, to hold her deceased husband's property for life, and so long as she lives, no collateral can claim possession of that property. (*Kensington, C. J. and Rattigan, J.*) HASAN KHAN *v.* BANO. **15 P. R. 1915 : 27 I. C 535 : 46 P. L. R 1915.**

——*Succession — Widow — Re-marriage — Forfeiture of husband's property.*

According to the agricultural custom in the Punjab, a widow on re-marriage forfeits her right to the property of her deceased first husband. (*Johnstone and Chevis, JJ.*) KESAR SINGH *v.* SANT SINGH. **19 P.L.R 1914.**

——*Succession—Widow—Guru—Bairagis in Kulu.*

Among the Bairagis of Kothi Nagar in Kulu, a chaste widow excludes the Guru from inheritance. (*Johnstone and Shah Din, JJ.*) DIAL DAS *v.* MUSAMMAT DHIANIN **36 P. R. 1914 : 17 P. L R. 1914 : 21 I. C. 932 : 18 P. W. R 1914.**

——*Succession—Widow — Re-marrying husband's brother—Effect.*

A widow does not by re-marrying her husband's brother, lose, for the purpose of succession, her previous status as the widow of her first husband. (*Agnew and Shadi Lal, JJ.*) KANHAYAL SINGH *v.* PREMI. **166 P. W. R. 1913 : 20 I. C. 876 : 322 P L. R. 1913.**

——*Succession—Widow—Unmarried daughter—If takes share of inheritance with son—Khattars of Fatehjang, Attock District.*

No custom prevails among *Khattars* of Fatehjang, Attock District, by which a widow or an unmarried daughter takes a share of inheritance with the sons of the propositus. In such a case, a widow or an unmarried daughter can have only maintenance which may be given by setting aside certain land for her. (*Kensington and Chevis, JJ.*) ROSHANAI KHANAM *v* NAWAB KHAN. **112 P. R. 1912 : 17 I. C. 903 : 32 P. L. R. 1913.**

——*Succession—Widow—Nature of her right.*

Obiter :—Among the Punjab agricultural tribes the right of the widow of a proprietor has grown from a right to maintenance into a right to hold her deceased husband's land, and this latter right

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is clearly a vested right or interest to or in her husband's land which the widow acquires on his death. (*Shah Din and Scott-Smith, JJ.*) SHAHAB DIN *v.* PANAH BIBI. 92 P. W. R. 1912: 14 I.C. 749: 97 P. W. R. 1912.

——*Succession—Widow — Brothers and agnates—Ansari Pathans, Jullunaur District.*

Among Ansari Pathans in the City of Jullundur a widow by custom succeeds for life to the estates of her deceased husband in the presence of his brother and other near agnates. (*Reid, C. J. and Johnstone, J.*) MURAD BIBI *v.* KHADIM HUSSAIN. 12 I. C. 49 : 114 P. W. R. 1911.

——*Succession—Widow—Re-marriage—*

Among Sikh Jats at Mouza Butahari, Ludhiana District, a widow does not forfeit her life-estate in her deceased husband's property by re-marriage in *koriwa* form with the latter's brother. But she forfeits it to her deceased husband's brother, if she re-marries a collateral, however near, other than the brother of her deceased husband as in that case she steps out of the proper family circle 29 P. L. R. 1901, Rel. 58 P. R. 1900. Ref. (*Shah Din, J.*) BASANTI *v.* PARVATA. 51 P. R. 1911 : 10 I. C. 885 : 156 P. W. R. 1911.

——*Succession — Widow — Re-marriage — Unchastity.*

Where the widow of a predeceased son succeeds by custom or acquiescence to her husband's property she is entitled to continue till remarriage or death and is not divested by unchastity. (*Shah Din and Chevis, JJ.*) KHARAM SINGH *v.* DHAN.

5 P. W. R. 1911: 9 I. C. 37 : 13 P. L. R. 1911.

——*Succession—Widow—Relinquishment.*

A widow who takes a life-interest in her husband's property is competent to make a *bona fide* relinquishment to accelerate the reversion. It is, however, not open to her to do so merely in order to convert her limited title into an absolute one by collusion with the presumptive reversioner, More distant reversioners are entitled to impeach such a transaction exactly as they would be entitled to impeach an alienation to outsiders made by the life-holder with the assent and collusion of the presumptive reversioner. (*Pipon, J. C.*) MT. RAM RAN *v.* ZARGUL. 70 I. C. 39.

Village Community.

——*Village Community — Applicability of agricultural custom.*

One of the most important tests to be applied in determining whether a particular caste is or is not governed by agricultural custom is to ascertain whether or not they form a compact village community or, at least a compact section of the village community. If they do so, the presumption is strongly in favour of the applicability of custom. This presumption in favour of custom has been applied even in cases of Brahmins, and must be still stronger when applied to a tribe whose religious and social status is much inferior. Where the caste concerned forms a compact section of the village community there is a strong presumption in favour of custom. (*Scott-Smith and Eforde, JJ.*) PREM SINGH *v.* DARBARA SINGH. 1923 Lah. 557.

CUSTOM (PUNJAB)—Widow.

——*Village community* —Abadi—Thakia—*Conversion of.*

Where a *thakia* issued by all the sections of the community and is not a mosque, a small section of the community have no right to appropriate it entirely and others have a right to object to such appropriation. A *thakia* cannot be converted into a mosque as it is likely to deprive a considerable section of the community of its use for which it is converted. (*Dundas, J.*) MAULA BAKSH *v.* DASONDHI. 3 Lah. L. J. 17.

——*Village community--Brahmins of a village —Whether, governed by custom or Hindu Law—Test to determine.*

In order to find out whether Brahmins of a village are governed by custom or Hindu Law, ordinarily one most important test is whether the Brahmins in question are a compact village community or at least a compact section of the village community. In such cases there is a strong presumption in favour of custom. (*Shah Din, J.*) JAI RAM *v.* SARDAR SINGH. 23 P. R. 1914 : 26 I. C, 512 :195 P.L.R. 1914:

——*Village community—Grazing right — Extent of.*

A *wajib-ul-arz* referred only to the proprietors and others who were in any way connected with the settlement of the land revenue as being entitled to graze their cattle in the *shamilat* land, *held*, that shop-keepers of the village who were neither proprietors nor tenants were not included in village community and had no grazing rights. (*Shah Din and Scott Smith, JJ.*) MUNSHI RAM *v.* RULIA RAM. 95 P. R. 1914 : 223 P. L. R. 1914 : 24 I. C. 980 : 126 P. W. R. 1914.

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——*Widow—Right of partition—Burden of proof.*

A widow of a deceased co-sharer has a statutory right to demand partition and the onus lies on the party who disputes such right to prove that it does not exist. (*Martineau and Moti Sagar, JJ.*) GHANSHAM *v.* RAMJI LAL. 4 Lah. 344 : 5 Lah. L. J. 444 : 1923 Lah. 625.

——*Widow—Re-marriage—Manjh Rajputs —Offspring, whether illegitimate.*

The custom among Manjh Rajputs of the Jagraod Tahsil, prohibiting re-marriage of widows being opposed to natural justice, equity, and public policy cannot be upheld and the offspring being otherwise legitimate are entitled to inherit their father's property. (*Le Rossignol and Harrison, JJ.*) MAULA BAKSH *v.* FATEH JANG. 1922 Lah. 358.

——*Widow—Acts affecting estate—Reversioners, if bound.*

Any act of a widow prejudicing the estate will not bind the reversioners except for the life of the widow. They need not contest the acts during her lifetime. The creation of occupancy rights being an alienation can be challenged by the heirs in accordance with the well recognised principles of customary law. (*Scott, Smith and Dundas, JJ.*) NAND SINGH *v.* MT. DHAN KAUR. 68 I. C. 299 : 2 Lah. L. J. 573.

CUSTOM (PUNJAB)—Widow.

———*Widow—Re-marriage—No forfeiture.*

Re-marriage of a widow does not entail forfeiture of the estate taken by her according to the customary law. (*Chevis and Campbell, JJ.*) DHANNUN *v.* BHAGWANI. **67 I.C. 555.**

———*Widow—Gift by.*

A widow cannot, in the absence of a custom to the contrary, make a gift of land at all. She can ordinarily alienate only for necessity. (*Martineau, J.*) NIZAM DIN *v.* SHADI. **59 I. C. 580 : 3 L L.J. 172.**

———*Widow—Re-marriage—Effect.*

Whether by custom a woman who has succeeded to her husband's estate after her son's death, loses on her subsequent re-marriage, her right to retain the estate, is a question depending upon the circumstances of each case. The onus is on the person who pleads her right to retain it of proving it. (*Rattigan, Chevis. Shadi Lal and Leslie Jones, JJ.*) BISSI *v.* HIRA SINGH.
75 P. R. 1917 : 42 I. C. 338 : 144 and 145 P. W. R. 1917.

———*Wtdow—Nature of estate.*

Under Hindu Law and agricultural custom a widow gets a life-interest in her husband's estate and she cannot question any disposition of the property made by her husband. (*Chevis and Le Rossignol, JJ.*) MOTI SINGH *v.* MT. JAMNA DEVI.
8 P, R. 1916 : 32 I, C. 522 : 203 P. W. R. 1915.

———*Widow—Unchastity of—Jats of Panipat Tahsil—Burden of proof.*

Among the Jats of Panipat Tahsil the burden of proving that by custom a widow forfeits her life-estate by reason of unchastity lies upon the person asserting the custom, 107 P. R. 1888, Foll. (*Robertson and Shah Din, JJ.*) KURF *v.* DES RAJ.
57 P. W. R. 1912 : 13 I. C. 448 . 102 P. L. R. 1912.

———*Widow—Unchastity—Forfeiture—Effect.*

When an unchaste widow gifts her husband's property to her love, the reversioner is entitled to immediate possession thereof in cases where by custom, unchastity involves forfeiture of the widow's estate. Per *Robertson, J.*—There is a distinction between the nature of forfeiture of a widow's estate by re-marriage and by unchastity. Per *Johnstone and Chevis, JJ.*—The forfeiture operates as against the widow and the alienee from her (not being a *bona fide* alienee for value) from the date of the unchastity and not merely from the date of the suit by the reversioner. Among Hindus and Muhammadan Rajaputs of Hoshiarpur District an unchaste widow forfeits her life-estate in the property of her husband. She becomes a trespasser, directly the act of adultery is committed and the reversioner's suit must be regarded as a claim to dispossess a person who has prior to the suit ceased to hold any right and becomes trespasser. (*Robertson, Johnstone, Rattigan and Chevis, JJ.*) RAMDEVI *v.* SHIB DEVI.
108 P. R. 1913 : 13 I. C. 290 : 1 P, W. R. 1912.

———*Widow—Re-marriage—Ahirs.*

The re-marriage of a widow is allowed by custom among 'Ahirs.' (*Kanhaiya Lal, A. J. C.*)
NARPAT *v.* JANAKA, **61 I. C. 303 ; 24 O. C. 11.**

CYPRES.

CUSTOMARY EASEMENT—*See.* EASEMENTS.

CUTCHI MEMONS—*See* KHOJAS AND KUTCHI MEMONS.

CYPRES—*See also.*
(1) C. P. CODE. S. 92.
(2) HINDU LAW. RELIGIOUS ENDOWMENT,
(3) MUHAMMADAN LAW. WAQF.

———*Application extra territorium—Jurisdiction of Court.*

Where the charitable objects lie outside the jurisdiction of the Court, the Court can only safeguard the funds intended to be applied to those charitable purposes where such funds lie within the Court's jurisdiction and thereafter leave their application to the intended objects to the Courts of the country within whose jurisdiction those objects are. A Court has no jurisdiction to apply the cypres doctrine *extra territorium.* (*Beaman, J.*) KANJI *v.* ADVOCATE-GENERAL.
32 I. C. 925 : 18 Bom. L. R. 60.

———*Failure of one charitable bequest.*

Where the testator had general charitable intention and one of the charitable bequests fails, the property would have to be devoted to other religious or charitable purposes. (*Beaman and Hayward, JJ.*) ABDUL KADAR *v.* SAFIABU.
36 B. 111 : 12 I. C. 702 : 13 Bom. L. R. 1025.

———*Charitable bequests.*

In the case of charitable trust, the court has no power to substitute a charity in place of one directed by the testator, merely on the ground that the latter is more useful. (*Davar, J.*) ADVOCATE-GENERAL OF BOMBAY *v.* FARDOONJI.
11 I. C. 356 : 13 Bom. L. R. 332.

———*Applicability of doctrine.*

Where there is vagueness and uncertainty in a charitable bequest the doctrine of cypres should be extended as much as possible. (*Raoof and Campbell, JJ.*) SUNDAR LAL *v.* KULLU RAM.
65 I. C. 820.

———*Muhammadan law — Waqf — Court's power to direct cypres—application of funds.*

The doctrine of cypres is applicable to India and is in harmony with the spirit of the Muhammadan Law. The doctrine is applied when from lapse of time or change of circumstances, it is no longer possible beneficially to apply the property left by the founder or the donor in the exact way in which he has directed it to be applied beneficially for similar purposes by different means. Eleemosznary doles are demoralising and mischievous in their effect and only pauperise the recipient and ought to be discouraged. The Court held that maintenance and support of poor Muhammadan students giving preference to those among the disciples or descendants of the original Sajjudanashin, would carry out the intention of the founder at the present day and under the present circumstances. (*Abdur Rahim and Seshagiri Aiyar, JJ.*) SUJJADASHAH *v.* PEERJADA SHAH HAH **53 I. C. 677: (1919) M. W. N. 662.**

———*Trustees—Powers of Muhammadan Law.*

The trustees of a charity cannot make a cypres application of its funds to purposes other than

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those marked out by the instrument of trust or the scheme of a Court regulating the charity. The Court can apply the doctrine in making the scheme for a Muhammadan charity. (*Abdur Rahim, C. J. and Moore, J.*) GOVINDA DOSS *v.* GOVINDA DOSS. **10 L W 559 : 53 I. C. 661 : (1920) M. W. N. 168.**

———*Inam grant—Doctrine if applies to.*

Semble—(*Abdur Rahim, J.*)—The doctrine of cypres execution will be applicable to charitable *inams* where a general charitable object is mentioned in the grant. (*Abdur Rahim and Spencer, JJ.*) SECY OF STATE FOR INDIA *v.* GULAM MAHBOOB KHAN. **42 Mad. 673 : 9 L. W. 587 : 51 I. C. 366 : (1919) M. W. N. 736 : 37 M. L. J. 71.**

———*Doctrine of—Scope of—Hindu Law.*

Where the objects mentioned by the dedicator do not exhaust the corpus of the fund, the Court is to find out whether there was a general charitable intention or purpose. Even though the object may be specified and the bequest otherwise denni e, if the law will not allow the application of the fund for the purpose, the Courts are not at liberty to infer a general intention in favour of charity and to direct the application of the property to other charitable purposes. If the Court can ascertain that there was a general charitable intention, the fact that the particular object for which the charity was intended did not exist or that the fund intended for that charity could not exhaust the whole income, will not be any reason for holding that the bequest failed in whole or in part. If the donor intended that the fund should be devoted to charity and that the particular intention was named merely as a channel to effect that intention the whole fund will be regarded as dedicated to the charity and the Court will proceed to carry out the intention of the testator on the principle of cypres doctrine. When grants made to religious institutions are not earmarked, or are not intended to exhaust the recurring income, and whenever they are made as general thanks-offerings, it is proper to direct their application to the promotion of knowledge. The doctrine of cypres is in harmony with Hindu Law. Indian Courts can give directions towards application of the trust income, though the trustee may not himself be competent to apply it. Under S. 92, C. P Code, the Court can sanction a scheme on a cypres application of a charitable trust. (*Abdur Rahim and Seshagiri Aiyar, JJ.*) MUTHU KRISHNA *v.* RAMACHANDRA. **47 I. C. 611 : 37 M. L. J. 489.**

———*Gift for charitable purposes—Construction.*

In the case of a charitable gift if the testator's intention is to promote some specific and well-defined purpose, only then the doctrine of cypres is not applicable. But if there is a general charitable intention which the testator wishes to carry out in a particular way, which is impracticable, the Court will give effect to his wishes cypres. (*Wallis, C. J. and Coutts Trotter, J.*) DORAISWAMI PILLAI *v.* SANDANATHAMMAL. **2 L. W. 577 : 30 I. C. 225 : (1915) M. W. N. 478.**

DAMAGES.

DACCA CONSERVANCY ACT (VII OF 1870).

———S. 6—*Vesting of Dhola Khal in Municipality—If includes bed of river.*

The vesting of the Channel Dhola Khal in the Dacca Municipality under S. 6 of the Dacca Conservancy Act includes the bed of the Channel. (*Holmwood and Chapman, JJ.*) ANANDACHANDRA GOPE *v.* MAHARANEE DASYA. **18 I. C. 840.**

DAHYAK.

———*Nature of—Charge—Dahyak or Dasaundhis closely analogous to nankar and is a charge on the property.*

A cash allowance in perpetuity awarded by an allowance by order of the ettlement officer is technically known as d yak or Daswant. (*Daniels, A. J. C.*) PRAN KUNWAR *v.* SHANKAR BAKHSH SINGH. **21 O. C. 327 : 49 I. C . 6 O. L. J. 152.**

———*Birt right—Distinguished.*

Dahyak is an under-proprietary right but not an under-proprietary right in land while Birt right is a right in the land in possession. The birtdar is entitled to deduct the Dahyak from its rental. (*Lindsay, J. C. and Kanhaiya Lal, A. J. C.*) MOHAMMAD ABDUL HASAN KHAN *v* ISHWAR NATH. **48 I. C. 265 : 21 O. C. 244.**

———*Holder—Whether has under-proprietary right in the land—Presumption.*

A dahyak right unless accompanied by possession otherwise than by fraud or force does not necessarily connote that the holder thereunder has also under-proprietary right in the land. A cash dahyak right does not necessarily carry a right to possession. A dahyak right ordinarily is transferable but a preferential right to a lease is not transferable even if coupled with a dahyak right so that a dahyak right coupled with a right to claim a lease in preference to the rest does not confer on the lessee an under-proprietary right. (*Kanhaiya Lal and Sabonadiere, A. J. C.*) RAM JIYAWAN *v.* MAHOMED ABDUL HUSSAIN KHAN, **23 I. C. 231.**

DAMAGES.

See also (1) CONTRACT ACT, S. 73.
(2) TORT.

Assessment of.
Breach of Contract
Cause of Action.
Conversion.
Illegal Attachment.
Illegal Seizure.
Interest.
Landlord and Tenant.
Lessor and Lessee.
Liability for.
Master and Servant.
Measure of.
Mines.
Negligence.
Pleader and Client.
Railway Company.
Right to
Secretary of State.
Special Damage.
Tort.

DAMAGES—Assessment of.

Trade Mark.
Trespass.
Use and Occupation.
Wrongful Attachment.

Assessment of.

———*Assessment of—Committee of experts—Adjudication, when binding on parties.*

In the absence of proof of fraud either in the inception or in the proceedings of a Committee appointed to assess damages the decision is binding upon the appellant. Mere error would not be sufficient to upset the decision of an expert tribunal voluntarily set up for the decision on matters of skill. (*Lord Robertson.*) PESTONJI JEHANGIRI *v.* JAISINGHDAS HANSRAJ.
8 C. W. N. 57 : 22 Bom. L. R. 420 (P. C.).

———*Assessment of — Foreign currency — Exchange.*

Plaintiff sued to recover the equivalent in rupees of the sum mentioned in foreign currency. It is converted into Indian currency at the rate of exchange. (*Fawcett, J.*) MADHAVJI THAKUR *v.* VADILAL. **25 Bom. L. R. 173 : 47 B. 487 : 1923 B. 437.**
[*See also* **2 Bur. L. J. 130.**]

———*Assessment of—Reference to Officer of Court—Market value—Assessing damages.*

Cases ought only to be referred to other persons to assess damages where the inquiry involves questions of detail which it would be a waste of time for the courts to enter into. But, as a general rule, it is not desirable to split up a trial into two enquiries, first, as to the right, and secondly as to the amount of damages. In a suit for the recovery of damages for alleged breach of contract for the supply of coal, the market rate at the time of the alleged breach might well have been ascertained by the Judge and there is no occasion for any reference to the *referee* for the purpose. (*Jenkins, C. J. and Woodroffe, J.*) D. N. GHOSE *v.* POPAT NARAIN. **42 Cal. 819 : 30 I. C. 990 : 19 C. W. N. 609.**

———*Assessment of—Suit for injunction and damages—Execution.*

In a suit for injunction and damages, the ascertainment of damages cannot be left to be determined in execution. (*Stephen and Mullick, JJ.*) MOULA BAKHSH *v.* STRUGHAN DEB DHABAL.
23 I. C. 595.

———*Assessment of—Principles.*

The principle of assessment of damages is that the party entitled thereto is to recover the profits which he would have made, if the contract had not been cancelled. Some factors to be taken into consideration in determining the amount of damages are : (*a*) The rates charged must not be in excess of the prevailing market rates; (*b*) Chapter of accidents must be taken into account ; and (*c*) the fact that the personal energies of the party released from the contract could be directed into other channels of enterprises, has also to be taken into account. (*Dawson, Miller and Bucknill, JJ.*) JUGAL KISHORE *v.* BABU HOMESHWAR.
1922 P. 79

DAMAGES—Breach of Contract.

———*Assessment of—High Court will not interfere in appeal.*

The High Court will not, except on a matter of principle, interfere with the decision of the lower Court on the question of quantity of damages. (*Das and Ross, JJ.*) BISWESWAR LAL *v.* RUP KISHORE. **62 I. C. 72 : 2 Pat. L. T. 255.**

———*Assessment of—Legality.*

An award of damages which the plff. has not claimed, and where the deft. is not given an opportunity to meet the claim, is illegal. (*Parlett, J.*) MAUNG AUNG PU *v.* MAUNG SI MAUNG.
12 I. C. 809 : 4 Bur. L. T. 128.

Breach of Contract.

———*Breach of contract—Doctrine of frustration of contract.*

To interpret a business bargain, expressed in the language of commerce, it is no doubt important to appreciate the methods and the point of view of business men, but this is merely a prudent way of qualifying the mind to construe their words, and so to determine their meaning, and is a very different thing from postulating that reasonable men would have been likely to agree to one kind of liability and not to another, and from this, concluding that, whatever the words of the contract say, that kind of liability, and that alone, is the obligation of the contract. As a matter of fact there is nothing surprising in a merchant binding himself to procure certain goods at all events. It is a matter of price and of market expectations. No doubt it is a speculation, but many dealings even in cotton goods are of that character. Where the vendor performed a subsequent contract with Govt. during war after breaking the contract with the plaintiff to supply goods as and when they may be received from mills, *Held*, the adventure, of which the commercial purpose is suggested to have been frustrated, is of course, the purchase and sale of these goods between the parties to this contract, and this adventure was not frustrated. All that happened was, that the defendants failed to perform their contract. When they have paid the damages, one commercial purpose, at any rate, will, so far from being frustrated, have been fulfilled. The Mills, from which the goods were to come, no doubt were contemplated as continuing to exist, though it does not follow that in a bargain and sale, the closing or even the destruction of the Mills would affect a contract between third parties, which is in terms absolute ; but where the Mills did continue to exist and did continue to manufacture the goods in question, only they were made for and delivered to somebody else, the matter is completely outside the principle enunciated in (1903) K. B. 740 or (1903) K. B. 756. (*Lord Sumner.*) HARNANDRAI FULCHAND *v.* PRAG RAJ. **44 M. L. J. 498 : 47 Bom. 344 : 25 Bom. L. R. 537 : 27 C. W. N. 879 : (1923) M. W. N. 547 : 18 L. W. 441 : 38 C. L. J. 248 : L. R. 4 P. C. 61 : 32 M. L. T. (P. C.) 171 : 50 I. A. 9 : 1923 P. C 54 (2 (P. C.).**

DAMAGES—Breach of Contract.

———*Breach of contract—Mutual obligations—Effect.*

In a case where there are mutual obligations on the parties, it is on the plaintiff to show that on the date fixed for performance of the contract, he was ready and willing to perform his part of the bargain. It may perhaps not have been necessary for him to prove that he made an actual tender of the money but it was, at any rate, incumbent on him to show that he had made arrangements for the purchase-money and was in a position to hand it over to the first defendant as soon as he was satisfied that the bulk of the goods was in accordance with the sample and that everything was satisfactory. (*Rafique and Lindsay, JJ.*) MAHOMED ISMAIL KHAN *v.* HASAN ALI KHAN. **1923 All. 220.**

———*Breach of contract to marry.*

Existence of syphilis at the time of entering the contract to marry or the acquiring of such disease after the contract is made is a good defence, though the disease was acquired through no wrongful act of the defendant. (*Mookerjee, A C. J. and Chowdhury, J.*) BIRENDRA *v.* HEMALATA. **48 Cal. 283 : 33 C. L. J. 97 : 60 I. C. 362 : 24 C. W. N. 914.**

———*Breach of contract— Repudiation of contract before date fixed for performance.*

Breach of contract may take place before the time fixed for its performance as where the promissor repudiates it. In such case the other party may sue for damages even before the date fixed for its performance. The damages in such a case are measured by what the injured party would have suffered by the continued breach of the other party up to the date of complete performance, less any abatement owing to circumstances of. which he ought to have availed himself. (*Mookerjee, A. C. J. and Fletcher, J.*) MANINDRA CHANDRA NANDY *v.* ASWINI KUMAR ACHARYA. **48 Cal. 427 : 32 C L J. 168 · 60 I. C. 337 · 25 C. W. N. 297.**

———*Breach of contract of marriage.*

Breach of betrothal agreement gives rise to a claim for damages. (*Le Rossignol, J.*) HIRA *v.* JOWALA DAS. **27 P. L. R. 1915 : 27 I. C. 1008 : 224 P. W. R. 1915**

———*Breach of contract of marriage.*

Where A contracted with B to give his sister in marriage to B and received Rs. 300 in cash and Rs. 300 were payable at the time of *phera* ceremony, which is a ceremony performed at the wedding and on the arrival of the marriage procession, A postponed the marriage but got his sister married elsewhere. *Held*, the non-payment of second Rs. 300 is no ground to break the contract as the time for that payment did not arrive ; that Rs. 300 must be refunded and some damages for loss of reputation must be paid by A to B. (*Chevis, J.*) RAM RAKHA *v.* ATMA RAM. **181 P. L. R. 1912 : 16 I. C 851 : 232 P. W. R. 1912.**

———*Breach of contract—Failure to execute proper lease.*

A failure to execute a properly stamped lease according to agreement renders the lessor liable for damages. 42 C. 801 ; 13 C P. L R. 163 ; 20 C. W. N. 149 Foll. (*Hallifax, A. J. C.*) MT. MAKTUMBI *v.* ANANT RAM. **1923 Nag. 73.**

DAMAGES—Cause of action.

———*Breach of contract to marry.*

The law does not say there must be an express promise of marriage to sustain an action for damages for breach of promise of marriage. (*Maung Kin, J.*) MAUNG SHWE THE *v.* MAE BON. **1 Bur. L. J. 259 : 1923 Rang. 128.**

———*Breach of contract of marriage—Measure of damages.*

In a suit by a Burmese Buddhist woman for damages for breach of promise of marriage, the seduction should be considered in awarding damages. (*Pratt, O.J.C.*) MA NGWE GAING *v.* TUN YA. **57 I.C. 815 : 13 Bur. L. T. 6.**

———*Breach of contract of marriage—Measure of.*

In an action for breach of promise of marriage, it is not the deft.'s position alone that will justify a reduction of damages. When the defendant has treated the plaintiff in a shameful and hard-hearted manner, cohabited with plff. under the promise and committed breach of faith by marrying another person, the Court should award substantial damages. (*Fox, C. J. and Parlett, J.*) MAUNG SEIN KYE *v.* MA E **9 Bur. L. T. 179 : 34 I. C. 159 : 8 L, B. R. 399.**

———*Breach of contract of marriage--Grounds.*

Damages for breach of contract of marriage can be awarded to the would-be husband. In case of a breach of contract of marriage the fact that the plff. became a butt of his acquaintances, jests or had experienced shame is not an injury sufficient to warrant the grant of damages. (*Parlett, J.*) MA NGWE YIN *v.* MAUNG PO TAW. **23 I. C. 376 : 7 Bur. L. T. 14.**

Cause of action.

———*Cause of action —Easement—Light—Obstruction.*

An obstruction to light is not actionable unless it amounts to a nuisance. *Colls* v. *Home and Colonial Stores, Ltd.* (1904) A. C. 179 Foll. *Jolly* v. *Kine* (1907) A. C. 1 Expl. (*Lord Moulton.*) PETER CHARLES ERNEST PAUL *v* WILLIAM ROBSON. **42 Cal. 46 : 18 C. W. N. 933 : 1 L. W. 561 : 16 M. L. T. 204 : (1914) M W. N. 631 : 12 A. L J. 1166 : 16 Bom.L. R. 803 : 41 I. A 180 : 24 I. C. 300 : 20 C. L. J. 353 : 27 M L. J. 117 (P. C.)**

[Affirming 39 Cal. 59.]

———*Cause of action—Institution of legal proceedings—Injury—Compensation—Costs.*

The mere failure of a litigant to establish his claim to relief in a civil suit does not necessarily, in fact does not usually—give the successful party a cause of action for damages simply by reason of his success. Even if an action has been brought falsely and maliciously and without reasonable or probable cause, it does not follow that the bringing of the action will furnish a cause of action in a subsequent suit to the person who has been sued. The first step is to prove special damage, and in the absence of the proof

of special damage, no action for damages will ordinarily lie. The reasons are that the bringing of an ordinary action does not, as a natural or necessary conclusion, involve any injury to a man's property, and. further that the only costs which the law recognise, and for which it will compensate him are the costs properly incurred in the action itself. For this the successful defendant has already been compensated. But the case is different when the bringing of an action does as a necessary consequence involve an injury to property which cannot be compensated by the grant of costs in the action. (1883) 11 Q.B.D. 674 Foll: 43 C. 550 Diss. (*Stewart and Kanhaiya Lal, JJ.*) ARJAN SINGH *v.* PARBATI. **44 A. 687 : 20 A. L. J. 636 : L. R. 3 A. 408 : 1922 All. 465.**

———*Cause of action—Illegal distraint.*

The cause of action for a suit for compensation for illegal distraint arises on the date of the actual loss or damage or at the latest when plaintiff comes to know of such loss. 8 A. L. J. 573 Rel. (*Gokul Prasad, J.*) THAKURAIN AMAR KUAR *v.* POHAP SINGH. **1922 A. 139.**

———*Cause of action—Election—List of voters—Intentional misdescription—Malicious removal of name—Damages—Liability for.*

In India, as in England, if any duly qualified person entitled to be upon the electoral roll of any constituency, is omitted from such roll so as to be deprived of his right to vote and so as to give the returning officer a right to refuse his vote, he has suffered a legal wrong and is entitled to recover damages, which may be made punitive if the omission is shown to be the result of malicious intention. In such a suit brought against the Municipal Board as well as individual members forming the Board, if liability is eventually established, that liability in order to be placed upon the right shoulders, must be decided according to the ordinary general principles of principal and agent. (*Walsh and Stuart, JJ.*) MUNICIPAL BOARD, AGRA *v.* ASHARFI LAL.
44 A. 202 : 20 A. L. J. 1 : 1922 All. 1.

———*Cause of action—False imprisonment—Warrant of arrest issued by error of Court.*

No action will lie against any person for an execution being issued or otherwise acting in pursuance of a judgment or order of a court of justice, even though it is erroneous. A valid order, in spite of its being erroneous in fact or law, is a sufficient justification for any act done in pursuance of it. Where a person is arrested in pursuance of a warrant of Court, though illegal, he has no cause of action for false imprisonment against the person executing the warrant. (*Mulla, J.*) BACHOO BHAIDAS *v.* VELJI BHIMSEY & Co.
25 Bom. L. R. 595 : 1924 Bom. 191.

———*Cause of action—Personal liability—Breach of contract of marriage*

An action to recover damages for breach of a contract of marriage abates on the death of the plff. Under Hindu Law if there is good cause for the retraction of a marriage contract, the offender is not liable to be fined but he must pay the expenses incurred by the bridegroom or his

father during the betrothal. (*Macleod, C. J. and Heaton, J.*) BALUBHAI HIRALAL *v.* NANALAL BHAGUBHAI. **44 Bom. 446 : 55 I.C. 624 : 22 Bom. L. R. 143.**

———*Cause of action—Obstruction to execution by third person.*

A judgment-creditor obstructed by a third person in executing his decree, by attachment of his judgment-debtor's property can sue to recover damages from such third person arising from his act. (1904) A. C. 301 at 313 Rel. (*Chandavarkar and Russell, JJ.*) HARI VENKATESH PAI HARI *v.* VENKAPPA SHETTI. **15 I. C. 541 : 14 Bom. L. R. 356.**

———*Cause of action — Personal liability—'Actio personalis moritur compersonae.'*

A suit to recover damages for wrongful acts of a Talukdari Settlement Officer in the recovery of a certain cess alleged to be due from the plff is a personal action and no liability descends from the particular officer, to his successor in the Talukdari Settlement Office. (*Beaman and Hayward, JJ.*) RANMALSINGJI *v.* MAHASHANKAR.
36 Bom. 174 ; 12 I. C. 716 : 13 Bom. L. R. 1047.

———*Cause of action—Co-sharer—Ouster from property.*

Where there has been a complete ouster of one co-sharer by another the former is entitled to recover damages from the latter. (*Buckland and Cuming, JJ.*) PARBATI MAJHI *v.* DIGAPATI MAJHI. **64 I. C. 465.**

———*Cause of action—Invasion of right to property—Trespass.*

Wherever any act injures another's right and would be evidence in future in favour of the wrong-doer an action may be maintained for an invasion of the right, without proof of any specific damage. Where there is a breach of a covenant not to excavate any tank, there is an infringement of the legal rights of the plff. who is consequently entitled to nominal damages even though he may not have suffered actual damage. (*Mookerjee and Beachcroft, JJ.*) AKSHOY KUMAR CHATTERJEE *v.* AKMAN MOLLA.
19 C. W. N. 1197 : 27 I. C. 397 : 20 C. L. J. 551.

———*Cause of action—Procuring erroneous decision.*

A party is not liable in damages for procuring an erroneous decision. (*Fletcher and Richardson, JJ.*) MOHINI MOHAN MISSER *v.* SURENDRA NARAIN SINGH. **42 Cal. 550 : 18 C. W. N. 1189 : 26 I. C. 296 : 21 C. L. J. 68.**

———*Cause of action—Erroneous decision—Remoteness.*

Where a party has suffered loss owing to the erroneous decision of a court of law, the other parties thereto though wrong-doers cannot be held liable for such damages which were not the probable result of the act of the deft. but were the consequence of the judicial officer. 16 M. 420: C. L. J. 226 Foll. (*Chatterjee, J.*) MACKAY *v.* CAVE. **9 I. C. 137 : 12 Cr. L. J. 14.**

———*Cause of action—Injunction wrongfully obtained.*

DAMAGES—Cause of action.

Where a person has without sufficient or reasonable cause obtained a temporary injunction which has caused loss to his opponent the latter can sue the former for damages without any proof of malice. (*Abdul Raoof and Abdul Qadir, JJ.*) L. EVANS *v.* ARTHUR MUICK.
45 P. L. R. 1922 : 1922 Lah. 303.

——*Cause of action—Voluntary offerings—Suit for compensation for loss of—Archaka—Wrongful dismissal by Dharmakartha.*

An Archaka of a temple, wrongfully kept out of the office by the trustee, is entitled to compensation for loss of offerings during the period of his exclusion though the offerings are of a purely voluntary nature. A temple trustee who has wrongly excluded an Archaka from the temple cannot plead that the Archaka's damages should be reduced as he did not promptly challenge propriety of deft.'s action in court. (*Oldfield and Phillips, JJ.*) BALASUBRAMANIA SASTRI *v.* PONNUSAMI AIYAR. 26 M. L. T. 259 : 10 L. W. 305 : 54 I. C. 721 : (1919) M. W. N. 707.

——*Cause of action—Malicious act—No infringement of a legal right—Loss of voluntary contributions.*

Malice does not by itself give a cause of action for damages, unless there is an infringement of a legal right. The trustees of a temple discontinued certain festivals as a result of which the Archakas lost the voluntary contributions they used to receive from worshippers. *Held*, that Archakas had no cause of action as the trustees owed a duty to the public and not to the Archaka to perform the ceremonies and therefore however malicious their action may be to injure the plff. they were not liable in damages to them. 6 B. 122 Foll. (*Ayling and Coutts Trotter, JJ.*) SUBBARAYA BHATTA *v.* SRINIVASA SHANBHAGA.
49 I. C. 800.

——*Cause of action—Attachment of moveables—Claim—Suit for damages.*

Where a person successfully intervenes and gets certain attached moveables belonging to the judgment-debtor released the decree holder may sue the claimant for the value of the bricks when attached. (*Fox, C. J. and Hartnoll, J.*) RUGBEER MISSER *v.* MAREAPPA PILLAYAND.
11 I. C. 828 : 4 Bur. L. T. 178.

Conversion.

——*Conversion—Hire.*

Where boats are hired out for a specific period, the proper course is to sue for damages for wrongful conversion of the boats and not for hire after that date. (*Parlett, J.*) MAUNG BA GYAW *v.* HENG SENG & Co. 36 I. C. 276 : 10 Bur. L. T. 187.

Illegal attachment.

——*Illegal attachment—Action for trespass—Defence of honest mistake—Reasonable and probable cause.*

The High Court in an appeal ordered that unless the plff. pay to the deft. the cost of the litigation within 6 weeks of the arrival of record in the Sub-Court, the appeal would be dimissed with costs. The payment was made in time ; but the deft. under a mistake as to pa ment attached the property of the plff. who sued for the malicious issue of legal proces-s and alleged that the attachment of his crop had resulted in the destruction of the crop and affected his credit : *Held*, that the suit was maintainable and the deft. was liable for damages for trespass, the mistake or the presence or absence of reasonable and probable cause being immaterial. (*Mookerjee and Carnduff, JJ.*) BISHUN SINGH *v.* A. W. N. WYATT.
16 C. W. N. 540 : 11 I. C. 729 : 14 C. L J. 515.

——*Illegal attachment—Attachment before judgment—Completion of attachment not necessary.*

In a suit for damages for wrongful attachment before judgment the facts were that the defendant had caused the attachment before judgment of the plaintiff's goods on the allegation that defendant had executed deeds of transfer in favour of his relations with a view to defraud creditors. The only fact proved in support of the allegation was that plaintiff had, two years before the application for attachment, purchased certain properties in the name of hie wife and had subsequently paid for improvements on it. On the passing of the order of attachment, the court amin at the instance of the defendant proceeded to the plaintiff's shop and took the goods out of the shelves whereupon the plaintiff paid the suit amount. Thereupon the attachment warrant was returned. *Held*, that the deft. was liable in damages because the attachment before judgment was obtained without reasonable and probable cause and therefore maliciously. The plaintiff was entitled to damages even though the attachment was not completed. (*Oldfield and Venkata Subba Rao, JJ.*) JOSEPH NICHOLAS *v.* SIVARAMA AIYAR.
45 Mad. 527: 15 L. W. 442: 30 M.L T. 269 (H. C.) : (1922) M. W. N 242 : 1922 Mad. 206.

Illegal Seizure.

——*Illegal seizure of cattle—Onus.*

In a suit for damages for wrongful seizure of cattle the onus lies on the defendant to prove that seizure was legal. (*Mitra, A. J. C.*) MADHO RAO *v.* ABDUL GAFOOR. 44 I. C. 241.

Interest.

——*Interest—Damages in lieu of.*

Interest by way of damages may be awarded in a proper case. Non-payment on due date does not justify such an award. (*Spencer and Krishnan, JJ.*) SINGARAJU VENKATASUBRAMANIAN *v.* RAJAH OF VENKATAGIRI. 56 I. C. 552 : 11 L. W. 523.

Landlord and tenant.

——*Landlord and tenant.*

Where a tenant gives up premises before the expiry of lease the landlord is entitled only to damages and not to a suit for the rent for the unexpired term of the lease. (*Mookerjee and Buckland, JJ.*) JOGENDRA KRISHNA ROY *v.* KURPAL HARSHI & Co. 35 C. L. J. 175 : 49 Cal. 345 : 1923 Cal. 63.

——*Landlord and tenant—Omission to pay rent.*

DAMAGES—Lessor and Lessee.

Damages should not be awarded to the landlord in a suit for arrears of rent where it is found that there was a long-standing dispute between him and the tenant on account of enhancement of rent. (*Mookerjee and Chatterjee, JJ.*) GANESH DUTT SINGH *v.* LUCHMI NARAIN SINGH. **34 I C. 783 : 23 C. L. J. 209.**

Lessor and Lessee.

——— *Lessor and lessee—Cause of action—Deprivation of a portion of the holding.*

Government settled certain lands with plaintiff subject to a permanent tenancy the rent of which was payable to the plaintiff.

Held, that the mere fact that as rent receiver the plaintiff was deprived of a small portion of lands without any reduction of rent payable to him by the permanent tenant, would not entitle him to any damages against Government. (*Fletcher and Walmsely, JJ.*) BIJOY CHAND *v.* SECRETARY OF STATE FOR INDIA. **48 I. C. 972.**

Liability for.

——— *Liability for—Deft. in possession taking fruits—Suit for damages is not maintainable.*

Where the defendant was in possession of a garden either as limited or absolute owner, a suit by the alleged true owner for damages for appropriation of fruits by defendant cannot be maintained. He must either sue for rent or for possession. (*Chatterjee and Panton, JJ.*) HARIHAR DAS *v.* KRISHNA DHAN GHOSH. **62 I. C. 635.**

Master and servant.

——— *Master and servant—Wrongful dismissal—Temple Committee—Trustee.*

Where a temple committee dismisses a trustee in an irregular manner without convening a proper meeting but by circulation of papers, the dismissal is wrongful and the individual members of the committee are liable in damages to the dismissed trustee. In a suit by such trustee for damages it is not open to the members to plead sufficiency of grounds for the dismissal. (*Wallis, C. J. and Kumaraswami Sastri, J.*) VENKATA NARAYANA PILLAY *v.* PONNUSWAMI NADAR. **41 Mad. 357 : 24 M. L. T. 454 : 7 L. W. 85 : 43 I. C. 205 : (1917) M. W. N. 839 : 33 M. L. J. 660.**

——— *Master and servant—Wrongful dismissal.*

In an action for wrongful dismissal, the general rule is that the plaintiff may recover damages for the whole unexpired period of service; where, however, it is provided that the agreement may be terminated at an earlier date by giving a previous notice, the parties may reasonably be held to have contemplated the time limit of the notice as attaching to any liability for wrongful termination of the agreement. In such cases damages for wrongful dismissal should be limited to the period of notice required under the agreement. Where the law creates a duty and a party is disabled from performing it without any default of his own by the act of God, the law will excuse him, but where a party by his own contract creates a duty he is bound to make it good notwithstanding any accident by inevitable necessity. (*Pratt, J. C and Fawcett, A. J. C.*) JACOB ELLAS SASOOL *v.* DOSSA KALIAN. **15 I. C. 757 : 5 S. L R. 192.**

DAMAGES—Measure of.

Measure of.

——— *Measure of—Fire insurance.*

Damage done by water used to extinguish fire and damages incurred during possession of the premises by insurers must fall on the Fire Insurance Company. (*Lord Moulton.*) AHMAD BHOY *v.* BOMBAY FIRE AND MARINE INSURANCE CO., LTD. **37 Bom. 183 : 40 I. A. 10 : 13 M L. T. 11 : 11 A. L. J. 42 : 15 Bom. L. R. 19 : 17 C.W.N. 269 : 17 C. L. J. 154 : 24 M. L. J 328. 17 I. C. 755 : (1913) M. W. N. 64 (P. C.) [Reversing 34 Bom. 1 : 1 Bom. L R. 1].**

——— *Measure of—Proof—Loss caused by Ry.—Damage caused to goods and its value.*

Where the plaintiff sought to prove by producing the invoices sent to him by the consignors showing that the value of the goods amounted to Rs. 304: *Held*, it is *prima facie* evidence of what the plaintiff was charged for the goods and what presumably he would have to pay for them and in the absence of cross-examination it is perfectly admissible evidence and it would not be necessary to call the consignors and put them into the box to prove what was the actual value of the goods sent. (*Ryves, J.*) DUKHI RAM BARAI *v.* B. N. W. RAILWAY. **1923 All. 145.**

——— *Measure of—Contract—Tort—Trespass—Bona fides.*

Damages for trespass are at large, but at least the plaintiff is entitled in every case to nominal damages. If the defendant makes a *bona fide* mistake a court ought to be content to award nominal damages, but if a defendant takes a risk which he knows to be a risk and persists in fighting, when he knows or ought to know that he is wrong, his conduct ought to be measured in some way by the special damages which the Court is entitled to award. The measure of damages in contract is quite different to that in tort. In contract the plaintiff can only recover the actual pecuniary loss. In tort he is entitled to special damages for trespass to property. Circumstances may aggravate the plaintiff's grievance, and can be dealt with by some special sum which is awarded partly as a *solatium*, and partly in *terrorem* to other persons who may be disposed to act as the defendants have done. (*Walsh and Ryves, JJ.*) SOHA LAL *v.* LALA AMBA PRASAD. **L. R. 3 A. 494 : 20 A. L. J. 833 : 1922 A. 526.**

——— *Measure of sale of land—No conditions for damages in case of re-sale—Effect of.*

Plaintiff acquired certain land for making a road and sold certain plots on either side of the road under certain conditions which were reduced to writing and signed. One of the conditions was that the purchaser would deposit ten per cent. of the sale price immediately on sale and in case of non-payment of the balance, the deposit would be forfeited. The defendant purchased a plot, deposited one rupee instead of ten per cent, and refused to pay the balance. The plaintiff resold the property. *Held*, that the only remedy the plaintiff

had, was under the contract, and in the absence of a condition as to payment of damages, the only penalty incurred by the defendant was the forfeiture of the ten per cent. deposit which he was bound to pay. (*Banerjee and Rafique, JJ.*) MUNICIPAL BOARD OF ALLAHABAD *v.* TIKANDARJANG.

38 All. 52 ; 30 I. C. 584 : 13 A L. J. 1079.

———*Measure of—Malicious prosecution.*

In an action for damages for malicious prosecution, the plaintiff is entitled to claim damages for mental distress and bodily discomfort resulting from his arrest and detention in the lock up. (*Pigott, J.*) BALDEO SHUKUL *v.* BALBHADER SINGH.

27 I. C. 410.

———*Measure of—Defamation—Libel.*

Where a libel was published in the course of public excitement and it is not easy to be precise in fixing the quantum of damages, aggravated damages were not allowed. In a case of libel the damages are at large: no particular damage need be proved. The jury may give damages having regard to the conduct of the parties and all the circumstances of the case. (*Scott, C. J and Chandavarkar, J.*) NADIRSAW HORMUSJI *v.* PIROJSHAW RATANJI.

19 I. C. 98 : 15 Bom. L. R. 130.

———*Measure of—Rate of exchange—Date for conversion.*

In a suit for damages by reason of negligence on the part of the defendant as a common carrier, the loss caused to the plaintiff must be measured by the rate of exchange prevailing on the date of the breach and not that prevailing at the date of judgment (1920) 2 K. B. 704 : (1920) 2 K. B. 709 : (1920) 2 K. B. 714 Foll. (*Rankin, J.*) DEKHARI TEA CO., LTD *v.* ASSAM-BENGAL RAILWAY CO., LTD.

66 I. C. 469: 48 Cal. 886.

———*Measure of—Appellate Court, when justified in interfering.*

Per Sanderson, C. J.—The Court of appeal should not interfere unless the decision of the trial Judge on a question of damages appears to be clearly erroneous 37 C. 760 Rel. *Per Woodroffe, J.*—English cases which deal with the question of revision of damages by the Court of Appeal have no application in this country where the jury system does not prevail. Here the question of damages is to be dealt with by the Court of Appeal as any other portion of the case. (*Sanderson, C. J. and Woodroffe, J.*) JUSTAIN HULL *v.* ARTHUR FRANCIS PAULL.

58 I C. 421: 24 C. W. N. 352.

———*Measure of—Lessor and lessee—Sale by reason of lessee's default.*

In the case of sale of an estate by reason of the lessee's default to perform his part of the contract, the measure of damages is the actual loss sustained by reason of the sale. (*Mookerjee and Beachcroft, JJ.*) RAHIM BAKSH MANDAL *v.* SAJJAD AHMAD CHOUDHURI.

26 I. C. 466: 19 C. W. N. 1311.

———*Measure of—Injunction improperly obtained.*

When a person is enjoined to stop the construction of a building after he has collected the materials therefor, he is entitled to damages for the loss and destruction of the materials, the loss and destruction being considered as the measure. If a person is unlawfully prevented by injunction from exercising acts of ownership on his property, he should get such damages as are the necessary and proximate results of the injunction. (*Mookerjee and Carnduff, JJ.*) BHUT NATH PAL *v.* CHANDRA BENODE PAL.

16 I. C. 443: 16 C. L. J. 34.

———*Measure of—Nominal.*

Nominal damages, are allowed in recognition of the fact that there is an infraction of a legal right, which though it gives the plff. no right to any real damages at all, yet it gives him a verdict or judgment because his real right is infringed. (*Mookerjee and Carnduff, JJ.*) BISHUN SINGH *v.* A. W. N. WYATT.

16 C. W. N. 540 : 11 I. C. 729: 14 C. L. J. 515.

———*Measure of.*

Damages infringement of for Copyright is the amount of the proceeds of the sale of the offending work and general damages for infringement. (*Le Rossignal and Campbell, JJ.*) MESSRS. KHOSLA BROS. OF LAHORE *v.* THACKER'S DIRECTORIES, LTD.

67 I. C. 983.

———*Measure of—Negligence—Injury to person—Tests for ascertaining amount awardable as damages.*

Where a person has suffered personal injuries on account of the negligence of another he can recover damages for personal suffering, and for loss of enjoyment of life and also to actual pecuniary loss resulting to, and the expenses reasonably incurred by him. If he is engaged in a profession or trade or other occupation, he must be compensated for the probable future loss by reason of incapacity to work. In assessing damages arising from the probable loss or failure of income the plff.'s average earnings form the natural basis. 28 L. T. 735 Foll. The law does not require the Court to give the injured party the value of an annuity for the same amount as his average income for the rest of his life. (*Shadi Lal and Martineau, JJ.*) SRI RAM *v.* DELHI ELECTRIC TRAMWAYS & LIGHTING CO., LTD.

75 P. R. 1919: 49 I. C. 435: 13 P. W. R. 1919.

———*Measure of—Assault—Costs incurred in prosecuting assailant.*

In a suit for damages for a criminal assault plff. is not entitled to include in his claim costs incurred by him in successfully prosecuting the deft. for the hurt caused to the plff. by the deft. (*Chevis and Shadi Lal, JJ.*) JAGANNATH *v.* HAKIM.

17 P. R. 1916: 30 I. C. 485 : 176 P. L. R. 1915 : 117 P. W. R. 1915.

———*Measure of—Exemplary—Doctrine of—If applicable to India.*

The doctrine of exemplary damages should not be introduced into India English decisions on the law of libel should not be accepted as precedents for Indian Courts unless they are in consonance with justice, equity and good conscience.

DAMAGES—Measure of.

(*Sadasiva Aiyar and Spencer, JJ.*) NAGANATHA SASTRI *v.* SUBRAMANIYA AIYAR.
5 L. W. 598: 40 I. C. 126 : 21 M. L. T. 324 : 32 M. L J. 392.

——— *Measure of—Principle of remoteness.*

In actions on contract and tort the damages which the plff. can claim must be the direct result from the wrongful act of the deft. and not remote. It is the basis of the principle, that plff. should avoid or diminish the damages as far as possible. In consequence of deft.'s obstruction to the plff.'s right of way to his field the plff. claimed damages for loss of crops. The damages were too remote but he could claim extra cost he would incur by using the more circuitous and hazardous way, and also substantial damages for interference with his right of way. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) GEDEHAL KARIBASAVANA *v.* NANDAVARAN VEERABADRA,
36 Mad. 580: 16 I. C. 14 : (1912) M. W. N. 1056 ; 25 M. L. J. 3,

——— *Measure of—Wrongful attachment.*

If in an execution a person objects to an attachment of property and has to pay costs of an erroneous decision to other side, he can recover the sum as damages, for having been compelled to pay costs. (*Stuart, J. C.*) MAIKU LAL *v.* NAZIR AHMAD. 55 I. C. 697 : 7 O. L. J. 310.

——— *Measure of—Dispossession of purchaser in execution sale.*

Where an auction-purchaser is dispossessed and claims damages for the period of his possession, the purchase money paid by him is not to be taken into consideration in assessing the amount of damages. He can get damages to the extent of the rent of the property of which he has been deprived. (*Kanhaiya Lal, J. C.*) NAWAB SAIYAD WILAYAT HUSAIN *v.* ZAMANI BEGAM.
54 I. C. 112: 6 O. L. J, 608.

——— *Measure of—Exemplary—Trespasser.*

Exemplary damages can be awarded against a trespasser. (*Lindsay, J. C.*) JAGANNATH *v* DEBI SAHAY. 13 I. C. 493.

——— *Measure of—Compensation for breach of contract of service—Descretion of Court.*

In a suit for damages for breach of contract of service, compensation should be decreased with the increase in the length of service rendered to the plff. by the deft. (*Parlett, J.*) KUMBHA HAJI *v.* MOTI CHAND MAKANJI SHAH. 39 I C. 121.

——— *Measure of—Breach of contract to deliver goods.*

Market rate on due date governs the question of measure of damages and the defaulting vendor cannot take advantage of a settlement between buyer and third party. (*Kemp, A. J. C.*) FIRM OF SANTDAS DEOKISHENDAS *v.* FIRM OF NIDHANSINGH JAVARISINGH. 66 I. C. 267: 15 S. L. R. 214.

——— *Measure of—Contract for the sale of land—Breach—Date for ascertaining quantum of damages.*

In a suit for damages for a breach of contract to sell land the court's consideration for ascertaining the quantum of damages will be what value would be fetched by it in the open market. (*Kemp, A. J. C.*) NAROOSHANKAR *v.* RAJUMAL.
15 S. L. R, 21.

DAMAGES—Negligence.

——— *Measure of conversion.*

The ordinary measure of damages in an action for conversion is the market value of goods at the time of the conversion. (*Pratt, J. C.*) JACOB ELIAS SASSOON *v.* DOSSA KALIAN.
15 I. C 757: 5 S. L. R. 192.

Mines.

——— *Mines—Wrongful working—Measure of damages.*

Where a person unauthorizedly opens and works mines in the land leasing out the minerals, the measure of damages is the value of the minerals wrongfully abstracte , as at the date of the abstraction deducting the expenditure incurred in converting the minerals into chattel and of carrying them to the pit's mouth. (*Mookerjee and Beachcroft, JJ.*) F. F. CHRISTIAN *v.* TEKAITNI NARBADA KOERI. 20 C. L. J. 527 : 27 I. C. 471: 19 C. W. N. 796.

——— *Mines—Wrongful working of adjacent mine—Measure of damages.*

As to the basis on which damages for wrongful extraction of coal from an adjacent mine should be assessed, *Held*, that the deft. having not acted fairly and honestly or inadvertently or under a mere mistake or under a *bona fide* belief of title, the plff. company was entitled to the value at the pit's mouth of the coal worked and taken by the deft. from he plff.'s mine making to the deft. all just allowances for the cost and expenses incurred by him in bringing that coal to the pit's mouth but not including the cost of getting or severing the coal. (*Das and Foster, JJ.*) THE LODNA COLLIERY CO., LTD. *v.* BIPIN BEHARY BOSE. 55 I. C. 113 : 1 Pat. L. T. 84.

Negligence.

——— *Negligence—Vis Major—Municipality—Statutory powers.*

The Hubli Municipality, a body corporate under the Bombay District Municipal Act, with a view to provide a municipal cotton market selected for that purpose the site of a large ancient tank largely silted up. The southern boundary of that tank was an embankment. In reclaiming the bed of the tank, the Municipality utlized a part of the embankment and took precautions to prevent the flow of water In June 1907 there was a sudden and extraordinary rainfall at Hubli, which practically overflooded the whole Municipal area and caused damage to the goods in the plff.'s Ginning Factory, to the south of the tank. Thereupon, the plff. sued the Municipality to recover damages alleging negligence on the part of the defts in carrying out the reclamation work. The deft. denied the plff.'s allegation and answered that the damage to the plff's. goods was due to the abnormal heavy rain in June 1907 and that no precautions by the defts. could have averted the damage caused. *Held*, that the suit was not maintainable and that the onus of proof of negligence lay on the plffs. and if the neglect in the execution of their

DAMAGES—Negligence.

statutory powers and duties was not brought home to the Municipality, a suit against them must fail however great was the damage suffered by plff. from the extraordinary flood uncontrolled by the old tank dam. (*Per Rao, J.*) The damage was mainly, attributable to the extraordinary fall of rain. It was a result of *vis major* for which the defts. were not responsible. (*Scott, C. J. and Rao, J.*) THE MUNICIPALITY OF HUBLI *v.* RALLI BROTHERS. **35 Bom. 492 : 12 I. C. 884 : 13 Bom. L. R. 1138.**

———*Negligence—Injury to workman on acoount of negligence of employer—Measure of damages.*

The defendants (employers) for the purposes of their own business used a method of breaking up caste iron which consisted of dropping a heavy weight on pieces of iron on a bed of iron with the intention that these pieces should be broken into smaller pieces. The weight was dropped from a height of 35 feet with the inevitable result that pieces of iron flew about. It was found that the iron pieces habitually flew to distances of four or five yards from the pit. The fencing around the pit was only three feet high and in spite of it iron pieces were flying about. The plaintiff's husband, who was employed under the defendants, was working at a distance of 70 to 80 yards from the pit, was hurt by a piece of iron and killed. In an action by the plaintiff for damages *held*, that the defendants owed a duty not only to the public but to their servants to take adequate precaution that the pieces of iron shall not cause injury, and that they were obviously negligent in putting up an inadequate screen round the pit. The defendants were therefore liable in damages, and they could not succeed on the plea of *volenti non fit injuria* as they failed to prove that the person injured knew of the danger, appreciated it, and voluntarily took the risk. As regards damages the High Court increased the award of the lower Court by giving three years' wages instead of one year's wages awarded by the lower Court. (*Sir Walter Schwabe, C. J. and Wallace, J.*) SOUTH INDIAN INDUSTRIALS *v.* ALAMELU AMMAL.
45 M. L. J. 53 : (1923) M W. N. 344 . 17 L. W. 490 : 1923 Mad. 660.

———*Negligence—Judgment-debtor's liability.*

A judgment-debtor is not liable in execution for negligently allowing the decreed house to be burnt. 5 C. L. R. 522 Foll. (*Sadasiva Aiyar and Moore, JJ.*) RAMUSHETTITHI *v.* MANNIAPPA SHETTITHI. **33 I. C. 620**

Pleader and Client.

———*Pleader and client—Contract by pleader with tenants in an agraharam to work for them.*

Where a pleader contracted with certain tenants in an agraharam that he would defend a suit against them by the agraharamdar but subsequently entered into a contract with the agraharamdar and filed suits against them, he is liable to pay damages to the tenants for breach of contract though no suit was brought against them. (*Sankaran Nair and Bakewell, JJ.*) TUMLURI VENKATARAMAYYA *v.* MADABUSHI LAXMINARASIMHA. **14 M. L. T. 589 : (1914) M. W. N. 88 : 22 I. C. 33 : 26 M. L. J. 72**

DAMAGES—Secretary of State.

———*Pleader and client—Defamation in argument.*

A suit against vakil for words used during argument is not maintainable. (*Das and Adami, JJ.*) JAGAT MOHAN *v.* KALIPADA. **1 P. 371 : 3 P. L. T. 276 : 1922 Pat. 85 : 1922 P. 104.**

Railway Company.

———*Railway Company.*

When in carriage of goods by the deviation of route loss of goods is caused, the Railway is not protected by the risk note form B. (*Macleod, Kt., C. J. and Shah, J.*) VALIMAHOMED KAMAD *v.* G. I. P. RY. **24 Bom. L. R. 316 : 46 B. 830 : 1922 Bom. 74.**

———*Railway Company—Refusal to reweigh goods.*

The refusal by Railway Co. to reweigh goods before delivery does not justify the consignee in refusing to take delivery as the company is not legally bound to reweigh. (*Das and Adami, JJ.*) SURAJ MAL MARWARI *v.* AGENT, BENGAL NAGPUR RAILWAY CO. **58 I. C 200.**

Right to.

———*Right to—Prize proceedings—Claim as alternative to claim for release.*

A claim for damages in prize proceedings cannot be had as an alternative to a claim for the release of the vessel and consistently with her condemnation. (*Lord Sumner.*) THE KARA DENIZ, *In re.* **25 Bom. L. R. 116 : 46 Bom 857 : 1922 P C. 371.**

———*Right to obligation under bond—An obligation under contract—Distinction.*

An obligation under a bond does not sound in damages but an obligation under a contract sounds in damages. (*Fox, C. J. and Twomey, J.*) COLLECTOR OF RANGOON *v.* MAUNG AUNG BA. **9 Bur. L. T. 111 : 33 I. C. 920 : 8 L. B. R. 382.**

Secretary of State.

———*Secretary of State—Liability for.*

The Secretary of State for India is liable in damages for wrongful interference with the property of a subject. Legislation taking away the remedy of subject in civil courts for such damages is *ultra vires*. (*Lord Haldane.*) SECY. OF STATE *v.* MOMENT. **40 Cal. 391 : 40 I. A. 48 : 13 M. L. T. 53 : 17 C. W. N. 169 : (1913) M. W. N. 45 : 15 Bom. L. R. 27 : 11 A. L. J. 49 : 17 C. L. J. 194 : 6 Bur. L T. 1 : 7 L. B. R. 10 : 18 I. C. 22 : 24 M. L. J. 459 (P. C.).**

———*Secretary of State.*

A suit against Secretary of State is not maintainable for the erroneous disposal of property produced in a criminal case. (*Rafique and Piggott, JJ.*) PANCHAETI AKHARAMAHA NIRBANI *v.* THE SECRETARY OF STATE FOR INDIA. **20 A. L. J. 420 : 44 A. 573 : 1922 A. 276.**

———*Secretary of State—Illegal levy of money.*

A suit for the refund of the money illegally levied is properly brought against the Secretary of State. (*Stephen and Chatterjee, JJ.*) KAILASH CHANDRA NAG *v.* SECRETARY OF STATE. **40 Cal. 452 : 17 C. W. N. 315 : 18 I. C. 112 : 17 C. L. J. 216.**

DAMAGES—Special damage.

Special damage.

——*Special damage.*

In case of wrongful detention by Railway Co. and its servants or passenger for refusal to pay excess fare, vindictive damages cannot be awarded. (*Macleod and Crump, JJ.*) KASTURIBAI *v* G. I. P. RY. CO. **1923 Bom. 172.**

Tort.

——*Tort—Overflow of rain water—Washing away of land on the bank of a water course.*

An owner of property as also his neighbours are entitled to protect themselves against water which they have not brought on their lands of their own accord and they can divert that water to protect themselves from damage. The owners on the banks of a nala by erecting dams passed the whole water into the nala and in consequence of that combined water the land of the plff. was damaged. In a suit by plff. it was held that he had no cause of action against the deft. who was owner of the lands on the opposite banks of the nala. (*Macleod, C. J. and Heaton, J.*) SHIDRAMAPPA *v.* MAHOMED YUSUF. **59 I. C. 391 : 22 Bom. L. R 1107.**

——*Tort—Criminal Act.*

The use of illegal means to attract traders by intimidation and physical complusion by a rival owner of a new market, gives rise to the right to a civil remedy for damages but not for an injunction to the owner of the old market, as the rival cannot be restrained from holding a market on a specified day. (*Richardson and Greaves, JJ.*) HEMCHANDRA ROY CHOUDHURY *v.* KRISTO CHANDRA SAHA SARDAR. **24 C. W. N. 800 : 58 I. C. 879 : 47 C. 1079.**

Trade Mark.

——*Trade-mark—Infringement.*

In a suit for damages for infringement of trademark, it is not necessary that special damage should be proved. If the plff.'s right to the mark has been invaded, some damages, even if only nominal, will be given. (*Shah Din and Scott-Smith, JJ.*) ABDUL SALAM *v.* HAMIDULLAH. **97 P. R. 1913 : 5 P. L. R. 1912 Supp : 15 I C. 116 : 166 P. W R. 1912.**

Trespass.

——*Trespass—Nominal damages.*

Where a person was given a slight push on the wrong assumption that he was a trespasser but it is found he has not suffered in person or in reputation, he is entitled only to nominal damages. (*Newbould and Panton, JJ.*) KUMUD KANT CHAKRABURTHY *v.* BIGNOLD. **1923 C. 306.**

——*Trespass—Erection of buildings.*

The owner is entitled to recover immoveable property from a trespasser as also damages for any injury committed by him which in the case of a building would be the cost of its removal. (*Benson, and Sundara Aiyar, JJ.*) SIKKUNDER ROUTHEN *v.* MAHOMED ABBUBAKKER ROWTHEN. **21 I. C. 45 : (1913) M. W. N. 648.**

——*Trespass mines.*

A trespasser is liable not only for the actual removal of coal but also for the damage he has occasioned thereby and otherwise to the mine generally but such a claim must be based on trespass and not on covenant. (*Das and Adami, JJ.*) THE LODANA COLLIERY CO. *v.* BEPIN BEHARI. **57 I. C. 307.**

Use and occupation.

——*Use and occupation—Trespass.*

A suit for compensation for use and occupation will lie where there is real or implied tenancy under the plff. (*Phillips, J.*) CHINNA JOGAYA *v.* VERUPATI VENKATA SUBBAYYA. **12 I. C. 428.**

——*Use and occupation—Claim for—When sustainable.*

A claim for use and occupation arises only when it is shown that the occupation was by permission or sufferance. No suit for use and occupation lies against a trespasser. He is liable only for mesne profits. (*Fox, C. J.*) MAUNG PO SHIN *v.* MOHAMED THAMBI. **8 Bur. L. T. 234 : 30 I. C. 753 : 8 L. B. R. 270.**

——*Use and occupation—Lessor and lessee.*

No suit by a lessor for compensation for use and occupation would lie during the continuance of a lease. (*Parlett, J.*) J. D. PAPPADEMETRION *v.* ROSE HALLIDAY. **6 Bur. L. T. 164 : 21 I. C. 3 : 7 L. B. R. 42.**

Wrongful attachment.

——*Wrongful attachment—Loss of goods—Liability for.*

Where an unauthorised attachment is made and the property attached is subsequently removed by a third party without the knowledge and against the will of the person who has made the attachment, the former is nevertheless liable in damages to the owner of the property. (*Stuart, A. J. C.*) DULARE *v.* IBRAHIM. **51 I. C. 191.**

DAMDUPAT.

See (1). CONTRACT ACT, S. 74.
(2). C. P CODE, S. 34 AND O. 34, RR. 2, 4 AND 5.
(3). INTEREST.

DANDIDARI.

See LAND TENURE.

DARKHAST.

——*Grant—Right to cancel—Lands submerged.*

A certain *warg* consisting of a portion of submerged lands was granted on Dharkhast. The whole extent was continued in the patta without any portion being struck off: *Held*, that the Dharkhast granted included the whole *warg* number and not merely the cultivable portion. Where a grant is made by an officer competent to make it, it can be set aside by a superior officer only for fraud, mistake of fact or want of jurisdiction. Land submerged under water continues the property of the former owner, unless it is struck out from his patta and the assessment reduced. (*Sankaran Nair and Tyabji, JJ.*) ABDUL RAZAK *v.* SECRETARY OF STATE. **28 I. C. 719.**

DARKHAST.

———*Assignment of land—Transfer of unassessed to assessed land necessary before assignment—No formal order of transfer necessary—Sanction may be implied.*

Under the Darkhast rules framed by the Government, assignment of unassessed waste could be effected by a Deputy Tahsildar only after the Collector had transferred it to the head of assessed land ; but such a transfer may be implied when the Collector sanctions the assignment of the land with the knowledge that the lands are unassessed waste and an order of assessment once made cannot be cancelled. (*Sankaran Nair and Oldfield, JJ.*) SECRETARY OF STATE *v.* KRISHNAMACHARIAR. **22 I C. 931 : 1 L. W. 225.**

DARPATNI.

See BENGAL PATNI REGULATION.

DASAUNDH.

———*Right to—If connotes right to possession or under-proprietary right in land*

A right to cash dasaundh in a village is in the nature of a charge on its rents and does not connote a right to possession of the village or an under proprietary right in its land. (*Stuart and Kanhaiya Lal, A. J. Cs.*) PARTAB ALI *v.* BINDESHRI PRASAD SINGH. **40 I. C. 111 : 4 O. L. J. 187.**

———*Right to—Nature of.*

A right to dasaundh does not necessarily imply the right to hold the lands on which it is imposed. (*Porter, S.M. and Baillie, J.M.*) COURT OF WARDS, AJODHYA ESTATE *v.* PARATENADIN.
28 I. C. 929 : 2 O. L. J. 156.

———*Decree for—If connotes possession.*

A decree for Dahyak or Dasaundh does not ordinarily cannote any right to possession of land as under-proprietor or thekadar. (*Baillie, S. M. and Tweedy, J. M.*) RAJA MAHAMAD ABDUL HASAN KHAN *v.* KELO SINGH. **28 I. C. 919 : 2 O L J. 154.**

———*Nature of right.*

A right to dasaundh does not carry with it any under-proprietary rights in the lands held by the *dasaund-holder* as an ordinary tenant. 14 O. C. 335, ref. (*Campbell, J. M.*) SAHEB DIN *v.* MUHAMMAD ABDUL HASANKHAN. **28 I. C. 847 : 2 O. L. J. 191.**

DASI.

See (1) DANCING GIRL.
(2) HINDU LAW—SUCCESSION.

DASTURAT.

———*Nature of right.*

A *dasturat* is of the same nature as a malikhana (*Lord Mersey.*) RAMESHWAR SINGH *v.* SECRETARY OF STATE FOR INDIA.
39 Cal. 1 : 38 I. A. 189 : 15 C. W. N. 1029 : 12 I C. 114 : 10 M. L. T. 285 (P. C.).
[On appeal from 11 C. W. N. 448.]

DATTA HOMA.

See HINDU LAW—ADOPTION—CEREMONIES.

DATTAK MIMAMSA.

See HINDU LAW—TEXTS.

DAYABHAG.

See HINDU LAW—TEXTS.

DEBTOR AND CREDITOR.

DAYA VIBHAG.

See HINDU LAW—TEXTS.

DEAD PERSON—Decree against.

See CIV. PRO. CODE, O. 22.

DEAF AND DUMB.

See EVIDENCE ACT, S. 119.

DEATH-BED GIFT.

See MAHOMEDAN LAW.

DEATH-ILL-NESS.

See MAHOMEDAN LAW.

DEATH OF PARTY.

See CIV. PRO. CODE, O. 22, R. 6.

DEATH REGISTER.

See EVIDENCE ACT, S. 74.

DEBT.

See (1) C. P. CODE, O. 21, R. 46.
(2) CONTRACT ACT, SS. 59 AND 60.
(3) DEBTOR AND CREDITOR.

DEBTOR AND CREDITOR.

———*Discharged security — Claims of — Borrower and lender.*

The mere fact that the money is borrowed and is used for the purpose of paying off a previous charge does not entitle the lender to the benefit of the discharged security. The right to the benefit depend upon the existence of an agreement between the borrower and the lender. And this agreement must be one by which it is provided that the subsequent lender shall be substituted for the earlier creditor. (*Piggott and Lindsay, JJ.*) UMARAI LAL *v.* RUKMIN KUAR.
35 I. C. 647 : 14 A. L. J. 953.

———*Extinguishment of the debt—Creditor succeeding to debtor's estate—Effect of—Merger.*

Creditor's succeeding to the debtor's estate operates as an extinguishment of the debt except where the creditor is a limited owner as a Hindu widow. (*Spencer, J.*) CHIDAMBARAM PILLAI *v.* MEENAKSHMI AMMAL. **16 L. W. 678.**

———*Debt to be discharged in a particular manner, if a waiver of other remedies.*

An agreement that the debt due may be discharged in a certain manner does not show that the creditor has waived all other remedies which they might have. (*Sankaran Nair and Spencer, JJ.*) CHIDAMBARA CHETTI *v.* RAMASWAMI CHETTIAR. **26 I. C. 911 : 27 M. L. J. 631.**

———*Agreement by some for satisfaction of all debts—Non-acceptance by others—Effect.*

An agreement entered into between the debtor and some of his creditors for the satisfaction of all his debts which is not accepted by the other creditors cannot bind any one and the non acceptance by some absolves all. (*Bakewell, J.*) CHUNDER GURUVIAH *v.* GUJJILAM KOTIAH.
24 I. C. 462 : 26 M. L. J. 366.

———*Duty of debtor to pay.*

Under the general law debtor is to seek out the creditor for the purposes of performance. 13 C. P. L. R. 74 : 11 N. L. R. 189 foll. (*Drake-Brockman, J. C.*) LAXMAN PRASAD *v.* RAMACHANDRA ROW. **51 I. C. 859 : 15 N. L. R. 128.**

DEBTS AND JOINT FAMILY BUSINESS.

See HINDU LAW.

DEBTS FOR IMMORAL PURPOSES.

See HINDU LAW, ALIENATION.

DEBUTTER PROPERTY.

See HINDU LAW—RELIGIOUS ENDOWMENT.

DECISIONS.

See PRACTICE—PRECEDENTS.

DECLARATION.

See SPECIFIC RELIEF ACT, S. 42.

DECLARATION OF TRUST.

See (1) HINDU LAW—RELIGIOUS ENDOWMENT.
(2) MAHOMEDAN LAW, WAKF.
(3) TRUST.
(4) TRUSTS ACT.

DECLARATORY DECREE.

See SPECIFIC RELIEF ACT, S. 42.

——Relief.

See SPECIFIC RELIEF ACT, S. 42.

——Suit.

See SPECIFIC RELIEF ACT, S. 42.

DECREE.

See also (1) C. P. CODE, SS. 2 (2) 47, 152 AND O. 9, R. 13.
(2) EXECUTION.

DECREE.

Construction.
Costs.
Date of.
Dependent-Judgment.
Divorce.
Effect of
Executability.
Execution.
Ex parte.
Finality of.
Form of.
Fraud.
Merger.
Minor.
Setting aside.
Validity of.

——Construction.

Ancillary relief.
Compromise.
Conditional decree.
Costs.
Declaratory decree.
Decree against Manager.
Decree directing sale.
Extrinsic evidence
Falsa demonstratio.
Instalment decree.
Joint decree.
Mesne profits.
Mortgage decree.
Partition
Personal Liability.
Prohibition against partition.
Reference to judgment and pleadings.
Res judicata.
Rules of
Settlement Court.

DECREE—Construction—Compromise.

Stipulation.
Suit for possession.
Trial.
Vagueness.
Withdrawal.

Construction—Ancillary releif.

——Construction—Ancillary relief not granted—Enforceable in execution.

Held that the High Court and the Privy Council both intended that the relief as to the delivery of possession being ancillary should be included in the relief as to the execution of the necessary conveyance in this case, and that delivery of possession could be made in the execution proceedings. (*Mullick and Sultan Ahmad, JJ.*) DEO NANDAN PRASAD SINGH *v.* JANKI SINGH.
5 P. L. J. 314 : 1 P. L. T. 325 : 1920 Pat. 266 : 56 I. C. 322 : 2 U P. L. R. (Pat.) 108.

Construction—Compromise.

——Construction—Compromise decree.

Where under a compromise decree the plff. was required to pay a certa n sum by a certain date and the deft. had executed a hypothecation of the property in due fulfilment of the compromise, *held* that a remittance by money order by the plff. which reached deft. after the date was not a payment within the meaning of the compromise, and also that plff. was entitled to have the property sold to realise his claim as a simple money-decree. (*Richards, C. J. and Banerji, J.*) INAYATULLLAH KHAN *v.* HASHMATULLAH KHAN.
46 I. C. 193 : 16 A. L. J. 472.

——Construction—Compromise.

When a construction of compromise decree for maintenance does not give effect to intention of the compromise separate suit is necessary. (*Mookerjee and Panton, JJ.*) INDRAMANI DASI *v.* SURENDRA NATH. **35 C. L. J. 61 : 1922 Cal. 35.**

——Construction—Compromise — Prior adjustment not informed—Inconsistent decree.

Where a prior compromise is unknown to the Court, is made and is inconsistent with the decree subsequently passed and where the decree is time-barred a person in whose favour a certain lease was executed as a result of the compromise cannot in law recover the sum of the lease money which he might have got by execution of the decree. (*Chevis, A. C. J. and Wilberforce, J.*) HEM RAJ *v.* DOST MUHAMMAD.
1 Lah. 445 : 3 Lah. L. J. 10 : 57 I. C. 153 : 2 U. P. L. R (L) 117 : 136 P. L. R. 1920.

——Construction—Compromise decree--Mortgage or charge.

The construction of a compromise decree generally follows the compromise itself 24 M. 265 ; 26 M. 31 ; 35 C. 537 ; 10 I. C. 481, Ref. and explained. Where a compromise provided that the plff was to have an *aiyaka* over the properties and it is found that the plff. had mortgage right over the properties even before the compromise, *held*, that the word *Aiyaka* would mean only that the properties were to be under mortgage for the debt. (*Benson und Sundara Aiyar, JJ.*) ANUDALA SUBRAMAIAH *v.* KANDA SUBBA REDDI. **14 I. C. 213.**

DECREE—Construction—Compromise.

———*Construction—Compromise decree—Surrender in default of payment—Forfeiture.*

A compromise decree in an ejectment suit provided that the tenant should continue in possession on payment of rent per year and in default of any year's payment the deft. was to surrender land to plff. who could recover in execution. The Executing Court relieved the deft. against the forfeiture *Held* the Executing Court was competent to relieve against the forfeiture, the principle applicable to contracts being applicable to a contract entered in a compromise decree. (*Sundara Aiyar and Ayling, JJ.*) THAYYAMMALACHI *v.* RAJALI. 10 M. L. T. 326 : 12 I. C. 334 : (1911) 2 M. W. N. 327.

———*Construction—Compromise decree.*

The interpretation to be placed on a consent decree ought to be the same as that to be placed on the original agreement between the parties. (*Benson and Sundara Aiyar, JJ.*) KUMARA VENKATA PERUMAL *v.* RAMASWAMY CHETTY. 35 Mad. 75 : 9 M. L. T. 487 : 21 M. L. J. 709 : 9 I. C. 875 : (1911) 1 M. W. N. 290.

———*Construction—Compromise decree.*

Where a compromise decree provided that if the money was not paid within a certain time the decree holders could realise their money by sale of the property specified in the decree, *held*, that the decree did not create a charge on the property but merely provided in what way the execution should proceed. (*Piggott, J. C. and Lindsay, A. J. C.*) SHAH ALMA *v.* WALUDUDDAHIR MIRZA. 14 I C. 29.

Construction—Conditional decree.

———*Construction—Conditional decree.*

Where the plff. got a decree conditional on his paying into Court a certain sum of money 'within 30 days of the decree becoming final.' *Held*, that a payment made within the appeal time extended by S. 12 Limitation Act but after the expiry of 30 days from the decree was within time. (*Richards, C. J. and Banerji, J.*) BHAGELU SAHAI *v.* RAMOTAR SHUKUL. 39 All. 193 : 37 I. C. 144 : 15 A. L. J. 38.

———*Construction—Conditional decree.*

A decree was passed against three persons with some conditions attached to the satisfaction of it. Two of the judgment-debtors had to pay the amount by instalments. It they failed, the decree-holder was entitled to bring to sale the property of the third. *Held*, the decree against the first two was a simple money decree and that against the third, whose property was to be sold was a mortgage decree after the default of the two, and it was a conditional decree for the sale of the third's property. (*Richards, C. J. and Banerjee, J.*) PARBHU NARAYAN SINGH *v.* LALJI SINGH. 34 All. 636 : 16 I. C. 190 : 10 A. L. J. 256.

———*Construction—Conditional decree.*

When a mortgagee obtained possession under a decree which stated that until payment of the money interest at 2 per cent. per mensem should be allowed, until payment the lands should be handed over to the mortgagee according to the agreement and delt. should redeem the land by paying the money it was held the decree contemplated taking of accounts in the future to ascertain the interest that accrued and since the remedies were mutual that implied that the mortgagee should be debited with the rents and profits, that as possession was to be given according to the agreement, it did not amount to foreclosure but permitted redemption in the future. (*Batchelor and Rao, JJ.*) RADHABAI *v.* RAMCHANDRA. 35 Bom. 204 : 9 I C. 301. 13 Bom. L. R. 30-

DECREE—Construction—Costs.

———*Construction—Conditional decree*

A conditional decree is one which provides that the decree-holder can get the relief granted only on condition of his having done something. (*Bevan-Pelman, J.*) KANSHI RAM *v.* TAGRA. 52 I. C. 165 : 153 P.R. 1919.

———*Construction—Conditional decree—Dahyak—Under-proprietary right—Oudh Rent Act and U. P. Land Revenue Act.*

Where the deft.'s ancesters brought a suit to establish their birt right and a decree was passed disallowing the birt right but recognising their possession and allowing them an allowance of 10 per cent. as dahyak, if they accepted the terms of the talukdar, *held*, that on a construction of the decree their claim to possession was neither heritable nor transferable and that it did not confer any under-proprietary rights in them within the meaning of Oudh Rent Act or U. P. Land Revenue Act. (*Piggott, J. C. and Linasay, A. J. C.*) PARMESHAR DAT *v.* MOHAMMED ABDUL HASAN KHAN. 13 I. C 809 : 14 O. C. 335.

———*Construction—Conditional decree—Trial conditional, on payment of costs.*

A suit for partition was dismissed on the ground that all joint properties were not included. The Court of Appeal set aside the order of dismissal and remanded the case on condition that plff. appellant should pay to deft. respt the sum of Rs. 200 as costs both of the lower court and of the Court of appeal. *Held*, that the proper construction of the order was that the case should be remanded and heard upon the issues on which the decision was not given only on condition that plff. paid deft. the sum of Rs. 200 and that the trial Court should refuse to proceed with the case until the condition imposed by the Appellate Court had been complied with. (*Miller, C. J. and Coutts, J.*) JOGESH CHANDRA *v.* MAKUNDA LAL. 1920 Pat. 65.

Construction—Costs.

———*Construction—Costs, interest on.*

Where the Privy Council reversed the decree of the High Court and restored that of the Trial Court, which awarded interest on costs, the proper construction of the P. C. decree is that interest ought to be allowed on the costs of the Trial Court, and in the absence of a specific direction no interest is to be allowed on the costs in the High Court. (*Chatterjea and Pearson, JJ.*) KIRANCHANDRA *v.* SHYAMAPADA. 68 I. C. 709.

———*Construction—Costs—Direction for.*

Allowing of an appeal by the High Court with costs means the costs of the High Court only and

DECREE—Construction—Declaratory decree.

that portion of the decree which directed the then respts to pay the costs of the then appellants in the Court of First Instance is wrong. (*Mookerjee and Teunon, JJ.*) SURENDRA NATH ROY v. GIRIJA NATH ROY. 15 I. C. 910 : 15 C. L. J. 658.

Construction—Declaratory decree.

——*Construction — Declaratory decree — Revenue Court allowing maintenance—Execution of decree.*

A decree of a Revenue Court in accordance with an award entitling a woman to receive a fixed sum as maintenance and on default to take proceedings in a proper Court is a declaratory decree and could be enforced by a suit in the Civil Court and not by an application for execution. (*Chamier and Piggott, JJ.*) ANUPA KUER *v.* ACHCHAIHAR SINGH. 37 All. 97 : 26 I. C. 597 : 13 A. L. J. 38.

——*Construction—Declaratory or executable —Maintenance.*

A decree providing for realisation of maintenance from the person and property of the defendants is not simply a declaratory decree but is executable by the holder of the decree. (*Lindsay, J. C.*) MUNESHAR BAKSH SINGH *v.* PHUL KUAR. 25 I. C. 684 : 1 O. L. J. 403.

——*Construction — Declaratory decree — C. P. Code, S. 47.*

Held, on a proper construction of a decree regarding *nankar* that the decree was merely declaratory and that the suit was not barred by S. 47, C. P. Code. The operative part ended with the word "be decreed". What followed appeared to be directions to the office. The decree fixed no date for the payment of the *nankar*. The mere addition of the direction that the *nankar* was to be realised on the execution side would not alter its character as a declaratory decree ; 6 O. C. 239 : 8 O. C. 361 : 16 A. 179, ref : 9 A. 33 : 12 B. 65 : 19 C. 139 : 14 M 396 : 30 M. 504 dist. (*Piggott, J. C. and Ranque, A. J. C.*) KASHI RAM *v.* SAHIB-UN-NISSA. 15 I. C. 389 : 15 O. C. 99.

——*Construction—Declaratory—Execution—Suit.*

In a suit for possession a decree was passed in plff 's favour the court ordering the plff. to make a certain payment, but without specifying any time. Several years afterwards money was paid up and possession was asked for. The decree-holder contending that the first decree was merely declaratory and that his application for possession should be regarded as a suit under S. 47 (2). *Held* that, the decree was not declaratory and the application was only an execution application. As money was not deposited in 3 years application was time barred 17 A. 39 : 24 A. 300 Not Foll. (*Chamier, J. C.*) AJUDHIA SINGH *v.* BRIGPAL SINGH. 10 I. C. 187 : 14 O. C. 100.

——*Construction—Declaratory or executory —Distinction between.*

A decree was passed on an award in a partition suit between a widow and her sons, that the widow should get a monthly allowance out of the rents of some houses and that the houses

DECREE—Construction—Extrinsic evidence.

should be the property of the sons. The allowance was not paid to the widow for some years and she applied for execution of the decree. *Held*, that the decree was merely declaratory and could not be executed. In the case of a declaratory decree the work of the Court is to pronounce the decree and no order is issued which the Court contemplates enforcing by execution. In an executory decree there is a definite order to a definite person to do or refrain from doing something. In the case of decrees on awards the test is whether the award merely declares or creates a right or contains a definite order which the Court can execute. (*Hayward and Crouch, A. J. Cs.*) LALIBAI *v.* VALIRAM GHANSHAMDAS. 24 I. C. 861 : 7 S. L. R. 192.

Construction—Decree against manager.

——*Construction—Decree against manager —If binds family.*

It is not the form of the suit that is material but the question in each case is whether in substance the person suing or sued conducted the suit for his own benefit or representing the family of which he was the head. Where the decree is in effect against the *tarwad* the fact that the *karnavan* was not especially impleaded in his representative capacity will not make it the less binding on the *tarward*. (*Ayling and Seshagiri Aiyar, JJ.*) KARAKKATHITATHIL RAYARAPPA *v.* KOYOTAN CHABLE VEETIL. 35 M. L. J. 51 : 24 M. L. T. 28 : 45 I. C. 489 : 8 L. W. 154.

Construction—Decree directing sale.

——*Construction—Decree directing sale in default.*

Held, (*Banerjee, J. Diss.*) A decree for sale under T. P. Act always presupposes a mortgage and no decree for sale can be obtained, without undergoing the formalities of law. (*Stanley, C. J. Banerjee and Richards, JJ.*) RAMESHAR *v.* SUBKARAM. 10 I. C. 481 : 8 A. L. J. 418.

Construction—Extrinsic evidence

——*Construction—Extrinsic evidence.*

Where a decree described the lands dealt with as north of a line marked in the plan attached to the decree and a schedule attached to the decree but not referred to in it, however, described the field as survey No. 265/1. *Held*, evidence was admissible to show that survey No. 265/1 was not included in the land to the north of the line marked in the plan attached to the decree. (*Benson and Miller, JJ.*) GOVINDA VARIER *v.* PARU AMMA. 15 I. C. 360 : (1912) M. W. N. 401.

——*Construction—Extrinsic evidence—Loss by fire.*

If any credible witness who read the judgment or the part of the judgment which contained the decision can depose to what he read a decree can be drawn up. There is nothing in the Civil P. C. to prevent that. (*Maccoll, A. J. C.*) MAUNG CHIT *v.* MAUN THA KU. 4 U. B. L. R. 135 : 1923 R. 113.

DECREE—Construction—Falsa Demonstratio.

Construction—Falsa Demonstratio.

——*Consiruction—Falsa demonstratio.*

Where a decree for possession was passed in respect of a whole village but the area given in the decree was incorrect *held* that this was a case of *falsa demonstratio non nocet* and the decree-holder was entitled to the possession of the whole village. (*Miltra, A. J. C.*) MADHO *v.* BHAGIRATHI BAI. **42 I. C. 291.**

Construction—Instalment decree.

——*Construction—Instalments for payments—Default—Forfeiture clause—Waiver.*

The plaintiff obtained a decree in 1895 that the interest should be recovered at a certain rate before 31st of May every year from 1892 and that the principal should be received in twenty-five years, that if the judgment-debtors obstructed the plaintiff in attaching the cash allowance till his principal was paid or obstructed the plaintiff in getting his interest every year or obstructed him in any other way or if the plaintiff did not get the interest every year, the plaintiff should recover the whole amount by sale of the mortgaged cash allowance. The judgment-debtor made default in payment of annual instalments of interest. Execution of the decree was taken out in 1902 and Rs. 171 and odd recovered in 1903, and Rs. 165 and odd in 1908. Another Darkhast filed in 1909 was infructuous, a third darkhast was filed in 1904 but it was dismissed. In none of these darkhasts was the point taken that the plaintiff was barred from executing the decree because of failure of taking advantage of the default clause. The present darkhast was filed in 1916 praying for execution for the whole amount. *Held*, that as the previous conduct of the parties showed that the plaintiff should not be barred absolutely from executing the decree merely because he had sought to execute the decree for the instalments in arrears; he may after 1914, when continued default in the payment of interest was made, take advantage of the decree and execute for that instatment which was in arrears and for the principal amount. (*Macleod, C. J. and Heaton, J.*) AMRIT KHANDERAO KANGO *v.* GOVIND RAMACHANDRA CHITNIS. **42 B. 840 : 58 I. C. 65 : 22 Bom. L. R 919.**

——*Construction of—Instalment decree—Default in payment—Penalty—When enforceable.*

Where it is provided by an instalment decree, that in case default be made in payment of any two instalments, the whole of the unpaid balance would be required to be paid at once, and the first instalment instead of being paid at the due date, was paid together with interest after that date but before the second was due, but the second instalment was not paid on the due date and the decree-holder sued for the whole unpaid balance *Held*, that it must be taken to be the intention of the parties in such cases that the penalty was to be enforced in case of two instalments remaining in arrears and therefore in the present case, that penalty could not be enforced. (*Beaman and Heaton, JJ.*) HEGDE *v.* SOMBAYA HEGDE. **20 Bom. L. R. 335 : 45 I. C. 561 : 42 B. 304.**

DECREE—Construction—Mesne profits.

——*Construction—Instalment decree—Possession to be given in case of default.*

Where under the terms of a decree the decree-holder was to be put in possession of a certain land on default of paying the whole or part of any instalment, *held*, that the option under the decree to apply for delivery of possession was not limited to the first default, but can be exercised on the occurrence of any subsequent default (*Le Rossignol and Martineau, JJ.*) HAR GOPAL *v.* RAM RACHHPAL. **63 I C. 664 : 2 Lah. 155.**

——*Construction—Instalment decree.*

Under a decree the decretal amount was payable by monthly instalments of Rs. 2,500 commencing from the 1st of Jan. 1916 and in default of payment of any two of the instalments the decree-holder was entitled to recover the whole amount due at the time of default. The judgment-debtor made default in the payment of the instalment of a certain month and paid it along with the instalment of the following month on the 11th of that month. *Held*, that the decree-holder could execute the decree for the whole of the remaining amount, as there was default in paying two instalments. (*Scott-Smith, J.*) ABDUL RAHMAN *v.* SIBGHATULLA. **38 I. C. 788 : 45 P. W. R. 1917.**

——*Construction — Instalment decree — Default.*

A decree for money payable by instalments contained a proviso that if any instalment was not duly paid the decree holder should be entitled to recover forthwith the whole amount remaining due under the decree. *Held*, the decree-holder had the option of taking advantage of any default, and could execute his decree for any of he Instalments not barred by limitation. He was not bound to apply for execution of the whole decree within three years from the date of the first default. 100 P. R. 1902 Foll. (*Reid, C.J.*) KISHANCHAND *v.* GOPAL SINGH. **6 P. R 1913 : 172 P. L R 1912 : 16 I. C. 842 : 271 P. W. R. 1912.**

Construction—Joint decree.

——*Construction—Joint decree.*

A decree for dower debt and costs passed against the heirs of the plff 's husband is indivisible though a portion of the decretal amount is directed to be paid from the deceased's assets only. (*Tudball and Rafique, JJ.*) RAM CHANDER NAIK KALIA *v.* ABDUL HAKIM. **35 All. 204: 19 I.C 304 : 11 A. L. J. 249.**

Construction—Mesne Profits.

——*Construction—Mesne profits—Order-in-Council—Interest—Mesne profits—Compensation for improvements.*

An order in council directed that on payment the appellant of certain sums of money, due in respect of mortgages and interest thereon at 6 per cent., the appellant should recover possession of the property together with mesne profits *Held*, that interest should run concurrently with the mesne profits, that being the construction which the Board had placed upon the order upon an application for review. Part of the

DECREE—Construction—Mesne Profits.

mesne profits having been due to permanent improvements made by the appellant a deduction of 10 per cent. was properly allowed by the High Court in respect thereof. The increased rents that could be properly attributable to the improvements could be properly set off against the mesne profits even though they were not actually executed by the persons in possession at the date of the decree but by persons from whom they had purchased the property. (*Lord Buckmaster.*) RAJA RAI BHAGWAT DAYAL SINGH *v.* RAM RATAN SAHU.
42 M. L. J. 243 : (1922) M W. N. 102 : 4 U. P. L. R 7 (P. C) : 24 Bom L. R. 326: 3 Pat. L. T. 229: 15 L W. 481: 35 C. L. J 121: 1922 P. C. 91: 26 C, W. N 257 : 20 A. L. J. 26 (P C).

———*Construction—Mesne profits.*

The reasonable meaning of a decree for mesne profits which treats all the defts. on the same footing, is, that they are liable in proportion to their interests in the property of which they were in wrongful possession. (*Jenkins, C J. and Roy. J.*) BISHNU CHARAN ROY *v.* BIPIN CHANDRA ROY. **25 I. C. 729: 18 C. W. N. 622.**

———*Construction—Mesne profits from a certain date.*

A decreee awarding mesne profits from a certain date must be deemed to have awarded it from that date till the date of delivery of possession to the party in whose favour the decree is made. (*Kanhaiya Lal, A. J. C.*) DURGA BHARATI *v.* BHAGWATI. **24 O. C. 209: 64 I. C. 101: 8 O. L. J. 477.**

———*Construction—Mesne profits.*

Where a decree awarded mesne profits without more, the construction is that the court, with a view to carrying out the object of the legislature intended to give with possession those mesne profits claimed by law up to the time of possession. (*Kanhaiya Lal, A. J. C.*) KISHEN LAL *v.* SURAJ NARAIN. **16 I. C. 866.**

Construction—Mortgage decree.

———*Construction — Mortgage decree—Accounts—Further interest after date fixed for redemption—When not allowable.*

Where in a redemption suit a decree directed "in taking accounts let annual rests be made every year and let what shall become due on account of rents and profits be applied in the manner declared in the decree of the 1st Court" *Held.* that the words 'annual rents and profits' meant the net and not the gross annual rents and profits, that where the surplus rents and profits were not appropriated by the mortgagee for any debt due to him, a debt which did not carry interest should in taking account rank last, and that as the action of the defts. had been obstructive and oppressive they should not be allowed further interest after the date fixed for redemption. (*Sir John Edge.*) GANGA BABU DEBI *v.* APURBA KRISHNA ROY. **18 I. C. 535 : 17 C. W. N. 25 (P. C.).**

———*Construction—Mortgage decree.*

In a mortgage suit the plff. ordinarily gets his costs, if successful, against the mortgaged property, and not personally against the deft. where

DECREE—Construction—Mortgage decree.

it is the intention of the appellate Court that costs should be recoverable out of the property and not personally, the decree should state so. *Held*, on the construction of the decree that it was against the mortgaged property and not against the mortgagor personally. 20 All. 523, Foll. (*Richards, C. J. and Banerjee, J.*) DAMBAR SINGH *v.* KALYAN SINGH.
40 All. 109: 43 I. C. 557. 15 A. L. J. 914.

———*Construction—Mortgage decree--Redemption — Decree for redemption on payment of mortgage money in Chaitra of any year—Rights of parties*

A consent decree was passed in a suit for redemption of the year 1886 in these terms. The plaintiff (mortgagor) do pay to defts. 2 and 3 (mortgagees) Rs. 55 in respect of the debt on mortgage in the month of Chaitra of any year and the plaintiff do obtain possession of the lands in suit considering the same to have been redeemed from the mortgage. It should be understood that plaintiff is not entitled to take possession of the lands in dispute in any other month except the month of Chaitra." The plaintiff applied in 1919 to execute the decree and claimed in the alternative that the application be treated as a suit. *Held* that the effect of the decree of 1886 was not to put an end to the mortgage, that the relationship of mortgagor and mortgagee continued to exist between the parties and only the amount due was ascertained. Even if the application of 1919 be considered to be one for the execution and as such barred under S. 48, C. P. Code, still it could be converted into a suit for redemption under S. 47, C.P. Code. (*Macleod, C J. and Crump, J.*) HANMANT ANANT *v.* SHIDU SAMBHU.
47 Bom. 692 : 25 Bom. L. R. 358 : 1923 Bom. 300.

———*Construction—Mortgage decree—Sale of interest of judgment-debtor priority set up but negatived—Rights of parties.*

The owner of a village mortgaged it subject to certain alienations of the Kudivaram interest already made by him. The mortgage itself as well as the alienation were made to discharge a decree on a prior mortgage. The mortgagee brought a suit to enforce his mortgage and claimed priority over the alienee of the Kudivaram interest. The alienee who had purchased the Kudivaram interest set up his own priority as regards one of the items but said nothing as to the other two. The priority set up by the alienee was negatived and the decree directed the sale of the right, title and interest of the mortgagor. The alienee took objection in execution proceedings to the sale of the whole property inclusive of the Kudivaram interest. *Held*, that as regards one of the items in respect of which the alienee set up his priority, there was an adjudication negativing his claim and that that item was liable to be sold in execution. As regards the other two items, there was no claim negativing the priority set up by the alienee and that the decree should be construed strictly so as not to affect the interest of the alienee. (*Spencer and Venkatasubba Rao, JJ.*) SAMI GURUKKAL *v.* THIRUPATHIYA PILLAI. **18 L. W. 288 : 1924 M. 193.**

DECREE—Construction—Mortgage decree.

———*Construction — Mortgage decree—Description of property in the body of the mortgage deed and in the schedule—Mortgage of a Zemindari village—Residential buildings if included.*

A mortgage decree directed the sale of a Zemindari village as described in the mortgage deed. In the body of the mortgage the property was thus described: "We (the mortgagors) have mortgaged to you for Rs. 15,000 the village of K. which is included in the four boundaries given below and which is attached to our *Zemindari* and which ancestrally belongs to us and is in our enjoyment . . . . . , and which is capable of yielding an annual melvaram kist of Rs. 3,000". At the foot of the document was given a specification of the mortgaged property in these terms: "The four boundaries of the village of K. attached to *Zemin*. (Then followed a description of the boundaries). The village of K situate within the four boundaries is inclusive of poramboke, nanjah 52 velis (and odd) punjah 204 velis (and odd). The total of nanjah and punjah is 256 velis (and odd), excluding the lands sold up to date, the remaining lands and all the rights and privileges I possess in the waste lands, poramboke and other lands attached thereto, all kinds of trees, topes, wells, ponds, tankbunds, etc., have been given as security." On a question arising as to whether the residential buildings of the Zemindar situate in the village of K. and within the four boundaries above-mentioned, were included in the security, *Held* (1) that the specification at the foot of the mortgage controlled the general words in the body of the deed; (2) that the words "and other lands attached thereto "occurring in the specification of the property were *ejusdem generis* with waste lands and poramboke, etc., enumerated previously; and that the residential buildings of the Zemindar did not pass under the mortgage. (*Spencer and Venkatasubba Rao, JJ.*) RAJAGOPALA PANDARATHER *v.* THIRPATHI PILLAI.

44 M. L. J. 285 : (1923) M. W. N. 230 : 1923 Mad. 511.

———*Construction—Mortgage decree.*

If a mortgage decree is clearly worded and there is no difficulty as to its meaning it cannot be read in the light of the Transfer of Property Act. (*Abdur Rahim and Spencer, JJ.*) RAJAH OF KALAHASTI *v.* VENKATA PERUMAL.

21 M. L. J. 1036 : 10 M. L T. 429 : 12 I. C. 689 : (1911) 2 M. W. N. 458.

———*Construction—Mortgage decree — Foreclosure decree—Village—Khudkasht land.*

Where a foreclosure decree in respect of a whole village specifies particular *Khudkasht* fields by their number the decree-holder cannot claim other *Khudkasht* lands not specified in the decree as falling within the general description of lands held in *khudkasht* right. (*Kotwal, A. J. C.*) HAZARILAL *v.* HAZARIMAL. **68 I. C. 476.**

———*Construction—Mortgage decree.*

A mortgagee got a decree on a mortgage deed which described the property as rent-free jaghir. It appeared that the mortgagor had a settlement decree which did not clearly describe his rights.

DECREE—Construction—Personal Liability.

But the revenue papers showed that the mortgagor had only the right to collect a portion of land revenue from Zemindars. It was held that the mortgagor must be held to have mortgaged all the rights he had under settlement decree and those rights though not mentioned in the mortgage deed were affected by the decree of the mortgagee. (*Lindsay, J. C. and Stuart, A.J.C.*) SARFARAZ HUSSAIN *v.* AMARCHAND PAL.

37 I. C. 78 : 3 O. L. J. 529.

Construction—Partition.

———*Construction — Partition — Consent-decree—Direction to account—Execution.*

Where under a consent decree in a partition suit some of the villages were left in the management of plff. who was to render accounts every year. *Held*, that accounts could not be claimed in perpetuity in execution of the decree in evasion of the law of procedure and Court-fees. (*Mitra, A.J.C.*) YESHWANTRAO *v.* DATTATRYA KRISHNA. **45 I. C. 201.**

———*Construction—Partition.*

Ordinarily a decree for the division of an entire village means that the land of the village together with all the buildings appurtenant thereto is to be divided. Revenue Courts however while making a partition have no jurisdiction to make the actual division of a house or building or the materials thereof. (*Lindsay, J. C.*) IQBAL NARAIN *v.* SURAJ NARAIN.

2 O. L. J. 51 : 27 I. C. 543 : 18 O. C. 80.

Construction—Personal Liability.

———*Construction—Personal liability—"Do pay"—Mortgage decree.*

Where a mortgage decree directs the defts. to pay, etc., the defts. are *prima facie* personally liable. (*Sadasiva Aiyar and Phillips, JJ.*) ZEMINDAR OF KARVETNAGAR *v.* SUBBARAYA PILLAI.

7 L. W. 36 : 43 I. C. 871 : (1918) M. W. N. 146.

———*Construction—Personal liability.*

A direction that the deft. do pay a certain amount of money imposes *prima facie* personal liability though not conclusively. (*Abdur Rahim and Spencer, JJ.*) RAJAH OF KALAHASTI *v.* VENKATA PERUMAL. **21 M. L. J. 1036 : 10 M. L. T. 429 : 12 I. C. 689 : (1911) 2 M. W. N. 458.**

———*Construction—Personal liability.*

A decree directed the properties to be sold in default of payment of money in certain instalments. The defts. were held to be personally liable by the decree and the plff.'s remedy was not confined to the sale of the properties. (*Abdur Rahim and Ayling, JJ.*) ARUNACHELLA IYER *v.* ATMAKUMAR RAO. **10 M. L T. 213 : 12 I. C. 184 : (1912) M. W. N. 85.**

———*Construction—Personal liability estate under Court of Wards.*

A decree on a bond executed by a proprietor whose estate was under the management of the Court of Wards was passed against the Commissioner as manager in the following terms. "The amount decreed should not be recoverable from him personally but from the estate under his management." *Held*, the decree should be read

DECREE—Construction—Prohibition against partition.

as if the word 'while' were absent before 'under his management' and that the intention of the Court was to bind the estate even if released from management. (*Chamier, J.C. and Lindsay, A. J. C.*) RAMESHAR BAKSH SINGH *v.* DHANPAL DAS. **9 I. C. 335 : 14 O. C. 6.**

Construction—Prohibition against partition.

——*Construction—Prohibition against partition—Joint possession—Assignment of right to grant lease.*

Under two consent decrees passed in 1866 A's party and B were jointly to carry on the vahivat of the land, each being entitled to one-half of the produce. the rent received was to be divided equally between them, and the land itself was not to be partitioned, and B. had power to grant a *mirasi* lease on the *nazrana* of not less than Rs. 500 to be divided in the proportion of one-fourth and three-fourths respectively. A's party conveyed their rights under the decree to B in 1890, who in 1891 mortgaged them by deposit of the conveyance deed. In 1891 B settled the property on his relative C. Now, the auction purchaser in the suit on the mortgage sued the representatives of C. (Deft. No. 1) for adjustment of their rights. Deft. No. 2 in the case was holding a *mirasi* lease from C, *Held*, that the plffs had no right to partition. The consent decrees of 1866 till set aside, operated as an estoppel and the clause therein as to partition cannot be ignored on the ground that the clause if resting merely on the agreement of the parties would be bad in law. That the plffs. were entitled to joint possession and that deft. No. 1 had no right to grant the lease to deft. No. 2 without plff's consent and that the lease was not binding on plff. and did not affect plff's right to joint possession. The agreement embodied in the decree of 1866 as to the grant of lease was made with the individual B, who only could get its benefit which could not be assigned. (*Scott, C.J. and Batchelor, J.*) COWASJI *v.* KISAN DAS.

35 Bom. 371 : 11 I. C. 984 : 13 Bom. L. R. 649.

Construction—Reference to Judgment and Pleadings.

——*Construction — Reference to judgment and pleadings.*

Per Walsh, J.—It is well established that the Court cannot construe a decree in a suit without looking at the issues and ascertaining what was really determined and it may be that the Court cannot arrive at a satisfactory conclusion without looking at the judgment as well. Similarly the Court cannot arrive at a satisfactory conclusion without looking as to what was determined by an appellate decree as the grounds raised in appeal, and in some way or another ascertaining what issues were actually discussed and decided. (*Walsh and Sundar Lal, JJ.*) TEJ BEGUM *v.* SARVI BEGUM.

37 I. C. 674 : 14 A. L. J. 1171.

——*Construction—Reference to pleadings and judgments.*

Where a decree is obscured and ambiguous a reference may legitimately be made to the judgment and if necessary, to the pleadings also.

DECREE—Construction—Res-judicata.

16 Cal. 173 ref. (*Mookerjee and Panton, JJ.*) RAJA SASHIKANTA *v* RAJA SARAT CHANDRA **70 I. C. 6 : 34 C. L. J. 415.**

——*Construction—Reference to pleadings.*

The Court executing a decree may construe it in the light of the plaint and judgment in cases of any ambiguity. 31 I. C. 478, Foll. (*Sadasiva Aiyar and Moore, JJ.*) RANGACHARIAR *v.* SOURI BATTACHARIAR. **33 I. C. 561 (Mad.).**

ALSO (*Seshagiri Aiyar and Napier, JJ.*) YEGNANARAYANA *v.* MAKKAYYA. **31 I. C. 478 : (1915) M. W. N. 914.**

——*Construction—Reference to judgment.*

Where the decree is consistent with either of two inconsistent views, the Court can look into the judgment to see the reasons for the decree. (*Sankaran Nair and Tyabji, JJ.*) RAMANA GOUNDEN *v.* RAMALINGA MUDALIAR. **25 M. L. J. 24 : 20 I C. 827 : (1913) M W. N. 1022.**

——*Construction—Reference to judgment.*

A decree might be construed in the light of the judgment. 21 M. 344 (P. C.) ref. (*Stuart and Kanhaiya Lal, A J. Cs.*) BISHESHAR BAKHSH SINGH *v.* DEBI BAKHSH SINGH. **25 I. C. 121 : 17 O. C. 153.**

——*Construction—Reference to pleadings.*

In interpreting an appellate decree the order of the trial court cannot be taken into consideration; the statements made by witnesses before the first Court can be referred to. (*Lindsay, A. J. C.*) BALBHADDAR SINGH *v.* JAGPAL SINGH. **14 I. C. 130.**

——*Construction—Reference to pleadings.*

Where a decree, is perfectly clear and there is no doubt about its meaning it is unnecessary to look at the pleadings in relation to it. (*Das and Ross, JJ.*) SURAJ PRASAD PANDAY *v.* SOMRA MAHTON. **68 I. C. 903 : 2 Pat. L. T. 648.**

——*Construction—Reference to pleadings and judgment.*

An executing Court can refer to pleadings and judgment for construing a decree but it cannot amend it. (*Jwala Prasad, and Adami, JJ.*) BRAIJ NATH SAHAR *v.* GAJADHAR PRASAD. **58 I. C. 276 : 1 Pat. L. T. 471.**

——*Construction—Reference to pleadings.*

An executing Court cannot vary or alter a decree under execution but it must be satisfied as to what it is called upon to execute, and in order to find that out, when the decree is ambiguous and it is an appellate decree, the Court is justified in referring to the pleadings and the decree of the trial Court. A decree must be construed in a fair and reasonable way so as to accelerate its execution and reference might be made to the pleading and the judgment. (*Sultan Ahmad, J.*) TRAILOKYA NATH MAZUMDAR *v.* SARAT KUMAR SINGH. **56 I C. 283 : 1 Pat L. T. 529.**

Construction—Res Judicata.

——*Construction*—Res judicata.

Where a particular construction has been given by the Court to a decree and it has been enforced.

DECREE—Construction—Rules of.

the parties shall be estopped from claiming that it should be construed otherwise. (*Seshagiri Aiyar and Kumaraswami Sastri, JJ.*) LODD GOVINDA DOSS *v.* RAJAH OF KARVETNAGAR.

30 I. C. 357 : 29 M. L. J. 219.

Construction—Rules of.

———*Construction—Rules.*

There is no general rule for construing decrees, each case depends on itself. (*Piggott and Walsh, JJ.*) AMINA BIBI *v.* RAMA SHANKAR.

41 All. 473 : 50 I. C. 730 : 17 A. L. J. 582.

———*Construction—Rules of—Possession of land includes possession of superstructures also.*

In a suit in ejectment of the defendant from certain land on which there were some huts. The huts were found by the lower Courts to belong to the plaintiff. There was no reference to the huts in the plaint but the decree was as follows: "The suit being decreed with costs and interests, the plaintiff will get *khas* possession of the disputed land on ejecting the defendant therefrom, as prayed. The defendant himself must remove all his personal properties from the disputed land within one month. In default the plaintiff will have to remove the same with the help of the Court and he will get *khas* possession of the said land." *Held*, that the decree directing *khas* possession by ejecting the defendant, would necessarily give the plaintiff a right to *khas* possession as against the defendant in respect of the huts also. (*Chatterjee and Cuming, JJ.*) JNANENDRA NATH MOOKERJEE *v.* BRAHMAPADA PRAMANICK.

1923 Cal. 704.

———*Construction—Rules of.*

A decree like any other document is open to construction. But the remedy by construction is only appropriate if the language is ambiguous. If the language is plain and clear the proper remedy for a variance between decree and judgment is to apply for amendment Any construction must be, if possible, to make it conform to the judgment. (*N. R. Chatterjea and Richardson, JJ.*) MAHA RAJ KUMAR SHOSHI KANTA ACHARJI CHOWDHURI *v.* RAJA SARAT CHANDRA ROY CHOWDHURI.

35 C. L. J. 339.

———*Construction—Rules of—Interest chargeable under decree—Calculation of.*

When under a decree the contractual rate of interest ceases to be payable at a given date and the court rate is substituted for it therefrom up to the date of realisation, the court rate will be chargeable on the whole amount due with interest at the contractual rate up to that given date. (*Ashworth, J. C. and Simpson, A.J. C.*) NAWAB MIRZA FAGHFUR MIRZA *v.* KHUSHAL CHAND.

26 O. C. 59 : 1923 Oudh 241.

———*Construction—Rules of—Maintenance—Declaratory or executable.*

A court construing a decree will, if possible, avoid such a construction as may in future result in multiplicity of suits between the parties in respect of a matter which has been finally settled. *Held*, that the decree for maintenance in favour of the plaintiff was not merely declaratory of a

DECREE—Construction—Suit for possession.

right to maintenance but that it enabled her to recover that maintenance from the talukdari and non-talukdari property to the extent to which they were respectively liable. 18 W. R. 175; 19 C. 139 Ref. 15 O C 99 Dist. (*Daniels and Wazir Hasan, A.J Cs.*) RANI BIJAI RAJ KOER *v.* THAKUR JAI INDRA BAHADUR SINGH.

9 O. L. J. 5 : 1922 Oudh 34.

Construction—Settlement Court.

———*Construction—Settlement Court.*

Where in a claim before the Settlement Court for under-proprietary title the superior landlord admitted the claims but the court declared the plff.'s title to such rights subject to payment of annual rent without power of mortgage or sale, the latter restraints are void and ineffectual 10 O C. 126, Foll. (*Kanhaiya Lal, A. J.C.*) SARJU DIN PANDE *v.* KAMTA SINGH.

34 I. C. 353 : 3 O. L. J. 187.

———*Construction—Settlement Court*

A settlement decree in favour of Hindu widows who had applied as heirs of their husbands does not enlarge their rights under the Hindu Law of Oudh. (*Stuart and Kanhaiya Lal, A. J. Cs.*) GANESHA *v.* NAGESHAR BAKSH SINGH.

19 O. C. 1 : 34 I. C. 257 : 3 O. L. J. 144.

———*Construction—Settlement Court decree—Vacation for 5 years—New lease—Rights of successors-in-interest—Limitation.*

Where a lessee under a Settlement Court decree vacated his position for 5 years and then had a new lease granted to him not materially inconsistent with the terms of the Settlement Court decree, the rights of his successors-in-interest under the Settlement Court decree were not destroyed or diminished, as the ouster was not long enough to bar their rights by limitation. (*Kanhaiya Lal and Sabonadiere, A. J. Cs.*) RAM JIYAWAN *v.* MOHAMMAD ABDUL HASSAN KHAN. **23 I. C. 231.**

Construction—Stipulation.

———*Construction of—Stipulation for jewels to be worn by the wife when required—Suit by wife for possession—C.P. C. (Act V of 1908), S. 47.*

Where a razinamah decree in a suit for restitution of conjugal rights provided that the husband was to give certain jewels to the wife to wear whenever she required them and the wife brought a suit for possession of the jewels. *Held*, that in the absence of an allegation that she required them for wearing, the suit must fail but that the suit ought not to have been dismissed on the ground that the wife was entitled to use them only on certain occasions, and that it was not barred by S. 47 of the C. P. C. (*Sundara Aiyar, J.*) CHELLAMMAL *v.* KRISHNASWAMY IYER.

13 I. C. 618 : (1912) M. W. N. 166.

Construction—Suit for possession.

———*Construction—Suit for possession.*

When a decree in a suit by an eight-anna cosharer for *khas* possession stated that the plaintiff's right to an eight-anna share was declared and he was directed to take *khas* possession thereof. *Held*, that it was a decree for joint possession and if he wanted exclusive possession

DECREE—Construction—Trial.

his remedy was by way of a separate suit for partition. (*Fletcher and Samshul Huda, JJ.*) MOHENDRA NATH PAL *v.* NASIRUDDIN MAHOMED.
46 I. C. 887.

Construction—Trial.

———*Construction—Trial conditional on payment of costs.*

A suit for partition was dismissed for non-inclusion of all joint properties. The Court of Appeal set aside the order of dismissal and remanded the case on condition that plaintiff-appellant should pay to defendant-respondent the sum of Rs 200 as costs both for the lower Court and the Court f Appeal. *Held*, that the proper construction of the order was that the case should be remanded and heard upon the issues not already decided only on condition that plaintiff paid defendant the sum of Rs. 200 and that the Trial Court should refuse to proceed with the case until the condition imposed by the Appellate Court had been complied with. (*Miller, C. J. and Coutts, J.*) JOGESH CHANDRA *v.* MUKUNDA LAL.
(1920) Pat. 65.

Construction—Vagueness.

———*Construction—Vagueness.*

A decree directing that sale of the right, interest and title of the judgment-debtor reserving the prior mortgagor's rights over the property is not vague and so it is executable as such. (*Piggott and Walsh, JJ.*) SHAHEBZAD SINGH *v.* LALSA SINGH.
35 I. C. 152: 14 A. L. J. 324.

———*Construction — Vagueness— Executing Court, power of, to construe decree—Patent ambiguity—Amendment by executing Court.*

The Court of execution must execute the decree as it stands. But a decree is open to construction and, if possible, it may be made to conform with the judgment. Where the decree and the judgment do not agree the remedy of construction is appropriate only if the decree is ambiguous. But if the language of the decree is plain, the proper remedy is to apply for amendment of the decree. The executing Court should not amend the decree under the pretence of interpretation. (*N. R. Chatterjea and Richardson, JJ.*) SHOSHIKANTA ACHARJYA *v.* SARAT CHANDRA ROY.
36 I. C. 500.

———*Construction—Vagueness— Construction against Law and Equity.*

Where the judgment admits of two meanings, it is wrong to construe it in a way which violates both law and equity. (*Chevis, J.*) UTTAM CHAND *v.* BALLA MAL.
60 I. C. 345.

———*Construction—Vagueness.*

A decree which is intelligible should be given effect to and it should be presumed to be legally effective for obtaining the relief sought and granted. (*Wallis, C. J., Abdur Rahim and Srinivasa Aiyangar, JJ.*) BALIDE KAMAYYA *v.* PRAGADA PAPAYYA.
21 M. L. T. 82: 5 L. W. 558: 32 M. L J. 477: 40 M. 259: 37 I. C. 414: (1917) M. W. N. 217 and 246 (F. B.).

———*Construction— Vagueness— Conformity to law.*

DECREE—Costs.

A decree should be considered in accordance with law. (*Benson and Sundara Aiyar, JJ.*) BHOGARAJA *v* ADAPPALLI SESHAYYA.
35 M. 560 : 12 I. C. 123 : 10 M. L. T. 179.

———*Construction — Vagueness—Shares of judgment-debtors.*

A decree is not incapable of execution merely because it omits to specify the shares of the judgment-debtor in the property decreed, if the decree-holder has secured possession. (*Mitra, A. J. C.*) AMIR ALI *v.* GOPAL DAS.
54 I. C. 924.

———*Construction — Vagueness—Benefit of doubt.*

Where the language of a decree or judgment is ambiguous or doubtful the benefit of the doubt ought to go to the judgment-debtor. (*Kanhaiya Lal, J. C.*) GOKARAN SINGH *v.* MANGLI.
66 I. C. 673 : 8 O. L. J. 407.

———*Construction—Vagueness.*

A decree saying that the personal effects of the deceased, such as. his *sabre, quren, signet ring*, and personal clothing should go to a certain person was held to mean that the person should get such of the various articles of the said description as were ordinarily used or worn by the deceased. (*Lindsay, J. C. and Kanhaiya Lal, A. J. C.*) SURAIYA QADR *v.* QUDSIA BEGAM.
24 I. C. 643: 1 O. L. J. 281.

———*Construction--Vagueness--Interpretation consistent with law.*

As long as a decree stands, the Court executing it can only construe the decree and cannot consider its merits. 11 B. 537; 28 C. 353 Rel. On an application for execution a Court cannot read into a degree a provision not contained in it merely because such an opinion might be expected. 19 M. 249 Ref. If a decree is ambiguous its interpretation consistent with law will be preferred to one contrary to law. (*Hayward, J. C., and Cohen, A. J. C.*) TOTAL DAS *v.* UTUMAL.
10 I. C. 975: 4 S. L. R 244.

Construction—Withdrawal.

———*Construction—Withdrawal of a ground of appeal—Effect of.*

When in a second appeal one of the grounds is withdrawn so that a relief granted by the first Appellate Court in favour of the respondents is acquiesced in, but the second Appellate Court sets aside the lower Appellate Court's decree and restores the decree of the Court of first instance, the decree of the first Appellate Court so far as it granted the relief not challenged by the appellant becomes final. (*Per Walsh, J.*) A decree of a Court cannot operate upon a subject-matter which was not before the court or upon a subject matter which is withdrawn by the parties though present in the pleadings. (*Piggott and Walsh, JJ.*) MUHAMMAD MARAF *v.* SULTAN AHMED.
34 I. C. 344.

Costs.

———*Costs—Set off.*

A plaintiff whose suit was decreed on payment of certain specified sum was held to be entitled

DECREE—Costs.

to set off the balance against the costs payable to him. (*Banerji, J.*) BECHAI SINGH *v.* SHAMU NATH.
10 I. C. 454.

——*Costs—Order for—Several respondents.*

If costs are awarded against a number of respondents without indicating the proportion in which those costs shall be borne by the different respondents such an order is always taken to mean that the respondents are jointly and severally liable for the costs, and the order for costs may be executed against any one of them, who will have a right of contribution against the others in a case of this nature. (*Dawson Miller, C. J. and Mullick, J.*) THE MIDNAPORE ZEMINDARY Co. *v.* MADAN MARWADI.
(1923) Pat. 17 : 1923 P. 215.

Date of.

——*Date of appeal.*

The date of the original decree and the valuation of the appeal are far more material than the grounds of appeal for determining whether the appeal is to be treated as one against the preliminary or the final decree or against both. (*Spencer, J.*) DAMODAR PADHAND *v.* HARIBANDHU PATNAIK. (1921) M. W. N. 558: 70 I. C. 392: 14 L. W. 389.

——*Date of—Money decree against different defendants.*

A money decree against different defts. at different times is not a consolidated decree against all for purposes of the Limitation Act and limitation in respect of each decree runs from the date on which it was passed. (*Benson and Sundara Aiyar, JJ.*) SAMBASIVA IYER *v.* MUHAMMAD HUSSAIN.
31 I. C. 917.

Dependent-judgment.

——*Dependent-judgments — Decrees based on a decree reversed in appeal—Effect of.*

When a decree has been passed determining the extent of recurring liability in one suit and the decision is under appeal, other decrees passed on the authority of the first decision stand superseded by the decree passed in appeal and the fact that the subsequent suits were decided on the authority of the first decision and not on the ground of *res judicata* makes no difference. (*Wallis, C. J. and Kumaraswami Sastri, J.*) ZEMINDAR, PANGIDIGUDEM *v.* VENKATAPPAYA.
54 I. C. 647 : 37 M. L. J. 591.

Divorce.

——*Divorce—Procedure.*

In all divorce cases the petitioner must come into the witness-box, petitioner must be sworn, and he must prove his case because, among other things, the Judge has to satisfy himself whether there is any collusion between the parties and he has further to satisfy himself as to the complete truth and honesty of the petition. Where this procedure had not been, followed the High Court set aside the decree *nisi*. (*Mears, C. J, Walsh and Kanhaiya Lal, JJ.*) HOWARD *v.* HOWARD.
20 A. L. J. 853 : 44 A. 728 : 1923 A. 43 (F.B.)

Effect of.

——*Effect of—Instalment decree— Failure to pay instalments.*

DECREE—Executability.

A Court of Equity can relieve the judgment-debtor against the consequences in default of his instalments where no injustice will be done to the decree-holder. (*Macleod, C. J. and Shah, J.*) NARSINHA *v.* BALWANT.
64 I. C. 570 : 23 Bom. L. R. 1288.

——*Effect of—Fictitious decree.*

A decree which is fictitious does not require to be set aside; for a collusive and fraudulent proceeding in a court is not a judicial proceeding and is to be treated as availing nothing to the party who sets it up (*Greaves and Cuming, JJ.*) SOSHI KUMAR SARKHEL *v.* CHANDRA KUMAR SAMADDAR CHAUDHURI. 68 I. C 322 : 35 C. L. J. 348.

——*Effect of—Land registration proceeding—Possession—Proof.*

A decree in a land registration proceeding does not prove the decree-holder's possession. It proves that the Collector held that he had a right to possession. (*Cuming, J.*) SEBA DAS JANA *v.* BALA DASI.
63 I. C. 602.

——*Effect of — Two conflicting decrees—Rights under later to prevail.*

Where the rights claimed under two decrees, both binding on both sides, are in conflict with each other the right under the later should prevail. (*Sadasiva Aiyar, J.*) RUKMANI AMMAL *v.* NARASIMMA IYER. 41 M. L. J. 54 : 14 L. W. 85 : 63 I. C. 730 : (1921) M. W. N. 487.

——*Effect of—Decree setting aside—Assignment of a mortage bond.*

A decree setting aside an assignment of a mortgage bond speaks only from its date and does not affect payments made prior to the decree but subsequent to the notice cancelling the assignment. (*Sadasiva Aiyar and Tyabji, JJ.*) VENKATASUBBA IYER *v.* SUBBARATHINAM AIYAR
27 M. L. J. 134 : 23 I. C. 607 : 1 L. W. 419 : 15 M. L. J. 331.

——*Effect of—Decree not put into execution—Lapse of time—Declaration.*

Where the plaintiff's title was established by a decree of 1907, the fact that the decree was not put into execution cannot affect the declaration of title made therein. The decree would only cease to have effect if it was set aside and otherwise it is erroneous on the part of the Court to go behind the decree into the question of title again. (*Ross, J.*) JHUMAK SINGH *v.* MAHINDRA SINGH.
17 I. C. 560.

Executability.

——*Executability of—Decree for possession—Boundaries given—Execution.*

When a decree for possession gives the boundaries and the property is identifiable, the decree cannot be said to be incapable of execution. The boundaries should be determined on evidence to be adduced by the parties. 19 W. R. 81: 23 W.R. 285 : 25 W. R. 39 : 2 C. L. R. 134 Diss. (*Mookerjee and Beachcroft, JJ.*) DHAYAL CHANDRA MANDAL *v.* KAURI CHARAN NASKAR.
25 I. C. 534.

DECREE—Executability.

———*Executability—Decree for sale but not for possession—Rights of mortgagee.*

Where a mortgage decree omits to mention that the mortgagee will take possession of the property in case the decree is not satisfied by sale of the property but declares that the mortgagee shall be competent to enter in possession of the mortgaged property and to retain possession of it till the sale takes place, the decree-holder is not entitled to get possession by executing the decree but he has only a cause of action to sue for possession of the property. (*Scott-Smith, J.*) J. RUSTOMJI *v.* GURANDITTAMAL.
8 P. L. R. 1915 : 27 I. C. 637 : 33 P. W. R. 1915.

——— *Executability of—Decree directing demolition of a wall—Evidence.*

A decree directing the demolition of a wall is capable of execution and the court is bound to take evidence to identify the subject-matter. (*Miller and Sadasiva Aiyar, JJ.*) KANDADAI RAMANUJA CHARIAR *v.* PRAUNATHARTHI HARACHARIAR.
14 I. C. 588.

———*Executability—Reciprocal reliefs.*

A decree provided " that the plaintiff's claim be and is hereby decreed for cancellation of the bond in suit but the defendant shall have the right to recover Rs. 50,000 from the plaintiff's property, *Held* that the latter portion of the decree was not a mere declaratory decree incapable of execution and that the defendant could execute it. (*Kanhaiya Lal, J. C.*) JHANDA SINGH *v.* MD. ANWAR KHAN.
1923 Oudh 160.

Execution.

———*Execution—Possession of share decreed—Partition proceedings—Effect of—Enquiry into substituted property.*

A decree though for possession of certain respective shares in a joint estate, may be executed in respect of certain executed shares on a subsequent partition of the estate without an application for amendment of the decree being made to the court which passed it. Enquiry as to what is substituted property is a question arising within the meaning of S 47 of the Code of Civil Procedure between parties and relates to the execution and satisfaction of the decree. (*Sir John Edge.*) RAI BAIJNATH GOENKA *v.* RAVANESHWAR.
43 I. A. 139 : 31 M. L. T. 43 : 16 M. L. W. 128 : (1922) M. W. N. 415 : 26 C. W. N. 906 : 20 A. L. J. 650 : 1 P. 378 : 43 M. L. J. 124 : 3 P. L. T. 547 : 24 Bom. L. R. 974 : 36 C. L J. 1 : 1922 P. C. 54.

——— *Execution—Going behind the decree.*

An execution court cannot go behind a decree in the sense, that it cannot alter, modify, or amend its terms. But it is untrue in the sense that it cannot go behind it to ascertain what the decree operates upon. (*Walsh and Sundar Lal, JJ.*) TEJ BEGUM *v.* SARVI BEGUM.
37 I. C. 674 : 14 A. L. J. 1171

——— *Execution of.*

The legal representative of a decree-holder was brought on the record without any notice to other decree-holders who thereupon applied for

DECREE—Execution.

the vacation of the *ex-parte* order. *Held* as the order was made *ex-parte* it is open to the decree-holders to ask the court to reconsider its decision and the fact that the previous order was made on the application of the legal representatives would not prevent the court from considering it when the other decree-holders object. (*Macleod, C. J. and Koyajee, J.*) MOHAN LAL AMRIT LAL *v.* BAI MAHAJAVERI.
1922 Bom. 280.

———*Execution—Declaratory decree or judgment—Remedy by execution not open.*

In the case of a decree which is merely declaratory and does not require to be carried into effect by process of execution, remedy by execution is not open. (*Mookerjee and Chotzner, JJ.*) SYAMACHARAN DAS *v.* SATAYA PRASHAD CHOUDHURY.
36 C. L. J. 101 : 1923 Cal 252.

———*Execution.*

In executing a decree, the executing court must be within the four corners of the decree itself. (*N. R. Chatterjea and Richardson, JJ.*) MAHA RAJ KUMAR SHOSHI KANTA ACHARJI CHOWDHURI *v.* RAJA SARAT CHANDRA ROY CHOWDHURI.
35 C. L. J. 339.

——— *Execution—Forfeiture clause in compromise decree—Relief, if can be given.*

The jurisdiction of the Court to grant relief against forfeiture, is not ousted by the mere fact that a consent decree for forfeiture has been passed and it is competent to the Court to grant relief even in execution. (*Mookerjee and Panton, JJ.*) GOPAL *v.* HARI.
66 I. C. 766 : 34 C. L. J. 157.

——— *Execution—Application for final decree in mortgage suit is not one in execution.*

All proceedings subsequently to a preliminary decree in a mortgage suit and before a final decree therein, are proceedings in a pending suit and an application made therein is not one for execution (*Newbould and Buckland, JJ.*) BHUTNATH *v.* TARA CHAND.
33 C. L. J. 115 : 59 I. C. 177 : 25 C. W. N. 595.

——— *Execution of.*

Where a decree holder was not entitled by the order to take out execution for the entire decretal amount until the disposal of the suit (or the appeal in the suit) which was then pending. *Held* as the sales took place for amounts in respect of which there were no decrees existing at the time, were illegal and the court will be justified in refusing to confirm the sale. The subsequent decision of the pending suit in favour of the decree-holder whereby title to the entire sum accrued to him would not validate the sale held prior to it. (*Woodroffe and Chatterjee, JJ.*) ARIATULLAH *v.* SASHI BHUSAN HAZRAH.
55 I. C. 547 : 24 C. W. N. 73.

——— *Execution — Executing Court cannot amend.*

An executing Court has as such no power to amend decrees, even to bring them in conformity with the judgment of the original Court. (*Chevis, J.*) UTTAM CHAND *v.* BALLA MAL.
60 I. C. 345.

DECREE—Execution.

——— *Execution—Revenue Court.*

Execution was sought on a decree giving certain areas in certain specified plots of shamilat. Defts. failed to get it set aside. They also failed in a suit for partition of the shamilat as they had more than their share. *Held*, the plff.'s right to execute the decree was not affected by the deft 's failure. Admission of the plff. of the correctness of Naib Tahsildar's measurements does not mean surrender of the decree. (*Rossignol, J.*) HARNAM SINGH *v.* BHAGWAN SINGH.
85 P.L.R. 1916 : 35 I. C. 867 : 163 P. W. R. 1916.

——— *Execution — Executing Court cannot go behind decree.*

An executing court cannot go behind the decree or enquire into the jurisdiction of the court which passed the decree. 43 M. 675 Foll. 44 C 627 Not foll. (*Ayling and Odgers, JJ.*) SAMI MUDALIAR *v.* MUTHIAN CHETTY. **16 L. W. 314 : 43 M. L. J. 293 : (1922) M. W. N. 597 : 1923 Mad. 212.**

——— *Execution — Executing court cannot amend.*

A Court has no power to amend even obvious error in execution decree. (*Spencer and Ramesam, JJ.*) KORALLA BACHITINGAM *v.* KORALLA SATYANARAYANMURTHI. **15 L. W. 301 : 1922 Mad. 186.**

——— *Execution—Mortgage-decree— Marshalling of securities, question as to—Execution proceedings.*

Where in a mortgage suit the question as to the right of having the securities marshalled was not raised and decided, the representatives of the party cannot urge their joinder as parties to the execution, if they are not joined for raising that question and getting it decided at that stage. (*Lindsay, J. C. and Stuart, A.J.C.*) RAZA HUSSAIN *v.* AMARCHAND PAL. **32 I. C. 715 : 2 O. L. J 593.**

——— *Execution—Construction.*

An Executing Court has power to construct the decree in accordance with law. (*Jwala Prasad and Ross, JJ.*) RAM BHUGAWAN PRASAD SINGH *v.* RAM NARAIN. **66 I. C 224 : 2 Pat. L. T. 396.**

——— *Execution—C. P. C., O. 21, R. 5.*

It is necessary to prove the exact contents of the decree which is alleged to have been passed before ordering execution. (*McColl, A. J. C.*) MAUNG CHIT *v.* MAUNG THA KU.
4 U. B. R 135 : 1923 Rang. 113.

——— *Execution — Concurrent execution is permissible—Discretion.*

There is nothing in the C. P. C. to prevent the simultaneous execution of a decree in two or more Courts. But it is a matter for the discretion of the Court to permit or refuse such execution (*Rigg, J.*) S. R. M. M. C. T. CHETTY *v.* BOWSINGA, **13 Bur. L. T. 285 : 63 I. C. 809 : 11 L. B. R, 15.**

——— *Execution.*

Executing Court cannot go behind decree for rateable distribution by rival decree-holders and whether they are fraudulent. (*Macleod, Shah and Fawcett, JJ.*) DATTATRAYA GOVINDSETH *v.* PURSHOTTAM NARAYAN SETH. **24 Bom L. R. 1 : 46 B. 635 : 1922 B. 31.**

DECREE—Ex parte.

Exparte.

——— Ex parte—*Final decree* ex parte—*Partition suit—Decree passed without notice to defendant—Setting aside.*

When a court adjourns a pending suit it is its duty to give notice of the adjourned date to the parties or their pleaders. Where after the preliminary decree in a partition suit the court appointed a commissioner for division by metes and bounds and on his report being received passed a final dercee without notice to the defendant, the *ex parte* decree is bad and should be set aside. (*Piggott and Walsh, JJ.*) DURGA RRASAD *v.* HET RAM. **20 A. L. J 912 : 1923 All. 79 (2).**

——— Ex parte—*Selling aside—Dismissal of prior application— Summonses not properly served.*

After the plff.'s application under O. 9, R. 13 to set aside an *ex parte* decree against them was dismissed for default, they instituted a suit for setting aside the decree for fraud: *Held*, that the suit cannot be maintained on the ground that the notices were not properly served on them, and as no other fraud was established, the suit was dismissed. 29 All. 212 Foll. (*Chamier and Rafique, JJ.*) RAMDHANI MISIR *v.* PARMESHWAR KURMI. **16 I. C, 5.**

——— Ex parte—*Fraud—Dismissal of application under O. 9, R. 13, C. P. C.*

A suit by the deft. to set aside an *ex parte* decree on the ground of fraud does not lie after an unsuccesslul application to set it aside under O. 9, R. 13, C. P. C., if the fraud for which the decree is sought to be set aside was properly in issue in the application, under O. 9, R. 13 and was determined upon such application. (*Chitty and Walmsley, JJ.*) KHIRODE CHANDRA RAY *v.* SRIMATI ASHTULABEE.
35 I. C. 557 : 20 C. W. N. 845.

——— Ex parte—*Setting aside — Application under O. 9, R. 13, C. P. C., proving infructuous—Suit to set aside decree for fraud.*

A plff. whose application to set aside an *ex parte* decree has proved infructuous, can maintain a suit to set aside the decree on the ground of fraud or any other valid reason. 29 C. 475 ; 29 C. 395 Rel. on. (*Mookerjee and Carnduff, JJ.*) BAL KISHAN LAL *v.* TOPESWAR SINGH.
15 C. L. J. 446 : 14 I. C 845 : 17 C. W. N. 219.

——— Ex parte—*Finality of.*

An *ex parte* decree is final till it is set aside by the first Court or the Appellate Court decree. (*Le Rossignol, J.*) ABBAS KHAN *v.* NURKHAN.
60 I. C. 496.

——— Ex parte *decree—Setting aside—Fraud.*

A regular suit lies to set aside an *ex parte* decree obtained by fraud. (*Scott Smith and Wilberforce, JJ.*) GODAR RAM *v.* AHMED YAR KHAN. **55 I. C. 412.**

DECREE—Ex parte.

——Ex parte—*Fraud—Substituted service—Decree obtained by fraud if liable to be re-opened on ground of fraud.*

Where a plff. falsely represents to the court that the deft. was away in a distant place and that summons should be served on him only by substituted means by advertisement in one of the papers of that place, and thus obtains an *ex parte* decree against him, the decree is obtained by fraudulent misrepresentation within S. 17 and the deft. can re-open the whole matter. (*Reid, C. J. and Kensington, J.*) MELA RAM *v.* RALLA RAM.
75 P. L. R. 1914 : 40 P. W. R. 1914 : 22 I. C. 549 : 65 P. R. 1914.

——Ex parte—*Setting aside—Fraud—Perjury—Rival decree-holders.*

In the absence of collateral fraud and collusion by the decree-holder and judgment-debtor it is not open to one decree-holder to attack a decree obtained by another holder against the same judgment-debtor seeking rateable distribution as not creating a valid debt and entitling the decree-holder to share in the distribution of the assets under S. 73, C. P. C. The mere fact that the decree was obtained *ex parte* on perjured evidence is not enough to vitiate it. (*Sadasiva Iyer and Burn, JJ.*) VENKATARAMA IYER *v.* THE SOUTH INDIAN BANK, LTD. **43 Mad. 381 : 38 M. L. J. 108 : 27 M. L. T. 66 : 11 L. W. 81 : 55 I. C. 452 : (1920) M. W. N. 92.**

——Ex parte—*Setting aside— Suppressing facts.*

If a plff. suppresses a compromise from the knowledge of the court and obtains an *ex parte* decree against the deft the latter should sue to set aside the decree as such a decree is and might be treated as a nullity by the judgment-debtor one obtained by fraud. (*Sadasiva Aiyar and Spencer, JJ.*) SUBBA IYAR *v.* KALLAPPAN PILLAI. **22 I. C 500.**

——Ex parte *decree—Setting aside—Fraud—What is.*

A plff. who knowing his claim to be baseless puts a deft. into court and obtains an *ex parte* decree against him, obtains it by fraud and the decree on that account is liable to be cancelled. The plff. in such a case will not be allowed to plead that he was not guilty of fraudulent conduct. The very knowledge of the plff. amounts to fraud. (*Lindsay, J. C.*) MADARI SINGH *v.* RAM RATAN. **23 I. C 976 : 1 O. L. J. 92.**

——Ex parte *decree—Fraud—Non service of summons.*

The mere fact that an *ex parte* decree has been passed does not show that there was no service of summons on the defendant and if anything, the presumption is that the Court passing the decree was satisfied that there had been a proper service of summons. It is incumbent on a person seeking to set aside the *ex parte* decree in a subsequent decree to prove that it was obtained by fraud. (*Ross, J.*) HARNARAIN PANDEY *v.* NAND KESHWAR PANDEY.
1 Pat. L. R. 127 : 1923 P. 406.

DECREE—Finality of.

——Ex parte—*Setting aside.*

That an *ex parte* decree is obtained by perjured evidence is no ground for setting it aside. *Ex parte* decree can be set aside by a suit only if fraud was practised in proceedings in Court and defendant was prevented by it. (*Das and Adami, JJ.*) RAM NARAIN LAL SHAW *v.* TOOKI SAO.
1 P. L. T. 119 : 2 U. P. L. R. (Pat.) 51 : 5 P. L. J. 259 : 58 I. C. 182 : (1920) Pat. 98.

—— Ex parte—*Fraud—Onus—Perjury.*

In a suit to set aside a decree on the ground of fraud the plff. must prove that the decree was obtained by some fraud practised upon the Court and the fraud was actual, positive and intentional. The dishonesty of a claim on which a plff. obtains a decree, after following the procedure laid down for the trial of suits, cannot justify the setting aside of the decree in a subsequent suit. (*Sultan Ahmed, J.*) MAHANT KRISHNA DAYAL GIR *v.* LAKSHMI NARAIN. **56 I. C. 270 : 1 Pat. L. T. 486.**

Finality of.

——*Finality of—Suit to recover money recovered under subsisting decree does not lie.*

It is clear and settled law that money recovered under a decree or judgment cannot be recovered back in a fresh suit or action whilst the decree or action under which it was recovered remains in force, but this rule of law rests upon this ground, that the original decree or judgment must be taken to be subsisting and valid until it has been reversed or superseded by some ulterior proceeding. If it has been reversed or superseded, the money recovered under it ought certainly to be refunded, and is recoverable either by summary process or by a new suit or action. The true question, therefore, in such cases is, whether the decree or judgment under which money was originally recovered has been reversed or superseded. (*Lord Carson.*) SRI RAJA BOMMADEVARA NAGANNA NAIDU *v.* RAVI VENKATAPAYYA.
45 M. L. J. 657 : L. R. 4 P. C. Rev. 7: 18 L. W. 913 : 25 Bom. L. R. 1290 : 50 I. A. 301 : 46 Mad. 895 : (1923) M. W. N. 554 : 21 A. L. J. 726 : 33 M. L. T. 262 : 28 C. W. N. 568 : 1923 P. C. 167. (P.C.).

——*Finality of—Decree passed without jurisdiction.*

A decree passed without jurisdiction is not a nullity but can be set aside by appeal or revision; and till it is so set aside, it is good in spite of any defect in the jurisdiction. Plff. sued for accounts and valued his suit at Rs. 130. The Munsiff dismissed the suit and on appeal, the District Judge passed a preliminary decree and remanded the suit for taking accounts. The Munsiff found the amount exceeding his pecuniary jurisdiction and transferred the suit to Sub-Judge who ignored the District Judge's order and ordered a fresh trial of the suit. *Held*, that the proceedings on the valuation were not *ultra vires* that the Sub-Judge ought not to have ignored the District Judge's order but should have acted on the preliminary decree of the District Judge (*Le Rossignol, J.*) RAMJI LAL *v.* BUJAN LAL.
60 I. C. 352.

DECREE—Finality of.

———*Finality of—When can be challenged.*

A decree once granted, cannot be challenged as based on a nullity and a decree based on a void mortgage cannot also be challenged if not set aside on appeal. (*Le Rossignol, Broadway and Wilberforce, JJ.*) KARORI MAL *v.* RAMJI LAL. **2 Lah 53 : 3 Lah. L. J. 68 : 59 I. C. 812 : 41 P. W. R. 1921.**

———*Finality of--Consent decree—Order passed by consent—Effect of—Subsequent retraction.*

Where a judgment-debtor consents to his money being paid over to the decree holder on furnishing security for restitution and in consequence the decree-holder furnishes the required security, it is not subsequently open to the judgment-debtor to withdraw that consent. An order passed by consent is conclusive between the parties. 8 C. 51, 6 A. 269, 7 A. 102, 18 A. L. J. 625 Ref. (*Daniels and Wazir Hasan, A. J. Cs*) RANI BIJAI RAJ KOER *v.* THAKUR JAI INDRA BAHADUR SINGH. **9 O. L. J. 5 : (1922) Oudh 34.**

———*Finality of.*

Mistakes in plaint re-produced in judgment and decree can be executed by Court if real points are not affected. (*Kanhaiya Lal, J. C.*) PAHALWAN SINGH *v.* GANGA BAKSH SINGH. **8 O. L. J. 416.**

Form of.

———*Form of—Suit against legal representatives.*

A court which finds in a suit upon a bond against the representatives of the executant that the bond was genuine should not abstain from passing a decree on the ground that the deceased executant has left no assets but pass a decree against the assets of the deceased, if any, in the hands of the defendant. (*Rafique, J.*) BASTI RAM *v.* RUSTAM SINGH. **56 I. C. 518 : 2 U. P. L. R (A.) 146.**

———*Form of—Contribution suit.*

In a suit for contribution the sums of the liabilities of the different parties, plffs. and defts. must be separately ascertained. A joint decree shou'd not be made in favour of the plaintiffs against the defendants. (*Mookerjee and Beachcroft, JJ.*) MATUNGINI DEBI *v.* BROJESWAR BANERJEE. **27 I. C. 22 : 20 C. L. J. 205.**

———*Form of—Specific performance—Contract for sale of land.*

In a suit by the vendor for specific performance of a contract of sale the form of the decree is that plff. is to be at liberty to prepare and to execute a conveyance to the deft. as an escrow to be delivered on payment of the purchase money within the time limited and the deft. is to pay the purchase money after the conveyance is ready, if the contract contains a term for the payment of the purchase money before execution of the conveyance. There should be a direction that the deft. should pay followed by a direction that the conveyance should be executed after payment. (*Wallis, C. J. and Seshagiri Aiyar, J.*) BHASHYAKARLU NAIDU *v.* NUNGAMBAKAM ANDALAMMAL. **35 M. L. J. 89 : 9 L. W. 19 : 49 I. C. 385 : (1918) M. W. N. 896.**

DECREE—Form of.

———*Form of—Suit on promissory note—Conditional decree on furnishing indemnity—Propriety of.*

Plff. sold land to deft. and obtained from the latter a promissory note. During the pendency of the suit a third person challenging the sale plff. sued deft. on the promissory note. Court gave plff. a decree conditional on his indemnifying the deft. in case the latter lost the property purchased by him. *Held*, that the condition attached to the decree was just and proper and that the Court had power to pass such a decree. (*Spencer and Srinivasa Iyengar, JJ.*) PARAMASIVAM PILLAI *v.* SUBAYYA NADAR. **43 I. C. 551.**

———*Form of—Relief going beyond terms of plaint—Appeal.*

Courts should determine by their decrees, the rights of parties as definitely as they can, by the evidence before them but a decree is not illegal merely because it is not mere specific. The relief claimed in the plaint in a suit by Hindu against Muhammadans was to restrain the latter by an injunction from interfering with the former's celebration of the Mariamman festival near a mosque with music. The decree extended the scope of the injunction by the words "and to carry on the procession with music without any restriction as to time" implying there by a right to go in procession with music past the mosque. *Held*, that the decree awarded a larger relief than that claimed in the plaint and the word "carry on the procession with music" must be expunged. (*Ayling and Napier, JJ.*) MAHOMED HANIF SAHEB *v.* ANAGAPPA MUDALI. **35 I C. 106.**

———*Form of—Indemnity—Costs of litigation.*

Where a deft. agrees to indemnify plff. against the costs of a litigation and the plff. brings a suit on the contract of indemnity. The decree must be made conditional on the plffs assigning to the defendant the decree obtained by the plff. against the third party. (*Benson and Sundara Iyer, JJ.*) SIVASUBRAMANIA MUDALIAR *v.* SOMASUNDARAM. **21 I. C. 442 : 25 M. L. J. 422.**

———*Form of—Points left for determination in execution—Legality—Material irregularity—Revision.*

It is illegal to pass a decree which without determining finally the questions in issue, leaves certain points to be determined in execution proceedings; the passing of such a decree is a material irregularity which would warrant the interference of the High Court in revision under S. 115, C. P. C. (*Phillips, J.*) KARUPA PADAYACHI *v.* SINARATHAMAL. **12 I. C. 136 : 10 M. L. T. 567.**

———*Form of—Conditional decree—Vendor and purchaser.*

It is doubtful whether a conditional decree can be passed in favour of the purchaser, on condition of his paying purchase money, when there is a registered sale deed. (*Benson and Sundara Aiyar, JJ.*) MUTHIA CHETTY *v.* SUMAVETHIAM CHETTY. **35 M. 625 : (1911) 1 M. W. N. 228: 9 M. L. T. 378 : 10 I. C. 662 : 21 M. L. J. 236.**

DECREE—Form of.

——*Form of—Suit for setting aside sale.*

The form of decree in a suit to set aside a sale. the consideration of which is proved to have not been paid but no fraud is proved, is that plff. on payment of Court-fee shall get decree for the amount of consideration. (*Lyle, A. J. C.*) MUMTAZ ALI *v.* DULLAH. **55 I. C. 634 : 7 O. L. J. 289.**

——*Form of—Postscript.*

The postscript attached at the foot of the decree of the same date and signed by the Judge is part of the decree. (*Kanhaiya Lal, A. J. C.*) DEPUTY COMMISSIONER, FYAZABAD *v.* JAGJIWAN BASKSH SINGH. **33 I. C. 461 : 19 O. C. 49.**

——*Form of—Defts. conspiring to keep plff. out of possession.*

Where the defts. are found to have kept the plff. out of possession of the land in suit, a joint decree for mesne profits con be passed against them. (*Das and Adami, JJ.*) DINANATH SAHAI *v.* MAYAWATI KUER. **2 Pat. L. J. 143 : 6 Pat. L. J. 54 : 60 I C. 346 : (1921) Pat. 69.**

——*Form of—Duty of court—Maintenance decree.*

Decrees, should be drawn up so as to make them self contained and executable without reference to any other document, but if not so drawn up, it would not be necessarily bad. (*Mullick and Thornhill, JJ.*) MAHAINAYA PRASAD SINHA *v.* SUKHDAI KOER. **46 I. C. 169.**

——*Form of—Decree of lower Court affirmed.*

An appellate decree should embody so much of the decree of the lower Court as is intended to affirm, and this should avoid the necessity of reference to the decree of the Trial Court (*Rigg, J.*) LALL DWARKADAS *v.* BURMA RAILWAYS CO. **10 L.B.R. 280 : 62 I. C. 299 : 13 Bur. L. T. 173.**

Fraud.

——*Fraud—Ex parte—Whether can be impeached in defence.*

An *ex parte* decree may in a subsequent claim of the plff. be impeached on the ground of fraud by the persons against whom it was obtained. 27 C. 11 Foll. (*Mookerjee and Roe. JJ.*) GIRJA KANTA CHAKRABATTY *v.* MOHIM CHANDRA ACHARYYA. **20 C. W. N. 675 : 35 I. C. 294 : 23 C. L. J. 587.**

——*Fraud—Remedy of deft.*

If a decree is obtained by fraud, the remedy would be by way of review or by a suit framed for the purpose. (*Holmwood and Chatterjee, JJ.*) JASODA DASSI *v* RAMESWARI DASSI. **13 I. C. 374 : 14 C. L. J. 603.**

——*Fraud—Decree set aside—Original suit whether revived.*

The fact that a decree is set aside on the ground of fraud does not have the effect of re-opening the original suit. (*Scott-Smith, J.*) NET RAM *v.* AHMED YARKHAN. **33 I. C. 890 · 32 P. W R. 1916.**

——*Fraud—Setting aside.*

In a suit to set aside a decree on the ground of fraud, the plff. must prove that the fraud was extraneous to the decree. (*Jwala Prasad, J.*) JAGARNATH PRASAD *v.* BAHURANI. **62 I.C. 594.**

DECREE—Minor.

——*Fraud—Compromise decree obtained by fraud—Effect.*

Though a deft. does not attempt to set aside a compromise decree obtained by fraud he can raise the plea of fraud in a subsequent claim made against him on the basis of that decree. (*Atkinson, J.*) RAM RATAN SINGH *v.* KHALE LAL GOPE. **39 I. C. 891.**

——*Fraud—Setting aside—Jurisdiction of Court.*

Every Court can treat as nullity a judgment which is or can be shown to be obtained by clear and manifest fraud. (*Twomey, C.J. and Robinson, J.*) MAUNG KYAW KIN *v.* AMINUL HAQ. **10 L.B.R. 253 : 62 I. C. 53: 13 Bur. L. T. 1988.**

Merger.

——*Merger—Decree of trial Court—Appeal—Dismissal for default.*

A decree of a trial Court is merged in the decree of the Appellate Court whether it confirms, amends or reverses the original decrees and it is the appellate decree that can be executed. This will not apply when appeal is dismissed for default. Then the decree of the Appellate Court cannot be said to adopt the decree of the trial Court the order of dismissal not being a decree. (*Mookerjee and Cuming, JJ.*) SYAM MANDAL *v.* SATINATH BANERJEE. **44 C. 954 : 24 C. L. J. 523: 38 I. C. 493; 21 C. W. N. 776.**

Minor.

——*Minor—Ignorance of real facts—Rights of parties.*

A person instituted a suit against his brother's widow, a pardanashin woman, and her minor daughter claiming his estate on allegations which were in fact untrue and in which he had no honest belief. The plaintiff induced the mother to enter into a compromise on behalf of herself and her infant daughter and a decree was passed accordingly. *Held*, that the rights of the minor daughter were in no way affected by the compromise and she could sue to set aside the decree. (*Sir John Edge.*) GUNJESWAR KUNWAR *v.* DURGA PRASAD.

45 C. 17 : 22 M. L. T. 403 : 22 C. W. N. 74 : 26 C. L. J. 557 : 16 A. L. J. 1: 34 M L. J. 1 : 20 Bom. L. R. 38 : (1918) M. W. N. 16 : 7 L.W. 94 : 4 P. L W. 1 : 42 I. C. 849: 44 I. A. 229 (P.C.).

——*Minor—Re opening case of.*

Where a minor is not represented in a prior litigation by a duly appointed guardian *ad litem* under O. 3, R. 3 of the C. P. C. and a compromise decree not sanctioned as required by O 3, R. 7 of the C. P. C. is passed the decree is not binding on the minor and in a suit to declare its invalidity the minor is remitted to his original rights as they stood before the compromise. (*Sir John Edge*). PARTAB SINGH *v.* BHARUNTI SINGH.

35 A. 487: 40 I. A. 182: 16 O. C. 247: 17 C. W. N. 1165: 14 M. L. T. 299: 25 M. L. J. 492 : 11 A. L J. 901 : 18 C. L. J. 384 : 15 Bom. L. R. 1001: 21 I. C. 288: (1913) M. W. N. 785 (P.C).

DECREE—Minor.

——*Minor—Defrauded by manager—Suit to set aside decree in Civil Court.*

If the managing member of a joint Hindu family practised a fraud upon the infant members of the family in partition proceedings in the Revenue Courts and obtained a larger share himself, the minors on attaining majority, can sue in the Civil Court for a declaration that the properties were still joint, the suit is not barred by S. 233 K. of the U. P. Land Revenue Act. Per *Walsh, J.*—Once it is established that, whether by his own fraud or by neglect amounting to recklessness or wilfulness on the part of the guardian, the managing member of a joint Hindu family, has robbed the infant members of the family, no question of procedure or technical refinement can be allowed to stand in the way of the Civil Court, before which the matter is brought compelling him to restore the proceeds of his robbery. (*Piggott and Walsh, JJ.*) RAGHUNANDHAN AHIR *v.* SHEONANDAN AHIR. 41 All. 182: 49 I. C. 306 : 17 A. L. J. 97.

——*Minor—Setting aside—Grounds.*

Fraud must be proved if the decree is to be set aside where the infant was properly represented in the suit. (*Richards, C. J. and Rafique, J.*) BENI PRASAD *v.* LAJJARAM.

14 A. L. J. 438 : 35 I. C. 63 : 38 A. 402.

——*Minor—Negligence of guardian.*

Where a minor was represented in a suit by a duly constituted guardian competent to act as such, he is as much bound by the decree passed in the suit as he would have been if he were of full age. If the guardian neglected to support the case of the minor, but there is nothing to show that he did so deliberately, that circumstances alone would not entitle the minor to avoid the opeartion of the decree. (*Banerjee, J.*) CHANDAR SEKHARI TEWARI *v.* BALAKDHAR DUBAY. 15 I. C. 611 : 10 A. L. J. 149.

——*Minor—Negligence of guardian.*

An infant plff. is as much bound as an adult by a judgment or order in a cause, even though there may have been irregularities in the conduct of it, in the absence of fraud or gross negligence on the part of his next friend. But in special circumstances, the infant may be allowed, on coming of age, to amend his claim or to institute a fresh action. An application for review of judgment is appropriate generally where it is possible that by a reconsideration of the judgment, minor's rights, which were lost by the fraud or negligence of the guardian can be restored. Where, on the other hand, the plff.'s object is to unripe a transaction which formed no part of the proceedings in the former suit and which had nothing whatever to do with that suit, it is obvious that an application for the review of the proceedings in that suit would be utterly ineffectual. (*Mookerjee and Beachcroft, JJ.*) JOGESHWAR NARAIN *v.* ROY RADHA RAMAN. 16 I. C. 543.

——*Minor—Representation—Defect in.*

Where a decree has been made against a minor duly represented by his guardian and the minor on attaining his majority seeks to set aside that decree by a separate suit, he can succeed only on

DECREE—Minor.

proof of fraud or collusion on the part of his guardian. If the guardian neglected to support the case of the minor and there is nothing to show that he did so deliberately, that circumstance alone would not entitle the minor to avoid the operation of the decree (*Scott Smith, J.*) IMAM DIN *v.* PURAN CHAND 1 Lah. 27: 84 P. L. R. 1920 : 55 I. C 833 : 37 P. W. R. 1920.

——*Minor—Negligence of guardian—Onus.*

If a minor is properly represented by a next friend or a guardian for the suit and there is no fraud or collusion on the part of the next friend or guardian and he is not guilty of gross negligence, the minor is as much bound by a decree or order made in a suit or proceeding to which he is a party as if he were of full age, and it can be executed against him or his property as the case may be, in accordance with law. It is not the duty of a *guardian ad litem* to raise frivolous or untenable defences. The amount of care and attention which a guardian is expected to bestow upon the case of his ward is the same as a reasonable person would bestow on his own case. (*Shadi Lal and Martineau, JJ.*) BIHARI LAL *v.* AMIN CHAND. 52 I. C. 346.

——*Minor—Negligence of guardian.*

The general rule entitling an infant to impeach a decree passed against him on the ground of fraud and negligence of his guardian is not applicable to a case where the person impeaching the decree was at the time of the judgment an adult and treated as such notwithstanding that he was an infant at the time the previous action was brought. (*Shadi Lal and Wilberforce, JJ.*) KHADIJA *v.* FIDVATUZ ZOHRA.

49 I. C. 707 : 24 P. R. 1919.

——*Minor — Setting aside—Negligence of next friend—Decree not* res-judicata.

Several persons, one of whom was a minor represented by a next friend, sued for possession of property ; owing to an omission in the decree the minor was deprived of property to which he was entitled as shamilat. The next friend did not appeal against the decree at the first Court. The minor on attaining majority sued for recovery of his share of the shamilat. *Held*, that the next friend was guilty of gross negligence, that the plff. was not precluded from suing for shamilat by the fact that he tried first to obtain it in other ways but that plff. was not entitled to more than his own share of the shamilat. (*Le Rossignol and Martineau, JJ.*) TIKA RAM *v.* YASIN KHAN.

49 I. C. 420 : 19 P. W. R. 1919.

——*Minor—Negligence of guardian.*

Where negligence of the next friend or guardian of a minor is proved, the prior decision against the minor does not operate as *res-judicata*. A guardian cannot be said to have been negligent in not preferring an appeal from a decision against the minor where there is little chance of success on appeal. (*Scott Smith and Leslie Jones, JJ.*) ISMAIL *v.* SULTAN BIBI.

103 P. R. 1917 : 155 P. W. R. 1917 : 43 I. C. 354 : 6 P. L. R. 1918.

DECREE—Minor.

———*Minor—Setting aside decree partially.*

A minor can seek to avoid the decree in toto and not in part only. (*Ayling and Tyabji, JJ.*) DAVALARU VIJAYA RAMAYYA *v.* DAVALARU VENKATA SUBBA ROW. **39 M. 853 : 32 I. C. 881 : 30 M. L. J. 465**

———*Minor—Negligence of guardian.*

A guardian setting up a false plea of adoption when he could have set up a will which gave him a moiety of the property in a suit to recover possession of property, is guilty of gross negligence and the decree does not bind the minor. (*Sankaran Nair and Spencer, JJ.*) GOTTEPATI SUBBANNA *v.* GOTTEPATI NARASAMMA. **26 I. C. 16 : 27 M. L. J. 486.**

———*Minor—Representation by guardian* ad litem—Ex parte *decree.*

Where a minor deft. in a suit is properly represented the mere fact that his guardian *ad litem* allowed an *ex parte* decree to be passed against him to impeach the decree by means of a subsequent suit, unless he succeeds in establishing that in the previous suit his guardian was guilty of negligence in the conduct of the suit, *i. e.*, that he could have made a valid defence or produced evidence in support of it with some chance of success (*Kanhaiya Lal, A J. C.*) BAJI NATH *v.* RADHA RAWAN PRASAD. **43 I. C. 563.**

———*Minor — Negligence — Partial setting aside when permissible.*

Where a guardian *ad litem* of a minor deft. is guilty of negligence and no attempt is made by him to protect the interest of the minor in the suit, the decree can be avoided by the minor. If the decree cannot be split it will be vacated against all the parties including the minor. (*Jwala Prasad, J.*) BHAIRO PRASAD SAHU *v.* RAMACHANDRA PRASAD. **45 I. C. 253 : 4 P. L. W. 373.**

———Setting aside.
Collusive Decree.
Compromise decree.
Effect of.
Execution Sale.
Forum.
Fraud.
Grounds.
Jurisdiction.
Minor.
Mistake.
Right to sue.
Suit.

Setting aside—Collusive decree.

———*Setting aside—Collusive decree--Contemplated fraud not carried out—Effect.*

Where the contemplated fraud has not been effected a party to the fraudulent transaction does not lose his right to be relieved from the effect of such a transaction. Deft. got a collusive decree against plaintiff promising to execute it only against the plff.'s brother but took out execution against plff. himself. In a suit by plff. to have the decree declared void and of no effect, held that even if plff. could not impugn the decree he was entitled to relief having regard to the agreement that it could not be enforced against him. (*N. Chatterjee and Mullick, JJ.*) RAJABALI *v.* HEDAYAT ALI. **19 C.W.N. 1151 : 29 I. C. 699 : 22 C.L.J. 197.**

DECREE—Setting aside—Effect of.

———*Setting aside—Collusive decree.*

The mere fact that a decree is based on special oath does not make it a collusive decree nor does the fact that a sale deed on the basis of which a decree is obtained is nominal, necessarily lead to the conclusion that the decree was obtained collusively. (*Mitra, A. J. C.*) DHODIRAM MANGNIRAM *v.* RAMGOPAL KANIRAM. **3 I. C. 960.**

Setting aside—Compromise decree.

———*Setting aside—Compromise decree—Misapprehension of counsel—Effect.*

Where under a *bona fide* mistake, the counsel in a case entered into a compromise, and before the decree was drawn up they wanted to withdraw their consent, the court will allow it and hear the matter again. If they sign the decree a fresh action is usually necessary to set it aside. (*Heaton, A. C. J. and Marten, J.*) JAMSHEDJI NAOROJI *v.* SORABJI NAORJI. **25 Bom. L. R. 1137.**

———*Setting aside — Compromise decree — Mistake—Unilateral mistake—Effect of revival of suit.*

The law requires men in their dealings with each other to exercise proper vigilance and to apply their attention to those particulars which may be supposed to be within the reach of their observation and judgment and not to close their eyes to the means of information which are accessible to them. Where two parties are at arms length, either of them may *prima facie* remain silent, and avail himself of his superior knowledge as to facts and circumstances equally open to the observation of both or equally within the reach of their ordinary diligence. A consent decree could be set aside only on a ground which would justify a cancellation of the agreement on which the decree is passed. Though a suit does not lie to set aside a decree in a previous suit on the ground that the judge in passing that decree made a mistake, yet as an agreement may be rectified for an appropriate mistake so may also the consent decree based upon such agreement. A mistake on the part of one party only, not caused or actively assisted by the act of the other party, cannot invalidate the agreement or the decree based thereon. 43 C. 217, 34 C. L. J. 257: 8 C.W. N. 473: 34 C. 70, 3 Pat. L. J. 465 Ref. When a consent decree is set aside, the effect is to revive the original suit which was terminated by the compromise decree. 2 C. 184: 6 C. 687: 9 C 810 : 11 C L.J. 456 ; 15 C. L. J. 217 ; 22 C.L.J. 313, 39 M. 823 Rel. (*Chatterjee, C. J. and Panton, J.*) MAJOR A. Y. REILY *v.* GOLABKHAN. **27 C. W. N. 575 : 1923 Cal. 645.**

———*Setting aside—Compromise decree—Excess of jurisdiction.*

A consent decree passed in excess of the jurisdiction of the Court can be set aside by a suit. 9 I. C. 210 : 5 I. C, 236 Rel. (*Richa dson, J.*) JAGADANANDA ASRAM *v.* RAJENDRA ROY. **20 I. C. 396.**

Setting aside—Effect of.

———*Setting aside--Effect of—Compromise decree—Status* quo ante.

DECREE—Setting aside—Effect of.

Where a compromise entered into by the father of a minor who was acting as his guardian *ad litem* without the sanction of the Court under O. 32 R. 7 of the Code of 1908 (S. 462 of the old Code) is set aside at the instance of the minor, the parties are relegated to their rights as at the date of the compromise and the suit must be tried out. (*Mr. Ameer Ali.*) GANESHA ROW *v* TULJARAM ROW. **36 Mad. 295 : 40 I. A. 182 : 17 C. W. N. 765 : 11 A. L. J. 589 : 18 C. L. J. 1 : 15 Bom. L. R. 626 : 14 M. L T 1: 25 M. L. J. 150: 19 I. C. 515 : (1913) M. W. N. 575 (P. C.).**

———*Setting aside—Effect of—Position of parties—C. P. C., O. 23, R. 3.*

Where an *exparte* decree obtained by plaintiff fraudulently concealing an adjustment of the suit, is set aside the original suit is revived, the parties restored to their position they occupied on the day of *exparte* decree was made and the arrangement between the parties, namely that the plaintiff to withdraw from the suit should be carried into effect by a decree under O. 23, R. 3 of the C. P. C. without fresh investigation. (*Mukherjee and Walmsley, JJ.*) NISTRANI DASI *v.* MOHENDRA NATH KAR. **47 I. C. 535 : 28 C. L. J. 158.**

———*Setting aside—Effect of.*

The setting aside of a decree against a minor on the ground of fraud does not necessarily mean the revival of the former suit. 15 C. L. J. 217 ; 11 C. L. J. 346 ; 39 A. 8. Dist. 10 B. 38 Foll. (*Chevis, J.*) ABDUL HAKIM *v.* SHUGAN CHAND **50 I. C. 321.**

———*Setting asde—Effect of—Minor—Revival of suit.*

The effect of avoidance of a decree as not binding on a minor is to relegate him to his original rights and to enable him to require the suit to be proceeded with. (*Ayling and Tyabji, JJ.*) DAVULURU VIJAYA RAMAYYA *v.* DAVULURU VENKATTA SUBBA RAO. **39 Mad. 853 : 32 I. C. 881 : 30 M. L. J. 465.**

Setting Aside—Execution Sale.

———*Setting aside—Execution sale.*

A judgment debtor cannot impeach a decree after it is executed and the sale has taken place under it. (*Mookerjee and Carnduff, JJ.*) BENI MADHAB ROY *v.* BISSESSWAR BHARATI. **16 C. L. J. 42 : 15 I. C. 436: 17 C. W. N. 84.**

Setting aside—Forum.

———*Setting aside—Forum.*

A suit to set aside a decree on the ground of fraud need not be brought in the Court where the decree was obtained but might be brought in any Court within whose jurisdiction a portion of the fraud was committed. *Obiter* : A suit to set aside a decree on the ground of fraud can be brought in a Court other than the one which passed the decree where the property of the plaintiff situate within the jurisdiction of the former Court is attached in execution of that decree. 25 All. 48 : 41 Cal. 990 ; 28 Cal. 475 ; 29 Cal. 395 ; 8 C. L. J. 485 ; 14 C. W. N. 693 Foll. In a suit to set aside a decree on the ground of fraud the plaintiff cannot succeed merely on proving that the summons

DECREE—Setting aside—Forum.

was not served on him. (*Chamier and Piggott, JJ.*) JAWAHIR *v.* NEKI RAM. **37 All 189. 28 I. C. 502 : 13 A. L. J. 190.**

———*Setting aside—Forum—Superior and inferior Court.*

A suit to obtain a declaration that a decree passed by a Court was obtained by fraud and is not binding on the plaintiff can be brought in a court of inferior jurisdiction to the Court which passed the decree, provided the subject matter is otherwise within the jurisdiction of the Court, in which the suit is instituted. 41 M. 213 Foll. (*Abdur Rahim and Bakewell, JJ.*) PILLA KAKKADU *v.* VEDULA CHENDRAYYA. **24 M. L. T. 254 : 51 I. C. 536 : (1918) M. W. N. 562.**

———*Setting aside—Forum—Jurisdiction of inferior court to set aside a decree of superior Court—Fraud.*

An inferior Court has jurisdiction to set aside the decree passed by a superior court if obtained by fraud, provided it is otherwise competent to try the suit Every court whether superior or inferior is equally competent to treat as a nullity any judgment which can clearly be shown to have been obtained by fraud. 33 C. 180 ; 30 C. 369 ; O. A. from 26 C 891 ; 25 A. 48 ; 37 A. 189 : 11 C. W. N. 579 ; 14 C. W. N. 695 ; 28 M. L. J. 410, Foll. case law discussed. (*Spencer and Srinivasa Aiyangar, JJ.*) ARUNACHALAM CHETTY *v.* SABAPATHY CHETTY. **41 Mad. 213 : 6 L. W. 368 : 41 I. C. 937 : 33 M. L. J. 499.**

———*Setting aside—Forum—Cause of action.*

There is no absolute rule that no decree could be impeached by suit save in the Court in which it was passed The suit might be brought in any Court in which the cause of action arises or where a portion of the property affected is situate. (*Wallis, C. J. and Hannay, J.*) ARUNACHELAM CHETTI *v.* VELLAPPA THAMBIRAN. **18 M. L. T. 135 : 28 I. C. 337 : 28 M. L. J. 410.**

———*Setting aside—Forum— Jurisdiction of court.*

One court can set aside a decree passed by another court only when it finds that the court passing the decree was prevented by fraud from ascertaining the true facts of the case. Without such proof, there is no jurisdiction to enter into the proceedings of another court. The effect of setting aside a decree for fraud is to destroy the whole proceedings including the plaint and no further proceedings can be maintained upon the plaint. (*Chapman and Roe, JJ.*) CHANDI PRASAD MISRA *v.* GOVIND SAHAIJ. **39 I. C. 791 : 1 P. L. W. 499.**

———*Setting aside—Forum.*

A suit to set aside a decree on the ground of fraud can be brought in a Court of inferior grade to the one which passed the decree provided such inferior Court has jurisdiction as to the subject-matter of the suit. 41 M. 213. (*Kemp and Raymond, A J. Cs*) BHAI CHAINRAI *v.* MUSSAMMAT DEVIBHAI. **52 I. C. 916 : 13 S. L. R. 144.**

DECREE—Setting aside—Fraud.

Setting aside—Fraud.

———*Setting aside—Fraud— Jurisdiction — Objection to—Distinction between irregular exercise and want of jurisdiction.*

Where a person is *ex facie* a party to a decree absolute on a mortgage, which was passed after hearing his objections, he could not sue to set aside the decree on the ground that at one stage of the case he was not properly heard. In the absence of fraud practised on the Court or of total want of jurisdiction in the Court, it is not competent to a party to a decree to sue for its rescission and destruction. A mere error in the decree or an irregularity in the procedure which led up to it, is not sufficient to sustain a fresh suit to set it aside. A challenge of the method of the exercise of jurisdiction can never in law justify the denial of the existence of such jurisdiction. 27 I. A. 216 Rel. (*Lord Shaw.*) RAJWANT PRASAD PANDE *v.* RAM RATAN GIR.
37 A. 485 : 42 I. A. 171 : 13 A. L. J. 937 : 29 M. L. J. 165 : 2 L. W 671 : 18 M. L. T. 173 : 17 Bom. L. R. 754 : 20 C. W. N. 35 : 23 C.L.J 55 : 30 I. C. 849 : (1915) M. W. N. 736 (P. C.)

———*Setting aside—Fraud—Revenue Court—Proceedings—Suit in Civil Court.*

An action can be brought in the Civil Court to provide a remedy where a person's rights have been infringed by some fraudulent act of the deft. even though fraud was once practised by a Revenue Court and would affect the result of partition proceedings which are the business of the Revenue Court. 25 A. 19 : 23 A. 291 ; 49 I. C. 300, Fol. Remedies open to a plaintiff where he has been deprived of his rights owing to the fraud of the defendant considered. (*Walsh and Stuart, JJ.*) JHUMAK RAI *v.* BINDESHRI RAI.
41 A. 626 : 17 A. L. J. 797 : 51 I. C. 125 : 1 U. P. L. R. 62. (H. C.)

———*Setting aside—Fraud—Nature of—Perjury.*

A suit to set aside a decree on the ground of fraud is not maintainable, if the fraud alleged in the plaint is that certain false allegations were made in the former plaint by the plaintiffs who proved those allegations by means of perjured evidence. It must be proved that some fraud has been practised upon the Court in the course of the judicial proceedings of which, the decree complained of was the result. (*Lindsay, J.*)
KURE *v.* JHINGUIAR. **35 I. C. 847.**

———*Setting aside—Fraud — Suppression of facts—Suit for sale on mortgage—Claim for personal decree—Notice served on judgment-debtors.*

The mortgagees applied for a decree under S. 90 of the T.P. Act. Notice of this application was duly served on the judgment-debtors. They did not appear and the court granted the decree asked for limited to the assets of the deceased mortgagor. In execution of this decree a house belonging to the judgment-debtors was attached. The judgment-debtors then sued to set aside the decree on the ground of fraud. *Held*, the suit was not maintainable. A party who after due notice allows the decree or order to be made without opposition is in the same position as a person who has had a decree or order made against him after contest, and fraud entitling a party to have a decree set aside by means of a suit must be actual positive fraud and a meditated and intentional contrivance to keep the parties and the Court in ignorance of the real facts of the case and obtaining that decree by that contrivance. 18 C. W. N. 447 not appr. (*Richards, C. J and Rafique, J.*) RAMRATAN LAL *v.* BHURI BEGUM. **38 All. 7 : 30 I. C. 792 (2) : 13 A. L. J. 901.**

———*Setting aside—Fraud--Perjured evidence—Effect of.*

A suit for a declaration that a decree obtained in a former suit between the parties was not binding as having been made in contravention of the pleadings is barred by the principle of *res judicata*, as the decree, whether right or wrong, had become final between the parties no appeal having been preferred. A suit to set aside a decree on the ground that the decree in the previous suit had been obtained by perjured and false evidence is not maintainable. 41 C. 990 ; 16 C. W. N. 1002, Foll.; 38 M. 203, Ref. 29 M. 179 not Foll. (*Banerjee and Rafique, JJ.*) JANKI KUAR *v.* LACHMI NARAIAN. **37 All. 535 : 30 I. C. 789 : 13 A. L. J. 753.**

———*Setting aside—Fraud.*

Suppressing of evidence by a party does not amount to such a fraud as would entitle the other party to institute a suit to set aside the decree especially when the onus of proving that fact lies on such other party. **1923 Bom. 379.**

———*Setting aside—Fraud.*

In a suit to set aside decree *ex parte* on the ground of fraud, when there is no finding that there was fraudulent suppression of the summons at the instance of the defendant (who was a plaintiff in the original case) even though the summons was not served on the plaintiffs (defendants in the original case), the decree cannot be set aside. An incomplete statement of a proposition of law in the plaint does not constitute a fraud on the part of the plaintiff. (*Ghose and Panton, JJ.*) MAHADEB PRASAD *v.* MAHABIR PRASAD.
1923 Cal. 569.

———*Setting aside—Fraud--Plea in defence—Decree acted upon.*

Where a decree has been obtained by fraud, a party to the decree as a defendant in a subsequent suit can plead that the prior decree was vitiated by fraud and therefore not binding on him even though he had not sued to avoid the decree. 26 C. 891 ; 27 C. 11 Rel. If however he had acted in accordance with the decree, he cannot be allowed to challenge its validity, unless he proves specifically the circumstances which constitute the alleged fraud on him of the Court. (*Mookerjee and Chotzner, JJ.*) PULIN BEHARI DEY *v* SATYA CHANDRA DEY. **36 C. L. J. 367 : 1923 C. 79.**

———*Setting aside—Fraud — Suppression of evidence—False claim.*

The mere fact that a notice of a suit was not served on a party is not necessarily fraud. If, on the other hand, it is shown that there was any deliberate suppression of notice particularily in

DECREE—Setting aside—Fraud.

order to give effect to any scheme such as that alleged, then such suppression of notice would be clearly fraud. Further it is not necessarily fraud on the part of any person to put forward a claim which is in fact unfounded in law. A person may make a claim to which he is not entitled and his conduct is not fraudulent merely on that ground. It must be found that there were circun stances which establish that the over-claim, if there be one, was made with knowledge and for a fraudulent purpose. (*Woodroffe and Suhrawardy, JJ.*) JOGESH CHANDRA GHOSE *v.* PROSANNA KUMAR TALUKDAR. **71 I. C. 962.**

———*Setting aside—Fraud—Facts necessary.*

In a suit to set aside an *ex parte* decree, on the ground of fraud, the plaintiff must prove either fraudulent suppression of summons or that the claim of the defendants was false and false to their knowledge. (*Teunon and Newbould, JJ.*) PANNALAL *v.* TARA KANTA. **63 I. C. 778.**

———*Setting aside — Fraud — Small Cause Court decree.*

A decree of a Small Cause Court, though final in the sense that there is no appeal against it, can be set aside on the ground of fraud. (*Teunon and Newbould, JJ.*) RAJANI KANTA *v.* PURNA CHANDRA. **63 I. C. 712 : 48 Cal. 298.**

——*Setting aside—Fraud—Collusion.*

If there is no fraud or collusion or any vitiating circumstance, a question settled by a compromise cannot afterwards be revived in Court for judicial determination. 32 Ch. D 266 ; 34 C. 70 (P. C.) (*Richardson and Shamsul Huda, JJ.*) BEJOY SINGH HAZARI *v.* MATHURIA DEBYA. **56 I. C. 97.**

———*Setting aside—Fraud—Perjury.*

Unless a person has been prevented by his opponent from placing his case before the Court, it is not open to the former to set aside an *ex parte* decree. A decree cannot be set aside merely on the ground that it has been procured by perjured evidence. There must be extrinsic fraud practised on the Court which has misled it. (*Chatterjee and Duval, JJ.*) MANINDRA NATH MITRA *v.* HARI MANDAL. **54 I. C. 626 : 24 C. W. N. 133.**

———*Setting aside — Fraud — Perjured evidence.*

The mere fact that a decree has been obtained by false evidence is not a sufficient ground for setting it aside. The case itself must be found a fraudulent one. 29 C. 395 (P.C.) Rel. (*Fletcher and Huda, JJ.*) KASISWAR GOSWAMI *v.* AMIRUDDIN. **47 I. C. 14 : 23 C. W. N. 133.**

———*Setting aside— Fraud — Suppression of summons.*

In a suit to set aside a decree on the ground of fraud the plff. establisbes that the usual processes were suppressed by the deft, he proves a great deal of his case. (*Richardson and Walmsley, JJ.*) GENDU NASYA *v.* SADI BANIA. **44 I. C. 983.**

———*Setting aside—Fraud — Suspicious circumstances.*

In a suit for a declaration that a decree in suit is fraudulent, the plff. has to prove that the decree is fraudulent and collusive. If that fact is not proved, the plff. fails, and if in the absence of direct proof the circumstances which are established are equally consistent with the allegation of the plff as with the denial of the deft., the plff. fails for the very simple reason that the plff. is bound to establish the affirmative of the proposition. (*Sanderson, C. J. and Mookerjee, J.*) AMJAD ALI HAZI *v.* ISMAIL. **44 I. C. 504 : 27 C. L. J. 137.**

———*Setting aside—Fraud—What is.*

A judgment will be vacated if it is proved that the successful party has taken means to prevent service of notice on the other or has procured a false return of service. (*Mookerjee and Beachcroft, JJ.*) NAGENDRA NATH BASU *v.* PARABATI CHARAN KOYAL. **35 I. C. 339 : 20 C. W. N, 819.**

———*Setting aside—Fraud.*

Fraud of the required character is a ground for setting aside a decree. (*Jenkins, C. J. and Holmwood, J.*) KUSADHAJ BHAKTA *v.* BROJA MAHAN BHAKTA **43 C. 217 : 31 I C. 13 : 19 C. W. N. 1228.**

———*Setting aside—Fraud—What is — Burden of proof.*

A rent-decree cannot be set aside for fraud which is not clearly and precisely alleged in the plaint. The plff. must prove affirmatively that the rent sued for was more than the rent due : also that the exaggerated rent was claimed to defraud him, A mistake of the claimant made because of an entry in the Record of Rights is not fraud. (*Sharfuddin and Coxe, JJ.*) BIBI SALIMAN *v.* UDHORAN SAHI, **27 I. C. 890.**

———*Setting aside—Fraud--What constitutes.*

A prior judgment cannot be upset on a mere general allegation of fraud or collusion, it must be shown when and where and how the fraud was committed and the fraud must be an actual positive fraud, a meditated contrivance to keep the parties and the court in ignorance of the real facts. (*Jenkins, C. J. and Chatterjee, J.*) NANDAKUMAR HOWLADAR *v.* RAM JIBAN HOWLADAR. **41 C. 990 : 18 C. W. N. 681 : 23 I. C. 337 : 19 C. L. J. 457.**

———*Setting aside—Fraud—Perjury.*

Perjury is not a sufficient ground to set aside a decree but where a false case is placed before the court, a fraud is practised and the Court can set aside the decree. (*Fletcher and Chatterjee, JJ.*) KEDAR NATH DAS *v.* HEMANTA KUMARI DASI. **22 I. C. 709 : 18 C. W. N. 447.**

———*Setting aside—Fraud—Perjury.*

A decree cannot be set aside merely on the ground that it was based on perjured evidence. 21 C. 612 ; 10 Ch. D. 327; 14 C W. N. 695 ; 3 Ch. 203, Foll.; 38 C 936; 29 Mad. 179, Diss.; 10 Q. B. 295 ; and 25 Q. B. D. 310, Dist. (*Carnduff and Chapman, JJ.*) MORUFUL HUQ *v.* SURENDRA NATH ROY. **15 I. C. 893 : 16 C. W. N. 1002.**

———*Setting aside—Fraud— Defence in subsequent suit.*

When a suit for rent was compromised and a decree made by consent, the defendant agreed to pay rent for the same premises at a certain rate

DECREE—Setting aside—Fraud.

and at the said rate, the defendant pleaded that the previous compromise was entered into under mistake and misrepresentation. *Held*, that if the compromise decree was obtained by fraud or misrepresentation or was based on a compromise into which the defendant had entered under a mistake, he could bring a suit properly framed to set it aside; that till it has been set aside, it must be deemed operative and defendant in the present suit could not avoid the effect of the consent decree. 29 C. 891; 27 C. 11 Dist. (*Mookerjee and Harrington, JJ.*) JATADHARI LAL *v.* SHAH SHAMSUL BARI. **14 I. C. 713 : 16 C. L. J, 552.**

———*Setting aside—Fraud—Suit to set aside decree—Scope of enquiry.*

Where a decree is sought to be set aside on the ground of fraud, the jurisdiction of the Court is not limited to an investigation merely as to whether the plaintiff was prevented from placing his case at a prior trial by the fraud of the defendant. The Court must rip up the whole matter for determining whether the decree has been procured by fraud. 21 C. 612 not Foll. (*D. Chatterjee and N. Chatterjee, JJ.*) LAKSHIMI CHARAN SHAHA *v.* NUR ALI. **38 C. 936 : 11 I. C. 626 : 15 C. W. N. 1010.**

———*Setting aside—Fraud—What constitutes.*

The fraud entitling the plaintiff to get a decree set aside must be a fraud practised on the court The dishonesty of the claim on which the decree was obtained is not fraud for this purpose, if the procedure laid down is strictly followed by the person obtaining the decree. (*Coxe and Teunon, JJ.*) MAROCHIN *v.* PARSURAM. **10 I.C. 905.**

———*Setting aside—Fraud—Decree on award.*

A decree based on award cannot be set aside on the ground of fraud. A decree in accordance with the agreement of parties is still one based on the award. (*Chevis and Broadway, JJ.*) TEJA SINGH *v.* JANMEGH SINGH. **57 I. C. 195.**

———*Setting aside—Fraud—Non-service of summons—Knowledge.*

Where in a suit to set aside a decree on the ground of fraud, it is found that the plaintiff was aware of the prior litigation and its result and acted in pursuance thereof, the decree is binding and cannot be set aside. (*Le Rossignol, J.*) FINUN *v.* SHIBBO. **8 P. W. R. 1918 : 43 I. C. 159 : 154 P. L. R. 1917.**

———*Setting aside—Fraud—Perjury.*

A decree once made cannot be set aside in a subsequent suit on the same materials used in the former suit on the ground of the decree having been obtained by perjured evidence, but if the materials were not available originally and come to light afterwards, it is to open revision. (*Johnstone, C. J. and Rossignol, J.*) SKINNER *v.* BADRI KISHEN. **98 P. R 1915 : 31 I. C. 196 : 179 P W. R. 1915.**

———*Setting aside—Fraud—Perjury.*

Perjury and suppression of evidence do not constitute such a fraud as would vitiate a judgment.

DECREE—Setting aside—Fraud.

38 M. 203 foll. (*Coutts Trotter and Ramesam, JJ.*) BALAKRISHNA MUDALIAR *v.* SAMINATHA MUDALIAR. **16 L. W. 132 : (1922) M W.N. 463 : 1922 Mad. 404.**

———*Setting aside—Fraud — Perjured evidence.*

No suit can be instituted to set aside a decree on the ground that it was obtained by perjured evidence. 29 Mad. 179 Overruled. 38 Mad. 203, 37 A. 535; Foll. (*Wallis, C. J., Sadasiva Aiyar and Spencer, JJ.*) KADIRVELU NAINAR *v.* KUPPUSWAMI NAICKER. **41 Mad. 743 : 34 M. L. J. 590 : 8 L. W. 103 : 45 I. C. 774 : 23 M. L. T. 372 : (1918) M. W. N. 514 (F. B.).**

———*Setting aside—Fraud—Collusion.*

A decree of Court though obtained by collusion to carry out a scheme of fraud, cannot be treated as void as between the parties to the decree or their representatives. The Court ought not to permit the parties to such fraud to show that the transaction upheld by the decree was not really what it purported to be and does not bind them. 31 Mad. 485; 18 Mad. 378, Fol.; 26 A. 272, Dist. (*Sadasiva Aiyar and Napier, JJ.*) IDINE BEARY *v.* UMMATHUMMA. **30 I. C. 606.**

———*Setting aside — Fraud—What constitutes.*

A decree may be set aside on the ground that it was obtained by fraud. Fraud to vacate the judgment must be extraneous to everything adjudicated upon by the Court and not any fraud already dealt with by the Court. Judgment of the Court includes the decision of the questions of reliability of witnesses and genuineness of documents. The Court's power to set aside a judgment on the ground of fraud is discretionary. (*Benson and Sundara Aiyar, JJ.*) SIGADAPATTI CHINNAYYA *v.* KOTLA RAMANNA. **38 Mad. 203 : 25 M. L. J. 228 : 13 M. L. T. 421 : 19 I. C. 579 : (1913) M. W. N. 387.**

———*Setting aside—Fraud —Perjured evidence.*

While third persons might treat a decree obtained by fraud as a nullity, the parties themselves, if they had been represented in the suit and had an opportunity of being heard, are not entitled to treat it as a nullity. The parties must set aside the decree; till then it is binding. A decree obtained on perjured evidence cannot be set aside on the ground of fraud. 29 Mad. 179, Doubted. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) KUMARASWAMI CHETTY *v.* KAMATCHI AMMAL. **12 M. L T. 186 : 23 M. L. J. 187 : 16 I. C. 843 : (1912) M. W. N. 805.**

———*Setting aside—Fraud.*

A fraudulent decree is voidable and not void and can only be impeached by the person injured. But in order to succeed he must indicate the grounds on which the decree is attacked or from which fraud may be inferred (*Ashworth, A. J. C.*) RAGHUBAR DAYAL *v.* BINDA PRASAD. **22 O. C. 171 : 6 O. L. J. 646 : 53 I. C. 572 : 1 U. P. L. R. 77. (J. C.)**

DECREE—Setting aside—Fraud.

———*Setting aside—Fraud—Proof of.*

To set aside a decree on the ground of fraud plaintiff must prove he was prevented from putting his case before the Court or that some trickery was practised on the Court. If the plaintiff fails to prove the fraud alleged in his plaint he cannot be allowed to adduce evidence to show that the claim agreed against him was otherwise wrongly decreed. A mere allegation of fraud in the pleadings or evidence is insufficient when the Judge after giving full opportunity to the parties to produce their evidence has decided, rightly or wrongly. (*Daniels, A. J. C.*) AJUDHIA PRASAD *v.* GURDAYAL. 22 O. C. 60 : 52 I. C. 101 (2.) : 1 U. P. L. R. 70. (J. C.)

———*Setting aside—Fraud—If plaintiff can set up* res judicata.

The deliberate making of a false statement in the plaint and thereby obtaining a decree amounts to fraud practised on the Court, and the plaintiff cannot plead the rule of *res judicata*. (*Lindsay, J. C.*) SARUP NARAIN *v.* SHEO SANKAR LAL. 42 I. C. 416 : 4 O. L. J. 522.

———*Setting aside—Fraud—False allegations.*

Where a decree is obtained upon allegations in a plaint which are subsequently found to be untrue in fact and it is also found that owing to certain circumstances the plaintiffs did not know them to be incorrect, the decree cannot be set aside on the ground that it was obtained by fraud. (*Lindsay, J. C.*) GIRJA DAYAL *v.* RAGHUMAL. 33 I. C. 481.

———*Setting aside—Fraud—What constitutes.*

A decree which is based on and solely due to fraud by a party can be held to be a nullity even though it cannot be said to have the effect of preventing an opposite party from placing his case properly before the Court. (*Baillie, S. M.*) TRIBHUVAN DAT *v.* BALAKRAM MISRA. 27 I. C. 587 : 2 O. L. J. 14.

———*Setting aside—Fraud — Non-service of summons—Deliberate suppression—Effect.*

Deleberate suppression of service of summons amounts to fraud, justifying setting aside of the decree passed in the suit. (*Das and Machperson, JJ.*) MAHARANI JANKI KUER *v.* BABO THAKUR RAI, 1923 Pat. 336 : 1924 P. 241.

———*Setting aside—Fraud--Consent of parties—Compromise decree—Remedy of parties.*

A court has inherent power to correct its own proceedings when it is satisfied that in passing a particular order it was misled by one of the parties. A distinction has been drawn between fraud practised upon the Court, where the question is whether there was a consent in fact of the parties to a decree, there is power to investigate the matter in a properly constituted application and to set aside the decree if satisfied that a party never in fact consented to it ; but where there was a consent decree in fact but a party alleges his consent was procured by fraud, the Court cannot investigate the fact either in review or in exercise of its inherent power and the only remedy is by suit. In other words, the factum of consent can be investigated in summary proceedings, but not so the reality of the consent. (*Das and Kulwant Sahay, JJ.*) SADHO SARAN RAI *v.* ANANT RAI. 2 Pat. 731 : 1923 Pat. 197 : 1923 P. 483.

DECREE—Setting aside—Fraud.

———*Setting aside—Fraud—Non-service of summons.*

Where an *ex parte* decree is passed and a suit is brought to set it aside on the ground that the summons was deliberately suppressed with a view to prevent the party from defending the suit, there is a fraud committed and the court can set aside the decree. (*Das and Macpherson, JJ.*) MAHARANI JANKI KUER *v* BABO THAKUR RAI. 1923 Pat. 336 · 1924 P. 241.

———*Setting aside—Fraud—What constitutes—Procedure on setting aside decree.*

The test as to whether a suit lies to set aside a decree is whether there was fraud practised in relation to the proceedings in court by which the defendant in the original suit was prevented from placing his case before the court.

Where a decree is set aside as fraudulent, the suit cannot be re-heard. Where a suit is brought to set aside an *ex parte* decree as fraudulent, the onus is upon the plaintiff to show that the summons was suppressed, and he can show that the claim was false so as to lead to an inference as to the fraudulent suppression of summons. It is not upon the defendant to show that his claim in the previous suit was a true one. (*Das and Bucknill, JJ.*) DAMODAR PRASAD *v.* RAMSARUP KUMAR. 4 Pat. L. T. 102 : 1923 Pat. 137 : 1 P. L. R. 252 : 1923 P. 327.

———*Setting aside—Fraud—Non-service of summons.*

A suit to set aside an *ex parte* decree on the ground of non-service of summons is not maintainable when the same ground was taken unsuccessfully in an application under O. 9. R. 13, but if other grounds of fraud are alleged, it will lie. (*Mullick and Bucknill, JJ.*) MAHANTH RAMRUP GOSHAIN *v.* MAHABIR SHAH. 74 I. C. 825 : P. 833.

———*Setting aside—Fraud —Non-service o summons.*

Mere non-service of summons is not a ground for a suit to set aside a decree. It must be shown that the opposite party was guilty of fraud in causing the suppression of summons and thereby keeping the plaintiff in ignorance of the suit. (*Jwala Prasad and Adami, JJ.*) RANI CHHATTRA KUMARI *v.* PANDA RADHA MOHAN SINGARI. 3 P. L. T. 451: 1922 P. 291.

———*Setting aside—Fraud—What is.*

A suit to set aside a previous judgment on the ground of fraud is not maintainable in the absence of any contrivance by which the person suing was prevented from placing his case before the court in the previous suit. Fraud must first be established as a fraud in relation to the proceedings in court before the record can be examined for the purpose of giving one court opportunity to differ from another court on a question of fact. 10 Ch. D. 327, Foll., 18 C. W. N. 447 ; 10 Q. B. D. 295 ; 25 Q. B. D. 310, Dist.

DECREE—Setting aside—Fraud.

(*Das and Adami, JJ.*) RAM NARAIN LAL SHAW *v.* TOOKI SAO. 5 Pat. L. J. 259 : 1 Pat. L. T. 119 : 58 I. C 182 : 1920 Pat. 98 : 2 U. P. L. R. (Pat.) 51.

——*Setting aside — Fraud —Perjured evidence.*

The mere fact that the claim in a suit decreed *ex parte* was supported by perjured evidence is no ground for the maintainability of another suit to set it aside. 16 C. W. N. 1002 ; 18 C. W. N. 447 ; 38 Mad. 203, Foll. The principle is also equally applicable to a false case, where the opposite party has beeen duly served with notice and owing to laches has not appeared and the suit has been decreed *ex parte*. If notice had not been served or if the defendants were prevented by the plaintiff from appearing by tricks or misrepresentation, there would be some extrinsic collateral act in the nature of fraud vitiating the previous adjudication. (*Coutts and Adami, JJ.*) KRIPASINDU PANIGRAHI *v.* NANDU CHARAN. 56 I. C. 606 : 1 Pat. L. T. 206.

——*Setting aside — Fraud—Subject-matter not existing.*

If a person obtains a decree, the subject-matter of which has no existence, the court can set aside such decree on the ground that it was fraudulently procured. If the subject-matter exists and the decree is obtained by false and perjured evidence this is not sufficient, by itself, to set aside the decree. (*Atkinson and Manuk, JJ.*) CHATTEN SINGH *v.* RADHA KISHUN. 50 I. C. 451 : 4 P. L. J. 87.

——*Setting aside—Fraud —Suppression of process.*

Non-service of summons by itself is not fraud but coupled with an intention to deceive it may amount to fraud. (*Miller, C. J. and Ali Imam, J.*) RADHA KISHEN RAI *v.* NAURATAN LAL. 46 I. C. 627 : 3 Pat. L. J. 522.

——*Setting aside — Fraud and collusion—Compromise being beyond scope of suit.*

A suit for setting aside a decree passed upon a compromise on the ground that it was obtained collusively and fraudulently must be dismissed on failure of the plff. to prove the allegations of fraud and collusion. Such a decree ought not to be set aside merely because it embodies a compromise which went beyond and was intended by all parties to go beyond the lands in dispute in the suit. Such a compromise is admissible to prove an admission by a party to it. (*Chamier, C. J. and Sharfuddin, J.*) MAHADEO PAHAN *v* BISSESAR RAM. 43 I. C. 772 : 1917 Pat. 181.

——*Setting aside —Fraud—Suppression of summons.*

A suit to set aside a decree can lie solely on the ground that the summons has been fraudulently suppressed. C. P. C., S. 108 is no bar to such a suit. 28 C. 475 (P. C.) Rel. (*Sharfuddin and Roe, JJ.*) CHIRANJIB LAL CHODHAY *v* DOULTEA. 41 I. C. 677 : 2 P. L. W. 20.

——*Setting aside—Fraud—Proof of.*

The jurisdiction to impugn a previous decree on the ground of fraud is beyond question but must be exercised with care and proof must be required of actual and positive fraud, *i. e.*, a meditated and intellectual contrivance to keep the parties and the Court in ignorance of the real facts and a decree obtained by that contrivance. (*Mullick and Atkinson, JJ.*) MOHAN KRISHNA DAR *v.* HAR PRASAD. 40 I. C. 2.

DECREE—Setting aside—Grounds for.

——*Setting aside—Fraud—Nature of.*

Although a decree can be set aside on the ground of fraud, if the fraud is extraneous to the suit it is not open to one Court to entertain a suit to set aside a decree of another court, the sole point being whether the latter court erred in believing the evidence before it. (*Beasley, J.*) MUSTHAN *v.* BABU MOHENDRA NATH SINGH. 1 Rang. 500 : 1924 R. 119.

——*Setting aside—Fraud—What to prove.*

To set aside a decree it must be shown that the court was not merely mistaken but misled. *Duchess of Kingston's case*, 2 Smith Leading Cases 731 Ref. (*Hayward, A. J. C. and Crouch, A. J. C.*) KHUSHI RAM POHUMAL *v.* GHANSHAMDAS. 25 I. C. 946 : 8 S L. R 81.

Setting aside—Grounds for.

——*Setting aside—Grounds for—Perjury.*

False evidence in a suit would not be fraud to vitiate a decree unless the effect of that false evidence was for preventing the other party from putting his case before the Court. (*Pratt, J.*) GOKULDAS PITAMBER *v.* ODHAVJI GIGABHAI. 25 Bom. L. R. 893 : 1924 Bom. 100.

——*Setting aside—Grounds—Consent decree—Unilateral—Mistake—Effect of revival of suit.*

The law requires men in their dealings with each other to exercise proper vigilance and to apply their attention to those particulars which may be supposed to be within the reach of their observation and judgment and not to close their eyes to the means of information which are accessible to them. Where two parties are at arms length, either of them may *prima facie* remain silent and avail himself of his superior knowledge as to facts and circumstances equally open to the observation of both or equally within the reach of their ordinary diligence. A consent decree could be set aside only on a ground which would justify a cancellation of the agreement on which the decree is passed. Though a suit does not lie to set aside a decree in a previous suit on the ground that the Judge in passing that decree made mistake, yet as an agreement may be rectified for an appropriate mistake so may also the consent decree based upon such agreement. A mistake on the part of one party only, not caused or actively assisted by the act of the other party cannot invalidate the agreement or the decree based thereon. 43 C. 217; 34 C. L. J. 257 : 8 C. W. N, 473 : 34 C. 70 ; 3 Pat. L. J. 465 Ref. When a consent decree is set aside, the effect is to revive the original suit which was terminated by the compromise decree. 2 C. 184 ; 6 C. 687 ; 9 C. 810 ; 11 C. L. J. 456 ; 15 C L. J. 217 ; 22 C. L. J. 313 ; 39 M. 823 Rel. (*Mookerjee and Chotzner, JJ.*) MAJOR A. Y. REILY *v* RAJKUMARI. 36 C L. J. 245 : 1922 Cal. 493.

DECREE—Setting aside—Grounds for.

———*Setting aside—Grounds for—Error of law—Fraud.*

It is not open to a litigant, except in the ground of fraud, to maintain a suit to rescind or nullify a decree passed in a former suit to which he was a party and which was tried out by a competent court. (*Chitty and Walmsley, JJ.*) DURGAH CHARAN BOSE *v.* LAKHINARAIN BIRA. 47 I. C. 917.

———*Setting aside—Grounds—Assignee from decree-holder purchaser, rights of, if affected.*

The defeasibility of the decree-holder's title to the property purchased in execution of an *ex parte* decree is of such a common occurrence that the plea of a purchaser for value without notice hardly applies. (*Jenkins, C.J. and Chatterjee, J.*) SATIS CHANDRA GHOSE *v.* RAMESWARI DASI. 22 C. L. J. 409 : 31 I. C. 894 : 20 C. W. N. 665.

———*Setting aside—Grounds.*

A decree which is beyond the subject-matter of the suit is not legal. (*Le Rossignol, J.*) WIRU MAL *v.* SARDAR KHAN. 3 Lah. L. J. 424.

———*Setting aside—Grounds.*

Where the lower court omits to deal with material questions raised in the pleadings, it has the effect of prejudicing a party and the decree must be set aside. (*Kumaraswami Sastri, J.*) A. VEDAJI BASKARA TIRUMAL RAO SAHIB *v.* SUBRAMANIA GURUKKAL. 10 L. W. 221 : 52 I. C. 992 (2) : (1919) M. W. N. 707.

———*Setting aside — Grounds — Error, if enough.*

No suit to set aside a decree on the ground of error is maintainable. It can be appealed against or reviewed or if it does not conform to the judgment, an application for correction can be made. (*Lindsay, J. C.*) SURAJ BAKSH SINGH RAJA *v.* BRIJRAJ KUNWAR. 23 O. C. 140 : 57 I. C. 415 : 7 O. L. J. 291.

———*Setting aside—Grounds—Reliefs going beyond the prayer in the plaint.*

In a suit to set aside a decree in a prior suit as having been passed without jurisdiction the facts found were these. In the plaint in the previous suit it was alleged that a certain leasehold property was pledged as security for the unpaid commission or royalty and though no specific prayer was inserted for enforcement of that charge, the facts upon which the charge might have been asked for were stated in the plaint. The plaintiff prayed for a much wider relief, namely, possession of the leasehold property according to the terms of the *kabuliyat* which gave him a right to re-enter. The Court passed a decree for a certain amount and directed that in the event of the same not being paid within a certain time, the leasehold property was to be sold. *Held*, that in the prior suit a case had been made which could serve as a foundation for the relief granted in the prior suit, though it had not been specifically asked for, consequently it could not be said that the relief was not within the scope of the prior suit and that the decree in the prior suit was not without jurisdiction. Under O. 7, R. 7, C. P. C., it is competent to the court to grant a general or other relief even though it had not been asked for. (*Miller, C. J. and Foster, J.*) SATYATARAN CHAUDHURY *v.* JYOTI PROSAD SINHA DEO. (1923) Pat. 153 : 1923 P. 386.

DECREE—Setting aside—Jurisdiction.

———*Setting aside—Grounds for—Compromise decree.*

If a decree on a compromise is inaccurate or does not embody the true terms of the compromise arrived at between the parties, the only remedy is by a fresh suit to set aside the decree on the ground of mistake or fraud or some other ground *ejusdem generis*. (*Atkinson and Das, JJ.*) RAM LAGAN SAHU *v.* RAM BIRICH KOERI. 50 I. C. 497 : 4 P. L. J. 205.

———*Setting aside—Grounds for—Mortgage decree absolute—Application for—After limitation—Effect—Notice to judgment-debtor—Want of.*

A suit will not lie to set aside a decree absolute for sale in a mortgaged suit, merely on the ground that it was obtained after the limitation period, nor can it be set aside on the ground that no notice of the application therefor was given to the mortgagor, as no statutory provision requires it to be given, but if an application to set aside the decree is made within 30 days of the date of knowledge of the sale on the ground of failure to give notice, the Court has inherent power to set it aside. (*Chapman and Roe, JJ.*) BHAIGA PARIDA *v.* GANNATH KHANDAI. 46 I. C. 569.

———*Setting aside—Grounds for—Mistake—Money paid under compulsion of legal process—If can be recovered.*

The principles which guided the Chancery Court in granting relief on the ground of mistake ought in similar cases here to be adopted. A mistake vitiating a decree and amounting to an abuse of the Court's process can be rectified in an independent suit, but not a mistake which amounts only to a mere irregularity. Money paid under compulsion of a legal process cannot be recovered as money had and received unless it was realised by fraud or some unconscionable dealing or by a grave mistake which a Court of Equity will relieve against. (*Mullick and Atkinson, JJ.*) SREENATH DAS *v.* GHANASHYAM NAIK. 46 I. C. 534 : 3 P. L. J. 465.

———*Setting aside—Grounds for—Suppression of evidence.*

A suit to set aside a decree on the ground that in the former suit accounts were suppressed is not maintainable. 45 I. C. 775 Foll. (*Pratt, J.*) ARLANDU *v.* C. T. A. A. L. SITHAMBARAM CHETTY. 1923 Rang. 82 (1).

Setting aside—Jurisdiction.

———*Setting aside—Jurisdiction—Void and voidable decrees—Distinction between—Absence of jurisdiction—Irregular assumption of jurisdiction—Minor—Guardian—Appointment of.*

There is a clear distinction between a judgment which is voidable and that which is void An erroneous judgment is a voidable judgment for the argument that a judgment is erroneous assumes both the regularity of the procedure and the jurisdiction of the court to render it. An erroneous judgment is one which, though regularly

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rendered, is contrary to law or facts, and is, therefore, liable to be reversed by an appellate tribunal. An irregular judgment is also a voidable judgment ; but the distinction between an erroneous judgment and an irregular one is this, that whereas an erroneous judgment will always be reversed by an Appellate Court, an irregular judgment will be reversed in appeal or ignored in a collateral proceeding only when it is shown that the irregularity in the proceeding has affected the merits of the case between the parties. A void judgment, on the other hand, is a judgment where there was a total lack of jurisdiction in the Court to render it. Such a judgment is a mere nullity It is not necessary to set it aside. It can be completely disregarded whenever it is pleaded in support of a claim or in answer to a claim. There is also a distinction between existence of jurisdiction and exercise of jurisdiction. Where there does not exist any jurisdiction to try and determine the cause, the judgment is void, and it can be impeached collaterally. But where there does exist such a jurisdiction, but in the exercise of the jurisdiction, the Court has acted illegally or with material irregularity. the judgment is voidable, and it can be vacated in an appropriate proceeding either by the Court which rendered it, or, under the C. P. Code, by the Appellate Court, either in appeal or in revision. 33 Cal. 68 ; 24 C. W. N. 723 Foll. Jurisdiction is of four kinds :—(1) Territorial jurisdiction, (2) Pecuniary jurisdiction, (3) Jurisdiction of the subject-matter, and (4) Jurisdiction of the person. Jurisdiction as to person is conferred on the Court by suing the person in a court competent to try the cause as against that person before the Court. Where the conditions for the assumption of jurisdiction as against a person exist, the authority of the Court to try and determine the cause as against him is complete, and the mode which the Court adopts to bring that person before it affects the exercise of jurisdiction, and not its existence. A judgment will not be regarded as a nullity, although it has been rendered in direct contravention of a statutory provision. 21 C. 66 ; 25 Bom. 337 : 24 C. W. N. 723 Foll. (*Das and Adami, JJ.*) PANDE SATDEO NARAYAN *v.* RAMAYAN TEWARI.

4 Pat. L. T. 147 : 2 Pat. 335 : 1923 P. 242 (2).

Setting aside—Minor.

——— *Setting aside — Minor — Guardian-ad-litem—Improper alienation.*

Where a minor sues to set aside a decree as against him on the ground that he was not properly represented in the suit in which the decree was passed, the Court can go into the merits of the prior litigation and see if the minor was properly represented therein. 25 B 337 ; 13 A. L. J. 437 ; 43 A. 104 ; 28 A. 137, Ref. (*Lindsay and Ryves, JJ.*) MURLIDHAR *v.* PITAMBAR LAL.

20 A. L. J. 329 : 4 U. P. L. R. (A) 170 : 1922 All. 91.

——— *Setting aside—Minor.*

A minor at the attainment of majority at the date of decree cannot set aside and it is not voidable at the instance of minor. (*Le Rossignol, J.*) GHULAM NABI *v.* BASHESHAR MAL.

4 Lah. L J. 398 : 1922 Lah. 407.

DECREE—Setting aside—Right to sue.

——— *Setting aside—Minor—Mortgage suit—Negligence of guardian—Omission to raise valid plea—Necessity.*

A minor is not bound by a decree passed against him in a suit where his guardian showed gross negligence such as not setting up a good defence of which he must have been aware. Fraud and collusion are not the only grounds on which a decree against the minor can be set aside. Where a guardian *ad litem* seriously neglected the interests of a minor in allowing an *ex parte* decree to be passed against his estate without setting up a valid plea, namely, that the mortgage sued on was neither beneficial nor necessary. (*Spencer and Ramesam, JJ.*) CHANDURU PUNNAYYAH *v.* RAJAM VIRANNA. **45 Mad. 425 : 42 M. L. J. 429 : 15 L. W. 427 : (1922) M. W. N. 213 : 1922 Mad. 273.**

——— *Setting aside—Minor—Ex parte decree.*

If the appointment of a guardian-ad-litem in the prior suit is the result of a judicial order based on evidence which the court considered sufficient, the deft. cannot be said to be guilty of fraud, and the minor cannot impeach an *ex parte* decree passed in such suit on the ground of fraud. 28 A. 137 ; 29 A 675 ; 11 B. H. C. R. 182, Dist. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) MARUTHAMALAI GOUNDAN *v.* PALANI GOUNDAN.

16 I. C. 182 : 37 Mad. 535.

Setting aside—Mistake.

——— *Setting aside—Mistake — Acquiescence. Effect of*

Where the plff. has acquiesced in a decree which is vitiated by a mistake and has been guilty of laches, negligence and carelessness, he cannot be allowed to maintain a suit to rectify the decree and to recover the money paid under it. (*Mullick and Atkinson, JJ.*) SHRINATH DAS *v.* GHANSHAM NAIDU. **46 I. C. 534 : 3 P. L. J. 465.**

Setting aside—Right to sue.

——— *Setting aside—Right to sue.*

Where a decree is obtained *ex parte* after suppression of summons and on a misrepresentation of the facts to the Court, such a decree can be set aside by a separate suit and it stands on a different footing from a decree obtained by perjury. (*Chatterjee and Pearson, JJ.*) THE INDIA PROVIDENT COMPANY, LTD. *v.* GOVINDA CHANDRA DAS. **65 I. C. 318.**

——— *Setting aside—Right to sue—Inconsistent relief.*

A person cannot sue to set aside a decree against a firm on the ground that he was not a member of the firm and that the decree was obtained against the firm by fraud and collusion. (*Harrison, J.*) JAWAHAR SINGH *v.* SASSOON & Co. **1923 Lah. 290.**

——— *Setting aside—Right to sue—Decree—Stranger.*

Strangers may sue to set aside decrees obtained by fraud or collusion. (*Hartnoll, C. J. and Twomey, J.*) TAN GAW ROK *v.* SUNDARESAN CHETTY. **14 I. C. 626 : 5 Bur. L. T. 13.**

DECREE—Setting aside—Suit.

Setting aside—Suit.

——*Setting aside—Suit when competent.*

A suit to set aside a decree obtained after contest and accurately expressing the Court's intention is not maintainable. (*Jenkins, C J. and Holmwood. J.*) KUSADHAJ BHAKTA *v* BROJA MOHAN BHAKTA. **19 C. W. N. 1228 : 31 I. C. 13 : 43 C. 217.**

——*Setting aside—Suit*—Ex parte *decree—Want of cause of action—Fraud.*

An *ex parte* decree based on a promissory note may be set aside by a s it on the ground that the note was never executed and therefore the decree was based on no cause of action and was fraudulent. 5 C. W. N. 747 Rel. (*Chatterjee and Chatterjea, JJ.*) LAKSHIMI CHARAN SHAH *v.* NUR ALI. **38 C. 936 : 11 I. C. 626 : 15 C. W. N. 1010.**
[This is not good law. *See* 38 Mad. 203 ; 43 Mad. 381 ; 41 Cal. 990 : 16 C W. N. 1002.]

Validity of.

——*Validity of—Person not a party nor properly represented.*

A decree against a person who is neither a party nor properly represented on the record is a nullity and may be disregarded without any proceeding to set aside it. (*Jenkins, C. J. and Chatterjee, J.*) PURNA CHANDRA KUMAR *v.* BEJOY CHAND. **17 C. W. N. 549 : 18 I. C 859 : 18 C. L. J. 18.**

——*Validity of—Person not party to suit—Execution sale thereunder—Validity of.*

A decree against a person not a party to the suit or not properly represented on the record and a sale in execution of such decree, are null and void against such person. (1863) Marshall, 647 Foll. (*Mookerjee and Carnduff, JJ.*) BAL KISHAN LAL *v.* TOPESWAR SINGH. **15 C. L. J. 446 : 14 I. C. 845 : 17 C. W. N. 219.**

——*Validity of—Absence of jurisdiction.*

Judgments of a Court without jurisdiction over the subject-matter are mere nullities and do not operate either as an estoppel or otherwise. (*Mookerjee and Carnduff, JJ.*) RAJA LAKSHMEE DASSEE *v.* KATYAYANI DASSEE. **12 I. C. 464 : 38 Cal. 639.**

——*Validity—Suit to contest maintainable.*

Where after the preliminary decree is passed the mortgagor dies without bringing on record his legal representative a final decree is passed, the decree is a nullity and its validity can be impeached in a subsequent suit for declaration and injunction. 13 L. W. 290 ; 21 A. 16 ; 4 Pat. L. J. 240 Ref. (*Ayling and Odgers, JJ.*) SAMI MUDALIAR *v.* MUTHIAN CHETTY. **16 L. W. 314 : 43 M. L. J. 293 : (1922) M. W N. 597 : 1923 Mad. 212.**

——*Validity of—Dead man—Decree against.*

A decree against a dead man is a nullity and the legal representatives can raise the objection in execution. (*Seshagiri Aiyar and Napier, JJ.*) TITTU GOPALACHARIAR *v.* MAIYAPPA CHETTY. **8 L. W. 501 : 45 I C. 22 : (1918) M. W. N. 177.**

DEED.

——*Validity of—Deft. not properly represented*—Prima facie—*Decree against a person not properly represented in a suit will not bind him.*

A decree successfully obtained against a person as legal representative but having no interest in the subject-matter cannot bind the estate of the deceased. (*Ayling and Seshagiri Aiyar, JJ.*) MADDALA MADHAYARAYUDU *v.* TANKALLA SUBBAMMA. **31 M. L. J. 222 : 35 I. C. 124 : (1916) 2 M. W. N. 233.**

——*Validity of—Death of party.*

A decree passed against a deceased appellant without his legal representative being brought on record is not binding on them. (*Ayling and Tyabji, JJ.*) KALIAPERUMAL KEERUDAYAN *v.* CHIDAMBARA THANJIRAN. **29 I. C. 10.**

——*Validity—Subsequent event—Effect.*

Decrees right at the time they were passed, are not bad on the ground that subsequent events have made it harsh or oppressive. (*Wallis and Sankaran Nair, JJ.*) THANDIAPANI *v.* RAGUNATHA. **35 M. 239 : 21 M. L. J. 240 : 9 M.L.T. 421 : 10 I. C. 660 : (1911) 1 M. W. N. 223.**

——*Validity of—Living person sued but dead person entered as deft—Summons served on the living deft.*—Ex parte *decree if* ultra vires.

Where a widow was sued on a bond executed by her husband but in the plaint another predeceased widow's name was added as defts. and summons was accepted by the living widow and an *ex parte* decree was passed, it was held that wrong description in the summons was a mere irregularity and did not make the decree a nullity. (*Mittra, Offg. A. J. C.*) MANJULA *v.* SHANKAR. **26 I. C. 830 : 10 N. L. R. 144.**

——*Validity of—Person not a party.*

Persons who are not parties to a decree are not bound by it and ordinarily sale in execution does not operate to pass property of persons not bound by it. (*Lindsay, J. C.*) JADU NATH SINGH *v.* AFZAL KHANAM. **7 O. L. J. 362 : 2 U. P. L. R. 118 : 57 I. C. 526 : 8 O. L. J. 191.**

——*Validity of—Party not a party to the decree how far bound—Original cause of action.*

A person who was not a party to a decree cannot be held bound by an account made therein and if such account is shown to be mistaken he can fall back on the mortgage deed and repudiate his liability for anything beyond what is actually due on the mortgage. (*Kanhaiya Lal, A. J. C.*) GOURI SHANKER SINGH *v.* BAJRANG BAHADUR SINGH. **35 I. C. 434 : 19 O. C. 39.**

——*Validity of—Death of party.*

A decree passed in favour of a party after his death is a nullity. 26 B. 317 Ref. (*Parlett, J.*) MA MIN THIN *v.* MAUNG PO WIN. **35 I. C. 438 : 10 Bur. L. T. 27.**

DEDICATION.

See (1) HINDU LAW—RELIGIOUS ENDOWMENT.
(2) MAHOMEDAN LAW—WAQF.

DEED.

Consideration.
Construction.
Execution.
Material Alteration.

DEED—Consideration.

Consideration.

———*Consideration.*

A sale purported to be for a sum of Rs. 1,200. It was recited in the sale-deed that a sum of Rs. 550 was being left with the purchaser to redeem a prior mortgage and the balance of Rs. 650 was to be paid before the registering officer. It was found that the money was handed over to the vendor before the registering officer but that after it had been so made over it was returned again to the purchaser. It was found that the market value of that property sold was not more than Rs. 500; *held* that if by this transfer the vendor was getting rid of the liability to pay a sum of Rs. 550 it cannot be said that there was no consideration for the transfer. (*Lindsay and Sulaiman, JJ.*) ALAMA CHAND *v.* CHHAJJU
45 A. 559 : 1923 All. 530.

———*Consideration — Passing of — Proof—Recital.*

A recital in a deed that the money was paid to the mortgagor and the registering officer's endorsement that the money was paid by the mortgagee to the mortgagor in his presence proves, in the absence of evidence to the contrary, the passing of consideration. (*Lindsay, J. C. and Kanhaiya Lal, A. J. C.*) MAHADEO PRASAD *v.* GUJRAJ SINGH. 34 I. C. 397 : 3 O. L. J. 164.

Construction.

Absolute or limited interest.
Adoption deeds.
Ambiguity.
Ancient documents.
Attornment clause.
Charge.
Conflicting recitals.
Ejusdem generis.
English rules.
Evidence of conduct.
Family arrangement or settlement.
Forfeiture clause.
Form of.
Gift
Grant.
Instalment bond.
Intention of parties.
Law applicable.
Lease or contract of service.
Lease or license.
Marriage settlement.
Meaning of parties.
Minor.
Misdescription.
Mortgage or charge.
Mortgage or lease.
Mortgage or money bond.
Mortgage or simple bond.
Partition deed.
Personal liability.
Powers of court.
Principles.
Release.
Sale.
Sale certificate.
Sale or contract of sale.
Sale or gift.
Sale or lease.

DEED—Construction—Absolute or limited interest.

Sale or mortgage.
Surety bond.
Surrounding circumstances.
Two documents.
Two executants.
Will and authority to adopt.
Will or gift.
Will or settlement.
Words.

Construction—Absolute or Limited Interest.

———*Construction — Absolute or limited estate—Gift "to son, son's son, etc."*

A gift in the terms "you do remain in possession of the land down to your son, son's son etc.," is an absolute gift to the donee whose daughter can succeed by inheritance in the event of the donee dying sonless. The gift does not create a life-interest only on the donee. (*Mookerjee and Beachcroft, JJ.*) NANDA GOPAL SINGH *v.* PARESHMONI DEBI. 17 I. C. 478 : 17 C. L. J. 464.

———*Construction—Absolute or limited estate—Son grandson.*

The words "son grandson" are words of limitation and not of purchaser indicating that the grantee takes the fullest and most absolute estate in the rights granted. (*Ayling and Tyabji, JJ.*) BARGARY MUTHU VENKATAPPA NAYANIVARU *v.* GOLLA CHINNABA NAIDU, 31 I. C. 565.

———*Construction—Absolute or limited estate—Curtailment of absolute estate into life-estate.*

Under a *razinama* filed in Court the properties therein referred to were to be held and enjoyed in common by A. and B, and that in the event of A having no issue, the entire properties were to go to B. exclusively A died without leaving any issue, but during his life-time had alienated certain properties. *Held*, that the alienation was not valid after his death. 16 C. 383; 4 C. 23 (P.C), Foll. The absolute estate conferred upon A. was defeasible in the event of failure of issue, and under Hindu Law the defeasance followed by a gift over, in favour of a person is existence is perfectly valid. 6 M. I A. 123 Foll. (*Benson and Krishnaswami Aiyar, JJ.*) LAKSHMINARAYANA NAINAR *v.* VALLIAMMAL.
11 I. C. 767 : 34 Mad. 250.

———*Construction—Absolute or limited interest.*

A deed for maintenance presumably creates only life-interest. (*Daniels and Dalal, A. J. Cs.*) HAFIZ-UN-NISA *v.* JAWAHIR SINGH.
66 I. C. 24 : 24 O. C. 374.

———*Construction— Absolute or limited interest —Compromise of disputes—Transferable interest.*

Held, on the construction of a compromise o a dispute between rival claimants regarding succession to a taluka belonging to a Muhammadan, that the rival claimants took a transferable interest in the villages assigned to them as well as in their shares in the taluka which they were competent to transfer even during the life-time of the talukdar (*Kanhaiya Lal, J. C and Daniels, A. J. C.*) BISHESHWAR NATH *v.* HAMID MIRZA.
48 I. C. 20 : 5 O. L. J. 582.

DEED—Construction—Absolute or limited interest.

———*Construction—Absolute or limited estate —Sale of land except certain plots reserved for vendor's maintenance.*

A sale deed purported to convey the entire share of the vendor with the exception of certain plots exempted for the vendor's maintenance without power of alienation and that the vendor had no interest or share of any kind left in the property sold except the property mentioned above. *Held*, that the intention was that that the vendor should remain in possession of the plots for life and that he had no right to transfer any interest therein. (*Evans, J. C.*) SHEO DARSHAN LAL *v.* SHEO BHAJAN.

11 I. C. 685 : 14 O. C. 189.

———*Construction--Absolute or limited interest —Gift by husband to wife*—'Malik mustakil Kamil' *—Provision in favour of future son or daughter —Effect.*

Where a husband gifted away properties to his wife, making her the permanent and full owner "*malik mustakil Kamil*", but adds a final clause to the effect that if a son or daughter is born and lives at her death, that person is to be the permanent or full owner.

Held, the deed should be construed as a whole and the mere use of the words "*malik mustakil Kamil*" did not confer an absolute estate, as it would be inconsistent with the last clause. Taking the document as a whole, it conferred only a life interest. (*Coutts and Ross, JJ.*) SORABJIT PANDE *v.* RAJ KUMAR PANDE.

(1922) Pat. 74 : 1923 P. 87.

Construction—Adoption deeds.

———*Construction — Adoption deed— Consequence.*

A document purporting to be an adoption deed contained the following words: "You (the adopted son) alone are the full owner of my moveable and immoveable property." *Held*, the executant in executing the deed, which was to evidence the previous adoption, did not intend to transfer thereby all his immoveable and moveable properties unless he used in the document words of conveyance or transfer. (*Macleod, C. J. and Crump, J.*) SHIDAPPA *v.* SANTAWA KOM.

1923 Bom. 302.

Construction—Adoption deeds.

A deed of adoption must in each case be construed according to the language, used in each case and in the light of the circumstances of the case. There can be no hard and fast rule about the construction of such deeds. (*Robertson and Shah Din, JJ.*) SANT SINGH *v.* SADDA.

63 P. R. 1912 : 14 I. C. 23 : 222 P. W. R. 1912

Construction—Ambiguity.

———*Construction—Ambiguity.*

Where an instrument contains ambiguity, the evidence of user is admissible to ascertain whether it is a latent or patent ambiguity. (*Mookerjee and Panton, JJ.*) GURU PROSANNA *v.* MADHUSUDAN CHOUDHURY. **64 I. C. 824 : 35 C L. J. 87.**

——— *Construction— Ambiguity—Clauses repugnant to each other.*

DEED—Construction—Ambiguity.

If there are clauses repugnant to each other, the Court should try to reconcile them as far as possible and if the attempt fails then the clause which expresses the real intention of the parties should be taken and the other rejected Conduct of parties may be considered in construing an ambiguous deed only. (*Mookerjee, A. C. J. and Fletcher, J.*) MIDNAPUR ZEMINDARY CO. *v.* JOGENDRA KUMAR. **33 C. L. J. 186 : 62 I. C. 491.**

———*Construction — Ambiguity— Extrinsic evidence.*

If the terms of the contract are ambiguous the right of the parties may be determined with reference to the conduct of the parties. Where the terms are unambiguous no evidence can be given of the conduct of the parties in contravention of the terms of the contract. (*Mookerjee and Fletcher, JJ.*) BHUPENDRA CHANDRA SINGHA *v.* HARIHAR CHAKRAVARTI. **24 C. W. N. 874 : 58 I. C. 867 : 32 C. L. J. 19.**

———*Construction—Ambiguity—Intention of parties.*

A Court in constructing a written instrument has to look to the words of the instrument to ascertain what the intention of the parties was. If the words of the instrument be ambiguous, a Court may call in aid of it the acts done under it as a clue to the intention of the parties. (*Mookerjee and Beachcroft, JJ.*) UMESH CHANDRA ROY *v.* SURENDRA CHANDRA DUTTA.

29 C. L. J. 6 : 49 I. C. 8.

———*Construction—Ambiguity.*

The fact that no persons are specifically named as arbitrators in an agreement containing a provision to refer disputes to arbitrators does not make the agreement ambiguous. (*Rattigan, J.*) DREYFUS AND CO. *v.* GURDITTA MAL.

35 P. R. 1911 : 70 P. W. R. 1911 : 9 I. C. 655 : 85 P. L. R 1911.

———*Construction—Ambiguity —Conduct of parties.*

Where a document is ambiguous, it is always to construe it by showing how the parties have acted under the document. (*Wazir Hasan, A. J. C.*) SHEIKH ALI ABBAS *v.* RAJA KUMAR SHER BAHADUR SINGH. **75 I. C 267: 9 O. & A. L. R. 815.**

———*Construction— Ambiguity —Description of property*—Falsa demonstratio.

The general rule is that where in a grant of land there is a repugnancy between the terms of grant and any plan or diagram the former will prevail It is however, subject to the qualification that where the plan or the boundary is a part and parcel of the description itself, the general rule ceases to apply. Where in a grant the description of the parcels is made up of more than one part and one part is true and the other false, then if the part which is true describes the subject with sufficient accuracy, the untrue part will be rejected as *falsa demonstratio* and will not vitiate the grant. (*Wazir Hasan, A J. C.*) ABDUL GHANI *v.* ASHIQ HUSAIN.

8 O. L. J. 521 : 3 U. P. L. R. (J. C.) 93 : 1922 Oudh 162.

DEED—Construction—Ambiguity.

———*Construction— Ambiguity — Recitals — Operative portion—What passes under the deed —Zerait—Raiyat—Bihar.*

Per Dawson Miller, C.J.—Where there is an ambiguity in the operative part of the deed one should look back to the recitals and be guided by what is therein contained in interpreting the ambiguity. This canon of construction, however, does not apply in all cases where there is a doubt or difficulty in the construction of a document. If one is satisfied upon the natural construction of the operative part of the deed that certain property passes notwithstanding that the construction may be difficult, the recitals have no binding force.

Per Das, J.—Recitals in a conveyance are subordinate to the operative part and where the operative part is doubtful and it is impossible to say, on a mere reading of it, to which properties it refers, then the recitals can and ought to be used to explain its meaning. While for the purpose of construing the operative part, the whole of the instrument may be referred to, yet the recitals leading up to it are more likely to furnish the key to its construction than the subsidiary clauses of the deed. (*Miller, C. J., Das and Adami, JJ.*) BHONU LAL CHAUDHURI *v.* VINCENT. **3 P. L. T. 653 : 1922 P. 619.**

———*Construction—Ambiguity.*

If a deed does not admit of double meaning, no question of interpretation can arise (*Chapman and Roe, JJ.*) SASIMAN *v.* SIBNARAIN.
39 I. C. 755 : 1 Pat. L. W. 375.

Construction—Ancient documents.

———*Construction— Ancient documents* — Contemporanea expositio.

Except where grant is ambiguous, *contemporanea expositio* is not a safe guide in the construction of modern deeds. (*Lord Shaw.*) RAGHOJI RAO SAHEB *v.* LAKSHAN RAO SAHEB.
36 Bom. 639 : 39 I. A. 202 : 23 M. L. J. 383 : 12 M. L. T. 472 : (1912) M. W. N. 1140 : 14 Bom. L. R. 1226 : 16 C. W. N. 1058 : 16 I. C. 239 : 17 C. L. J. 17 (P. C.).

———*Construction — Anicient documents— Cogent evidence required to hold that an instrument is not what it purports to be.*

An instrument after 30 years should not be held to be otherwise than what it purports to be, unless evidence of a very cogent nature. (*Knox, J.*) KALPU RAI *v.* BENI MADHO SAHU.
37 I. C. 835.

———*Construction — Ancient documents— Pattah—Increase of rent—Accretion.*

In the year 1790 the Government granted a sanad by which they granted the plaintiff's predecessor-in-title a taluk within specified boundaries in the Sunderbans. The revenue on the lands was to be ascertained from time to time on the extent of the cultivated lands at a rate which was to be gradually increased to As. 8, after which it was to be fixed in perpetuity. The taluk was surveyed from time to time and assessments were made on the basis of the additional areas found to be cultivated. The Government in the year 1916 claimed to assess the lands formed by

DEED—Construction—Charge.

alluvion within the specified boundaries since the year 1790 not at the rate of As. 8 specified in the patta but at the rate of As. 12 a bigha.

Held, that the lands comprised within the specified boundaries were permanently settled with the plaintiffs under the patta of 1790 and that the alluvial accretion could not be charged at more than As. 8 per bigha, which was the highest rate leviable under the patta. (*Woodroffe and Cuming, JJ.*) PARBATI CHARAN SAHA *v.* SECRETARY OF STATE FOR INDIA. **35 C. L. J. 445.**

———*Construction—Ancient documents—Recitals.*

Recitals in old documents as to matters upon which it is difficult at a considerable distance of time to adduce evidence ought not to be lightly set aside, but it is for the Court to attach such weight as it deems proper having regard to the other circumstances in the case. (*Chatterjee and Suhrawardy, JJ.*) SARAT CHANDRA CHATTERJEE *v.* SATINDRA MOHAN BANERJEA. **63 I. C. 887.**

———*Construction—Ancient documents—Contemporaneous usage when a strong ground for interpretation.*

The doctrine that contemporaneous usage is indeed a strong ground for the interpretation of doubtful words has no application where the deed is neither ancient nor ambiguous. (*Mookerjee and Beachcroft, JJ.*) RAHIM BAKSH MANDAL *v.* SAJJAD AHMAD CHOUDHURY. **26 I. C. 466: 19 C. W. N. 1311.**

Construction—Attornment clause.

———*Construction — Attornment clause in mortgage deed.*

The strongest reasons in the absence of Courts in India will not give a construction to an alleged attornment clause in the mortgage deed which will have the effect of creating rights of the tenancy in derogation of the rights of the mortgagee. If the intention was to create tenancy Rent Law will apply. (*Mullick and Jwala Prasad, JJ.*) UDAICHAAD *v.* JANG BAHADUR SINGH.
2 P. L. J. 353 : 40 I. C. 500: 2 P. L. W. 118.

Construction—Charge.

———*Construction—Charge—Creation of—Villages granted by talukdar for maintenance of junior member—Liability to pay Govt. revenue.*

It was arranged between a talukdar and a junior member of the family that the junior member should get eleven villages in lieu for maintenance for his branch, the talukdar himself having undertaken to pay the Govt. revenue on the eleven villages. *Held*, that the obligation undertaken by the talukdar to pay the Govt. revenue was personal and no charge was created on the estate. (*Mr. Ameer Ali.*) SUNDAR LAL *v.* RAMJI LAL. **47 I. A. 149: 16 N. L. R. 114: 24 C. W. N. 929: (1920) M. W. N. 447: 28 M. L. T. 319 (P. C.).**

———*Construction—Charge—Company—Loan borrowed for fixed period by Company with condition not to mortgage Company's property.*

A limited company in accordance with a resolution, borrowed a certain sum of money from the Bank of India, agreeing not to further mortgage or charge the property of the company

DEED—Construction—Charge.

during the currency of the loan which was for a fixed period of one year. On the expiry of the period, the loan was renewed for another year but the resolution passed previously was neither passed again nor confirmed at the time of the renewal, *held* that the renewal must be treated as a fresh transaction and that as no resolution was passed at the time thereof and the previous resolution had not also been confirmed at the time, the prior resolution was exhausted and not in force after the expiry of the period. (*Davar, J.*) SHIVLAL *v.* TRICUMDAS MILLS CO., LTD.

36 Bom. 564: 14 I. C. 353: 14 Bom. L. R. 45.

———*Construction—Charge—Annuity.*

A provision in a deed granting an annuity that it is to be paid out of the estate of the grantor creates a charge on the estate in respect of the annuity. (*Teunon and Newbould, JJ.*) RAJENDRA MOHAN MOULIK *v.* UPENDRA NATH GUHA.

64 I. C. 518.

———*Construction— Charge— Description of properties—Sufficiency.*

Where a mortgagor took a fresh advance under the terms of a document styled a mortgage and the document gave the boundaries and description of the properties as in the original mortgage, *Held*, that the document constituted a deed of further charge. 64 I. A. 33; 20 A. L. J. 601; 6 A. L. J. 255; 31 A. 482 Rel. (*Simpson, A. J. C.*) GAYA PRASAD *v.* RAHPAL, **9 O. L. J. 484 : 4 U. P. L. R. (O. C.) 110 : 1923 Oudh 24.**

———*Construction—Charge—Pension.*

Where the payment of the pension granted in perpetuity is secured by a charge on property, the agreement enures for the benefit of the representatives of the grantee and not only for the life of the original grantee. (*Lindsay, J. C.*) RAJA RAM *v.* SANT BAKSH. **57 I. C. 618.**

Construction—Conflicting recitals.

———*Construction — Conflicting recitals— Boundaries and area—Conflict between.*

Where lands are described with reference to specified boundaries and their area is also given as 400 bighas, the statement as to area is mere description and the boundaries prevail. Evidence of prior negotiations, etc., is inadmissible to vary the construction of the lease. (*Sir John Edge.*) DURGA PRASAD SINGH *v.* RAJENDRA NARAYAN BAGCHI. **41 Cal. 493: 40 I. A. 223 : 26 M. L. J. 25: 15 M L. T. 68: 19 C. L. J. 95: 18 C. W. N 66: (1914) M. W. N. 1: 21 I. C. 750: 16 Bom. L R. 42 (P. C.).**

[Reversing 37 Cal. 293: 4 I. C. 713: 10 C. L. J. 570.]

———*Construction—Conflicting recitals.*

A deed recited that there was originally one house and it then proceeded that three houses were afterwards built anew and "are hereby sold to you with the right of ingress and egress through the main door, and given over to your possession". Then followed the particulars of boundaries. Then a clause " there is an open Chowk belonging to these three houses and in front of the door of my other house. All may use the said Chowk according to the limits of their respective

DEED—Construction—Conflicting recitals.

houses and the inmates of all the four houses have the right of egress and ingress through the main Kadki door". *Held*, that the words "Open Chowk belonging to these three houses" do not mean having regard to the context that this Chowk was to be in the exclusive ownership and possession of the three houses. The words "all may use the said Chowk" meant all four houses and that they have the same meaning as "the inmates of all the four houses" referred to in the next sentence. The words "according to the limits of their respective houses" meant that all might use the Chowk and this means the whole Chowk. (*Marten and Fawcett, JJ.*) SHA BULAKHIDAS *v.* SHAH GUNPATRAM. **1923 Bom 281.**

———*Construction— Conflicting recitals— Printed and written terms.*

The written terms where inconsistent with printed ones, will prevail. (*Kajiji, J.*) NOORBHAI GHULAM HUSSEIN MAKARI *v.* ALLABUX AND CO.

42 I. C. 820: 19 Bom. L. R. 845.

———*Construction — Conflicting recitals — Boundaries and area.*

If the boundaries specified in a lease can be identified the ordinary rule is that the statement of area must give away to the description of boundaries. (*Teunon and Newbould, JJ.*) SHEIK BARA KALIM *v.* RAJENDRANATH ROY. **64 I. C. 751.**

———*Construction — Conflicting recitals— Boundaries and area.*

It is a well-established rule that where the boundaries can be ascertained effect must be given to the description by boundaries irrespective of area. But if the boundaries are uncertain, then area must be considered. 41 C. 49 Ref. (*Newbould and Ghose, JJ.*) HARI MOHAN MODAK *v.* RAMESWAR DAS. **64 I. C. 737.**

———*Construction — Conflicting recitals— Boundaries and area—Land found to be of less area.*

Where a conflict arises between the descriptions of the boundaries and the quantity of land conveyed, the description of the boundaries if precise and accurate dominates the description of the area. But this is not an inflexible rule and may be displaced in a particular case. (*Campbell, J.*) NARAIN DAS *v,* JAWAHAR SINGH.

50 P. L. R. 1922.

———*Construction—Conflicting recitals.*

Per Seshagiri Aiyar, J.—In cases where a subsequent clause in a deed is inconsistent with the operative portion of it, the cardinal principle of construction is to ascertain the intention of the parties. Technical rules of the construction should as far as possible be avoided. (*Wallis, C.J. and Seshagiri Aiyar, J.*) ARUMUGASUNDARA *v.* NARASIMHA IYER. **(1915) M. W. N. 397: 2 L. W. 542: 18 M. L. T. 110: 29 I. C. 916: 29 M. L. J. 583.**

———*Construction — Conflicting recitals— Boundaries and measurements.*

Where there is a conflict between boundaries and measurements, more importance would be attached to the boundaries. Where there is a

DEED—Construction—Conflicting recitals.

conflict between the description of the boundaries and the description of the quantity the former must be taken if it is precise and accurate. 37 C 293; 14 C. W. N. 268 Ref. (*Benson and Sundara Aiyar, JJ.*) TYADA POOSAPATI *v.* MAHARAJA OF JEYPORE. **11 M. L. T. 385: 14 I. C. 286: 23 M. L. J. 97.**

——*Construction—Conflicting recitals—Preference.*

Where there is a discrepancy between one specification of property and another in the same document, that which is more certain, stable and the least likely to have been mistaken or inserted inadvertently must prevail, if it sufficiently identifies the subject-matter. 18 W. R. 25 ; 17 O. C. 256 referred to. (*Wazir Hasan, A. J. C.*) RAGHO PRASAD *v.* SECRETARY OF STATE.
9 O. L. J. 629: 1923 Oudh 114.

——*Construction—Conflicting recitals.*

The rule of construction that in case of two repugnant clauses in a deed the first shall prevail and the latter shall be rejected is subject to the general rule that a document must be read as a whole (*Evans, J. C.*) SHEO DARSHAM *v.* SHEO BHAJAN. **11 I. C. 685: 14 O. C. 189.**

——*Construction—Conflicting recitals—Conflict between area and boundaries.*

A deed which contains an adequate and sufficient definition of the property intended to pass is not vitiated by any erroneous statement contained in it as to the dimension or quantity of the property. (*Das and Foster, JJ.*) LINTON MOLESWORTH AND CO. *v.* JAGANNATH SURAKAR.
1 P. L. R. 377 : 1924 P. 226.

——*Construction—Conflicting recitals—Description of property.*

When the premises is sufficiently described, as by giving the particular name of close, or otherwise, an erroneous additional description will be rejected as a 'false demonstration,' but if there is not this certainty in the first description as if it is expressed in general terms and a particular description is added, the latter controls the former and limits the generality of the earlier description. Where there is a conflict between the two descriptions, the question which the court has to consider is, whether the words constituting the second description should be rejected as a false description, or whether they should be read as words of restriction. The test is this, if the first description is sufficient in itself to identify the land which is conveyed, then, if there is a conflict between the first description and the second description, the second description ought to be rejected as a false description; but if the first description is not sufficient by itself to identify the lands intended to be sold, then the second description ought to be read as restricting the operation of the grant. The question then is this: Is the first description sufficient in itself to identify the lands in dispute? (*Das and Kulwant Sahay, JJ.*) GOPAL MISSER *v.* PARTAP MANDAL.
72 I C. 643 : 4 P. L. T. 652.

——*Construction —Conflicting recitals—Boundaries and area—Conflict between.*

DEED—Construction—Ejusdem generis.

Where boundaries are certain, they will prevail over the area but where they are uncertain, the area will prevail. (*Sultan Ahmed, J.*) RIT LAL MAHTO *v.* SHILLINGFORD. **57 I. C. 2.**

——*Construction — Conflicting recitals—Boundaries and area—Description by reference to map.*

Where a lease is granted on the basis of a map and the map exhibits the boundaries of the demised land, the map is decisive on the question of boundaries unless it contradicts the unambiguous description of boundaries in the lease; where some terms in a deed sufficiently define the property covered by the deed, other terms giving wrong description may be rejected as a false demonstration unless they actually restrict the previous words. If possible full effect must be given to all terms. (*Das and Foster, JJ.*) THE LODNA COLLIERY CO., LTD. *v* BEPIN BEHARI BOSE.
55 I. C. 113: 1 P. L. T. 84.

——*Construction — Conflicting recitals — Printed and manuscript portion—Rule of construction.*

Where in a printed form of a lease there is conflict between the printed portion and the manuscript portion, the manuscript portion must prevail over the printed portion. (*Das, J.*) MUKHLAL PANDEY *v.* KASHEO PRASAD SINGH BAHADUR.
52 I. C. 956.

——*Construction—Conflicting recitals.*

A mere recital in a deed cannot abridge the operative part. (*Atkinson and Kingsford, JJ.*) BABUI KITA KUER *v.* PURAN MAL.
1 P. L. J. 581: 38 I. C. 44: 2 P. L. W. 393.

Construction—Ejusdem generis.

——*Construction*—Ejusdem generis.

Rulings on the construction of deeds couched in different languages are of very little use in deciding a question relating to construction. (*Chamier, J.*) BHAGWATI SINGH *v.* SARUP SINGH.
15 I. C. 851.

——*Construction*—Ejusdem generis—Kabuliyat.

Where a *kabuliyat* stated " you shall never be competent to enhance the *jama*; nor shall we get abatement of the *jama* on the ground of diluvion or any other ground" *held*, that the words "on any other ground" must be construed *ejusdem generis* with diluvion (*Chatterjea and Panton, JJ.*) MESBAHUDDIN *v.* ABDUL. **65 I. C. 839 : 34 C. L. J. 119.**

——*Construction*—Ejusdem generis.

It was stipulated in a *Kabuliyat* that decrease or increase of *jama* shall not come into force for any reason (such as) inundation, drought, failure of crops, etc. *Held*, that the intention of the parties was that the rent shall not be increased or decreased for any reason although reasons for the decrease alone were given. The principle of *ejusdem generis* did not apply as it applies only when there is no intention to the contrary in the context and the word 'increase' in this case is an indication of a contrary intention. (*D. Chatterjee and Walmsley, JJ.*) SARAT CHANDRA GHOSH *v.* ENTAZ SHEIK. **38 I. C. 678.**

DEED—Construction—English rules.

Construction—English rules.

———*Construction—English rules, how far applicable.*

Rules established in English Courts for constructing English documents are not as such applicable to transactions between Natives of India. The English rules have grown up side by side with a very special law of property and a very artificial system of conveyance. It is a very serious thing to use such rules in interpreting the instruments of Hindus who view most transactions from a different point. think differently and speak differently from Englishmen and who have never heard of the rules in question. (*Lord Macnaughten.*) BHAGBATI BARMANYA *v.* KALI CHARAN SINGH.

38 Cal. 468: 38 I. A. 54: 15 C. W. N. 393: 9 M. L. T. 411: 13 C. L. J. 434: 21 M. L. J. 387: 8 A. L. J. 433: 13 Bom. L. R. 375: 10 I. C. 641 : (1911) 2 M. W. N. 295: (P. C.) [Affirming 32 Cal. 992: 9 C. W. N. 749].

Construction—Evidence of conduct.

———*Construction— Evidence of conduct—Not relevant.*

The subsequent conduct of the parties to a concluded contract has no bearing on the construction of it. (*Lord Macnaughten.*) VISSANJI *v.* SHAPURJI. 36 Bom. 387 : 16 C. W. N 769 : 14 Bom L. R. 493 : 9 A. L. J. 811 : (1912) M. W. N. 691 : 16 C. L. J. 53 : 23 M. L. J. 77 : 16 I. C. 98 : 12 M. L. T. 90 (P. C.).

———*Construction—Evidence of conduct.*

Evidence of the acts and conduct of parties is inadmissible to show that document is not what it purports to be, namely, that it is not a mortgage but really a sale. (*Walmsley and B.B. Ghose, JJ.*) KAMALA KANTA *v.* ANNADA CHANDRA CHAKRABURTY. 71 I. C. 1030.

———*Coustruction—Evidence of conduct—Document doubtful.*

A deed of doubtful import is best construed by evidence of the conduct of the parties to it. Where an *ikrarnama* between a Hindu widow and her adopted son provided that the former should possess and enjoy certain properties for life, but that she should have no power of alienation and that the latter had the right to enter into possession after the mother's death, *held*, that the deed was merely intended to give the mother the rights of a Hindu widow in the properties, that the estate was not a life-estate and that the adopted son was not a remainderman. (*Mitra and Caspers, JJ.*) PROMOTHA NATH *v.* DINAMANI.

65 I. C. 826 : 34 C. L. J. 129.

———*Construction —Evidence of conduct—Ambiguous terms.*

If the terms of the contract are ambiguous the right of the parties may be determined with reference to the conduct of the parties. But when the terms of the contract are unambiguous, no evidence can be given of the conduct of the parties in contradiction of the terms of the contract. (1900) A. C. 260 Ref. (*Mookerjee, C. J. and Fletcher, J.*) RAJA NIROD CHANDRA SINGHA SARMA *v.* HARIHAR CHAKRAVARTI CHOWDHURY.

58 I. C. 867 : 32 C. L. J. 19.

DEED — Construction — Family arrangement or settlement.

———*Construction—Evidence of conduct.*

The terms of an unambiguous document cannot be controlled by the conduct of the parties. (*Mookerjee, A. C. J. and Fletcher, J.*) KIRANSASHI *v.* ANANDA. 58 I. C. 841: 32 C. L. J. 15.

———*Construction — Evidence of conduct—Ancient grant.*

It is only in the cases of ancient grants whose terms are ambiguous, that reliance may be placed on the conduct of the parties to ascertain the intention of the grantor. (*Mookerjee and Beachcroft, JJ.*) F. F. CHRISTIAN *v.* TEKAITNI NARBADA KOERI. 20 C. L. J. 527 : 27 I. C. 471: 19 C. W. N 796.

———*Construction—Evidence of conduct.*

All documents, except ancient ones whose terms are clear to be construed literally without reference to subsequent conduct of the parties. (*Benson and Sundara Aiyar, JJ.*) NARASAMMA HEGADTHI *v.* BILLA KESU PUJARI.

31 I. C. 543: 25 M.L. J. 637.

———*Construction—Evidence of conduct.*

The legal effect of a document cannot be controlled or altered by evidence of subsequent conduct of the parties. 30 C. 738 Foll. (*Pratt, J. C., Crouch and Fawcett, A. J. Cs.*) MANGHIRMAL *v.* VITTAL RAM. 18 I.C. 225 : 5 S. L. R. 107.

Construction—Family arrangement or settlement.

———*Construction— Family arrangement—Will.*

A document described as a will but effecting a division of the property *in praesenti* among the several members of the family was construed as a family arrangement. (*Lord Moulton.*) BRIJ RAJ SINGH *v.* SHEODAN SINGH. 35 All. 337 : 40 I. A. 161 : 11 A. L. J. 698 : 17 C. W. N. 949 : 18 C. L. J. 57 : 14 M. L. T. 11 : 25 M. L. J 188 : 15 Bom. L R. 652 : 19 I. C. 826 : (1913) M. W. N. 515 (P. C.).

———*Construction— Family arrangement—Agreement to discharge dower debt—Mahomedan Law.*

Where a Mahomedan transferred certain of his property to his wife in lieu of her dower debt stipulating that she should enjoy usufruct of such property for her life-time, that if she predeceased him, the property should revert to him, the dower debt being deemed to be discharged and that if he predeceased her, she should become the absolute owner of such property. *Held*, that this transfer was neither a mortgage by conditional sale nor a *Mahabat* but only created a right in the wife to enjoy the usufruct during her husband's life-time with the probability of its developing into full ownership if the husband predeceased the wife. 14 M. I. A. 77 Ref.: 38 A. 421. (*Stanley, C. J. and Banerjee, J.*) MUBARACK UNNISA *v.* MUHAMMAD MUNSAB HASAN KHAN. 33 All. 421 : 10 I. C. 727 : 8 A. L. J. 206.

———*Construction— Family arrangement—Compromise of family disputes.*

A deed of settlement amounts to a compromise of family disputes where an antecedent title in the parties is assumed. (*Mullick, J.*) MUHAMMAD ABDUL NAYEEM *v.* JHONTI MAHTON. 41 I. C. 389.

DEED—Construction—Forfeiture clause.

Construction—Forfeiture clause.

———*Construction — Forfeiture clause — Whether debtor can avail himself of benefit secured to creditor.*

No one is obliged to take advantage of a forfeiture clause and a benefit secured to a creditor should not be availed of by a debtor when the creditor does not want it. 18 Eq. 290 : 1876 W. N. 296 Foll. (*Seshagiri Aiyar and Napier, JJ.*) NAMA *v.* AMMANI AMMA. **39 Mad 981 : 4 L. W. 77 : 20 M. L. T. 174 : 31 M. L. J. 865 : 35 I. C. 418 : (1916) 2 M. W. N. 125.**

Construction—Form of.

———*Construction—Form of — Obligee not named in the bond—Court not a judicial person.*

Where a person has become surety for mesne profits that might be awarded by the Appellate Court the enforcement of the liability of the surety must be by proceedings in the original suit. A fresh suit on the bond is not competent. The decision in the suit as regards the amount of mesne profits is binding on the surety. (*Lord Phillimore.*) RAJ RAGHUBAR SINGH *v.* JAI INDRA BAHADUR SINGH. **42 All. 158 : 22 O. C. 212 : 6 O. L. J. 682 : 38 M. L J. 302 : 18 A. L. J. 263 : 55 I. C. 550 : 22 Bom. L. R 521 (P. C.).**

Construction—Gift.

———*Construction—Gift to "children"—Illegitimate sons.*

Semble : A gift of property to the children of a testator might include illegitimate children also. (*Lord Atkinson.*) SHER BAHADUR *v.* GANGHA BAKHSH SINGH. **36 All. 101 : 17 O. C. 68 : 41 I. A 1 : 18 C. W. N. 401 : 15 M. L. T. 169 : 12 A. L. J. 188 : 26 M. L. J. 291 : 19 C. L. J. 277 : 10 L. L. J. 109 : 22 I. C 293 : 16 Bom. L R. 306 : (1914) M. W. N. 184 (P. C.).**

———*Construction — Gift of occupancy and inam rights.*

In a gift deed of inam lands the Inamdars stipulating the lands to be free from assessment undertook to be liable for the same, in case the donee had to pay it. *Held*, it was a gift of occupancy and inam rights and the donors and their heirs were liable in respect of the stipulation. (*Shah, A. C. J. and Coyajee, J.*) RAMCHANDRA MADHAVRAO *v.* TRIMBAK SHRIDHAR. **25 Bom. L. R. 1074 : 1924 Bom. 152.**

——*Construction—Gift—Settlement of property on trust—Gift of absolute estate.*

A Parsi lady executed a deed of settlement of which she appointed one M. and her son Rustomji the trustees, and by which she settled the immoveable properties for herself for life, and after her death on Rustomji for his life and after Rustomji's death in trust for his "sons and their male heirs in equal shares absolutely as tenants in common." The deed contained no power of revocation. There was a maintenance clause referring to the share to which an infant son or his male heirs should be entitled. The settlor first died and her son died next himself leaving three sons. *Held*, that the three grandsons of the settlor took on the settlor's son's death the trust properties absolutely in equal shares as tenants-in-common. (*Shah, A.C J. and Marten, J.*) DADABHAI FRAMJI CAMA *v.* COWASJI DORABJI. **24 Bom. L. R. 1111 : 47 B. 349 : 1923 Bom. 177.**

DEED—Construction—Gift.

———*Construction — Gift—Right to recover compensation*

A deed of sale relating to certain shops had a covenant in it that in case of eviction by municipality, the purchaser would be entitled to recover the purchase-money. The shops were transferred to the plaintiff by a deed of gift, which purported to transfer all the rights to realise rents to do repairs, etc., subject to the terms by which the donor was bound. On eviction by the Municipality the plff. brought a suit to recover the purchase-money from the original owner who had sold it to his donor. *Held*, that he was not entitled to recover the purchase-money inasmuch as that right was not assigned to him. (*Abdul Raoof, J.*) MUHAMMAD SAID *v.* ABDUL ALI. **66 I. C. 256.**

———*Construction—Gift—Creation of further interests after the first donee.*

Where an estate is given in terms of absolute estate to a donee, and further interests are created to take effect after the first donee's interest terminates, the further interests do not cut down the interest of the first donee. A gift to one person when followed by another gift to another of what may not be required by the first, the latter gift is void for uncertainty. (*Broadway and Abdul Raoof, JJ.*) MOHAN LAL *v.* NIRANJAN DAS. **60 I C. 619.**

———*Construction—Gift— Defeasance clause —Effect of—Transferee from donee—Position of.*

A clause in a deed of gift that the donor was to become entitled to the properties gifted on the happening of a specified contingency is not invalid or opposed to Hindu Law. A Hindu who had been sentenced to transportation for life made a gift of his properties to a relation of his subject to a condition that the donee should hand over the properties to the donor in case he returned to his native village after the termination of his sentence. The donee alienated the properties gifted to strangers who had notice of the terms of the gift. The donor subsequently returned and sued for possession. *Held*, that he was entitled to recover the properties from the alienee who could not be said to be *bona fide* purchasers. (*Krishnan and Venkatasubba Rao, JJ.*) VENKATARAMA AYYAR *v.* AIYASAMI AYYAR. **31 M. L. T. 435 : 43 M. L. J. 340 : 16 L. W. 552 : (1922) M. W. N. 357 : 1923 Mad. 67.**

———*Construction—Gift of income if absolute —Casual expressions in documents—Value of.*

The gift of income of property to a charity without any limitation is a gift of the property itself. In the mofussil, the forms of conveyance are not strictly observed, and Courts ought not to attach importance to casual expressions in documents describing them as ancestral properties and in the enjoyment of the executants. (*Abdul Rahim and Burn, JJ.*) VAITHINATHA AIYAR *v.* TYAGARAYA AIYAR. **68 I. C. 631 : 41 M. L. J. 20.**

DEED—Construction—Gift.

———*Construction—Gift— Limited owner—What passes.*

When a limited owner recited in a document that she had a limited interest in the property and gifted it to another, what passes is only her limited interest. (*Ashworth, A. J. C.*) MT. MAHESHA *v.* RAMESHAR. 1923 Oudh 173.

Construction—Grant.

———*Construction — Grant — Conveyance by executor, also having beneficial interest—"All estate, right or title"—What passes*—Bona fide *purchaser.*

It is a settled rule of construction that the meaning of a deed is to be decided by the language used, interpreted in its natural sense. An executor who had some beneficial interest in the estate of the testator, joined with other beneficiaries in the conveyance of a portion of the estate to *bona fide* purchasers of value. Though the executor did not purport to convey in his capacity as executor, the deed stated that all the right and title of the vendors were conveyed. *Held*, that the conveyance was of the whole title vested in the executor and not of the beneficial interest alone. The plain terms of the conveyance could not be altered by inferences and speculations drawn from the conduct of the parties. (*Lord Moulton,*) BIJRAJ NOPANI *v.* SREEMUTTY PURA SUNDARY DASEE. 42 Cal. 56 : 27 M. L. J. 93 : 1 L. W. 555 : 18 C. W. N. 1313 : (1914) M W. N. 679 : 16 M. L. T. 338 : 12 A. L. J. 1185: 16 Bom. L. R. 796 : 41 I. A. 189 : 24 I. C. 296 : 20 C. L. J. 368 : 37 Cal. 362 (P. C.). [Reversing 6 I. C. 893].

———*Grant—Construction—Endorsements.*

An endorsement appended to the Registrar of Sunads will not be a sufficient proof that the property is vatan property 25 B. 470 Foll. (*Macleod, C. J. and Crump, J.*) DULANBI KOM *v.* MAHOMED HANIF. 1923 Bom. 296 (1).

———*Construction — Grant* — Agrahar *gift—Condition as to residence in the place.*

Certain property was given by way of *Agrahar* gift to a Brahman priest and descendants. It was provided that the donee should not abandon his house and go to another place. If the donee acted in contravention of the above, his act should be considered as an act of irreligiousness and another person should be substituted in his place. *Held*, that the *Agrahar* gift was a private gift to the donee and an absolute gift according to law ; that further provision as regards residence was not valid and enforceable in law. (*Shah and Hayward, JJ.*) RUKMINI BAI KRISHNA RAO *v.* LAKSHIMI BAI NARAIN. 44 Bom. 304 : 56 I. C. 361 : 22 Bom. L. R. 254.

———*Construction—Grant—Contract of sale—Offer open "up to or until a day."*

Where in offering a motor car for sale, the vendor wrote that his offer held good up to Wednesday next. *Held*, that the offer was open during the whole of Wednesday and did not expire at midnight Tuesday. Where there is an ambiguity the document will be construed strongly

DEED—Construction—Grant.

against the grantors. (*Greaves, J.*) METROPOLITAN ENGINEERING WORKS *v.* WALTER EUGENE DEBRUNNER. 45 Cal. 481 : 45 I. C. 305 : 22 C. W. N. 416.

———*Construction—Grant—Contract of sale.*

Where the contract of sale is ambiguous regarding a clause restricting the rights of the purchaser, the condition should be construed more strictly against the vendor. (*Jenkins, C. J., Woodroffe and Mookerjee, JJ.*) JI. I. J. HYAM *v.* M. E. GUBBAY. 32 I. C 53 : 20 C. W. N. 66.

———*Construction — Grant—Taluk tenure—Lands within specified boundaries.*

A document purporting to convey lands within specified boundaries to be held at a certain rent on *Sikmi Taluk* tenure has the effect of either reviving an old *Sikmi Taluk* or creating a new one on same terms. (*Teunon, J.*) ABDUL KARIM *v.* AHMED ALI MEAJI. 23 I. C. 612.

———*Construction—Grant.*

A clause in a lease deed stipulating for the sanction of the Collector for building a house is not necessarily inconsistent with the theory of a permanent grant as the object of the clause may be to secure a suitable type of building. *Per Beachcroft, J.*—A meaning must be given to every clause and if there is ambiguity in a grant it must be construed in grantee's favour. (*Mookerjee and Beachcroft, JJ.*) SECRETARY OF STATE *v.* FORBES. 17 I C. 180 : 16 C. L. J. 217.

———*Construction — Grant — A permanent grant—Words importing.*

A *Kanom* deed reciting that *Anandravan* may hold the properties "for ever and ever" was held to import a permanent grant (*Seshagiri Aiyar and Phillips, JJ.*) KUTIPURATH KUNHUNI PANNIKKAR *v.* RAMAN. 26 M. L. T. 332 : 10 L. W. 427 : 52 I. C. 675 : (1919) M.W.N. 742.

———*Construction—Grant--Gift.*

Per Kumaraswami Sastri, J.—In constructing a deed of gift the Courts should see the intention of the donor shown by the deed and by the surrounding circumstances at the time. (*Coutts-Trotter and Kumaraswami Sastri, JJ.*) KUYYATTIL KONDAN KUTTI *v.* VAYALPATH PARKUM. 32 I. C. 107.

———*Construction —Grant—Gift —Condition —Liability of donee for* peishkush.

Where a gift of village was made on condition that should the donor get the village sub-divided, the donee should thereafter pay the *peishkush* apportioned to him, the donee must afford facilities for separate registration by concurring in the application made by the donor for the purpose. Where, therefore, on such an application by the donor the Collector fixed the *peishkush*, but the donee did not intimate his consent thereto and the petition was dismissed, the donee is nevertheless liable to pay the *peishkush* due on his land from the date on which the Collector fixed the proportion. (*Miller and Sadasiva Aiyar, JJ.*) SRI SRI SRI GAJAPATHI KRISTNA CHANDRA DEO GARU *v.* SRINIVASA CHARLU. 38 Mad. 235: 14 M. L. T. 20 : 25 M. L. J. 433 : 20 I. C. 446 : (1914) M. W. N. 99.

DEED—Construction—Grant.

———*Construction — Grant — Conveyance — "Appurtenances"— Right of way.*

A conveyance of land to be held and enjoyed along with "appurtenances" is wide enough to convey a way which never existed as an easement, but which when all the parcels were in the possession of the grantor, was used for the convenience of the whole tenement. (*White, C. J. and Tyabji, J.*) PENUKONDA VENKIAH *v.* SANKA KRISHNAMOORTHY. **38 Mad. 141 : (1913) M. W. N. 317 : 13 M. L. T. 313 : 19 I. C. 80 : 24 M. L. J. 552.**

———*Construction—Grant—Duty to examine terms*—Istimrari patta—*Proprietary rights.*

A Court construing a grant must look to its terms and ascertain its legal effect with reference to them. A deed styled as *istimrari patta* authorised the grantee to continue in possession of the property conveyed, generation after generation, on payment of revenue to the grantors. The deed further recited that the grantees and her heirs had the same rights of ownership as the grantors and the grantors and their representatives had no claim to, or had no power of, interference in the property conveyed. *Held*, that the documents conferred complete proprietary right on the grantees in respect of the lands conveyed. (*Wazir Hasan, A. J. C.*) LIAQAT HUSAIN *v.* NAROTAM DAS. **4 U. P. L. R. (J. C.) 1 : 65 I. C. 780 : 8 O. L. J. 516.**

———*Construction—Grant* — Sankalapnamah *—Grant of land in perpetuity—Zurpeshgi rent.*

Under a deed described as *Sankalapnamah* with powers of transfer the grantors had in consideration of the payment of certain sum put the grantees in possession of certain land and the grantees were to remain in possession for ever subject to an annual payment of Rs. 3 on account of *Malguzarisarkari*. *Held*, that the document was clearly a sale of an under-proprietary right. (*Lindsay, J.*) RAM SUCHIT *v.* SHEO SEWAK SINGH. **56 I. C. 629 : 23 O. C. 50.**

———*Construction—Grant*—Shankalap *grant —Grantee to hold* bila lagani, *with heritable and transferable rights.*

A Hindu widow gave under a *Sankalapnama* deed in favour of the family priest reciting that her husband had made a gift by way of *Sankalap* in his favour in certain Sir. Matahti and grove land a *Sankalap* grant of 26 bighas of land *Bila Lagani*. The lady further declared in that deed that the transferee was to hold it for ever with heritable and transferable rights and she had no right over it. *Held*, that the deed conferred only under-proprietary rights on the priest. (*Lindsay, J. C.*) GANESH PRASAD *v.* BISHUNATH. **7 O. L. J. 188 : 56 I. C. 354 : 23 O. C. 30.**

———*Construction—Grant—Award of--British Indian Association.*

An award of the British Indian Association granted a village rent-free "in perpetuity" to the appellant. The award did not confer any under-proprietary right nor did the words in perpetuity indicate an interest beyond the life time of the grantee. (*Evans, J. C. and Piggott, A. J. C.*) SHAMBHUNATH *v.* RUDHRA PRATAP. **12 I. C. 324.**

DEED—Construction—Instalment bond.

——*Construction—Grant—Power of attorney —If amounts to disposition*

Where a body executed a *mukhtearnama* appointing somebody manager and general agent till a minor grandson attained majority, there is no conveyance of title to the grandson, nor could it be treated as a will or declaration of trust. (*Bucknill and Ross JJ.*) RAM BAHADUR SEN *v.* GANESH BHAGAT. **2 Pat. 554 : 1924 P. 49.**

Construction—Instalment bond.

———*Construction — Instalment bond— Interest to run in case of aefault—Irregular payments—Waiver.*

A mortgage bond was payable by nine half-yearly instalments without interest, but in case of default the mortgagee could cancel the arrangement and charge interest at a certain rate. The first instalment was paid beyond time. The mortgagee credited it partly towards the interest which had begun to run and the balance towards the principal. The second instalment was paid in time but the mortgagee apportioned it in the same way. From time to time irregular payments of varying sums were made, and were credited in same way. *Held*, the mortgagee was entitled to treat the payments merely as payments made on account generally and by accepting them he did not waive his right to charge interest. (*Rivers and Gokul Prasad, JJ.*) WEZARAT HUSAIN *v.* MOHAN LAL. **18 A. L. J. 776 : 58 I. C. 7 : 43 All. 38: 2 U. P. L. R. (A.) 357.**

———*Construction—Instalment bond.*

There was a condition in the sale deed that the purchase money should be paid in instalments on fixed dates. In default of first instalment on due date, the vendor was to be entitled to possession. In case of non-payment of three subsequent instalments the vendor was to sue for possession of the land, but the vendor had waived it on many occasions. As he did not sue immediately he was not entitled. He could not enforce the strict terms of the contract as he had waived it on so many occasions. (*Chandavarkar and Hayward, JJ.*) CHANGAN *v.* SUKA. **35 Bom. 511 : 12 I. C. 384 : 13 Bom. L. R. 891.**

———*Construction—Instalment bond—Suit on limitation.*

An instalment mortgage-bond contained the clause "in the event of default of payment of one *kist*, all the *kist* being taken as defaulted, mortgagors shall pay interest, etc." *Held*, the intention was that in the event of default in payment of one *kist*, the whole amount and interest on that was to be paid and that a suit on the basis of the bond brought more than 12 years after the date of the first default would be time-barred. (*Walmsley and Greaves, JJ.*) SAKHWAT ALI KHAN *v.* AMIR PRAMANIK. **61 I. C. 208.**

———*Construction—Instalment bond.*

Where under a mortgage deed, the principal was payable on 4th January, 1916. the interest was payable regularly on the 4th January of each year and in default of payment of interest on the due dates, the mortgagee was entitled to recover the said amount then and there without waiting for the due date, *viz.*, 4th January, 1916. and default was made in payment of interest, the

DEED—Construction—Instalment bond.

mortgagee is entitled only to the balance of interest claimable on default of payment of any one instalment and not to the principal amount. (*Abdur Rahim and Srinivasa Aiyangar, JJ.*) SETHRU CHERLA RAMA CHANDRA *v.* MAHARAJAH OF JEYPOOR. **19 M. L. T. 360 : 34 I. C. 411. (1916) 1 M. W. N. 354.**

——*Construction—Instalment bond—"Due," meaning of.*

A hypothecation bond payable by instalments executed by the deft. to the plff. contained the stipulation that on failure to pay according to terms it shall be lawful for the said Collector on behalf of the Secy. of State to sell the said lands and apply the proceeds of such sales in or towards the payment and satisfaction in the first place of the expenses of such sale and then of the amount due or owing by me on account of the said balance of purchase money, etc. *Held*, that the word "due" in the said bond meant payable, and that the creditor could on default of any instalment claim only the overdue instalments and not the entire balance due on the bond. (*Benson and Sundara Aiyar, JJ.*) ANNAVARAPU NACHARAMMA *v.* SECRETARY OF STATE. **15 I. C. 231.**

——*Construction — Instalment bond —Interest—Provision for payment of.*

Where a mortgage bond was made up of principal and prospective interest and the whole amount was made payable in some instalments, and there was also a clause for payment of the whole amount in default of two monthly instalments. *Held*, that the mortgagee could recover the principal sum secured by the bond with proportionate interest out of the total interest (prospective) up to the date of the 2nd default and compound interest at a rate fixed in the bond on the sum due on the date of the first default from that date to the date of the second default. The mortgagee was not entitled to any interest after the date of the second default. (*Stanyon, A. J. C.*) BHAUJI *v.* BHAGWANT ATMARAM DHONGDI. **45 I. C. 722.**

Construction—Intention of parties.

——*Construction—Intention of parties—Extrinct evidence.*

Evidence of the intention of the parties thereto is inadmissible in construing the terms of a deed because the question is not what the parties may have intended, but what is the meaning of the words used. 17 C. L. J. 53 Affirmed. (*Lord Parmoor.*) MAHARAJA MANINDRA CHANDRA NANDI *v.* RAJA SRI SRI DURGA PRASAD SINGH. **32 M.L.J. 559 : 38 I.C. 929. : 22 M.L.T 202 : 6 L. W. 110 : 21 C. W N. 707 : 25 C. L. J. 567 : 19 Bom. L. R. 493 : 15 A. L. J. 432 : 1 Pat. L. W. 627 : 10 Bur. L. T. 229 : (1917) M. W. N 448 (P C.). [Affirming 18 I. C. 545 : 17 C L. J. 53.]**

——*Construction—Intention of parties.*

The intention of the parties to a document must be gathered from the terms of the deed itself and oral evidence is excluded by S. 92, Evidence Act (*Ryves and Daniels, JJ.*) BISHAMBHAR NATH *v.* MUHAMMAD UBAIDULLAH KHAN **45 A. 581 : 21 A. L. J. 503 : L. R. 4 A. 433 : 1923 All. 586.**

DEED—Construction—Intentention of parties.

——*Construction—Intention of parties — Clauses altering rule of succession and restraining alienation—Effect*

Whereby clause (*a*) of a deed, a right of preemption was created among the parties to the partition and by clause (b) if any co-sharer dies *lawalad*, the property left by him was to be divided amongst his near co-sharers according to their shares and by clause (*c*) no co-sharer could have the right of creating title in favour of a daughter's son in his divided share directly or indirectly. *Held*, paragraphs (*b*) and (*c*) of the deed could not be looked upon as creating a legal contractual relationship between the parties to the deed. Paragraph (*a*) undoubtedly creates a legal contractual relationship, but paragraphs (*b*) and (*c*) go much further. The intention there is to alter the rules of succession and restrain the right of transfer. The attempt to alter the rules of sucession is obnoxious in view of the well-known Tagore case, and the restrictions laid down in paragraphs (*b*) and (*c*) cannot be enforced. (*Stuart, J.*) MT. MHADAI KUAR *v.* BAGESHAR RAI. **1922 All. 293.**

——*Construction — Intention of parties—Shown by the document or its language.*

The document itself or its language as applicable to the surrounding circumstances should guide the determination of the intention of the parties to the document. (*Knox, J.*) KALPU RAI *v.* BENI MADHO SAHU. **37 I. C. 835.**

——*Construction—Intention of parties.*

Where a document is silent that a person was appointed an agent for carrying on the bnsiness of another or an agent with full power to represent it, but merely " as agent in the share brokerage business" the document read as a whole was construed to mean only relation of subbroker and broker. (*Fawcett and Coyajee, JJ.*) MORARJI PREMI GOKULDAS *v* MULJI RANCHHOD VED & Co. **25 Bom. L. R. 1014 : 48 Bom. 20 : 1924 Bom. 232.**

——*Construction — Intention of parties—Addition of words, if permissible.*

Where on a division of the joint property of three brothers into three lots respectively, a limitation is provided as to the share of the first brother and not as to other the limitation regarding each share should be read alike and if such reading necessitates the addition of some words to the deed it is permissible. (*Scott, C. J. and Heaton, J.*) PRAMJIWANDAS KALIDAS *v.* SHAMKOREBAI. **37 I. C. 263 : 18 Bom. L. R. 516.**

——*Construction—Intention of parties—Subsequent admissions—Value of.*

Whatever title may have vested in a mortgagee from a tenant must be traced to the mortgage bond and cannot be rested on an admission of the tenant himself. The question clearly is not, what the tenant intended to mortgage, but what was conveyed by virtue of the description actually inserted therein. The admission of the tenant cannot be utilized to contradict the document, and it would be dangerous to allow outside evidence to show the intention of the writer, which is not disclosed by the authorised channel, namely,

DEED—Construction—Intentention of parties.

the words which he himself selected. (*Mookerjee and Rankin, JJ.*) MANMATHA NATH KAR *v.* PROBODH CHANDRA.

37 C. L. J. 52 : 1923 Cal. 102.

——*Construction—Intention of parties—Where the agreement recited.*

Where the agreement recited "I agree to allow you to sell my oil mill at Rs. 40,000 you will get brokerage 5 per cent. when the mill will be sold this year, this condition in force till fortnight from to-day." Brokerage is earned by the broker if he introduced within 15 days to the promisor, persons ready and willing to purchase for Rs. 40,000 but it is not necessary that the sale should be completed within the 15 days. The postcript "on the sale proceeds being received in hand brokerage will be paid to you" does not mean that the commission was only to be payable if and when the whole amount (Rs. 40,000) will be received in cash. If the promisor chose to agree with the purchaser to receive partly cash and partly by hundi the broker's right to commission on the stipulated date, would not be affected. (*Sanderson, C. J., Woodroffe and Mookerjee, JJ.*) LALJEE MAHOMED *v.* DADABHAI JIVAJI GUSDAR. 43 Cal. 883 : 34 I. C. 807 : 23 C. L. J. 190.

——*Construction—Intention of parties.*

In construing a document the court should determine the intention of the parties as expressed in the deed itself. It cannot give effect to this unexpressed intention. (*Mookerjee and Beachcroft, JJ.*) DURGA PRASAD SINGH *v.* GOSTA BEHARI NANDI. 18 I. C. 545 : 17 C. L. J. 53.

——*Construction—Intention of parties.*

When there is no ambiguity in the deed the intention of the executant should be gathered from the plain language used ; unexpressed intention cannot be given effect to. (*Mookerjee and Carnduff, JJ.*) KANIJ JINATAL KUBRA *v.* HAMIDUNNISSA. 14 I. C. 56 . 16 C. L. J. 111.

——*Construction—Intention of parties.*

Clause 2 of the document provided thet the vendor shall draw upon the purchasers through any bank in sterling for the total amount of the invoice at 60 days sight free of interest, the bill of lading and shipping documents to be handed to the purchasers on payment of the draft. The purchasers further bind themselves to accept such drafts upon presentation and pay at maturity notwithstanding any objection they may have on account of any variation whatever from the terms of the indent, such objections, if any, to be settled privately or by arbitration." Clause 8 contained the provisions as to arbitration and commences with the statement that the purchasers shall not raise any claim in respect of the transaction unless they have accepted and returned the draft or drafts. *Held* upon the true construction of that agreement that purchasers are bound to accept the drafts upon presentation or tender of the bills of lading and shipping documents and that no claim by the purchasers can be raised, nor arbitration invoked, until such payment has been made. (*Shadi Lal, C. J. and Fforde, J.*) BUBBY HURRY AND CO. *v.* HERTZ AND CO.,

4 Lah. 215 : 1923 Lah. 541

DEED—Construction—Intentention of parties.

——*Construction—Intention of parties.*

The clause which determined the respective abilities of the parties to contribute towards the sum to be paid by party No. 1, appellants, on account of taxes ran as follows :—" As to the amount of Income Tax, Excess Profits Tax and super tax for 1919—20 to be paid by Bakhsh Elahi & Co. and Karam Elahi Muhammad Shafi, after the tax has been deposited in Government Treasury, the liability will be shared by party No. 1 and party No 2 among themselves in proportion to their shares for ¾th of a year or 9 months." Party No 1 paid in November 1920 a sum of Rs 1,22,500 as Excess Profits Tax for the year 1918-19 and claimed that party No. 2 respondents should pay their share of this amount for 9 months. *Held* the liability of the respondents was circumscribed by the terms of agreement and that, paragraph as it stands does not make them liable for payment of any portion of the Excess Profits Tax for 1918—19. The onus was on the appellants to prove that respondents were liable. (*Shadi Lal, C. J. and Abdul Qadir, J.*) HAJI MAHOMMED TAQI *v.* HAJI ABDUL RAHMAN.

1923 Lah. 151.

——*Construction—Intention of parties—Release of a share—Father's property—Share of brother's property on his death—Estoppel.*

Plaintiff at the time of partition with his brothers for a certain sum of money released his share in his father's property in favour of his brothers. On the death of a brother (one of the releasees) he sued for his share. The deed of release ran as follows : " Said releasor (plaintiff) for himself, his heirs, executors and administrators relinquishes all his right, title and interest in and to the firm of " M. Hakimji" and all the remaining moveable and immoveable properties hereunto jointly owned and possessed by the said releasor and the said releasees (his brothers), or to the ownership or possession of which they may now or hereafter be entitled as heirs of the late Seth Mamoonji and proprietors of the said firm of M. HAKIMJI." *Held* it is clear that what the plaintiff was relinqishing was only his claim as an heir of his deceased father and as joint owner of the firm M. Hakimji. Had it been his intention to give up any future right of inheritance that might accrue to him from the death of one of the releasees this would have been expressed in the deed Plaintiff was not estopped by the deed of release. Halsbury's Laws of England, Vol. X, page 461 Foll. 20 Cal. 373 Dist. (*Martineau and Campbell, JJ.*) SETH YUSAF ALI MAMOONJI *v.* SETH ALI BHOY.

1923 Lah. 8.

——*Construction—Intention of parties—Sale of staircase—Landing if included.*

The purchaser of a staircase includes a right to go over the landing at the foot of the staircase, (*Martineau, J.*) SHAMBHU SAHAI *v.* GAMAN.

5 Lah. L. J. 73.

——*Construction — Intention of parties—General authority to widow to gift away—Failure of particular chosen by her does not extinguish charity.*

DEED—Construction—Intention of parties.

When the reversioners originally gave the widow authority to devote the property to any charity, if the execution of the mode of charity selected by her becomes impracticable, they could not impeach any other charity selected by her afterwards. (*Rattigan and Shadi Lal, JJ.*) BHIWANI ORPHANAGE ASSOCIATION *v.* PARAMANAND. **43 P. L. R. 1916 : 31 I. C. 737 : 7 P. W. R. 1916.**

———*Construction—Intention of parties—Sale of land—Village Shamilat if included.*

Where the deed of sale of land does not expressly mention the share of the *Shamilat* pertaining to the land, it is a question of the intention of the parties as to whether the sale should include the *Shamilat* or not and this must be ascertained from the facts of each case. Where after the sale the vendor left the village and settled in another district and took no interest in the *Shamilat* area in 1905 on partition of the *Shamilat* the share pertaining to the *Khewat* was awarded to the vendees and it was only in 1912 that the vendor's descendants brought a suit to claim the *Shamilat*. *Held* the *Shamilat* had passed by the sale. 75 P. W. R. 1910, Dist (*Shadi Lal and Le Rossignol, JJ.*) SHAHAMAD *v.* IBRAHIM. **57 P. R. 1915 : 134 P. W. R 1915 : 30 I. C. 100 : 60 P. L. R. 1916.**

———*Construction—Intention of parties.*

Any expression of the intention of the parties that leads to the making of a deed cannot be taken to control clear and unambiguous dispositive words in it. Statements of motives for making a gift are not relevant in considering whether a gift is absolute or conditional. 24 C. 834 P. C. Foll. (*Spencer and Krishnan, JJ.*) RANGA RAO *v.* KITORI AMMAL. **42 I. C. 265: (1917) M. W. N. 634.**

———*Construction — Intention of parties—Agency for sale Document—Construction.*

The terms of a contract of agency for sale provided that the principal would be bound to pay a commission of Rs.....as remuneration out of the amounts that may be realised by the sale of.....The aforesaid commission shall be paid out of the amount which the agent may obtain for the principal. *Held*, the payment of the commission was conditional on the actual payment of the purchase money or at any rate not before all obstacles to the principal receiving the amount had been removed. (*Benson, O. C. J. and Sankaran Nair, J.*) IMHUDIPATTAM VIJAYA GANDIPA *v* ANNASAMY IYER. **17 I. C. 106.**

———*Construction — Intention of parties—Ordinary circumstances.*

A Court must consider the surrounding circumstances and should not extend the object of parties beyond what is expressed in the document itself. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) SANKARANUNNI *v.* APPAVU PILLAY **16 I. C. 671 : 12 M. L. T. 556**

———*Construction — Intention of parties—Intention that several parties should be executants—Deed signed by some only of the executants—Effect of.*

DEED—Construction—Intention of parties.

If a contract in writing is executed by some only of the several persons who purport to join in the contract and were intended to be parties to it and to execute the document, that document constitutes only a proposed agreement which has never been perfected, and it cannot bind even those who did execute it 25 M. 389 ; *Latch* v. *Wellake* (1840) 11 A. L. J. 959 Ref. 31 M 114 dist. (*Hallifax, A. J. C.*) RAMACHANDRA *v.* RUPRAO. **64 I. C. 726.**

———*Construction — Intention of parties—Name used by parties if a sufficient guide.*

The name given to a document by the parties is not a sufficient guide as to whether a document creates a mortgage or a charge. (*Stanyon, A. J. C.*) KHEMCHAND *v.* MALLOO. **26 I. C. 601 : 10 N. L. R. 81.**

———*Construction — Intention of parties—Gift of an annuity—Gift of immoveable property in lieu of annuity—Suit to set aside gift—Annuity whether must be restored.*

The defts. had become entitled to an annuity, generation after generation, from the profits of a certain village in possession of another, who subsequently made a gift of certain other villages to the deft in consideration of the defts. relinquishing their right to annuity on condition that if ousted from the possession of the gifted property the annuity will be restored. On a subsequent holder of the estate seeking to oust the defts. from the gifted village, it was held that the defts could not be ousted without the restoration of the annuity. (*Stuart, J. C. and Kanhaiya Lal, A. J. C.*) NARAYAN SINGH *v.* DEPUTY COMMISSIONER, PARATAPGARH. **54 I. C. 359 : 6 O. L. J. 633.**

———*Construction — Intention of parties—Intention clear from the deed—Omission to specify in a table attached to the deed.*

Where it is clear from the deed that the intention of the vendor was that he should transfer his entire interest in a certain village, the vendee's claim for possession of some of the parcels of the property cannot be resisted on the ground that they are not mentioned specifically, in the long table attached to the deed wherein all the parcels going to make up the vendor's property, are purported to be recited. (*Lindsay, J. C.*) SURAJPAL SINGH *v.* DEBI DAT SINGH. **34 I. C. 390 : 3 O. L. J. 156.**

———*Construction — Intention of parties—Contents of document and other surrounding circumstances to be considered.*

The intention of the parties to an instrument is to be gathered not from the name given to it but from the contents and relationship created and other circumstances going to show in what manner the language of the instrument is related to existing facts. 12 A. 387 ; 22 A. 149 referred to. (*Kanhaiya Lal, A. J. C.*) BALDEO PRASAD *v.* CHET RAM. **26 I. C. 706 : 1 O. L. J. 703.**

———*Construction — Intention of parties—Compromise—Court, duty of.*

In construing a compromise the Court must look to the actual terms of the compromise and

DEED—Construction—Intention of parties.

not to its effect on the interest of parties. The court should try to carry out the intention of the parties. (*Evans, A. J. C.*) ASHIK HUSSAIN *v.* MEHDI HUSSAIN. **12 I. C. 413.**

——— *Construction—Intention of parties—Sale—Gift—Failure of consideration.*

A deed inoperative as a sale deed for failure of consideration cannot be treated as a deed of gift in the absence of any indication to that effect in the deed. A deed must be construed by what appears within the four corners of a document itself and the court cannot go outside the deed for the purpose of showing the intention of the maker. 33 C. 773 Dist. (*Mullick and Atkinson, JJ.*) GHULHAI *v.* BALA BAKSH SETH **3 Pat. L. W. 206 : 45 I. C. 330 : (1917) Pat. 369.**

——— *Construction—Intention of parties—Contract—License to cut trees and make sleepers on payment of royalty—Breach of contract.*

Appellants entered into a contract in writing with respondents whereby they acquired the right for a term of just over 4 years to cut Sakhua trees for the purpose of making sleepers upon which a royalty was payable at certain rates. When work had been in operation for a short period, the respondents cancelled the contract and retook possession. In determining the question whether the landlord was entitled to cancel the contract, the court considered the document as a whole in order to find out the true intention of the parties and held that the mere failure to cut sleepers at a certain rate every month did not entitle the landlord to terminate the contract. (*Miller, C. J and Bucknill, J.*) JUGAL KISHORE *v.* BABU HORRESHWAR. **1922 Pat 79.**

——— *Construction—Intention of parties—Compromise stipulation that two ladies are to hold certain property for life—Gift over to plaintiff on death of both-death of one of the life tenants—Rights of parties.*

Where in a certain compromise decree it was stipulated that two ladies would take into possession certain lands for maintenance for life and after the death of both of them, the plaintiff will take possession of the lands and whereafter the death of one of the ladies, the plaintiff wanted to take possession of half of the lands demised. *Held*, that it was clearly a grant of land to the two ladies for life as maintenance, that is to say, they were joint tenants of the property and that the plaintiff was not entitled to recover possession until the death of both the ladies. (*Miller, C. J. and Coutts, J.*) CHANDRA MOHAN DUTTA *v.* SASIBALA DASI. **(1922) Pat. 39 : 4 U P. L. R. (Pat) 7 : 3 Pat. L. T. 623 : 1922 P. 68.**

Construction—Law applicable.

——— *Construction—Law applicable.*

The legal effect of a transaction cannot always be determined by the then prevalent interpretation of the law affecting the transaction. (*Mookerjee and Carnduff, JJ.*) BIRENDRA KISHORE *v* AHMED ALI. **15 I. C. 479 : 17 C. W. N. 619.**

Construction—Lease or contract of service.

——— *Construction — Lease or contract of service.*

DEED—Construction—Meaning of parties

If there are provisions in a document under which one of the parties is to be put into possession of land belonging to the other for a specific term of years on condition of delivering a specified amount of paddy irrespective of the quantity actually grown the document is a lease and the person put in possession of the land a tenant and not a mere labourer. (*Woodroffe and Huda, JJ.*) ANANDA KUMAR RAU *v.* HARA DURFA GHOSH. **49 I. C. 731.**

Construction—Lease or License.

——— *Construction—Lease or license.*

Where plff. contracts in writing with the deft. whereby the former was to cut and take away timber from the latter's forest for a period of four years on payment of a certain royalty the agreement is not a mere license but an instrument conveying an interest in immoveable property. 20 Mad. 58 ; 29 Mad. 353 Dist. (*Spencer and Krishnan, JJ.*) ZAMINDAR OF BODOKIMIDI *v.* SEESIL KUMAR LAHIRI. **49 I. C. 811 : (1918) M. W. N. 772.**

——— *Construction—Lease or license*—Kabuliyat *whether contract of tenancy.*

Where a tenant is let into possession of land under a *Kabuliyat* and has paid rent at the *Kabuliyat* rates, the *Kabuliyat* is deemed to be confirmed by the conduct of the parties and adopted as a contract of tenancy. (*Mullick and Atkinson, JJ.*) SHEIKH KASIM ALI *v.* SHEIKH AHMAD ALI. **38 I. C. 808 : 2 Pat. L. J. 40.**

Construction—Marriage Settlement.

——— *Construction—Marriage settlement and will—Children's portion—Time of vesting.*

In marriage settlement and wills of parents there is a presumption that the settlor or testator intended the portions should vest in the case of daughters on their attaining majority or marriage and in the case of sons on their attaining majority, whether the children do or do not survive their parents. (*Twomey, C. J. and Young, J.*) ESTHER COHEN *v.* E. I. COHEN. **13 Bur. L. T. 78.**

Construction—Meaning of parties.

——— *Construction—Meaning of parties.*

In a suit upon a bill of exchange drawn in foreign currency and payable in rupees at the current rate at the bank drafts at the date of payment. *Held*, that the rate of exchange should be calculated at the due date of payment. The date of payment could only mean the day on which the acceptor agreed to pay and not some other day at which he might choose to tender the money or might be forced to pay by an order of the Court (*Macleod, C. J. and Crump, J.*) MULLER MACLEAN AND CO *v.* KADERBHOY MULLA. **47 Bom. 493 : 25 Bom. L. R. 177 : 1923 Bom. 241.**

——— *Construction — Meaning of parties —* Dowl kabuliat.

The fact that a deed is called a *dowl kabuliat* does not decide its nature. It must be looked at as a whole to see what it is. Where in a *dowl kabuliat* creating a tenancy for a term of years there was an express statement that the tenant had no right of transfer without the landlord's

DEED—Construction—Meaning of parties.

consent and that the only right shown was an option in the tenant to take a renewal after the expiry of the term, *held*, that the tenancy created was neither heritable nor transferable. (*Greaves and Newbould, JJ.*) MAHOMMED AYEJUDDIN MIA *v.* PRODYAT KUMAR TAGORE. 48 Cal. 359 : 61 I. C. 503 : 25 C. W. N. 13.

———*Construction— Meaning of parties—Agreement that compensation for land acquisition by Municipal or Local Board to go to lessor —Effect where acquisition is by Government of Bengal.*

In construing deeds regard must be had to what exactly the parties said and put in writing and not what they meant ; where an agreement between a lessor and lessee stipulates that any compensation if awarded by a Municipality or a Local Board for acquiring the leased lands should go to the lessor and the land is later actually acquired by the Government of Bengal, *held* that the terms ought to be strictly construed and the compensation should go only to the lessee. (*Carnduff and Richardson, JJ.*) DWARKA NATH SEN GUPTA *v.* SECRETARY OF STATE. 22 I. C. 956.

Construction—Minor.

———*Construction — Minor — Execution of mortgage by guardian.*

Where a mortgage deed executed by a minor's mother recites that the amount was taken in order to discharge her husband's debts and also refers to the property being in her and her son's enjoyment after her husband's death. *Held*, that the deed can be fairly construed without any violence to the ordinarily accepted rules of construction as one executed by the mother on behalf of her son. (*Sadasiva Aiyar and Hannay, JJ.*) VENKATARAMANACHARI *v.* THIRUNARAYANACHARI. 27 I. C. 930 : 2 L. W. 212.

Construction—Misdescription.

———*Construction—Misdescription.*

R. W. and Company and R W. Company Limited are two distinct legal *persona*. (*Lord Shaw.*) RAMKANI SINGH *v.* MATHEWSON. 42 Cal. 1029 : 42 I. A. 97 : 19 C. W. N. 585 : 17 M. L. T. 377 : 13 A. L. J. 534 : 21 C. L J. 446 : 17 Bom. L. R. 449 : 2 L. W. 555 : 30 I. C. 55 : 29 M. L. J. 80 (P. C.).

Construction—Mortgage or charge.

———*Construction—Mortgage or charge.*

A person executing a mortgage afterwards executed a bond in favour of the mortgagee in the following terms : "If I do not pay on the due date then when I come to redeem the land mortgaged I shall pay this money with interest; until I pay this money with interest I shall not pay the mortgage money. . . I shall pay the mortgage money in a lump sum and redeem the fields. . . ." *Held*, that the bond though it effected a charge was not a simple mortgage. (*Chamier, J.*) BHAGWATI SINGH *v.* SARUP SINGH. 15 I. C. 851.

———*Construction—Mortgage or charge.*

The memorandum of articles of a *chit* fund fixed the duties and liabilities as follows : (1) A six monthly drawing should be held to ascertain who was to take the prize. (2) A bond should be executed by the prize winner before he takes the prize (3) That the subscriber should collect the prize money from the stakeholder with interest if he fails to pay. In the absence of a formal promise on the part of the stakeholder to pay, the document must be construed as a covenant. (*Oldfield and Sadasiva Aiyar, JJ.*) VENKATARAMA CHETTY *v.* PANCHANATHA AIYAR. 38 I. C. 813 : (1916) 2 M. W. N. 263.

DEED—Construction—Mortgage or lease.

———*Construction — Mortgage or charge "Thanakha"*

The words in a document purporting to be a simple bond "I and my heirs with all my property moveable and immoveable, as 'Thanakha' shall be liable" are not enough to create a charge or a mortgage. (*Benson and Sundara Aiyar, JJ.*) KAMAYYA *v.* YEROKOLA. 13 M. L. T. 327 : (1913) M. W. N. 335 : 19 I. C. 221 : 24 M. L. J. 479.

Construction—Mortgage or lease.

———*Construction — Mortgage or lease — When parts of the same transaction— Question of fact.*

Whether the two transactions, *viz.* of the mortgage and lease are to be treated as one or as separate transaction is a question to be decided upon the special facts of each particular case and also regard must be given to the construction of the deeds. (*Abdul Raoof, J.*) BHAGWANDAS *v.* JALALUDDIN. 69 I. C. 54.

———*Construction— Mortgage and lease—Same transaction—Test of.*

Two documents were executed on the same date and styled one a mortgage and the other a lease. *Held*, that the omission of a reference to the lease in the mortgage deed was a strong indication of the separate nature of the two transactions and all that was intended by the lease was that such moneys as were payable thereunder were to be given credit for by the mortgagee. As at the time of execution of the rent deed, the parties clearly intended to establish the relation of landlord and tenant between themselves, the mortgagees were entitled to evict the mortgagors at any time. (*Broadway, J.*) MANGIA RAM *v.* GANESH DAS. 47 I. C. 351 : 161 P. W. R. 1918.

———*Construction—Mortgage or lease—Test.*

Per Abdur Rahim, J.—The exact nature of a transaction must be found with reference to the intention of the parties, that intention has to be gathered mainly from the internal evidence furnished by the document itself with such light as may be derived from the surrounding circumstances. The essential test to be applied to such cases is whether by the transaction in question the debt was secured or satisfied. If the former, it would be a mortgage otherwise a lease. *Per Seshagiri Aiyar, J*—Even if the document be regarded as a combination of an agreement to mortgage and an agreement to lease it does not require registration At best it is only an agreement to execute an anomalous mortgage. (*Abdur*

DEED—Construction—Mortgage or Lease.

Rahim and Seshagiri Aiyar, JJ.) MEENAKSHISUNDARA MUDALIAR *v* RATHNASWAMI PILLAI.
41 Mad. 959 : 24 M. L. T. 315 : (1918) M. W. N. 811 : 49 I. C. 291 : 8 L. W. 438 : 35 M. L. J. 489.

———*Construction — Mortgage or lease — Same transaction.*

Prima facie a mortgage and a lease are two distinct transactions and the person alleging that they are one must prove it. (*Spencer and Krishnan, JJ.*) RAMAKRISHNA KUKKILAYA *v.* NEKKAR KUPPANNA.
6 L. W. 621 : 22 M. L. T. 422 : 43 I. C. 286 : (1918) M. W. N. 75 : 33 M. L. J. 581.

———*Construction—Mortgage or lease.*

A document styled a "patta qaul qarar birt rahni" recited that the talukdar had received certain sums from the grantee and put him in possession of certain lands for which he had to pay a certain annual rent. *Held*, that the transaction was a lease and not a mortgage (*Lindsay, J. C.*) INDER BAHADUR SINGH *v* BACHAN SINGH. 48 I. C. 151 : 5 O. L. J. 594.

———*Construction—Mortgage or lease.*

A document though not enforceable as mortgage may be used for all collateral purpose unconnected with the mortgage, *viz.*, to prove the ratification of leases 9 C. 520 ; 26 C. 78 : 32 M. 410, Rel. (*Stuart and Kanhaiyo Lal, A J.Cs.*) HUSSAIN ALI MIRZA *v.* MUHAMMAD AZIM KHAN.
31 I C. 728 : 18 O. C. 168.

———*Construction—Mortgage or lease.*

Where the consideration for a document is an old debt and possession of the property was given over to the other party for a fixed period of time, but there were no terms making him accountable for profits or for the repayment of the debt, the document is a lease and not a mortgage. (*Batten, J. C.*) BHICKA *v.* SHAIK AMIR.
19 N. L R. 1 : (1923) Nag. 60.

Construction—Mortgage or Money bond.

———*Construction—Mortgage or money bond —Agreement by mortgage deed.*

Where a mortgagor executed a subsequent deed in favour of the mortgagee by which he agreed that he would pay the amount due under the subsequent deed at the time of redemption of the first, the subsequent deed is merely a simple deed and the mortgagee can get a simple money decree upon it. (*Stuart, J. C.*) LAL BEHARI *v.* SATGUR PRASAD. 38 I. C. 480 : 3 O L. J. 714.

Construction—Mortgage or Simple bond.

——— *Construction—Mortgage or simple bond.*

A mortgage of certain properties as security for the payment of rent contained a provision that in case the rent was not recovered out of the hypothecated properties, the landlord could realise the money by sale of other moveable and immoveable properties of the mortgagor. *Held*, that the stipulation in the mortgage bond meant that if the mortgaged properties were proceeded against and found insufficient, the deficit could be made up by execution against other property and that such stipulation did not compel a mortgage suit

DEED—Construction—Powers of Court.

for each instalment of rent. (*Chitty and N. R. Chatterjee, JJ.*) BENOY KRISHNA DEB *v.* DEBENDRA KRISHNA.
9 I. C. 660 : 15 C. W. N. 722.

———*Construction—Mortgage or simple bond.*

A document of gift provided for certain payments to a ebatram from certain endowed properties without express words constituting a charge (1) No charge was created on the properties for payments. (2) The document created a personal liability which being without consideration cannot be enforced. (*Abdur Rahim and Sundara Aiyar, JJ.*) PRESIDENT, TALUK BOARD, PEDDAPUR *v.* CHILAKAMANI.
12 I. C. 146 : (1911) 2 M. W. N. 238.

———*Construction—Mortgage or simple bond —Creation of rights—Future tense, use of.*

The mere fact that the future tense is used in the operative words of a document, does not postpone its operation to future time or convert a mortgage into an agreement to mortgage if the document read as a whole shows a present intention to create a mortgage. (*Pratt, J.*) PO MAUNG *v.* R. M. C. R. M. CHETTY.
54 I. C. 42 : 12 Bur. L. T. 156.

Construction—Partition deed.

———*Construction—Partition deed.*

A deed of partition contained among other things a clause to this effect "that having defrayed the expenses of her funeral ceremony we shall divide the abovementioned land equally between us, the land of the person that does not so contribute to the said funeral expenses shall be enjoyed by the person who contributes and performs." The above clause did not operate as a condition precedent to the vesting of the land but was only a forfeiture clause to take effect on the refusal of either to perform the conditions therein. (*Sundara Aiyar and Ayling, JJ.*) VISWANATHA AIYAR *v.* VENKATARAMA AIYAR.
12 I. C. 256 : 10 M. L. T. 276.

Construction—Personal Liability.

———*Construction—Personal liability—Bond —Mode of payment prescribed—Creditor's remedy not limited to that mode.*

Where a certain mode of payment is prescribed in a bond, the creditor is not limited to that mode alone and can proceed personally on an implied obligation to repay. (*Mookerjee and Carnduff, JJ.*) RAM NARAIN SINGH *v.* ODINDRA NATH MOOKERJEE. 15 C. L. J 17 : 13 I. C. 440 : 17 C. W. N. 369.

———*Construction—Personal liability—Recital of guardianship—Necessity.*

Where a document is in fact executed by a person for himself and as guardian for another, it is not necessary that the executant should describe himself as the guardian of the person who is sought to be bound by it. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) GOVINDA UDALY *v.* MUTHUSWAMY PILLAI. 17 I. C. 169.

Construction—Powers of Court.

———*Construction—Powers of Court—Not to make a new contract,*

DEED—Construction—Principles.

Courts of law should not make a new contract for the parties according to its own notions of what is reasonable by supplying defects or removing ambiguities in an instrument. (*Shadi Lal and Jones, JJ.*) BARKAT RAM *v.* ANANT RAM.

31 I. C. 632 : 185 P. W. R. 1915.

Construction—Principles.

———*Construction—Principles.*

The direction to the trustees in the trust in the settlement was to pay to the widow of the settlor within thirteen months of the settlor's death out of the balance of the "income, accruing within the first thirteen months" the Rs. 80,000. The trustees were further directed to divide the remaining balance of the income "arising or accruing" during the first thirteen months after the settlor's death among the four beneficiaries named in equal shares. The direction in the deed operated under the form of a trust for sale. The balance of the proceeds of sale and income to be derived from it were to be held as subsequently directed, "except the income arising or accruing due for and within the first thirteen months after the settlor's death," as to which there was reference back to the direction. *Held*, the character of payments such as those directed is *prima facie* discontinuous at common law. No doubt, the settlor could have given directions which would have modified this character, or at least, have deprived it of the consequences arising from its discontinuity. But such directions would have had to be clear and unambiguous in order to have the result of varying the rights defined by the general law. There was no such distinctness in direction in the deed as would have been required to have this effect. (P. 174, C. 2. P 175. C. 1). (*Viscount Haldane*, PIROZSHAW BOMANJEE PETIT *v.* BAI COOLBAI.

47 Bom. 790 : 18 L. W. 940 : 26 Bom. L. R. 76 : (1923) M. W. N. 616 : (1923) P. C. 171 : 50 I. A. 276 : 33 M. L. T. 372 (P.C.).

———*Construction—Principles—Deed of settlement carrying out decision of Court.*

In construing an instrument of settlement carrying out a decision of the Court, Courts ought to take for their guidance the rule that, if possible, such a document should be construed *ut res magis valeat quam pereat.*

A deed of settlement provided that on the death of the last three persons *i.e.*, Raja Hanwant Singh, Raja Rampal Singh and Dirgaji Kuar, the mother of Raja Rampal Singh, Babu Lachman Singh the second son of Raja Hanwant Singh and his heirs and representatives shall succeed to the entire Rampur Kaithala estate as provided by S. 22 of Act I of 1869. But the said Babu Lachman Singh shall not interfere in any way with the said ilaqa, besides the six villages which he has received under S. 8 during the lifetime of Raja Rampal Singh and his mother Dirgaj Kuar. *Held*, in the first place, the words "heirs and representatives" are to be treated as words of limitation and not of purchase, that is they are merely intended to express the absolute estate which it was proposed to give to Lachman as distinguished from the life estates which had preceded it. This being so the later words in the sentence may be regarded either as an idle attempt to derogate from the grant previously made and therefore to be rejected, or as

DEED—Construction—Principles.

words of description only, stating the legal incidents which the grantor conceived to belong to the estate which he had granted. In this case his mistake as to the legal consequence does not affect the grant which he has made and that it was his self-acquired property and therefore Lachman received an absolute estate in reversion. (*Lord Phillimore*) LAL RAM *v.* Y. COMMISSIONER OF PARTABGAR.

45 A. 596 : 21 A. L. J. 777 : 33 M. L. T. 355 : 26 O. C. 257 : 90 & A. L. R. 746 : 50 I. A. 265 : (1923) M. W. N. 591 : 1923 P. C. 160 (P.C.).

———*Construction—Principles of,*

For the purposes of interpreting a document not much help can be derived from a consideration of the interpretation placed on another one in a different case though somewhat similar to the one in hand. (*Ryves and Gokul Prasad, JJ.*) BENAYAK PRASAD PANDE *v.* BISHUN DATT PATHAK.

L. R. 3 A. 308.

———*Construction—Principles of—Intention of parties—Language.*

Two essential considerations to declare the legal result of two or more documents taken together are as follows: (1) what was the intention of the parties at the time of contract, (2) whether the language used carries out that intention. In the case of ambiguous language or one used without the knowledge of a party the Court may be required to give effect to words used causing hardship to the party but where the party undertakes not to dispute his own language no straining of language or hardship occurs. (*Walsh, J.*) MAHABIR SINGH *v.* JAG MOHAN LAL.

57 I. C, 569 : 2 U. P. L. R. 167 (All).

———*Construction—Principles.*

It is not sale to construe one document with reference to another. (*Tudball, J.*) MUKHA *v.* HAR SAHAI.

9 I. C. 810 : 8 A. L. J. 770.

———*Construction—Principles.*

The Court in ascertaining the time, nature of the contract must construe the deeds and contracts of the people of India liberally and should regard the real meaning of the parties which the transaction discloses and not the form or the literal sense. (*Batchelor and Hayward, JJ.*) KATURCHAND LAKHMAJI *v.* JAKHIA PADIA PATIL.

40 Bom. 74 : 31 I. C. 388 : 17 Bom L. R. 928.

———*Construction—Principles—Liberal construction.*

Documents by Indians should be construed liberally and more attention should be paid to intention than to form. (*Batchelor and Heaton, JJ.*) ABHISANG TARABHAI *v.* RAI SANG TALESING.

16 I. C. 561 : 14 Bom. L. R. 602.

———*Construction—Principles.*

If the meaning of a term in the original agreement is doubtful, assistance might be sought from the conduct of parties. Apart from ambiguity, the mere fact that the parties have acted on an erroneous construction of an instrument, furnishes in itself no reason why the courts should not follow the general rule that an instrument should be construed according to its natural meaning in the light of the circumstances in

which it was executed. (*Richardson and Suhrawardy, JJ.*) RAJA BHUPENDRA NARAYAN SIMHA BAHADUR *v.* MIDNAPORE ZAMINDARY COMPANY, LTD. **1922 Cal. 300.**

———*Construction—Principles—Sicca Rupees.*

Sicca rupees though coined by the Company, having never been known as the "Company's Sicca rupee" the expression "Company's Sicca rupees" used in a *kabuliyat* is ambiguous. The intention of the parties must be ascertained, having regard to the surrounding circumstances, the conduct of the parties, the date of the document, the stamp duty paid on the document, and a reference to the current coin in a portion of the *kabuliyat*. The history of the "Sicca rupee" discussed. (*Teunon and Richardson, JJ.*) MAHARAJ BAHADUR SINGH *v.* JADAB CHANDRA GHOSE. **46 Cal. 347 : 47 I. C. 109 : 30 C. L. J. 246.**

———*Construction—Principles.*

If the terms of a contract are clear and unambiguous, the Court is bound to give effect to them without considering how far they may be reasonable or otherwise and the court, in construing it cannot speculate about possible intention of the parties, but is concerned only with their intention as expressed by the words they have deliberately used, to guess the intention of an average man is dangerous. (*Mookerjee and Beachcroft, JJ.*) BASIRUDDI *v.* AFSARUNNESSA BIBI. **40 I. C. 833 : 21 C. W. N. 860.**

———*Construction—Principles—Intention of parties—Position of the parties and position of affairs at the time of the agreement, to be considered.*

In construing a deed the Court has to take into consideration the position of the parties who executed the document and the position of affairs at the time the agreement was entered into and the real intention of the parties. The whole of the document with all its terms must be looked to. If expressions used in the deed are capable of both constructions contended for, by both the parties, then that construction should be adopted which is consistent with the law to which the parties are subject. (*Sanderson, C. J. and N. R. Chatterjee, J.*) MAHOMED UMAR *v.* MT. MAN KUAR. **40 I. C. 783 : 21 C. W. N. 906.**

———*Construction — Principles — Technical rules, to be avoided.*

Deeds and contracts of the people of India should be liberally construed; the form of expression or the literal sense is not so much to be regarded as the real meaning of the parties which the transaction discloses. (*Mookerjee, J.*) UPENDRA NATH *v.* BINDESHRI PRASAD. **20 C. W. N. 210 : 32 I. C 468 : 22 C. L. J. 452.**

———*Construction—Principles.*

Contracts should be interpreted by themselves and to interpret one contract by reference to another is improper. 17 Cal. 449, Dist. (*Jenkins, C J. and Woodroffe, J.*) PATIRAM BANERJEE *v* KANKINARRA CO., LTD. **42 Cal. 1050 : 31 I. C. 607 : 19 C. W. N. 623.**

——— *Construction—Principles.*

An instrument must receive a construction according to the plain meaning of the words and sentences therein contained, *i.e.*, in their grammatical and ordinary sense unless the context shows otherwise. Where the language is clear and unequivocal, an alteration of the construction from the plain meaning for the purpose of escaping from what may seem to be the harsh consequences of rules of law, is not permissible. (*Mookerjee and Roe, JJ.*) SURESH CHANDRA PALIT *v.* LALIT MOHAN DUTTA. **22 C L. J. 316 : 31 I. C. 405 : 20 C W. N. 463.**

———*Construction—Principles—Matters material to.*

Where there is a document defining the right of the parties, its terms in the first instance must be investigated. In construing a document to ascertain its meaning, the Court must have regard to every fact, a knowledge of which may conduce to the right application of the words used. 15 B. L. R. 125; 9 C. 505 Ref. (*Jenkins, C. J. and N.R. Chatterjee, J.*) ANANTH NATH MITRA *v.* MIDNAPUR ZEMINDARI CO. **29 I. C. 802.**

———*Construction—Principles.*

The contracts of the people of India ought to be liberally construed. It is the real meaning of the parties as disclosed by the transaction, rather than the form of expression or the literal sense that has to be regarded. 18 W R. 81, P. C Foll. (*Jenkins C. J. and Chatterjee, J.*) NARAIN CHANDRA *v* MOHENDRA NATH. **14 I. C. 820 : 15 C. L. J. 332.**

———*Construction—Principles—Reference to later one not* inter partes.

A later document cannot be used as an aid to the construction of an earlier document not between the same parties. (*Woodroffe and Carnduff, JJ.*) CHANDRAKUMAR SINGH *v.* KALY PROSAD. **9 I. C. 223.**

———*Construction—Principles of.*

According to the general rule of construction, no part of a document should as far as possible be left out as redundant. (*Abdul Raoof, J.*) MT. DURGO *v.* PREM SINGH. **74 I C. 653.**

———*Construction—Principles.*

In determining the nature of a transaction the document evidencing it should be considered as a whole and the intention of the parties should be gathered not from isolated sentences but from the whole of the instrument. (*Shadi Lal and Le Rossignol, JJ.*) GOPI RAM *v.* RAM DHAN **10 P. W. R. 1918 : 44 I.C. 228 : 157 P.L.R. 1917.**

———*Construction -- Principles — Unskilful draftsman.*

A mortgage deed, drafted by an unskilled person must not be strictly construed. (*Shah Din and Agnew, JJ.*) CHHABIL DAS *v.* MASU. **4 P. R. 1914 : 243 P. L. R. 1913 : 145 P. W. R. 1913 : 19 I. C. 981 : 207 P. W. R. 1913.**

———*Construction — Principles— Adoption—Power to widow to adopt son—Reversioner giving assent for consideration.*

DEED—Construction—Principles.

The deeds and contracts of the people of India should be liberally construed. The real meaning of the parties should be more regarded than mere form of expression and literal sense. In construing such deeds and contracts regard must be had to all the attendant circumstances of the transaction. Where a widow executed a deed of adoption, by which she adopted a boy to her husband, reciting in the deed that the adoption was in compliance with the expressed wishes of her husband, one of the reversionary heirs sued for a declaration that the deed of adoption was invalid against his reversionary interest and obtained a decree to that effect and subsequently executed an agreement by which he gave the widow authority to adopt any one she liked and as a consideration for this concession he received immediate possession of a large portion of the estate. Accordingly the widow again adopted the same boy saying "*mulbanna apna qurar dekariqrar karte hainke Nmazkur hamara mutabanna hai*" After the death of the reversioners the widow, her mother-in-law and reversioner's grandson sued for possession of his share in the estate. *Held*, that the intention of the parties must not be gathered from the strict terms used in the agreement and the deed of adoption, but that the circumstances of the case must also be considered; that the intention of the parties was that the widows should appoint an heir to the last male holder of the estate and that the adoption was binding on the reversioners and his heirs. (*Rattigan, J.*) NIDHAN SINGH *v.* SHAH SINGH. 40 P. R. 1913 : 17 I. C. 524 : 24 P. L. R. 1913.

——*Construction — Principles—Compromise set aside--Prior rights, revival of.*

Where a compromise deed is set aside, the parties are remitted to their original rights. (*Sadasiva Aiyar and Spencer, JJ.*) RAJARAJESWARA SETHUPATHI *v.* KUPPUSAMI AIYAR.
68 I C. 352 : (1921) M.W.N. 722 : 41 M. L. J. 474.

——*Construction—Principles.*

In construing a document a Judge should not be guided by evidence as to what the parties meant though he can look at the surrounding circumstances to find out the subject matter of their contract. The absence of words in a deed of gift that the estate was to be enjoyed from "son to grandson" indicates that the donor granted only the limited interest. (*Coutts Trotter and Seshagiri Aiyar, JJ.*) VEERAKKAL *v.* THIRUMAKKAL, 34 I. C. 596

——*Construction — Principles — Maxim — 'Ut tres magis valeat quam pariat.'*

A Court will look to the surrounding circumstances to find out the intention of the parties to a transaction and will not construe a document so as to nullify one important clause therein. (*Spencer, Coutts Trotter and Napier, JJ.*) VENKATA SUBBIAH CHETTY *v.* SUBBA NAIDU.
2 L. W. 977 : 18 M. L. T. 533 : 31 I. C. 152 : (1915) M. W. N. 822.

——*Construction—Principles — Reference to stamp.*

The legal nature of a document is not to be determined by its contents and not by the stamp duty paid on it. (*Benson and Sundara Aiyar, JJ.*) VENKATARAMANA AIYAR *v.* NARASINGA ROW.
38 Mad. 134 : 13 M. L. T. 114 : 24 M. L J. 180 : 18 I. C. 135 : (1913) M. W. N. 72.

DEED—Construction—Principles.

——*Construction—Principles—Value of precedents.*

A decision based on one document should not be applied to construe another document unless the language is identically the same. (*Ayling and Spencer, JJ.*) ANDIYAPPA CHETTY *v.* DEVARAJULU NAIDOO. 10 M L. T. 251 : 36 Mad. 68 : 12 I. C. 378 : (1911) 2 M. W. N. 225 : 21 M. L. J. 1024.

——*Construction—Principles — Description of document.*

The true construction of a document does not depend upon the name given to it but it must be determined with reference to all its terms. (*Dalal and Wazir Hasan, A.J. Cs.*) KARIM DAD KHAN *v.* MT. BIBI GHAFURAN. 9 O. L. J. 104 : (1922) Oudh 42.

——*Construction—Principles of—Sale deed.*

In construing a document described as a sale deed, all the covenants must be looked into and it must then be judged whether the intention of the parties as expressed in the deed was to effect an immediate transfer of proprietary right. (*Daniels and Lyle, A.J. Cs.*) BISHRSHAR DAYAL *v.* MT. HAR KAJ KUAR. 66 I. C. 622.

——*Construction—Principles of.*

No general rule can be laid down with regard to the construction of documents and each document must be interpreted according to its own terms. (*Kanhaiya Lal, J. C. and Dalal, A. J. C.*) SHAIKH RUTAB ALI *v.* MAHOMED ZAMAN BEG.
66 I. C. 106 : 9 O. L. J. 101.

——*Construction—Principles.*

Construction harmonising all parts is preferred to one causing repugnancy. (*Daniels and Dalal, A. J. Cs.*) HAFIZ-UN-NISA *v.* JAWAHIR SINGH.
66 I. C. 24 : 24 O. C. 374.

——*Construction—Principles of—Interpretation of other deeds.*

It would not be safe to import considerations into the question of construction of a document which might have arisen or may arise with reference to the question of construction of documents. In the case of construction of documents the only question is how the law is to be applied to the particular facts put before the court. (*Wazir Hasan, A. J. C.*) LACHHMAN DAS *v.* BHAGWANT RAM. 65 I. C. 707 ; 8 O. L. J. 481.

——*Construction—Principles.*

The question of proper construction of a document is often a mixed question of law and fact. (*Bucknill, J.*) ABDUL RAHIMAN *v.* WALI MAHAMAD.
65 I. C. 224 (2).

——*Construction—Principles— Repugnancy, to be avoided—'Year,' meaning of.*

It is not desirable to impute repugnancy to the terms of a document where a consistent intention can be found from the study of the document as a whole. A year usually means a period of twelve months but the context of a document may show that a particular year, ending with a specified

DEED—Construction—Principles.

month or season was intended. (*Stuart and Kanhaiya Lal, A. J. Cs.*) PRAG *v.* MOHAN LAL.
47 I. C. 161 : 5 O. L. J. 263.

———*Construction—Principles of.*

Where a word is capable of several interpretations, the Court will adopt that interpretation which will be consistent with the existence of a contract, which persons of ordinary intelligence would make and reject the interpretation involving the acceptance of a contract which no sensible person would be likely to agree to. Where the terms are however clear the mere fact that the bargain becomes unconscionable if a particular meaning is given affords no reason for holding that the intention of the parties was otherwise. (*Stuart and Kanhaiya Lal, A. J. Cs.*) CHARU CHANDRA BISWAS *v.* LALLAN SINGH.
40 I. C. 42 : 4 O. L. J. 148.

———*Construction—Principles.*

No assumption concerning the nature of the legal effect which a document is intended to produce should be made but the construction of a document must be based upon the intention of the parties to the document, which depends upon a consideration of the evidence disclosing the circumstances attending its execution. (*Lindsay, J. C. and Stuart, A. J. C.*) SATROHAN LAL *v.* NAGESHAR PRASAD. 19 O. C. 75 : 35 I. C. 770 : 3 O. L. J. 339.

———*Construction—Principles — Other documents, value of.*

The construction placed on the document cannot be of any material help in construing another. (*Kanhaiya Lal, A. J. C.*) CHAUHARAJA BAKSH *v.* RAM HARAKH. 32 I. C. 740 : 2 O. L. J. 601

———*Construction—Principles—Reference to other deeds.*

One deed cannot be construed by reference to another unless the two form part of the same transaction. 27 A. 383 (P. C.), Ref. (*Stuart and Kanhaiya Lal, A.J.Cs.*) SITA RAMJI *v.* JADUNATH SINGH. 24 I. C. 72 : 1 O. L. J 204.

———*Construction—Principles — Principles of English law if applicable to India.*

The rules of English Court for construing English documents are not as such applicable to transactions between natives of India. 6 A. 560 (P. C.) ref. to. (*Evans, J.C. and Lindsay, A. J. C.*) MOHAMAD HOSIM ALI KHAN *v.* SADIQUI HUSSAIN KHAN. 13 I. C. 882 : 14 O. C. 356.

———*Construction—Principles—Harmony.*

A document ought to be construed so as to make each part expound the other so as to make all the parts agree. Where a doubt in a deed can be removed by construing it against the grantor, it will be so done especially where the deed is supported by valuable consideration. A general and definite description of the mortgaged property in a deed of mortgage cannot be restricted by its enumerative description following the general description. (*Das and Bucknill, JJ.*) KALIKA NAND *v.* SHIV NANDAN: 63 I. C. 625.

———*Construction—Principles--Mortgage-bond—Interest.*

DEED—Construction—Sale Certificate.

In construing the mortgagor's liability to pay an enhanced rate of interest the bond should be considered as a whole and a construction most favourable to the mortgagor should be given. Where a suit by a dispossessed usufructuary mortgagee is brought more than six years after dispossession, enhanced interest should not be allowed. (*Jwala Prasad and Ross, JJ.*) JAINANDAN *v.* BAIJNATH. 63 I. C. 297 : 2 Pat. L. T. 229.

Construction—Release.

———*Construction — Release* — Dastbardarinama—*Relinquishment by widow—Effect.*

Where a registered *Dastbardarinama* was executed by a widow stating that she relinquished all her rights as widow in the estate of her husband held by her in favour of her next reversioner on his agreeing to pay her a certain amount which was never paid, *held*, that the deed was not a sale-deed but a deed of release by which the widow surrendered her life-estate in her husband's lands. Since no part of the consideration for the surrender of her life-estate was paid to her by the reversioner, the agreement embodied in the deed was void and unenforceable. (*Johnstone and Shah Din, JJ.*) MUSSAMMAT FAZLIN *v.* IMAMUD-DIN. 95 P. W. R. 1915 : 70 P. R. 1915 : 29 I. C. 253 : 10 P. L. R. 1916.

———*Construction—Release—Conveyance.*

A document though styled a release can be treated as a conveyance if it appears clearly that the intention of the executant of the document was to transfer his rights. (*Wallis, C. J. and Kumaraswami Sastri, J.*) DORAISAMI *v.* CHINNIA GOUNDEN. 22 M. L. T. 538
(1918) M. W. N. 89 : 43 I. C. 560 : 34 M. L. J. 258 : 7 L. W. 335.

Construction—Sale.

———*Construction—Sale—Condition precedent and condition subsequent.*

A condition precedent if not complied with invalidates a sale but a condition subsequent does not. (*Chitty and Richardson, JJ.*) DYAM KHAN *v.* SARAT CHANDRA DE. 26 C. W. N. 218.

———*Construction—Sale—Right to demand—Re-conveyance—Future date—No present right.*

A right to demand re-conveyance of property sold, at a future date, does not confer any present right in the property. (*Coutts Trotter and Seshagiri Aiyar, JJ.*) NOCHAT KIZHAKKE MADATHIL VENKATESWARA AIYAR *v.* KALLOOR ILLATH RAMAN NUMBUDRI. 3 L. W. 435 : 33 I. C 696 : 19 M L. T. 329.

Construction—Sale certificate.

———*Construction — Sale certificate — Value of.*

Certificates of sale are documents of title and ought not to be lightly regarded or loosely construed. Where there is no ambiguity in the words of a certificate, its object would be defeated, if it were construed by reference to other documents. (*Lord Buckmaster.*) RAMABHADRA NAIDU *v.* KADIRIASAMI NAICKER.
44 Mad. 483 : (1921) M. W. N. 374 : 14 L. W. 125 : 48 I. A. 155 : 63 I C. 708 : 3 U. P. L. R. (P. C.) 83 : 30 M. L. T. 34 (P. C.).

DEED—Construction—Sale certificate.

———*Construction—Sale certificate—Boundaries not mentioned—Effect of.*

Where the boundaries of an estate are not mentioned in a sale-certificate the purchaser takes what was comprised in that estate by its name, at the date of the sale. (*Mookerjee, C.J., Fletcher and Teunon, JJ.*) SECRETARY OF STATE FOR INDIA *v.* NARENDRA NATH MITTER.

61 I. C. 91 : 32 C. L. J. 402.

———*Construction—Sale certificate.*

The test for construction of a sale certificate is what did the Court intend to sell and what the purchaser thought he bought. It has nothing to do with the intention of the decree-holder who sells the property. (*Mullick and Jwala Prasad, JJ.*) GOBIND DAS *v.* DURHAM WAITE.

38 I. C. 451. 1918 P. H. C. C. 333.

Construction—Sale or Contract of sale.

———*Construction—Sale or contract of sale.*

A deed when though described as a contract of sale was registered and distinctly provided that on certain events happening, the property should be regarded as sold to the purchaser who was put in possession in consequence. *Held*, there was a certain transfer in consequence and by operation of the sale deed. (*Chandavarkar and Batchelor, JJ.*) KANDU KANHUJI DHAVDE *v.* KRISHNU MAHASHWAR BHAT. **37 Bom. 53 : 17 I. C. 176 : 14 Bom. L. R. 801.**

Construction—Sale or gift.

———*Construction—Sale or gift—Sale for no consideration—Test to be applied—Intention of parties.*

In the case of an ostensible sale for no consideration the test is was the transaction intended to transfer title. If intended to be operative mere postponement of payment does not matter; if however, operation was intended to be postponed until payment of consideration, transfer becomes operative only on such payment. In any case, the test is the intention of the parties. (*Mookerjee and Beachcroft, JJ.*) KASHIDAS GOSAIN *v.* CHAITHRU PATRAS URAON. **23 I. C. 813 : 19 C. L. J. 239.**

Construction—Sale or lease.

———*Construction—Sale or lease—Terms and conditions.*

A document purported to be a perpetual lease of 5 bighas, 5 biswas and 8 dhurs for a premium of Rs. 493, the rent reserved being Rs. 5-5-0. The lease went on to provide that the lessee, generation after generation, shall be entitled to remain in possession of the leased property as pattadar and would have the right to have his name recorded in the revenue papers as tenant and perpetual pattadar; that he would be liable to pay the rent reserved year after year and instalment after instalment; in the event of the rent falling in arrears, the lessor would have all the rights of an owner with respect to its realisation, but that there would be no right to have the lease cancelled, the rent enhanced or to eject the lessee. It was clear that the lessor and his representatives would for all time to come have the right to recover the rent reserved though it may be small. They would also under the law have the right of reversion in case the line of the lessees became

DEED—Construction—Sale or Mortgage.

extinct. As under the terms of this document the proprietary interest of the lessor had not ceased, there could possibly be no escheat to Government The liability to pay Government revenue rested on the lessor, and he could not escape it.

Held, it could not be open to any of the representatives of the lessee to deny that the transaction was anything other than a lease or to refuse to pay rent. In spite of the direction as to non-enhancement of the rent, it was clear that if at the next settlement the Government revenue were to increase the lessee would be bound under section 49 of the Agra Tenancy Act to submit to an enhancement of rent or to allow the lease to be avoided. So long as these rights are reserved to the lessor it was impossible to hold that this transaction was an out and out sale. (*Lindsay and Sulaiman, JJ.*) BHAIRO TEWARI *v.* RAMNATH RAI. **21 A. L. J. 734 : L. R. 4 A. 529: 1924 A. 60.**

———*Construction—Sale or lease.*

Where a lease deed conferred on the lessee very extensive rights including the right to sink a well or to construct a house and no right of re-entry was reserved, *Held*, that these are sufficient grounds as between parties to the document for holding that the lease is not a lease but a sale. (*Daniels, J.*) INDER DEO RAI *v.* RAM CHARITTER RAI. **1923 A 560.**

———*Construction—Sale or lease—Transfer of proprietary rights—Purporting to be a lease—Nominal — Malikana reserved — Whether amounts to.*

A deed though purporting to be a perpetual lease and even providing for a nominal *malikana* to be paid to the so-called lessor is yet a sale deed, if all the proprietary rights in the land are transferred for the consideration of a substantial sum of money. 136 P. R. 1907, Dist. (*Shah Din and Chevis, JJ.*) AMAR SINGH *v.* SADHOO SINGH.

187 P. L. R. 1914 : 23 I. C. 970 : 115 P W. R. 1914.

———*Construction—Sale or lease—Perpetual lease—Under proprietary right.*

In a deed of grant there were these recitals :— A declaration that it was drawn as a perpetual lease; that the grantee was to be put in possession of a particular share in a village and of all rights thereto ; that the grant was from generation to generation ; that the grantee as lessee was to deposit money with Govt. for malguzari; that the grantee was to pay a sum as Malikana ; that the grantors were to make mutation of names ; and the grantee was to have power of distraint and to sue for arrears of rent and ejectment. *Held*, that all these proved a grant of perpetual lease and not of an under-proprietary right. Where a deed purports to be a lease deed it cannot be construed as a deed of transfer unless there are express words in the deed to indicate the intention of transfer or such an intention could be implied from the language of the grant. (*Lindsay, J. C.*) KALKA SINGH *v.* SURAJ BALY LAL.

45 I. C. 208 : 5 O. L. J. 80.

Construction—Sale or Mortgage.

See also T. P. ACT, S. 58 (*c*).

DEED—Construction—Sale or Mortgage.

——— *Construction—Sale or mortgage—Tests.*

The question whether a transaction is a mere mortgage in the form of sale must depend upon the intention of the parties which may be found in the deed itself or gathered from the circumstances attending the transaction in each case. (*Chatterjee and Panton, JJ.*) MADHAB CHARANDAS *v.* RAJANI MOHAN DAS. **64 I. C. 583.**

——— *Construction—Sale or mortgage.*

Where there is a debt and a security of land for its repayment the arrangement is a mortgage, by whatever name it may be called. (*Das and Adami, JJ.*) HITENDRA SINGH *v.* RAMESHWAR SINGH. **6 P. L. J. 37 : 61 I. C. 67 : 2 P. L. T. 593.**

Construction—Surety bond.

——— *Construction—Surety bond—Personal liability—Signature by directors.*

A surety bond executed by the appellants who are the Directors of the Luxmi Co., Ltd., to the Manager of the Marwar Bank was in these terms: "In consideration of your allowing the Luxmi Co., Ltd., to overdraw sums not exceeding in the aggregate of Rs. 50,000 only (on the security of the Luxmi Co., Ltd., demand pro-note in your favour of date) we hereby pledge for the repayment on demand of the said overdraft, etc., etc. The deed was signed by the appellants. *Held*, that the bond created a personal liability. Any other construction would nullify the object of the security bond. The only materiality of the security bond would be if it gave some new security and some fresh liability, and therefore the natural construction to put upon what is indicated by the use of the imperfect but definite expression "pledge" is that the fresh liability of the three signatories personally was the new security introduced. (*Viscount Haldane, J.*) PANNA LAL *v.* NIHAL CHAND. **43 M. L. J. 66 : (1922) M. W. N. 376 : 26 C. W.N, 737 : 16 L. W. 80 : 36 C. L. J. 5 : 24 Bom L. R 971 : 31 M. L. T. 129 : 2 P. L. R 1922 : 1922 P. C. 46 (P. C.).**

———*Construction—Surety bond—Liability for decree "that might be made by the Appellate Court"*

Where pending an appeal, a person becomes a surety for mesne profits that might be awarded on appeal, his liability continues up to the Privy Council appeal and the decision thereon. (*Lord Phillimore*) RAJ RAGHU BAR SINGH *v.* JAI INDRA BAHADUR SINGH. **42 All. 158 : 22 O. C. 212 : 6 O. L. J. 682 : 18 A. L. J. 263 : 55 I. C. 550 : 22 Bom. L. R. 521 : 38 M. L. J. 302 (P. C).**

———*Construction—Surety bond—Strict construction—Surety till disposal of appeal—Case remanded—Suretyship, if determined.*

Surety bonds must be construed strictly and a surety cannot be held liable beyond the extent to which he has agreed. *Held*, on a construction of the bond that the sureties undertook nothing more than to produce the judgment-debtors on the date fixed for the next hearing, *i.e.*, 19th January, 1914, and, therefore, they were not liable for the non-production of the judgment debtors at a date

DEED—Construction—Two executants.

nearly two years later. (*Chevis, J.*) THAKUR DAS *v.* SHAM DAS. **49 I. C. 438 : 15 P. W. R. 1919.**

——— *Construction—Surety bond—Partnership deed—Interpretation.*

A surety bond executed in connection with a partnership must be read in conjunction with the partnership agreement to which it makes express reference. It should be construed strictly and the surety's liability cannot be extended beyond the period for which he was undertaking liability simply by showing that the partnership was subsequently continued by mutual agreement of the partners to which he was no party, beyond the specified period. (*Johnstone and Rattigan, JJ.*) MAHARAJ KISHEN *v.* HAR GOBIND. **101 P. R. 1914 : 27 I. C 69 : 218 P. L. R. 1915.**

Construction—Surrounding circumstances.

——— *Construction — Surrounding circumstances.*

Where a gift is made by means of a mutation, then in ascertaining the intention of the donor and the nature of the estate conveyed by the gift, the Court is not confined to look to the mutation only but can consider the previous and subsequent circumstances. (*Broadway, J.*) TULASI RAM *v.* MUSSAMAT JAI DEVI. **53 P. L. R. 1919.**

——— *Construction — Surrounding circumstances— Evidence of.*

Where an instrument is ambiguous or contains a description which is imperfect or inaccurate as to existing facts, evidence is receivable of all the circumstances surrounding it for the purpose of throwing light on its interpretation. (*Kanhaiya Lal and Daniels, A. J. Cs.*) ADITYA PRASAD *v.* MUHAMMAD MUBARAK ALI SHAH. **48 I. C. 257 : 21 O. C. 234.**

———*Construction — Surrounding circumstances.*

In construing the terms of a bond it is necessary to look into the intention and the circumstances of the case. Stamp duty paid on the bond on the basis of one year's rent is not a sufficient guide. (*Chapman and Atkinson, JJ.*) GADADHAR PRASAD *v* UMESH CHANDRA CHAKRAVARTHI. **2 P. L. T. 195.**

Construction—Two documents.

———*Construction — Two documents— Same transaction—Separate receipts—Effect.*

Though separate receipts are given for the cost of a site and a building over it, the transactions are not separate. (*Broadway, J.*) ITBAR *v.* WILAYAT. **50 I. C. 922.**

Construction—Two executants.

———*Construction — Two executants— One received consideration—The liability of the other.*

When a deed recites that the consideration money has been paid to one of the two executants, the other executant cannot absolve himself from liability unless he proves that he has received no part of the consideration. (*Lindsay, J. C.*) NANHI KHANAM *v.* MASUMAN. **33 I. C. 746 : 3 O. L. J. 1.**

DEED—Construction—Will and authority to adopt.

Construction—Will and authority to adopt.

——*Construction — Will or authority to adopt.*

Where the operative portion of a deed was "I have been laid up by illness. . . . I have consented to your adopting a son at your pleasure and conduct the management of the estate in best manner. This Will is executed with my consent" *Held*, the document was a mere authority to adopt and not a Will and ought to have been registered. (*Viscount Haldane.*) BHEEMA DEO *v.* KUNJA BEHARI. **48 I A. 482 : 14 L W. 398 : 41 M L. J 648 : 44 M 733 : (1921) M. W. N. 713 : 24 Bom. L. R 600 : 30 M. L. T. 124 : 26 C. W. N. 374 : 1922 P. C. 162 (2) (P. C.)**

——*Construction — Will and authority to adopt.*

Mere authority to adopt though revocable and taking effect on the death of a person cannot be considered a will though the document is styled as such. There must be a disposition of property in addition to the authority to adopt if it is to be treated as a will. A mere direction for management of the property by a manager during minority is not a disposition by will (*Wallis, C.J. and Seshagiri Aiyar, J.*) JAGANNADHA GAJAPATI *v.* KUNJA BEHARI DEO. **25 M. L. T. 204 : 9 L. W. 385 : 49 I. C. 929 : (1919) M. W. N. 52.**

Construction—Will or gift.

——*Construction—Will or gift.*

Where a Mahomedan lady executed a deed by which she purported to give away the whole of a zemindari estate, reserving for herself the usufruct of a portion for her life and directed the donee to pay the Government revenue on the whole from that time : *Held*, the deed was a gift *inter vivos* and not a will. (*Sir John Edge.*) MAHAMMAD ABDUL GHANI *v.* FAKHAR JOHAN BEGAM. **44 A. 301 : 20 A. L. J. 994 : 31 M. L. T. 21 (P. C.) : 25 O. C. 95 : 9 O. L. J. 369 : L. R. 3 P. C. 198 : 24 Bom. L. R. 1268 : 49 I. A. 195 : 27 C.W.N. 53: 43 M.L.J. 453: 1922 P.C. 281 (P.C.).**

——*Construction—Will or gift.*

A document though called a will, if the intention as gathered is to make a transfer in *praesenti* is really a deed of gift. (*Abdul Raoof, J.*) MT. DURGO *v.* PREM SINGH. **74 I. C. 653.**

——*Construction—Will or gift.*

A document styling itself a will in more than one place but not written on a stamp paper in which the beneficiaries are to take only after the death of the executant and no restriction is placed upon them in dealing with the properties, is a will and not a settlement. (*Sadasiva Aiyar and Napier, JJ.*) AIYASAMI UDAYAN *v.* APPASAMI UDAYAN. **28 M. L. J. 542 : 1 L. W 983 : 26 I. C. 249 : (1914) M. W. N. 889.**

——*Construction Will or gift— Date of effect, a decisive test — Name immaterial — Registration Act, S. 17.*

An instrument intended to take effect from the date of execution is a non-testamentary instrument requiring registration under S. 17 of the Registration Act, and not a "will" notwithstanding that that word is used in the instrument. (*White, C. J., Sankaran Nair and Oldfield, JJ.*) KRISHNASWAMI ODAYAN *v.* KAMALAMBAL AMMAL. **22 I. C. 661**

DEED—Construction—Will or gift.

——*Construction—Will or gift—A deed in form is no will except under special circumstances —Appointment of a hukdar under a deed irrevocable.*

If an instrument is a deed in a form, it should not be treated as a will unless there are special circumstances compelling the Court to treat it as a will. By a registered deed A settled certain property on charitable trust and appointed himself hukdar for his life and after him his grandson B. It was *held* that B acquired a vested right to the property which could not be defeated by A before his death. (*Benson and Wallis, JJ.*) MAHADEVA AIYAR *v.* SANKARA SUBRAMANIA AIYAR. **12 I. C. 546 : (1911) 2 M. W. N. 382.**

——*Construction—Will or gift—Intention of executant.*

Some loose words in the document should not be interpreted to alter the obvious intention of the executant. Where a person disposed of his property taking himself to be dead at the time of the execution, the document must be taken to be a *post mortem* disposition of the property. (*Ayling, J.*) *In re* KARADI VEERABHADRAPPA **12 I. C. 175 : (1911) 2 M. W. N. 201.**

——*Construction—Will or gift.*

Where a document styled a gift provided that the donee should not take possession of the properties until after the death of the donor and his wife, the deed *quoad* the properties, is a will and on the death of the donor the donee takes a vested interest subject to a life estate in favour of the donor's wife. (*Kanhaiya Lal, J. C. and Daniels, A. J. C.*) LACHMAN PRASAD *v.* BALDEO PRASAD. **5 O. L. J. 625 : 48 I. C. 396 : 21 O. C. 312.**

——*Construction—Will or gift.*

A person having stated in a document registered as non-testamentary, that he was giving out of love, certain immoveable property to be enjoyed after his and his widow's death, and agreed not to alienate it in the meantime, the document was held not to be devise revocable, but a deed of gift transferring a vested interest in the property. A deed of gift and a deed of will being executed simultaneously, the former will take effect as a gift notwithstanding the executant's reservation in the will of a power of revocation. (*Stuart and Kanhaiya Lal, A.J.Cs.*) DIP NARAIN SINGH *v.* HARGOBIND SINGH. **37 I. C. 69: 3 O. L. J. 525.**

——*Construction—Will or gift.*

Where a document constituted a person representative of the executant and provided that the person should exercise all the powers of a Talukdar and the privileges of the executant, *held* that it could not amount to a will conferring a Taluka in the absence of words of positive bequest and divesting the rights of a legatee under a previous

DEED—Construction—Will or gift.

will. (*Piggott, J. C. and Lindsay, A. J. C.*) MIR SYED HASAN *v.* TAIYABA BEGAM.
26 I C. 547 : 1 O. L. J. 591.

———*Construction—Will or gift.*

A court of title or construction cannot hold that a document alleged to be a Will relied upon as a Will and established as Will in a court of probate is not a Will but a deed of gift The Court may construe the Will and may hold that the executant had no power to make it. (*Das and Bucknill, JJ.*) BRIJKISHORE NARAYAN *v.* HARBANS NARAYAN. 62 I. C. 611 ; 2 P. L. T. 728

Construction—Will or settlement.

———*Construction—Will or settlement—Inconsistent pleas—Costs—Disallowance of—Registration Act, S. 17 (2)—Unregistered instrument—Inoperative as regards land.*

The contest in the case was about the validity and effect of an instrument of 1884 executed in settlement of a dispute between a father and his sons. The pleadings of the parties as regards the character of the instrument were one way in the first Court and the reverse in the lower appellate Court. *Held*, that notwithstanding the conflicting views presented by the appellants, the Privy Council was bound to give effect to the real character of the instrument, but without their costs throughout. *Held*, further that the instrument the effect of which was in contest, was not testamentary but a family arrangement intended to be final and irrecoverable and operative immediately, but void as regards immoveable property for want of registration under S. 17 of the Registration Act. (*Lord Macnaughten,*) UMRAO SINGH *v* LACHMAN SINGH. 33 All. 344 : 14 O C. 133 : 38 I. A. 104 : 15 C. W. N. 497 : 8 A. L. J. 465 : 13 C. L. J 519 : 9 M L. T. 507 : 10 I. C. 285 : 13 Bom. L. R. 404 : (1911) 2 M. W. N. 242 : 21 M. L. J. 637 (P. C.)

Construction—Words.

See also—WORDS AND PHRASES.

———*Construction—Words—'Grant'—Technical English meaning not to be given.*

Words used in connection with legal transactions in India cannot be given the special and technical meaning they possess in England. The word "grant" in India is not to be understood in its technical meaning of a conveyance at common law of *remaindar* and *reversions* incorporeal hereditaments which do not lie in livery or of which livery could not be given. (*Lord Buckmaster.*) SASHI BHUSHAN MISER *v.* JYOTI PRASHAD SINGH DEO. 44 Cal. 585 : 1 Pat. L. W. 361 : 21 C. W. N. 377 : 15 A. L. J. 209 : 32 M. L. J. 245 : (1917) M. W. N. 226 : 40 I. C. 139 : 25 C. L. J. 265 : 21 M. L. T. 303 : 19 Bom L. R. 416 : 6 L W. 2 : 44 I. A. 46. (P. C.)
[Affirming 38 Cal. 845 : 16 C. W. N. 241 : 12 I. C. 482 : 14 C. L. J. 361.]

———*Construction — Words — "Aurasaputra poutradik"—Maintenance.*

Held, that a gift to a person "*aurasaputra poutradik*," for his maintenance excludes female heirs by reason of the family custom of Dharbanga Raj. (*Sir John Edge.*) EKVALESHWAR SINGH *v.* JANESHWARI BAHUASIN. 42 Cal. 582 : 41 I. A. 275 : 18 C. W. N. 1249 : 16 M. L. T. 382 : 1 L. W. 863 : (1914) M. W. N. 807 : 12 A. L. J. 1217 : 25 I. C. 417 : 21 C L. J. 9 : 17 Bom. L R. 18 : 27 M. L J. 373 (P. C.), [Reversing 3 I. C. 207 Cal.].

DEED—Construction—Words.

———*Construction—Words—Question of inference from words used—Distinction between.*

The distinction as to how far a decision upon the contents of a document is a question of law and how far it is a question of fact may be thus stated. The expression "construction' as applied to a document at all events as used by English Lawyers means two things : first, the meaning of the words ; and secondly, their legal effect, or the effect which is to be given to them. The meaning of the words is a question of fact and the effect of the words is a question of law. (*Stuart, J.*) SHEIKH MUHAMMAD SHAKUR *v.* ABDUL GHANI. 1923 All. 362.

———*Construction — Words "arh" and "Mustagharak"—Meaning.*

The use of the words '*arh*' and '*Mustagharak*' do not necessarily imply a power of sale. (*Ryves and Lyle, JJ.*) MOTI BEGAM *v.* HAR PRASAD.
19 I. C. 658 : 11 A. L. J. 570.

———*Construction—Words—"Asmani Sultani," meaning of.*

The phrase "*Asmani Sultani*" means some act such as that of God or of the King's enemies, which is in the nature of a calamity which no person can control. It does not cover all acts of authority speaking in the name of the King and compelling a person to adopt a certain line of conduct independently of the Will of that person. (*Chandavarkar and Batchelor, JJ.*) CHUNILAL *v.* JAFFIR ALLI SPINNING AND WEAVING CO., LTD.
16 I. C. 440 (2) : 14 Bom L. R. 581.

———*Construction—Words — Kar — Meaning of.*

Held on the interpretation of the document in question that an exemption from liability to pay any Kar covered revenue, rent or any kind of tax including road cess. (*Newbould and Cuming, JJ.*) ANNADA CHARAN DE SARKAR *v.* HABIBULLA.
1923 Cal. 283 (1).

———*Construction—Words—Natural meaning to be given.*

The natural and obvious meaning of the words in a deed cannot be refused to be given to them, merely because it is suggested that the words have been inserted in the deed for the purpose of ascertaining and specifying the stamp duty which was to be paid. If that were the object of inserting the words in the deed it ought to have been so stated. (*Sanderson, C. J. and Richardson, J.*) FANINDRA NATH ROY *v.* BHOLA DASSI DEBI.
75 I C. 402 : 38 C. L. J. 21.

———*Construction—Words—Saranjami does not include Govt. Revenue.*

Where an agreement between the *patnidar* and the *zemindar* was that the former should pay a

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yearly rent of Rs. 1,001 besides 'Saranjami' *held* that the *patnidar* was under no liability to pay the Government Revenue. (*Mookerjee, A. C. J. and Fletcher, J.*) BHABANI NATH ROY *v.* PURNA CHANDRA SAR. 25 C. W. N. 308 : 61 I. C. 818 : 33 C. L. J. 332.

——*Construction—Words—"Malik", Meaning of.*

The word "Malik" itself is a term of no special meaning. It may mean proprietary right or it may mean a lessor right superior to that of the actual cultivator of the land, even the ryot who has let his land to an under-raiyat is sometimes called 'malik'. (*Newbould, J.*) SHED AHAMAD *v.* IBRAHIM. 52 I. C. 814.

——*Construction — Words — Conveyance —Dwelling-house—Meaning of.*

The expression "dwelling house" when used in conveyance on partition generally means not only the house in itself but also the land and appurtenances ordinarily and reasonably requisite for its enjoyment. (*Richardson and Walmsley, JJ.*) PRAN KRISHNA BHADURI *v.* KESHA CHANDRA ROY. 45 Cal. 873 : 45 I. C. 604 : 22 C W. N. 515.

——*Construction —Words — Tamleek or Tauliatnama—If contemplates absolute endowment of entire properties.*

A deed described as a *Tam Leek* or a *Tauliatnama* does not contemplate an absolute endowment of the entire property. (*D. Chatterjee and Walmsley, JJ.*) LATIF UNNISSA BIBI *v.* MAJDUNNISSA BIBI. 26 I C. 358.

——*Construction—Words—Money repayable within one year.*

Under a mortgage the principal and interest were to be paid within one year. *Held*, that the case fell within the class in which the mortgage is payable before a certain day, and not within the class where a day is fixed for the payment of the debt. Therefore, the debtor was entitled to pay off the debt on any day within one year 23 M. 35, Rel. 8 A. 95, Dist. (*Harington and Mookerjee, JJ.*) PURNA CHANDRA SARMA *v.* PEARY MOHAN PAL. 39 Cal. 828 : 15 I. C. 287 : 17 C. W. N. 149.

——*Construction—Words*—Pitralaya.

Pitralaya be a deed may include not only the father's house but the brother's house as well. (*Mookerjee and Teunon, JJ.*) BIDHU MUKHI DASI *v.* SATISHCHANDRA BOSE. 9 I. C. 534.

——*Construction—Words—"Malik"—Gift to wife.*

The words "*malik*" or "*malkiyat*" in a formal document imply an absolute estate unless there is something in the context to qualify it, and deeds in favour of females must be interpreted in the same way as any other deeds. (*Scott Smith, J.*) MT. MUHAMMADI *v.* KARAM BAKHSH. 72 I. C. 977.

——*Construction—Words— Aulad— Meaning of.*

Where the words in the compromise were "ruski auladjo hogi wo sab malik hogi", the word "aulad" is used in its generic sense and includes male and female children. 114 P. R. 1900 is a better guidance for the interpretation of the

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words "aulad" than 89 P. R. 1889. (*Le Rossignol and Abdul Qadir, JJ.*) SAIDAN *v.* FAZAL. 1922 Lah. 215.

——*Construction—Words—"Tarka"—Meaning of.*

The Court in construing deeds should endeavour to gather the intention of the parties from the language of the document as a whole and from all surrounding circumstance at the time of execution. A deed purported to convey the *tarka* of a Hindu widow, *held* that the expression "*tarka*" meant the moveable and immoveable property in the widow's possession at the time of her death and not incorporeal rights in a property which were no longer in her possession. (*Shadi Lal and Broadway, JJ.*) JAI RAM SINGH *v.* SUKH DIAL. 39 I. C. 436 : 10 P. W. R. 1917.

——*Construction—Words*—Al Aulad—*Meaning of*

The word '*Al Aulad*' means offspring of any kind and all descendants whether males or females through the male or female line are included in it, 84 P. R. (1909) Rel. (*Robertson and Rattigan, JJ.*) CHANDI *v.* THULLA SINGH. 76 P. R. 1912 : 141 P. W. R. 1912 : 14 I. C. 523 : 161 P. L. R. 1912.

——*Construction—Words* 'Gramattars', *Grant of fishery right to* 'gramattars'—*Claim exclusive by* Mirasdars—*Parties, proper.*

Govt. leased right of fishery for five years to the '*gramattars*' of a village. The plaintiffs sued for a declaration of their exclusive right to the fishery in the two tanks in the village, as the *Mirasdars* of the village and for damages for wrongful enjoyment of the right by the defendants, *i. e.*, the *Ryots*. *Held*, (1) that the '*gramattars*' neither meant *Mirasdars* alone, nor all the inhabitants of the village irrespective of owners of land or not but meant those only of the village community who held lands under the Govt. : (2) that the plaintiff's claim for exclusive right could not be maintained (*Sadasiva Aiyar and Spencer, JJ.*) PARTHASARATHY AIYANGAR *v.* AUTHARI PERIA KUPPA NAICKAN. 38 I. C. 100.

——*Construction—Words—Bond—Time fixed for repayment—Hundi and English dates.*

Under a bond the money was repayable at the end of Jeth 1317, Fasli corresponding to the end of June, 1910. *Held*, that the parties must be taken to have settled that the last day of the Jeth 1317 Fasli was the same as the last day of June 1910 and therefore the suit was within time if filed on 29-6-1916. (*Lindsay, J. C. and Stuart, A J. C.*) BADSHAH KHANUM *v.* BHISHUNATH SINGH. 48 I. C. 332.

——*Construction— Words*—'Bila Lagan'—*Sale of share excluding*—Sir Bila Lagan.

Where a person sold land of a two-anna share excluding *sir Bila Lagan* but the purchaser paid revenue for the whole two-anna share, the reservation of rent by the vendor did not mean that he wanted to remain proprietor of the Sir Land but that he was to remain in possession free of rent. (*Evans, J. C.*) TAJAMUL HUSAIN *v.* RANNAK ALI 13 I. C. 679 ; 15 O. C. 25.

DEED—Construction— Words.

———*Construction—Word– Gift by husband to wife—"Malik" meaning of—Principles of construction– Mokurari lease, if can be granted.*

Where a husband gifts properties to his wife as "*malik*", but the instrument of gift contains limitations as regards alienation and also provisions as regards final devolution, *held*, the intention of the donor was clear, *i.e.*, to provide for the donee and also for the ultimate devolution of the property. The grant is in effect the grant of an ordinary Hindu widow's estate. The absence of a clause restraining the donee from granting a *mokurari* lease, does not lead to the conclusion, she is empowered to grant it. It is always dangerous to construe the words of one document by the construction put upon similar words in another document. All the clauses of the particular document must be looked at and given effect to, ignoring none as redundant or contradictory The word "malik" is not a term of art, and does not necessarily define the quality of the estate taken, but the ownership of whatever that estate may be. (*Coutts and Ross, JJ.*) ASHURFI SINGH *v.* BISESWAR PRATAB NARAIN SAHI 1 P. 295 : (1922) Pat. 70 : 3 P. L. T. 273 : 1922 P. 362

———*Construction—Words–* Putra Poutradikmai—*In Chota Nagpur.*

The words '*Putra poutradik*' in their ordinary acceptance include "female as well as male", heirs where by law the estate would descend to such heirs. 42 Cal. 682, Foll. "*Mai warisan*" adds nothing to this meaning and "*Kayem mokamiyan*" adds nothing to it. The whole phrase means no more than the heir who by law would be entitled to succeed to the estate. Where according to the custom of the locality the words *Putra poutradik* mean only heirs male, it follows that the custom of the locality must be that words "*Putra poutra dhik mai warisan kayem mokamiyan*" mean equally only heirs male. 21 C L. J. 332 (P.C.), Foll. (*Roe and Coutts, JJ.*) PUROHIT BROJOKISHORE RAM *v.* MAHARAJAH KUMAR JAGAT MOHAN NATH SAHI DEO. 5 P. L. J. 265 : 58 I. C. 486 : 1919 Pat 209.

———*Construction—Words—Asli Mai Dakhili —Meaning.*

Where a village is described in the sale certificate as "*Asli Mai Dakhili*" it includes both the main village and also villages appurtenant thereto. A decree-holder need not particularize by name in the sale proclamation all the villages which are *Dakhili* or appurtenant to a main village, he should simply say *Mouza Ali Dakhili*. 16 W. R 149 Rel (*Mullick and Jwala Prasad, JJ.*) GOBIND DAS *v.* DURHAM WAITE. 38 I. C. 451: 1918 Pat. 333.

Execution.

———*Execution— Registration — Presumption —Consideration—Burden of proof.*

Held, further that where a deed is registered in a regular way there can be no doubt that the executant had executed it and was a party to its registration. In a suit for redemption brought by the purchasers of the equity of redemption, the sale-deed was a registered document and contained an admission of the executant that full consideration had been paid but the mortgagee contended that the sale deed was without consideration and valueless. *Held*, that the burden was on the executant of the deed and on people claiming under him to prove that what apparently happened did not happen. *Held*, also, that when a deed of sale has once been executed and registered it can be only avoided by a subsequent registered transfer. (*Lord Phillimore.*) MUNSHI EHTISHAM ALI *v.* JAMNA PROSAD.

48 I A. 365 : 64 I. C. 299 : 24 C. C. 272 (P. C.).

DEED—Execution.

——— *Execution—Date—Presumption.*

There is a general though not conclusive presumption that a document was made on the day of the date it bears. (*Sir Lawrence Jenkins,*) MINA KUMARI BIBI *v.* BIJOY SINGH.

44 Cal. 662 . 1 Pat. L W. 425 : 5 L. W. 711: 21 C. W. N. 585 : 21 M.L,T. 344 : 15 A. L. J. 382 : 25 C. L. J. 508 : 19 Bom. L. R 424: 44 I. A. 172 : 40 I. C. 242 : (1917) M. W. N. 473 : 32 M. L. J. 425 (P. C.).

———*Execution.*

Admission of signature or thumb impression on a blank paper does not amount to an admission of execution. (*Ratique and Lindsay, JJ.*) PIRBHU DAYAL *v.* TULARAM. 20 A. L. J 672 : 1922 All. 401.

———*Execution—Signature—Some of the executants signing document—Effect.*

Where the names of some of executants of a document do not appear at the top, the question arises whether the party not having signed the document regularly at the foot yet meant to be bound by it as it stood or whether it was left so unsigned because he refused to complete it. But when it is ascertained that he meant to be bound by it as a complete contract, the signature is for purposes of execution effective. (*Mookerjee and Cholzner, JJ.*) J. D. EZEKIEL *v.* ANNADA CHARAN SEN. 50 C. 180 : 36 C. L. J. 109 : 1923 Cal. 35.

——— *Execution—Signature.*

The place and manner of signature of a document are immaterial provided that the signature is inserted in such a manner as to authenticate the document. Where the instrument is in the handwriting of the party to be charged, it is sufficient if his name is inserted at the commencement. The document is operative though not signed by the executant. (*Mookerjee and Beachcroft, JJ.*) GANGARAM AGARWALA *v.* LACHIRAM KISEN DYAL. 28 I. C. 705 : 19 C. W. N. 611.

———*Execution—Genuineness—Meaning of.*

"Genuineness" used with reference to a document means that not merely the document is duly executed but that it is an operative document. (*Jenkins, C. J. and Chatterjea, J.*) BIBI BAKHTUN *v.* AHMAD ISHAQUE. 27 I. C. 1.

——— *Execution—Non-appearance to admit, i amounts to denial.*

It is doubtful if the non-appearance of a party to admit execution of a document is equivalent by itself to a denial of executiou. (*Abdal Raoof and Moti Sagar, JJ.*) UTTAM SINGH *v.* MT. RUTTAN DEVI. 5 Lah. L. J. 217 : 1924 Lah. 28.

DEED—Execution.

———*Execution—Effect on note—Executants—Estoppel*

Where it was found that the apoellants were majors at the time the deed of gift was executed and that they were wrongly described as minors in the deed of gift in question. *Held*, that they never joined in executing the deed of gift and cannot be bound by any alienation effected in favour of the plaintiff-respondent's father without their permission and consent. (*Moti Sagar, J.*) CHHITRU *v.* CHHAJJU. **1923 Lah. 611.**

———*Execution—By some of the parties—Effect of.*

The construction to be put on a special transaction must depend upon the intention of the parties as inferred from their acts and conduct. It was held that a mortgage which was intended to be executed by all the sharers but actually executed by some of them only, was inoperative and conveyed no interest. (*Rattigan, C. J.*) KISHAN DAYAL *v.* RODU. **53 I. C. 813.**

———*Execution—Proof of—Suspicion*

A document, executed a year before the stamp paper (on which the agreement is written) purports to have been purchased, and proved only by the scribe, is suspicious. The facts that the suit for possession of purchased land is brought thirteen years after its purchase and no mutation of names was effected, render the whole transaction of sale doubtful (*Shah Din, J.*) GANESHI LAL *v.* DERA SINGH. **16 I. C. 684 (1) : 138 P. W. R. 1912.**

———*Execution — Priority — Two mortgage documents of the same date.*

Where it has been impossible to decide which of two mortgages bearing the same date was executed first it is not open to either of the mortgagees to claim priority over the other but both must rank *pari passu* as if both of them had been executed at the same time. (*Wallis, C. J and Oldfield, J.*) KUTTI THEVAN *v.* KAYAPPA GOUNDEN. **14 L. W. 422 : 65 I. C. 961 : (1921) M. W. N. 703.**

———*Execution—Validity.*

A deed is not ineffective though some persons who are subsequently shown to have no title to the property have joined in the execution. An erroneous recital of the vendor's title in a sale-deed cannot be relied on as not passing his real title to the property. (*Napier and Krishnan, JJ.*) ARUMUGAM PILLAI *v.* PANDIGAM AMBALAM. **40 M. L. J 475 : 29 M. L. T. 255 : 13 L. W. 416 : 62 I C. 630 : (1921) M W. N. 255.**

———*Execution—By some of the parties only—Effect of.*

The mere fact of execution of a deed by one of the several parties does not bind him conclusively, when that has been done on the assumption that all shall execute. (*Abdur Rahim and Oldfield JJ.*) SUBRAMANIA IYER *v.* KALYANASUNDARAM IYER. **53 I. C. 283.**

———*Execution—Execution by some of the parties only.*

DEED—Execution.

A document intended to be executed by more than one person may be construed as evidencing a contract by some only who have signed the deed. 39 M. 597. Ref. (*Ayling and Seshagiri Aiyar, JJ.*) NATESA IYER *v.* SUBRAMANIA IYER. **23 M. L. T. 307 : 45 I. C. 535 : (1918) M. W. N. 703.**

——*Execution—Signed by two out of three persons.*

It is a question of intention in each case whether a document drawn up for execution by several persons was to be operative only if all should execute it, or otherwise. 25 M. 389, Ref. (*Spencer and Coutts Trotter, JJ.*) NETHIRI MENON *v.* MULLAPULLI GOPALAN NAIR. **39 Mad. 597 : 18 M. L. T. 220 : 2 L. W. 714 : 30 I. C. 713 : (1915) M. W. N. 586 : 29 M. L. J. 291.**

——*Execution—Recital that three persons are executants — Execution by only two—Enforceability.*

Where a bond contains a recital purporting to have been executed by three persons but is in fact executed by two alone, its enforceability against the actual executants will depend upon the intention of the parties and circumstances of the case. 25 M. 389 : 31 M. 114. (*Sadasiva Aiyar and Tyabji, JJ.*) BANGARASAWMY AIYANGAR *v.* SOMASUNDARAM CHETTIAR. **16 M. L. T. 102 : 1 L. W 584 : 27 I. C. 161 : 27 M. L. J. 176.**

———*Execution—Signature some time after writing.*

The mere fact that a document is signed and attested a few days after it is written out, does not invalidate it or alter its legal effect. (*Kanhaiya Lal and Lyle, A. J. Cs.*) NAZIR BIBI *v.* RAM KATAN. **54 I. C. 877 : 6 O. L. J. 691.**

———*Execution—Touching pen and handing it over to writer.*

Where an illiterate executant of a deed touches the pen and then hands it over to a literate person and asks him to sign the deed on his behalf, this is sufficient to constitute the execution of the deed. (*Kanhaiya Lal, J. C. and Daniels, A. J.C.*) SATROHAN SINGH *v.* GANGA BAKSH SINGH **6 O. L. J. 39 : 49 I. C. 375 : 1 U. P. L R. (J. C.) 24**

———*Execution—Proof of — Collateral evidence in a suit—Quantum of proof.*

Where a deed is filed merely for a collateral purpose, it need not be proved with the same formalities as when it is sought to enforce its provisions in a suit. (*Kanhaiya Lal, J. C. and Daniels, A. J. C.*) LACHMAN PRASAD *v.* BALDEO PRASAD. **21 O. C. 312 : 48 I. C. 396 : 5 O. L. J. 625.**

———*Execution—Admission of— Effect of—Evidence, sufficiency of.*

Where in a suit by a mortgagee on a mortgage-deed executed in full satisfaction of the amounts, the mortgagors admitted its execution but pleaded non receipt of the money and the

DEED—Execution.

execution of the previous deed was proved. *Held*, that the evidence of the execution of the previous deeds, with further admission of the existence of the debt, was sufficient for proving the existence of the antecedent debts. (*Kanhaiya Lal, A. J. C.*) NARAIN SINGH *v.* KUSTAM SINGH.
33 I. C. 777 : 3 O. L. J. 23.

———*Execution—Essentials — Admission of execution—Signing on blank paper.*

Execution of a document consists in signing a document written out and read over and understood and does not consist of merely signing a name upon a blank sheet of paper To be executed, a document must be in existence ; where there is no document in existence there cannot be execution Where an executant clearly says that he signed on a blank paper the document which he contemplated, the statement is a denial, not an admission, of execution. 6 C. W. N 329, Dist. (*Roe and Jwala Prasad, JJ.*) EBADUT ALI *v.* MUHAMMAD FAREED.
(1917) Pat 40 :
35 I. C. 59 : 3 P. L. W. 226.

——— *Execution—Document embodying terms of an agreement.*

An agreement signed by one party only is a document embodying terms of an agreement. It becomes an agreement when signed by both parties. (*Crouch, A. J. C.*) J. LEUZ *v.* LAL CHAND.
19 I. C. 925 : 6 S. L. R. 278.

Material alteration.

———*Material alteration—Suit on.*

Original debt is not extinguished by a material alteration if the same can be proved to have not merged in the bond, in which case an action can be brought on the debt apart from the bond. (*Newbould and Rankin, JJ.*) DULA MEAH *v.* MOULAVI ABDUL RAHAMAN.
28 C. W. N. 70 :
1924 Cal. 452

———*Material alteration—Suit on original consideration—Maintainability.*

Though a bond is materially altered by an addition to the amount due thereunder, the plaintiff could succeed on proof of the loan by independent evidence and obtain a decree for the amount of the loan. 5 C. W. N. 56, Ref. (*Newbould and Panton, JJ.*) KHOSAL MAHOMED *v.* AMIRUDDIN MAHOMED PRAMANIK.
1923 Cal. 318.

———*Material alteration—Effect of.*

A material alteration of an instrument is one which causes it to speak a language different in legal effect from what it originally spoke. The alteration must change the legal identity or character of the instrument. It is the effect of the Act upon the instrument and not the particular manner in which it is done, that is material. The alteration must be in a material part of the instrument and must also affect the rights and obligations of the party thereto. An alteration of a document after its execution and registration in good faith to carry out the original intention of the party does not vitiate the instrument,

DEED—Material alteration.

25 C. L. J. 155 ; 33 Cal. 812 ; 18 C. L. J. 354, Foll. (*Mookerjee and Buckland, JJ.*) KRISHNA *v.* NAGENDRABALA.
26 C. W. N. 942 :
66 I. C. 694 : 34 C. L. J. 338.

———*Material alteration — Interpolation of clause for payment of compound interest.*

The addition of a clause for payment of compound interest if made without the knowledge and consent of the mortgagor avoids it. (*Mookerjee and Beachcroft, JJ.*) ACHYUTANUNDA BHATTACHARYA *v.* RAM NATH BHATTACHARYA.
21 I. C. 79 : 18 C. L. J. 354.

———*Material alteration—Consent — Estoppel.*

A mortgage deed was presented for registration more than four months after its execution but to enable it to be registered the date was altered by the mortgagor, the mortgagee consenting to the alteration. *Held*, that the mortgagor was estopped from setting up the alteration as an answer to the claim of the mortgagee. The mortgagor's lessee who took the lease subsequent to the alteration was equally estopped. The matter would have been different if the lessee had been defrauded. (*Harrington and Mookerjee, JJ.*) GOPAL CHANDRA CHARRAVARTI *v.* SURENDRA KUMAR ROY CHOWDHURY.
15 I. C. 480 : 16 C. W. N. 585.

———*Material alteration.*

A suit based on a document which has been materially altered so as to cast liability on a party should be dismissed. (*Beadon, J.*) GANGA NATH *v.* TAJA.
28 P. W R. 1914 :
23 I. C. 596 : 70 P. L R. 1914.

———*Material alteration.*

Unless there is any contrary evidence, and any note by the Registrar about it any alteration or interpolation in a document is presumed to have been made before its registration. (*Abdur Rahim and Moore, JJ.*) RAMANATHAN CHETTIAR *v.* MUTHUKUMARU.
12 L. W 754 :
58 I. C. 849 : (1920) M. W. N. 487.

———*Material alteration—Rights of parties.*

Where a document containing the terms of the contract between plff and deft. was materially altered by plff. without the knowledge of the deft. and the payment of advance was acknowledged on the same piece of paper by the deft. *Held*, on breach of contract by deft. that the plff., though he cannot recover damages under the contract, is entitled to recover the advance under S. 65 of the Contract Act treating the contract as void. (*Spencer and Krishnan, JJ.*) KANDREGULA ANANTHA RAO PANTULU *v.* KANDIKONDA SURAYYA.
38 M. L J. 256 :
(1920) M. W. N. 187 : 11 L. W. 390 : 55 I. C. 697 :
27 M. L. T. 134.

———*Material alteration—Enforcement of.*

A material fraudulent alteration vitiates a contract and it cannot be enforced at the instance of the party making the alteration. Any one who has received a benefit or advantage under a void contract is bound to make it good. (*Sadasiva*

DEED—Material alteration.

Aiyar and Spencer, JJ.) CHITTURI SURAYYA *v.* BADURAMAYYA. (1915) M. W. N. 150 : 28 I. C. 57 : 17 M. L. T. 160.

——*Material alteration—Effect on rights*

Any material alteration in a document after its execution and without the privity of the party to be affected by it, is fatal to its validity and the right of action based thereon is destroyed. (*Prideaux, A. J. C.*) PANDURANG *v.* KISHAN. 19 N. L. R. 79 : 1923 Nag. 295.

——*Material alteration—No knowledge by party affected.*

A document is vitiated and deprived of all its effect by the making of a material alteration in it without the knowledge of the party affected thereby. (*Hallifax, A. J. C.*) GANGA PERSHAD *v.* MOTIRAM. 1922 Nag 191

——*Material alteration.*

Where a bond being signed by some of the intending executants, the addition of the signature of others afterwards is not such a material alteration of the document as to vitiate it against him who did execute it. (*Hallifax, A. J. C.*) RAMACHANDRA *v.* RUPRAO. 64 I. C. 726 : 4 N. L. J. 270

——*Material alteration.*

Per Jwala Prasad, J.—A document is not void by the mere addition of an executant's name. It is not a material alteration. A suit not based on a materially altered document which is tendered as evidence of a pre-existing debt will not fail owing to the alteration. (*Chamier, C. J. and Jwala Prasad, J.*) BABULAL *v.* JADUNATH JHA. 33 I. C. 417.

——*Material alteration—What is.*

Because a man alters a figure in a document, it is no forgery ; nor is document materially altered because there is something in a different ink to the rest of the document, (*Maung Kin, J.*) BICHAY SUKUL *v.* BEHARI SUKUL. 43 I. C. 488 : 11 Bur. L. T. 1.

——*Material alteration--Suit based upon it—Use of for collateral purpose*

A document becomes vitiated if there is a material alteration of the date A suit based upon such a document must fail The party who presents such an instrument which was an essential part of his case in an apparently altered and suspicious state must fail from the mere infirmity or doubtful complexion of the proof unless he could satisfactorily explain the existing state of the document. The altered document though it cannot be made the basis of a suit may be used for the collateral purpose of proving the acceptance of the terms 33 C. 812, Dis. (*Pratt, J. C. and Rawcett, A. J. C.*) TAHIL RAM *v.* J. A. BLACKWELL. 19 I. C. 616 : 6 S. L. R. 228.

DEFAMATION.

See TORT—DEFAMATION.

DEFAULT.

See C. P. CODE, O. 9.

DEFENCE OF INDIA ACT (IV OF 1915), R. 23.

DEFEASANCE CLAUSE.

See HINDU LAW—ADOPTION.

DEFENCE.

——*Contract capable of specific performance—If can be set up—Part performance.*

Contract capable specific performance can be set up as part performance. *Schwabe, C.J., Coutts-Trotter and Krishnan, JJ.*) VIZAGAPATAM SUGAR DEVELOPMENT COY. *v.* MUTHURAMAREDDY. 45 M. L. J. 528: 1924 M. 271 (F. B.).

——Limitation.

See LIMITATION ACT, S. 3.

DEFENCE OF INDIA ACT (IV OF 1915).

——S. 2—*Rules under.*

Offences created by R. 2 are triable by ordinary Criminal Courts in the manner provided by the Cr. P Code in the absence of a notification creating special tribunals for the trial under the defence of India Act. An acting Dt. Magistrate can sanction a prosecution in all cases where a District Magistrate can sanction it (*Sadasiva Aiyar and Napier, JJ.*) KANDASAMY PILLAI, *In re.* 42 Mad. 69: (1918) M W.N. 856 49 I. C. 161 : 20 Cr. L J. 129 : 24 M. L. T. 505 : 35 M. L. J. 736.

——S. 4—*Power of Governor-General in Council to create Courts—New tribunal*—Ultra vires *enactment.*

S. 22 of the Indian Councils Act read with S. 9 of the High Courts Act, 1851, is wide enough to empower the Governor-General in Council to create new tribunals such as those contemplated in S. 4 of the Defence of India Act. 4 Cal. 172, Foll. If an enactment of the Indian Legislature is outside the powers conferred on the Governor-General in Council by Act of Parliament, the High Court can in proper proceedings declare such an enactment to be *ultra vires.* (*Miller, C. J., Chapman, Mullick, Roe and Atkinson, JJ.*) PARAMESWAR AHIR *v.* EMPEROR, 4 P. L W 157 : 19 Cr. L J. 281 : 3 P. L. J. 537: 44 I. C. 185 : (1918) Pat. 97 (F. B.).

——Ss. 8 and 11—*High Court—Superintendence over—Commissioners appointed under the Defence of India Act.*

The special tribunals created under the Defence of India Act are independent of and not subject to the superintendence of the High Court. (*Miller, C. J., Mullick and Ali Imam, JJ.*) SHEO NANDAN PRASAD *v.* EMPEROR, 19 Cr L J. 838: 3 P. L. J. 581 : 5 P. L. W. 324 : 46 I. C. 977 : (1919) Pat 1 (F. B.)

——Rr. 23 and 29—"*Dissuade or attempt to dissuade*"—*Meaning of—Acts already done—Accused not given option under* S. 191, *Cr. P. C. under Ch XVI—Irregularity.*

The Defence of India Act confers exceptional powers on the authorities and a strict compliance with its terms is essential A tenant of the accused was recruited for military service. Subsequently the accused sued him for arrears of rent, *viz.*, Rs 30 15-0. The tenant made a statement before the Dt. Magistrate whereupon he directed warrants without bail to issue for the

DEFENCE OF INDIA ACT, (IV OF 1915), R. 25.

arrest of the accused and summons for certain witnesses. The Dt. Magistrate took up the case himself, framed a charge and convicted the accused under R. 29 of the rules under the Defence of India Act. *Held*, that the proceedings of the Dt. Magistrate were irregular in their initiation, because the Magistrate did not give the accused option of being tried by another Court, as he was bound to do, if he was taking cognizance of the offence upon information received under S. 191 (c) of the Cr. P. C. If the tenant's statement was a complaint the Magistrate ought to have taken from him a sworn declaration of its truth before issuing warrants. R. 23 did not apply inasmuch as no person could dissuade another from doing something which the latter had already done. (*Piggott, J.*) MAHADEO SINGH *v.* EMPEROR. **41 A. 164 : 48 I. C. 483 : 20 Cr. L. J. 8 : 16 A. L. J. 895.**

——(Consolidation)—R. 25, Sub-rules 1 and 2 —*Report and challan by Police on the direction of the Dt Magistrate—Conviction—Superintendent of Police—Delegation.*

A conviction under R. 25 of the Defence of India rules is not bad in law merely on the ground the Police put up a challan before the Dt. Magistrate acting on his direction to make an enquiry. The Supt. of Police is competent to authorise any of his subordinates to make the enquiry or lodge the information. (*Broadway, J.*) KHUSHAL SINGH *v.* EMPEROR.
2 Lah. L. J. 707 : 25 Cr L. J. 234 : 1923 Lah. 335.

——R. 30—*Melting of sovereigns—Attempt —Consent mentioning accused by name without reference to offence—Prosecution.*

The written consent of the authority specified in R. 30 of the Rules is essential to sustain a conviction. The accused is entitled to an acquittal, where the consent under R. 30 is silent about him. The consent in question is not inoperative as regards an accused though the nature of the proceedings to be initiated against him is not specified. The accused is guilty of attempt to melt sovereigns where the only act that remained unperformed to complete the offence was the final act of putting the sovereigns in the crucible. (*Heaton and Shah, JJ.*) EMPEROR *v.* ABU HASAN.
21 Bom. L. R. 747 : 52 I. C. 597 : 20 Cr. L. J. 677.

DEGRADED WOMAN.

See (1) HINDU LAW—MAINTENANCE.
(2) HINDU LAW—STRIDHANAM.
(3) HINDU LAW—SUCCESSION.

DEITY.

See HINDU LAW—RELIGIOUS ENDOWMENT.

DEKHAN AGRICULTURISTS' RELIEF ACT (XVII of 1879).

——— Ss. 1, 3 and 11—*Applicability of—Agriculturist in other provinces—Extension of Act—Meaning of*

The Dekhan Agriculturists' Relief Act is not applicable to an agriculturist who earns his livelihood wholly and principally by agriculture at Dera Ghazi Khan, outside the Bombay Presidency or at any place to which the Act has not

DEKHAN AGRICULTURISTS' RELIEF ACT (XVII OF 1879), S. 2.

been extended. What is meant by the extension of an Act to a district is, the extension of a substantial portion of the Act and not merely the extension of a particular section or one or more sections. 44 B. 217 ; 4 B. 360. Rel. (*Raymond, A. J. C.*) FIRM OF AYA RAM TOLARAM *v.* FIRM OF RAI HIT RAM. **66 I. C. 682.**

——— S. 2—*Agriculturist—Income from district where Act does not apply is not to be considered.*

Income from lands not in a district, to which the Dekhan Agriculturists Relief Act applies cannot properly be treated as income, from agricultural sources, but must be treated as non-agricultural income for to constitute a person as "an agriculturist" for the purposes of the Act he must earn his livelihood principally by agriculture carried on within the limits of a district to which the Act applies. (*Pratt and Fawcett, JJ.*) VAMANACHARYA KAMACHARYA *v.* GOVIND MADHAVACHARYA. **25 Bom. L. R. 826 : 1924 Bom. 33.**

——— S. 2—*Agriculturist — Test of Joint family.*

If a family is joint, the only way to test if the members are agriculturists is to ascertain what is the joint income of the family provided they are living together. If the income from the land cannot amount or falls far short of the real income, they are not agriculturists within the meaning of the Act. (*Macleod, C. J. and Crump, J.*) NARAYAN BAPULAL *v.* SONUSINGH. **1923 Bom. 383.**

——— S. 2 (2nd)—*Agriculturist.*

If a person deriving the greater part of his income from land by sale of the crops (including fruit) must be deemed an agriculturist under the Act. The test is whether the income is derived from the produce of the land and not the quantum of labour bestowed in getting the crops. (*Macleod, C. J and Shah, J.*) HIRALAL RAVCHAND *v.* PARBHULAL SAKHIDAS.
23 Bom. L. R. 796 : 1922 Bom. 146.

——— S. 2—*Finding that a party is agriculturist—Appeal*

The finding that a party is an agriculturist is not an adjudication resulting in a decree and hence no appeal lies from such finding although the plaint may be returned for presenting an application to draw up such a finding in the form of decree. (*Macleod, C. J. and Fawcett, J.*) DATTATRAYA PURSHOTTAM *v.* RADHABAI BALKRISHNA.
45 Bom. 627 : 60 I. C. 885 : 23 Bom. L. R. 92.

——— S. 2—"*Agriculturist*"—*Meaning of—Act not in force.*

Where the Agriculturists Relief Act was not in force in the District at the time the document was executed, the person was not an agriculturist within S. 2 of the Act. (*Scott, C. J., Heaton and Macleod, JJ.*) SAWANTRAM *v.* GIRIAPPA.
38 Bom. 18 : 21 I. C. 4 : 16 Bom. L. R. 778 (F.B.).

——— S. 2—*Agriculturist—Meaning of*

A person who ordinarily engages personally in agricultural labour within the defined limits is an agriculturist within the meaning of the Act though his strictly agricultural income is much less than

his income from another source as for instance a pastoral source. (*Batchelor and Rao, JJ.*) BHIKHA *v.* RAICHAND. **37 Bom. 398 : 18 I C. 380 : 15 Bom. L. R. 68.**

——S. 2—*Suit by Court of Wards.*

A suit by the Court of Wards on behalf of a ward, an agriculturist is governed by the Dek. Agr. Relief Act. A rich agriculturist is as much an agriculturist under the Act as a petty agriculturist. (*Batchelor and Rao, JJ.*) MANOHAR *v* COLLECTOR OF NASIK. **37 Bom. 97 : 17 I. C. 670 : 14 Bom. L. R. 943.**

——S 2—*Agriculturist—Scholarship.*

A scholarship or a stipend of a student is not money earned by working for livelihood and it should be excluded in determining whether a person is an agriculturist or not. (*Russell and Chandavarkar, JJ.*) PARVATI BAI *v.* YESHWANT KRISHNA. **36 Bom. 199 : 12 I. C. 919 : 13 Bom. L R. 1204.**

——S. 2—*'Agriculturist'—Inamdar.*

The income derived from tenants by an Inamdar as an assignee of Govt. revenue cannot be taken into account when determining whether the Inamdar derives his income principally from agriculture and thus is an agriculturist within the meaning of Dekhan Agriculturists Relief Act. (*Scott, C. J. and Batchelor, J.*) KASHINATH *v.* VINAYAK. **35 Bom. 266 10 I. C. 814 : 13 Bom. L R 242.**

——S. 2—*Agriculturist—Essentials.*

In order to be an agriculturist all that is required is that his livelihood should be acquired mainly by agriculture even though it be by his servants or tenants. Wealth and social position cannot exclude a man from the definition. (*Batchelor and Rao, JJ.*) NARASANGJI *v.* RANCHODBHAW. **9 I. C. 929 ; 13 Bom. L. R. 109.**

——S. 2—*Wife of agriculturist.*

The circumstance that she is the wife of an agriculturist does not constitute her an agriculturist within the meaning of the Act as she does not earn her livelihood by agriculture. (*Batchelor and Rao, JJ.*) RADHABAI *v.* RAMCHANDRA. **35 Bom. 204 : 9 I. C. 351 : 13 Bom. L. R. 30.**

——S. 2 (1)—*Agriculturist —Gosavis— Wandering beggars—Presumption—Mendicancy.*

Plffs. Gosavis had no lands of their own at the date of the suit but purchased some thereafter. *Held*, that plffs were not agriculturists, for they adduced no proof to bring themselves under the first part of the definition. They could not take advantage of the second branch inasmuch as they being Gosavis, the presumption would be, that their ordinary occupation was that of mendicancy. (*Chandavarkar and Batchelor, JJ.*) NAVALPURI *v.* BALA. **36 Bom. 543 16 I. C. 341 : 14 Bom. L. R 566.**

——S. 2 (1) (b)—*Agriculturist—Grantee of watan.*

Where a Sanad evidencing the grant of a village as a service watan without demand of service did not grant anything more than a share of the revenue and provided that in certain cases

the grant may be converted into private property, and a question having arisen as to whether the grant was one of the soil and whether the holders were agriculturists. *Held*, that the grant was a grant of a share of the revenue and not a grant of the soil and the holders were not agriculturists in view of S. 2, Expl (*b*) of the Act. (*Beaman and Hayward, JJ.*) CHUNILAL *v.* BHANUMATI **36 Bom. 151 : 12 I. C. 727 : 13 Bom. L. R. 1053.**

——S. 2 (2)—*Agriculturist—Minor son of agriculturist—Livelihood by agriculture.*

The minor son of an agriculturist is not an agriculturist within S. 2 (2) of the Act. Dependence for livelihood upon another who is an agriculturist is not the same thing as earning livelihood for oneself by agriculture. To earn livelihood by agriculture is to obtain the means of livelihood by it. 19 B. 255 Foll. (*Chandavarkar and Batchelor, JJ.*) DAGDU *v.* MIRA SAHEB. **36 Bom. L. R. 496 : 15 I. C. 827 : 14 Bom. L. R. 385.**

——Ss. 2 (4) and 64—*Money—Cattle.*

Cattle being included in 'Money,' a creditor receiving bullocks from agriculturists is bound to give a receipt. (*Heaton and Shah, JJ.*) EMPEROR *v.* GOVIND BALAJI BOBDE. **27 I. C 178 : 16 Cr. L. J. 114 : 16 Bom. L. R. 683.**

——Ss. 3, 12 and 13—*Suit for redemption—Setting aside of a consent decree and a prior sale deed as fraudulent—Scope of the Act.*

A suit to redeem a mortgage under the provisions of the Act by setting aside as fraudulent a consent decree between the parties, whereby the mortgaged properties were freshly mortgaged and a sale deed of a part of the mortgaged property was executed in favour of the mortgagee is outside the Act. (*Batchelor, A. C. J. and Shah J.*) VINAYAK RAO *v.* SHAM RAO. **40 Bom. 655: 36 I, C 72: 18 Bom. L. R 708.**

——Ss. 3 (w) and 10—*Suit for money--Appeal.*

A suit for money spent on behalf of the deft. agriculturist is one under S. 3 and there is no appeal from the decision of the First Court under S. 10. (*Scott, C. J. and Hayward, J.*) SITARAM *v.* SHRI KANDOBA. **39 Bom. 165: 26 I. C. 606: 16 Bom. L. R. 756.**

——S. 3 (y)—*Scope of.*

Under S. 3 (y) read with S. 10-A, the intention of the legislature seems to be that the nature of the suit under Cl. (y) should not be determined by the frame of the plaint but by the allegations of the parties which raised the question of mortgage. (*Scott, C. J. and Heaton J.*) GAUTAM JAYA CHAND *v.* MALHARI BAPU. **40 Bom. 397 34 I. C. 406: 18 Bom. L. R. 247.**

——Ss. 3 (z), 12 and 13—*Suit for redemption—Prayer to set aside a sale-deed as fraudulent—Suit outside the scope of the Act.*

A suit to redeem a mortgage under the provisions of the Dek. Agr. Rel. Act with a prayer for cancellation of a sale-deed subsequently executed by plff.'s mother of some of the mortgaged lands to defts. is outside the scope of S. 3 (z) of the Act, because the suit is not a suit for redemption

but is a suit primarily for the setting aside of a fraudulent sale. (*Batchelor, A C. J. and Shah, J.*) CHANDA BHAI JANUBHAI *v.* GANPATI PATILBOA.
36 I. C. 517: 18 Bom. L. R. 763.

——S. 10-A—*Suit by ward after majority—Transaction a sale and not mortgage—Limitation Act, Art.* 44.

More than 3 years after a minor attained majority, he brought a suit declaring that a transaction entered into by his mother was not a sale but a mortgage. *Held*, he had a right to do it under S. 10-A of the Act, and the suit would not be governed by Art. 44, Lim. Act. (*Shah, A. C. J.*) SHIVBASAPPA NINGAPPA *v.* BALAPPA BASAPPA.
25 Bom. L R. 1209: 1924 Bom 172.

——S. 10-A—*Sale or mortgage—Oral evidence—Admissibility of—Suit for partition.*

For S. 10-A of Dekhan Agri. Relief Act to be applicable it is only necessary that an agriculturist must be a party to the suit and that some transaction shall be in issue entered into by such agriculturist or the person, if any, through whom he claims, which shall be of such a nature that the rights and liabilities of the parties thereunder are triable wholly or in part under Chapter III of the Act. S. 10-A is not limited to suits mentioned in S. 3, cl. (*w*) (*y*) or (*z*). (*Macleod, C. J. and Coyajee J.*) HALLAPA KALLAPPA *v.* IRAPPA GIRI MALLAPPA. 24 Bom. L. R 406 1922 Bom. 415.

——S. 10-A.

Although the first suit for declaration that a sale was in reality a mortgage is dismissed a second suit on independent satekhat is not barred. (*Macleod, C. J. and Shah, J.*) DOLA KHETAJI *v.* BALYA KANOO. 24 Bom L. R. 236 : 46 B. 803 : 1922 Bom. 29.

——S. 10-A—*Second proviso*—Bona fide *transferee within* 12 *years.*

The second proviso does not protect a *bona fide* transferee for value without notice of the real nature of a transaction if he holds under a deed registered and executed within 12 years of the receipt of the suit. (*Macleod. C J. and Heaton, J.*) PRANJIVANDAS *v* MIA CHAND BAHADUR.
22 Bom. L R. 1123 : 59 I. C 418 ; 45 B. 87.

——S. 10-A, Illustrations (a) and (c)—*Leases and sale deeds misnamed mortgages.*

Illustrations (*a*) and (*c*) of S. 10 A show that the legislature intended to apply the section to suits by a money lender to enforce either a lease

or sale-deed against an agriculturist although the instrument sued on, was really according to the intention of the parties in the nature of a mortgage. (*Scott, C. J. and Heaton, J.*) GAUTAM JAYA CHAND *v.* MALHARI BAPU. 40 Bom 397 : 34 I. C. 406: 18 Bom. L. R. 247.

——S. 10-A—*Document in form of sale deed—Suit for redemption as if on mortgage—Evidence as to intention.*

Under S. 10-A of the Act to enjoy the special benefit of the favoured class in disregarding the provisions of S. 92 of the Evidence Act, if the person belonged to the favoured class as defined by the Act at the date of transaction. 36 Bom. 305 Overruled. (*Scott, C. J., Heaton and Macleod, JJ.*) SWANTRAVA FAKIRAPPA *v.* GIRIYAPPA FAKIRAPPA. 38 Bom. 18 : 21 I C. 4 : 15 Bom. L. R. 778 (F. B).

Overruling. (*Russel and Chandavarkar, JJ.*) GOPAL *v.* RAJARAM. 36 Bom. 305: 13 I. C. 851: 14 Bom. L. R. 14.

——S. 10-A—'*Any other law for the time being in force*'—Ejusdem Generis—*Rule of.*

The words "any other law for the time being in force" in S. 10-A. of the Act must be read *ejusdem generis* with the words referring to S. 92 of the Evidence Act, and do not include the Registration Act. S. 10-A was only intended to remove restrictions standing in the way of pursuing the inquiry beyond the written words, but when the enquiry is opened, the court is, as usual, bound by the ordinary laws of evidence or otherwise. (*Batchelor and Heaton, JJ.*) GOPAL PARSHOTTAM *v.* MORAR PUNJA. 20 I. C. 249 : 15 Bom. L. R. 555.

——S. 10-A—*Procedural law—Retrospective effect.*

The law embodied in S. 10-A of the Act is one of procedure and applies to pending proceedings being retrospective in effect. (*Russell and Chandavarkar, JJ.*) GOPAL *v.* RAJARAM. 36 Bom 305: 13 I. C 851 : 14 Bom. L. R. 14 : [overruled in 21. I. C. 4]

——S. 10-A—*Sale—Contemporaneous agreement to retransfer—Kabuliat—Evidence Act,* S. 92.

Defendant executed a sale deed in favour of plaintiff. At the same time there was an oral agreement to reconvey on payment of purchase-money, and an unregistered kabuliat was executed subsequently embodying the terms of the agreement. In plaintiff's suit for possession, defendants pleaded that the transaction was only a mortgage. *Held*, S. 10-A of the Dekhan Agriculturists Relief Act, empowers a court, notwithstanding the provisions of S. 92 of the Evidence Act, to inquire into and determine the real nature of such a transaction. The plaintiff whose title is based on the sale deed, cannot succeed, if defendants prove the transaction to be only a mortgage. (*Kennedy, J. C. and Raymond, A. J C.*) HAMBIRKHAN *v.* MURIJMAL. 15 S. L R. 160: 1922 Sind 39.

——S. 10-A—*Retrospective effect—"Agriculturist at date of transaction."*

S. 10-A of the Act is retrospective. A person is not entitled to the benefit of the section unless he

was earning at the time of the transaction his livelihood from agriculture in a District to which the Act applied. (*Pratt, J.C. and Crouch, A.J.C.*) BILAMAL *v.* CHYTHRAM.

19 I. C. 729: 6 S. L. R. 245

———S 11—*Suit in the Court of the Judicial Commissioner — Deft agriculturist residing within the jurisdiction of another Court.*

A suit for maintenance and deferred dower was brought in the Court of the Judicial Commissioner, Sind. When at a late stage of the proceeding, the deft. pleaded that he was agriculturist residing within the Kotri Sub-judge's jurisdiction, and that the case was therefore only triable in the latter Court, plff. replied that notwithstanding the provisions of S. 11 the suit should be tried in the Court of the Judicial Commissioner as a Court of concurrent jurisdiction: *Held*, that in view of S.15, C.P.C. and of S. 11 of the Act, the suit must be instituted and tried in the Court of Sub Judge, Kotri. (*Hayward, A. J. C.*) HAYTU *v.* GHULAM HUSSEIN SHAH. 10 I. C. 980 : 4 S. L. R. 264.

———Ss. 11 and 20—Ex parte *decree—Execution proceedings—Application for instalments.*

A decree for money was obtained *ex parte* on the Original Side of the Bombay High Court against the defendant who was described as a merchant in the plaint. During the course of the execution of the decree deft applied for instalments on the ground he was an agriculturist. *Held*, that the defendant could not raise the plea that he was an agriculturist in execution proceedings as the point must be deemed to have been decided against when the original side of the High Court entertained the suit and decreed it. If he were an agriculturist the High Court would not have had jurisdiction to entertain the suit and as the deft. was not an agriculturist at the date of the decree he could not raise the plea in execution proceedings. 37 B. 486 Ref. (*Shah, A. C. J. and Crump, J.*) MULJI PURSHOTTAM *v.* GOVERDHAN DASS. 24 Bom. L. R. 1291: 1923 Bom. 36.

———Ss. 12, 13 (d) and 13 A—*Extraordinary relief—Form and substance of suit different.*

The Act gives extraordinary relief in a suit for redemption. But such relief cannot be granted in a suit which is in form one for redemption, but in reality a suit to recover property of which the rightful owner has been deprived by fraud. (*Lord Macnaghten*). BACHI *v.* BIKHCHAND JIOMAL.

13 C. L. J. 69 : 8 A. L. J. 105 : 13 Bom. L. R. 56: 9 M. L. T. 199 : 15 C. W. N. 297 : 21 M. L. J. 89 : 9 I. C. 393: (1911) 2 M. W. N. 59 (P.C.).

———S. 12—*Reopening of compromise.*

Admission of claim by a defendant does not preclude a court from going behind the admission and inquiring into its nature. (*Macleod, C. J. and Shah, J.*) GOBIRAM RADHAKISHAN *v.* BARKUDODHU.

46 B. 560 : 24 Bom. L. R. 88 : 1922 Bom. 331

———Ss. 12, 13—*Instalment bond—Failure to pay instalments—Accounts under the Act—Amount due under bond less than amount due under accounts—Result.*

Where money under a mortgage bond is payable by instalments, but as a result of default, a suit

is brought and accounts are taken under the provisions of the Dekhan Agriculturists Relief Act, but the figures arrived at are much large than the amount ordinarily due under the bond itself, *held* the Act being to protect agriculturist the party cannot be made to pay the bigger amount as a result of his seeking relief under the Act. (*Macleod, C J. and Shah, J.*) VITHALDAS BHAGWANDAS *v.* MURTAJA HUSEIN. 46 Bom 764 : 24 Bom. L. R 267 : 1922 Bom. 201.

———Ss. 12 and 13—*Accounts—Taking of—C. P. C., O. 21, R. 83—Mortgage passed in satisfaction of decree—Sanction of Court—Effect of.*

The sanction of a Court to a mortgage in satisfaction of decretal debt cannot interfere with the jurisdiction of the Court conferred by the Act to enquire whether the principal sum shown in the mortgage consisted partly of interest. (*Beaman and Hayward, JJ.*) KISANDAS *v* RAMCHANDRA.

12 I. C. 589 : 13 Bom. L. R. 1009.

———S. 12—*Applicability of — Retrospective effect.*

Though the right of taking accounts mentioned in S. 12 cannot be given effect to so as to have retrospective effect, this rule ought not to be applied so as to defeat a suit under S. 17, merely because the creditors had, previous to the enactment of the legislature, instituted suits against an agriculturist. (*Batchelor and Roe, JJ.*) NARSANGJI *v.* RANCHHODBHAI. 9 I. C. 929 : 13 Bom. L. R. 109.

———Ss. 12 and 13—*Onus.*

The custom throughout the Dekhan is to put the onus on the creditor in an inquiry under ss. 12 and 13 of the Act if such course is indicated by the comparative positions in life and mental powers of the parties. (*Hayward, J. C. and Boyd, A. J. C.*) BIKCHAND *v* VERHOMAL.

25 I. C. 924 : 8 S. L. R. 57.

———S. 13—*Applicability to traders.*

It is inequitable that a trader should be entitled to the advantages of the Act, simply because, he happens to carry on agriculture, along with his trade and his agricultural income exceeds the trade income (*Macleod, C. J. and Shah, J.*) NARAYAN *v.* CHAPSI.

64 I. C. 1002 : 23 Bom. L. R. 1186.

———S. 13—*Object of directing accounts.*

The object of directing accounts to be taken under the Act, is to ascertain how much of the amount secured by a bond, is principal and how much interest. It is not competent to a Court to award on account of principal any sum in excess of the amount of the mortgage-deed. (*Macleod, C. J. and Shah, J.*) RAGHUNATH *v.* RAMCHANDRA.

64 I. C. 928 : 23 Bom. L. R. 1098.

———S 13—*Mortgage— Account, mode of taking—Evidence, absence of*

Where a mortgage is admitted the plff. should not be made to lose everything because he cannot go back far enough to distinguish what is principal and interest. Where in taking an account under S 13, the Court forms, in the absence of exact data, a reasonable estimate of the probable amount of the actual principal. There can be no

legal objections to the estimate being accepted. (*Macleod, C.J and Fawcett, J.*) KHONDAN DAMU *v.* INDRACHAND BACHARAJ. 5 Bom. 323 : 59 I. C. 576 : 22 Bom. L. R. 1299.

——S. 3—*C. P. Code, O. 2. R. 2—Suit on one of several simultaneous mortgages—Account taken only in respect of one mortgage — Subsequent suit on another mortgage.*

To secure the balance found due by the defts. to the plffs. in several transactions the defts. executed to the plff simultaneously 3 mortgages and he latter sued on one of the mortgages and the account taken therein was limited to the particular mortgage sued on and subsequently the plff. brought a suit on the 2nd mortgage, *held*, that an account taken by the Court under S. 13 of the Act is taken from the earliest of the preceding transactions between the parties to the suit and is continued right up to the date of the suit and that the suit was barred under O 2, R 2, C. P. Code. (*Macleod, C.J. and Heaton, J.*) DALUCHAND BALARAM *v.* APPI KHEMA SASTE. 45 Bom. 55 : 59 I. C. 347 : 22 Bom. L. R. 1093.

——S. 13—*Accounts—Separate transactions amounting to one set of dealings.*

In the years 1885, 1891 and 1895, the plffs. passed a usufructuary mortgage and simple mortgages respectively in favour of the defendant. At the time of each successive advance the former was not paid off and the transaction was still open to the parties. *Held*, that accounts should be taken of the whole series of transactions between the parties as if they were one entire transaction. (*Macleod, C. J. and Fawcett, J.*) GURUNATH KESHAV KALKUNDRI *v.* SADASHIV BALAKRISHNA DESHPANDE.

22 Bom L. R. 1190 : 59 I. C. 217 : 45 B. 216.

——S. 13—*Redemption suit — Taking of account.*

In a suit by mortgagor for redemption of several connected mortgages to the same mortgagee, the accounts taken under S. 13 of the Act should embrace all the mortgages which were involved in the same security. 7 Bom. 185 and 14 Bom. 19, Dist. (*Scott, C. J. and Beaman, J.*) DHONDI *v.* REVAPPA. 40 Bom. 453 : 39 I. C. 631 : 19 Bom. L R. 276.

——S. 13—*Mesne profits after suit—Watan property—Mortgage of—Adverse possession.*

A mortgagee of a watan property remains a mere mortgagee even though he may be in possession for more than 12 years, unless he has expressed any definite intention to claim as an absolute owner. Mesne profits after the date of the institution of redemption suit cannot be decreed against the mortgagee under the Act. This does not lead to a presumption that the mortgagee is not entitled apart from the Act, to possession after the date of the institution of the suit. (*Scott, C. J. and Shah, J.*) RAMCHANDRA *v* KALLO.

39 Bom. 587 : 30 I. C, 396 : 17 Bom. L. R. 630.

——S. 13, cl (c)—*Repeal of S. 257 A. of C. P. C. (1882), if affected by.*

S. 13, cl. (c). of the Act cannot be regarded as repealed in consequence of the repeal of S. 257-A.

of the old C. P. Code. (*Chandavarkar and Heaton, JJ.*) TRIMBAK *v* ABAJI. 35 Bom. 307 : 11 I. C. 553 : 13 Bom. L. R. 508.

——S. 13 (d)—*Suit for accounts—Decree debt—Consideration for the mortgage, if can be split up—If Court can go behind decree.*

In a suit for accounts of a mortgage under the Act, the consideration for which was a decree debt made up of principal and interest, the Court cannot go behind the decree and resolve the decree debt into principal and interest under S. 13 (*d*) of the Act, inasmuch as the original interest had been converted into principal, not by any contract between the parties but by a decree. 7 B. 330 Rel. (*Batchelor, C. J. and Kemp, J.*) GUNDO *v.* MAREPPA. 43 Bom. 1 : 46 I. C. 166 : 20 Bom L. R. 469.

——S. 15—*Decision that plaintiff is an agriculturist is not a preliminary decree.*

A finding on an issue whether a party to a suit was an agriculturist prior to taking accounts under the provisions of Dekhan Agriculturists' Relief Act is not a preliminary decree within the meaning of Ss. 2 and 97 of C. P. C. 17 Bom. L. R. 324 ; 23 Bom. L. R. 92 Foll. (*Macleod, C. J. and Kanga, J.*) JAISHINGRA MADHARAU RANU *v.* VENKATARAO SATWJI RAO. 1922 Bom. 336 (2).

——S. 15-B—*Decree under—If to be made absolute.*

A mortgage decree passed under S. 15-B of the Dekhan Agri. Relief Act should be subject to change. (*Shah, A. C. J. and Crump, J.*) SUKLYA JAIRAM PATIL *v.* SUKLAL MOTICHAND VANI. 25 Bom. L R. 1214 : 48 Bom. 172 : 1924 Bom. 169.

——S. 15-B—*Instalment decree—Grant of in favour of a person not an agriculturist at the time.*

S. 15-B of the Dekhan Agriculturists' Relief Act does not empower the Court to grant instalments under a decree to a person who at the time of the decree was not, but has thereafter become an agriculturist. (*Macleod, C. J. and Coyajee, J.*) DEVU JETHIRAM GULJAR *v.* REVAPPA SATAPPA 24 Bom. L. R. 370 : 1922 Bom. 220.

——S. 15-B—*Consent decree—Court cannot alter.*

A Court cannot alter the terms of a consens decree A consent decree made without complying with the special provisions of S. 15-B it not bad in law. (*Macleod, C. J. and Shah, J.*) MADHAV *v.* APPAJI. 45 Bom. 1123 : 62 I. C. 634: 23 Bom L. R. 503.

——S. 15-B—*Scope of.*

S. 15 B of the Act applies only where the Court, in its discretion, directs that the amount due shall be payable by instalments, and it cannot be applied by analogy whenever a compromise is entered into Therefore a compromise in a mortgage suit governed by the Act, under which upon failure to pay two instalments, the whole of the mortgaged property may be brought to sale, is not unlawful or contrary to public policy. (*Scott, C.J Beaman and Shah, JJ.*) SHIVAYAGAPPA *v.* GOVINDAPPA. 37 Bom. 614 : 20 I. C 969 : 15 Bom. L. R. 687.

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——S. 15-B—*Future interest on decree.*

S. 15-B of the Act does not negative a decree-holder's right to future interest allowed by the general law. (*Chandavarkar, A. C. J. and Batchelor, J.*) SAKHARAM *v.* DAGADU.

16 I. C. 998 : 14 Bom. L. R. 739

——Ss. 15-B and 3 (v)—*Decree in terms of award on reference without intervention of Court—Nature—Power of Court to modify.*

A decree for sale in terms of an award on reference without the Court's intervention is not a decree in a suit for sale contemplated by S. 15 (*b*) read with S. 3 (*v*) of the Act and no relief can be granted under the former section (*Chandavarkar and Heaton, JJ.*) GOVIND RAO *v.* AMBALAL

35 Bom. 310 : 11 I. C. 366 : 13 Bom. L. R. 352.

——S. 15-B—*Benefit of—Right to.*

A dett. agriculturist cannot in execution of an award filed under S. 525 of the old C. P. Code get the benefit of S 15-B of the Act. (*Pratt, J. C. and Fawcett, A. J. C.*) HASSOMAL *v.* KHUSHIRAM.

19 I C. 564 : 6 S. L. R. 209.

——S. 15-B (1)—*Mortgage.*

There is no necessity for decree absolute in the case of a decree under the Dekhan Agriculturists' Relief Act. An application for making decree absolute should be treated as a step-in-aid of execution. (*Macleod, C. J and Shah, J.*) HIRACHAND KHEMCHAND *v.* ABA LALA PATIL.

24 Bom. L. R. 269 : 46 B. 761 : 1922 Bom. 95.

——S. 15-B (1)—*Payment of redemption money with interest from date of suit till payment—Mesne profits.*

A redemption decree passed under the Act, 1879, directed the mortgagor to pay in instalment the mortgage amount with interest at six per cent, from the date of suit and ordered the mortgagee to account for profits received from the date of the suit till restoration of possession to mortgagor *Held*, that the directions as to payment of interest and the accounting for mesne profits were proper. (*Macleod, C.J.*) MAHAMAD *v.* SHAIKH MAHOMED.

44 Bom. 372 : 55 I. C. 557: 22 Bom. L. R 124.

——S. 15-B (1)—*Mortgage—Final decree.*

In the case of mortgage, on failure to pay the instalments ordered according to S. 15-B (1) of the Act, the holder of decree for sale need not apply under O. 34, R 5 (2), C. P. C., to make the decree final before applying for sale of a necessary portion of the property under R. 5 (2) of the Act. (*Batchelor and Shah, JJ.*) KASHINATH *v.* RAMA.

40 Bom 492 : 37 I. C. 255 : 18 Bom. L. R. 475.

——Ss. 15-D and 16—*Mortgage transaction—Subsequent money dealing — Mingling of acounts.*

A mortgagor agriculturist is not allowed to import the relief by way of redemption under S. 15-D into his claim for account under S 16 and thus obtain the benefit of surplus profit remaining in the hands of the mortgagee under the usufructuary mortgage. (*Scott, C.J. and Beaman, J.*) LAXMANDAS *v.* BABAN.

39 Bom. 73 : 27 I. C. 59 : 16 Bom. L. R. 671.

DEKHAN AGRICULTURISTS' RELIEF ACT, S 22.

——S. 20—*Applicability of.*

S. 20 does not apply to the case of a person who was an agriculturist when the decree was obtained, whatever his status may be thereafter when execution is taken out against him. (*Heaton and Roe, JJ.*) BALCHANDRA *v* CHUNNILAL.

37 B. 486 : 19 I. C. 901 : 15 Bom. L. R 387.

——S. 22—*Immoveable property of agriculturist—Attachment and sale in execution of money decree—Exemption—Limits of.*

The result of S. 22 is that when immoveable property is sought to be attached in execution of a money decree, and it is found that at the time of attachment such property belongs to an agriculturist, then it shall be free from the attachment. But it does not follow that such protection continues when the agriculturist to whom the property belongs dies and the property goes into the hands of his heir or legal representative who is not an agriculturist. The section denotes that the only question to be decided when immoveable property is sought to be attached for a money decree, is whether at that time it belongs to an agriculturist or not, and it is not permissible to read into the section any further words so as to make the section read that property should still be protected from attachment if it once belonged to an agriculturist judgment-debtor, although it has passed by inheritance or otherwise into the hands of a person who is not an agriculturist. The object of the section was to protect in the hands of an agriculturist immoveable property belonging to him from which he derived the greater part of his income and the necessity for such protection is at once removed when such property passes into the hands of a person who is not an agriculturist. (*Macleod, C. J. and Shah, J.*) MARUTI BABAJI TOTRE *v.* MARTAND NARAYAN KULKARNI.

47 B. 44 : 24 Bom. L R 749 : 1922 Bom. 213.

——S. 22—*Agriculturist's house—Exemption not confined to contractual debts.*

The exemption is not confined to contractual debts and applies to execution of an order under S 144, C. P. C. (*Batchelor and Hayward, JJ.*) MAHADEV *v.* RAM TUKARAM.

40 Bom. 194 : 31 I. C. 305 : 17 Bom. L. R. 962.

——S. 22—*Sale in contravention—Absence of plea—Effect.*

A mortgaged his property to *B* while he was an agriculturist. Subsequently the property was sold in execution of a money decree to *C*, who sold it to *B* as there was no plea under S. 22 A suit for redemption relying on S. 22 was dismissed on the ground that *A* did not raise the plea of being an agriculturist. (*Scott, C. J. and Chandavarkar, J.*) NARAYAN *v.* GOWBAI.

37 Bom 415 : 19 I. C. 691 : 15 Bom. L. R 278.

——S. 22—*Devolution of estate of agriculturist under Muhammadan Law does not override section.*

The mere devolution of the estate of a deceased agriculturist, according to Muhammadan Law, to his heirs has not the effect of overriding the prohibition in S 2- of the Act against the sale in execution of the immoveable property of an agriculturist. Crops raised by the legal representative of a deceased agriculturist judgment debtor

cannot be attached in execution as the deceased's property. (*Fawcett, J. C. and Raymond, A. J. C.*) CHOITHRAM KALIANDAS *v.* LALBUX,
63 I. C. 310 : 15 S. L. R. 47.

——S. 22—*Application for execution of an order—Arbitration Act, S.* 15.

S. 15 of the Arbitration Act makes an award directly enforceable as a decree of Court, and therefore an application to execute the award is not an application in execution of an order within S. 22 of the Dek. Agri. Rel. Act. (*Fawcett, J.C. and Kennedy, A. J. C.*) UDHAV DAS *v.* UKAMAL FATAMAL 60 I. C 942 : 14 S. L. R. 217.

——S. 22 (2)—*Execution of decree for money against agriculturist—Death of judgment-debtor—Liability of heirs.*

Where an agriculturist against whom a money decree had been passed dies no order can be passed under S. 22 (2) of the Dekhan Agri. Rel. Act against the immoveable property in the hands of the heirs of the deceased. (*Macleod, C. J. and Crump, J.*) HIRACHAND MOTICHAND *v.* HANSABAI GANPAT RAO. 47 Bom. 527 : 25 Bom. L. R. 76 : 1923 Bom. 190.

——S. 30—*Decree for excess amount is bad—Object of directing accounts.*

A Court could not decree an amount in excess of the principal of the mortgage-deed 10 Bom. L. R. 7 5. Com. The object of directing accounts is to ascertain how much of the amount secured by the bond is principal and how much is interest. But once a creditor has taken a bond then he can in no case recover in a suit more than the principal amount with interest. (*Macleod, C. J. and Shah, J.*) RAGHUNATH *v.* RAMACHANDRA.
64 I. C. 923 : 23 Bom. L. R. 1098.

—— ——Ss. 39 and 48—*Conciliator's certificate—Deduction of time.*

A pronote was executed by a deft. in plff's favour. The plff. applied for a certificate to the conciliator under the Act. He granted a certificate accordingly ; but after that the plff and the deft. agreed to compromise, and made a joint application to the conciliator, who having held the previous certificate, useless, granted a new one in terms of the joint application. The plff. afterwards brought a suit. *Held*, that the proceedings before the conciliator from the date of first application for the previous certificate to the date of the grant of a fresh one on the joint application, were continuous and so pltf.'s suit is within time as he must get the deduction of that period from the usual period prescribed for his suit. (*Chandavarkar and Batchelor, JJ.*) DEVIDAS *v.* VITHALDAS, 36 Bom. 183 : 12 I. C. 925 : 13 Bom. L. R. 1183.

——Ss. 43, 44 and 45—*Award by conciliator not accepted by the court—Suit on award does not lie.*

Plff. a mortgagee from an agriculturist, with a view to enforce his mortgage applied for a certificate to the conciliator. Subsequently the parties agreed to have their dispute settled by arbitration and appointed the conciliator as their arbitrator. He made an award on the same day the plff. applied to the court for filing the award

and a decree thereon but the court refused to file the award after hearing the other side. The plff. thereupon sued to enforce the award, *Held*, that having regard to Ss. 43 to 45 of the Dekhan Agriculturists' Relief Act the award could not be treated as a valid award. (*Shah, A. C. J.*) SAKHARAM MARUTI *v.* RAJMAL GIRDHARLAL.
47 Bom. 298 : 25 Bom. L. R. 52 : 1923 Bom. 173.

——Ss. 47 and 48—*Limitation—Conciliator's—Certificate—Deduction of time.*

Time spent in obtaining a conciliator's certificate the mortgagor being an agriculturist, ought to be deducted in computing limitation for a suit by a person against a person and the mortgagor where the mortgagor is a necessary party. (*Chandavarkar, C. J. and Batchelor, J.*) EKNATH *v.* DAGDURAM. 36 Bom. 624 : 17 I. C. 87 : 14 Bom. L. R. 750.

——S. 48—*C. P. C., S. 48—Deduction of time spent in obtaining certificate.*

The time occupied in obtaining the conciliator's certificate under S. 48 of the Act must be excluded in computing the period of limitation prescribed by S. 48 of the C. P. C. (*Batchelor, A. C. J. and Shah, J.*) SHIDDAYA *v.* SATAPPA.
42 Bom. 367 : 45 I. C. 494 : 20 Bom. L. R. 360.

——S. 48—*Limitation—Exclusion of time in obtaining conciliator's certificate—Mode of computation.*

In computing the period of limitation, the time to be excluded according to S. 48 must be reckoned by days and the days between the day of the application and the day of grant of a certificate are to be excluded. (*Scott, C. J. and Beaman, J.*) APPAJI *v.* THALEGAUDA.
27 I C. 101 : 16 Bom. L. R. 661.

——S. 48—*Limitation.*

The limitation prescribed for a suit or application of the kind referred to in S. 48 of the Dek. Agr. Rel. Act is 12 years. (*Scott, C. J. and Batchelor, J.*) DAYRAM *v.* LAXAMAN.
10 I. C. 910 : 13 Bom. L. R. 264.

——S. 53—*Revision—District Judge.*

Under S. 53 of the Act, the Dt. Judge alone has power to revise and not the Sub-Judge of First Class. (*Scott, C. J, and Hayward, J.*) SITARAM *v.* SHRI KANDOBA. 39 Bom. 165 : 26 I. C. 606 : 16 Bom. L. R. 756.

——S. 71—*C. P. Code, O. 21, R. 2—Compromise by natural guardian of minor decree-holder.*

After the death of a decree-holder leaving a widow and a minor son the judgment-debtor compromised with the widow as the minor's natural guardian and paid her the money. The guardian appointed by the Court applied for execution. *Held*, that O. 21, R. 2 did not apply that the Court must see whether the compromise was for minor's benefit and if it was not, it should be disregarded and the money actually paid should only be taken into consideration. (*Macleod, C.J, and Shah, J.*) CHHAGANLAL KALIDAS *v.* FARASRAM KURNASHANKAR. 45 Bom. 1128 : 62 I. C. 219 : 23 Bom. L. R. 473.

DEKHAN AGRICULTURISTS' RELIEF ACT, S. 71.

——S. 71—*Decree based on award—Section does not apply.*

S. 71 does not apply to decrees based on award. (*Kinoaid, J..C. and Kennedy, A. J, C.*) SOJHRO *v.* CHANGAMAL. 63 I. C. 238 : 15 S. L. R. 77.

——S. 72 — *Limitation — Agriculturist—Status—Cause of action—"Person," meaning of.*

The word "person" in S. 72 is equivalent to the word delt., which occurs in S. 2, cl (*w*) of the Act. The son of an agriculturist though not born on the date of the mortgage bond is still an agriculturist. 'Cause of action' means the whole bundle of facts necessary for plff. to prove. (*Batchelor and Hayward, JJ.*) PIRRAPPA *v.* ANNAJI. 17 Bom. L. R. 974 : 32 I. C. 495 : 40 Bom. 189.

DELAY.
See (1) ACQUIESCENCE.
(2) EVIDENCE ACT, S. 115.
(3) LIMITATION ACT, S. 5.
(4) SPECIFIC RELIEF ACT, S. 22.

DELIVERY.
CONTRACT ACT, S. 108.
MAHOMEDAN LAW—GIFT.
RAILWAYS ACT, S. 72.
See TR. P. ACT, S. 122.

DEMOLITION OF BUILDING.
See (1) ACQUIESCENCE.
(2) MUNICIPAL ACTS.

DEMONSTRATIVE LEGACY.
See (1) HINDU LAW—WILL.
(2) WILL

DENIAL OF TITLE.
See T. P. ACT, S. 111.

DEPOSIT.
See (1) C. P. CODE, O. 21, Rr. 84 AND 89,
(2) T. P. ACT, S. 83.

DEPOSITORY.
See LIMITATION ACT, ART. 145.

DEPOSITION.
See EVIDENCE.

DEPOSIT OF TITLE-DEEDS.
See T. P. ACT, S. 59.

DESAI INAM.
See GRANT INAM.

DESCENDANTS.
See HINDU LAW—SUCCESSION.
MAHAMEDAN LAW—SUCCESSION.

DESCRIPTION OF PARTY TO SUIT.
See C. P. CODE. O. 1, R. 10.

DESCRIPTION OF WITNESS.
See EVIDENCE.

DESHGAT VATAN.
See (1) BOMBAY VATAN ACT.
(2) C P. CODE, S. 60.
(3) GRANT.

DETERMINATION OF TENANCY.
See (1) LANDLORD AND TENANT.
(2) LEASE.
(3) T. P. ACT, Ss. 105, 117.

DISPOSSESSION.

DEVASTAVIT.
See (1) EXCUTOR,
(2) PROBATE AND ADMINISTRATION ACT, S. 146.

DEVASTHAN.
See HINDU LAW-RELIGIOUS ENDOWMENT.

DHARMA.
See (1) HINDU LAW—RELIGIOUS ENDOWMENT,
(2) MAHOMEDAN LAW—RELIGIOUS ENDOWMENT.
(3) TRUST.
(4) TRUST ACT.

DHARMADA.
See HINDU LAW—WILL.

DHARMAKARTA.
See HINDU LAW—RELIGIOUS ENDOWMENT.

DICTA
See PRACTICE—PRECEDENT.

DIGWARI.
See LAND TENURE.

DILUVION.
See (1) ALLUVION AND DILUVION,
(2) BENGAL ALLUVION AND DILUVION REGULATION XI OF 1825.
(3) RIPARIAN RIGHTS.

DIRECTORS.
See COMPANY.

DISABILITY.
See HINDU LAW—WIDOW—SUCCESSION.

DISAPPEARANCE.
See EVIDENCE ACT, Ss. 107 AND 108.

DISCIPLINARY JURISDICTION.
See (1) CONTEMPT
(2) LEGAL PRACTITIONER,
(3) LEGAL PRACTITIONER'S ACT.
(4) LETTERS PATENT.

DISCONTINUANCE OF POSSESSION.
See (1) ADVERSE POSSESSION.
(2) LIMITATION ACT, ART. 142.

DISCOVERY.
See C P. CODE, O. 11.

DISCRETION.
See (1) PRACTICE.
(2) SP. REL, ACT, S. 22.

DISCRETIONARY RELIEFS,
See SP. REL. ACT, S. 42.

DISHONEST INTENTION.
See (1) EVIDENCE.
(2) EVIDENCE ACT, Ss. 14 AND 15.

DISHONOUR—HUNDI.
See NEG. INSTR. ACT, Ss. 91—98.

DISMISSAL FOR DEFAULT.
See C. P CODE, O 9, R. 8.

DISMISSAL FROM SERVICE.
See MASTER AND SERVANT.

DISMISSAL OF SUIT.
See C. P. CODE, O. 9, R. 8.

DISPOSSESSION.
See (1) ADVERSE POSSESSION.
(2) LIMITATION ACT, ARTS. 142—144.

DISQUALIFICATION.

See HINDU LAW—SUCCESSION.

—— ——To give evidence.

See EVIDENCE ACT, S. 118.

DISQUALIFIED HEIR.

See HINDU LAW—SUCCESSION.

DISSOLUTION OF MARRIAGE.

See (1) DIVORCE ACT.
(2) HINDU LAW—MARRIAGE—(a) DISSOLUTION, (b) DIVORCE.
(3) MAHOMEDAN LAW—DIVORCE.

DISSOLUTION OF PARTNERSHIP.

See (1) CONTRAC ACT, CH. XI.
(2) PARTNERSHIP.

DISTANT KINDRED.

See MAHOMEDAN LAW, SUCCESSION.

DISTINCT SUBJECTS.

See COURT FEES ACT, S. 17.

DISTRAINT.

See (1) B. T. ACT.
(2) DEKHAN AGRICULTURISTS REL. ACT.
(3) LANDLORD AND TENANT.
(4) MADRAS ESTATES LAND ACT.

DISTRESS.

See (1) B. T. ACT.
(2) DEKHAN AGRICULTURISTS RELIEF ACT.
(3) LANDLORD AND TENANT.
(4) MADRAS ESTATES LAND ACT.

DIVERSION.

See (1) EASEMENTS.
(2) EASEMENTS ACT.

DIVESTING OF ESTATE.

See HINDU LAW—ADOPTION—SUCCESSION.

DIVISION.

See HINDU LAW—JOINT FAMILY—PARTITION.

DIVORCE.

See (1) DIVORCE ACT.
(2) HUSBAND AND WIFE.
(3) RESTITUTION OF CONJUGAL RIGHTS.

DIVORCE—Costs.

—— *Costs—C.P.C*, S. 35.

Even although a wise defence fails or her counter-charges break down or she has been proved guilty of adultery the husband has to pay her costs (*Walsh and Stuart, JJ.*) PARICK NORMAN DWYER *v.* MARY CECILLA DWYER.
1922 All. 243.

DIVORCE ACT (IV OF 1869).

—— **Ss. 2 and 7—*Jurisdiction—Non-domiciled parties.***

Per Macleod, C. J. :—Jurisdiction in matrimonial causes was not based on a so called matrimonial domicile when the Indian Councils Act was passed in 1861.

The Indian Divorce Act does not confer jurisdiction of the Courts to dissolve the marriages of non-domiciled parties. Relief not involving the status of the parties may be granted under the Act if the conditions of residence is satisfied. Undoubtedly a country by its Municipal Law may lay down its own tests for creating jurisdiction within its own boundaries even in cases where the status of the parties is involved. When the

DIVORCE ACT (IV OF 1869), S. 2.

jurisdiction of the Court is exercised according to the rules of International Law, as in the case where the parties have their domicile within its forum its decree dissolving their marriage ought to be respected by the Tribunals of every civilized country. The Court in considering a petition for divorce will follow the principles of International Law, whatever doubts may have been felt on the question until the decision in *Le Mesurier* v. *Le Mesurier*. 1895 A.C. 517. As the legislature has not directly given to the Indian Courts the power to dissolve marriages between non-domiciled parties, the District Court has no power by implication even if the argument that residence has been made the test of jurisdiction was a sound one.

Marten, J :—Jurisdiction over residence, with reference to judicial separations as opposed to decrees for dissolution of the marriage itself. is now well recognised by the English Courts as a principle of private International Law and a similar jurisdiction is exercised by the Bombay High Court or its predecessor the supreme court for 100 years. History of the Court for divorce and matrimonial causes in England discussed.

The Court has not any jurisdiction to dissolve the marriage by reason of the appearance of the parties without protest. The High Court has no jurisdiction to dissolve their marriage, notwithstanding that it was solemnized in India and that adultery was committed in India. But on the other hand, the Court has jurisdiction to grant the husband a decree for judicial separation and to provide for the custody of the children. This is because the word 'reside' in S. 2 of the Divorce Act should be construed as such and not as meaning 'domiciled', and because under S. 7 the principles of the English Courts should be applied which in such cases will grant judicial separations to non-domiciled parties. Having regard to S. 7, Indian Courts give or withhold relief on the principles of jurisdiction now finally established in the English Courts and it is no objection to their so doing, that those principles as now enunciated are not the same as those enunciated in the English Court of Appeal in *Niboyet* v. *Niboyet*, 4 P. D. 1. The jurisdiction to dissolve a marriage as opposed to granting a judicial separation did not exist until it was given by the Matrimonial Causes Act, 1857.

Crump, J. :—The jurisdiction, whatever it may be, is conferred by the Act in express terms, and the provisions which confer that jurisdiction are not in any way subject to any rules or principles which may from time to time be laid down by English Courts. Those provisions, confer upon the Courts in India jurisdiction to give decrees for dissolution of marriage between British subjects domiciled in England who in other respects are within the conditions prescribed by the Act. (*Macleod, C. J., Marten and Crump, JJ.*) ALFRED WILKINSON *v.* WILKINSON. **47 Bom. 843 : 25 Bom. L. R 945 : 1923 Bom. 321.**

——**S. 2—*Residence—Meaning of.***

Under S. 2 of the Act, the residence of the petitioner must be *bona fide* and not casual or as a traveller. The High Court has no jurisdiction to grant a decree for restitution either against a

DIVORCE ACT (IV OF 1869), S. 2.

Parsi respondent or a respondent not within the Presidency. (*Scott, C. J. and Chandavarkar, J.*) NUSSERWANJI *v.* ELEONARA. 38 Bom. 125 : 20 I. C. 492 : 15 Bom. L. R. 593.

——S. 2—*Marriage— Solemnization—Proof of date and place of marriage.*

In a divorce case before a final decree is passed the Court must definitely come to a finding on the question whether the marriage was solemnized in India as stated and on what date, though the statement in a verified petition for dissolution of marriage contains the allegation that the parties were married to each other in British India according to the doctrine of Christianity. (*Sanderson, C. J., Mookerjee and Fletcher, JJ.*) SINGARI SANTHAL *v.* PURAIGI SANTHALNI.
57 I. C. 43 : 31 C. L. J. 340.

——S. 2—*Divorce —Jurisdiction—Residence in India.*

Residence in India is sufficient to give the Court jurisdiction under the Act, though the party retains a foreign domicile. There will be a valid divorce in India though the marriage may be valid in the country of the domicile of origin. (*Fletcher, J.*) FRANCESCO GIORDANO *v.* FLORA GIORDANO. 40 Cal. 215 : 20 I. C. 512 : 17 C. W. N. 491.

——S. 2—*Person professing Christianity—Ex-communication—Effect—Hindu Law—Marriage—Dissolution—Conversion of either party to Christianity—Effect--Native Converts' Marriage Dissolution Act, XXI of* 1886.

A person does not cease to profess Christianity within the meaning of S. 2 of the Indian Divorce Act of 1869 merely because she has been excommunicated by the sect or the church to which she belongs. The question of profession of Christianity is a question of her own action and not of the action of her church. The conversion to Christianity of one of two married Hindus does not dissolve the marriage. The convert can under the Native Converts' Marriage Dissolution Act of 1866, obtain dissolution of the marriage by application to the Court first of all for restitution of conjugal rights and then after the lapse of a year for dissolution of the marriage if conjugal rights are refused. (*Schwabe, C. J., Oldfield and Ramesam, JJ.*) PAKKIAM SOLOMON *v.* CHELLIAH PILLAI.
33 M. L. T. (H.C.) 231 : 46 Mad. 889 : 45 M. L. J. 208 : 1924 M. 18.

——Ss. 2 and 7—*Petitioner of English domicile—Indian Courts have no jurisdiction to dissolve marriage.*

Courts in India are not empowered to decree dissolution of the marriage between persons not domiciled within their jurisdiction. The provisions of S. 2 as to the residence, no doubt, apply to cases when the parties are domiciled in India, but where the parties are domiciled in England they cannot override the express provisions in S. 7 of the Act. Courts in India are bound by the provisions of S. 7 of the Act, and give relief on the same principles, namely, that jurisdiction depends on domicile. (*Robinson, C. J., May Oung and Beasley, JJ.*) A. H. D. JONES *v.* K. JONES.
2 Bur. L. J. 106 : 1923 Rang. 228.

DIVORCE ACT (IV OF 1869), S. 3.

——S. 3—*'District Judge'.*

The Resident at Aden is not a District Judge as defined in S. 3 as he has not been appointed a Commissioner of a Division. (*Chandavarkar and Batchelor, JJ.*) A. MOUNA *v.* J. E. MOUNA.
37 Bom. 57 : 17 I. C. 215 : 14 Bom. L. R. 872.

——S. 3—*Judge of Divisional Court.*

Judges of Divisional Courts throughout Burma are District Judges under the Act. No appeal however lies to the Chief Court from their decision. (*Fox, C. J., Hartnoll, Ormond and Twomey, JJ.*) W. E. HARDINGE *v.* H. E. HARDINGE.
6 Bur. L. T. 10 : 19 I. C. 53 : 7 L. B. R. 8 (F. B.).

——S. 3 (1)—*Divorce— Jurisdiction—"Last resided together."*

Where a husband and wife had no permanent residence but they last lived together in a hotel in Bombay for the greater portion of the month, the husband then being on leave from Active Service in Mesopotamia. *Held*, that the Bombay Court has jurisdiction to entertain a suit to dissolve the marriage as the residence was a sufficient residence. (*Marten, J.*) MURPHY *v.* MURPHY.
45 Bom. 547 : 22 Bom. L. R. 1077.

——S. 3 (1)—*Divorce—Petition—Parties living separately—Jurisdiction.*

Though both parties to a petition for divorce are residing separately from each other, the Court has jurisdiction if they lived within the jurisdiction of the Court at the time of the presentation of the petition. (*Marten, J.*) BORGONHA *v.* BORGONHA. 44 Bom. 924 : 59 I. C. 931 : 22 Bom. L. R. 361.

——Ss. 3 (1), (2), (3), 10 and 17—*Divorce petition—Jurisdiction of District Court.*

Where the respondent was not residing, dwelling, or present at any place within the province and has not for many years resided within the jurisdiction of the District Court to which application for divorce had been made and the husband and wife has last lived and co-habited at a place outside the jurisdiction of such Court, having regard to the definitions of the terms of "High Court," "District Judge," "District Court" in S 3 of the Act, it was held that the said District Judge had no jurisdiction to entertain the application. (*Rattigan, Scott-Smith and Le Rossignol, JJ.*) R. J. MORTON *v.* N. M. MORTON.
76 P. R. 1916 : 122 P. W. R. 1916 : 35 I. C. 367 : 139 P. L. R. 1916 (S. B.).

——S. 3 (1)—*Construction of—Residence.*

The word 'together' in S. 3 (1) of the Act must be read with "last resided" only. Had the intention of legislature been to make "together" apply to "reside" also there would have been a comma after resided. (*Reid, C. J., Kensington and Rattigan, JJ.*) HENREITA ALEXANDRA GALE *v.* JAMES FRANK AUNDURAS GALE.
171 P. L. R. 1911 : 47 P. R. 1911 : 10 I. C. 487 : 122 P. W. R. 1911.

——S. 3 (3)—*Jurisdiction— Residence of husband and wife—Divisional Court—District Court.*

DIVORCE ACT (IV OF 1869), S. 4.

A Divisional Court which is the District Court under the Act has jurisdiction in a petition under the Act only if the husband and wife reside at the time of the petition, or have last resided together within the local limits of its ordinary jurisdiction. (*Fox, C. J., Hartnoll and Twomey, JJ.*) MRS. ROSE D'CASTRO *v.* EDMUND D'CASTRO.

7 L. B. R. 5 : 20 I. C. 399 : 6 Bur. L. T. 176.

——— **Ss. 4 and 7**—*Suit for declaration of validity of marriage—Maintainability of—Letters Patent (Patna), Cl. 27.*

A suit for a mere declaration that the plaintiff's marriage with her deceased husband's brother is valid and illegal, is not sustainable on the matrimonial side of the Patna High Court. The jurisdiction of the Patna High Court in matters matrimonial is only such jurisdiction as is comprised within the provisions of the Divorce Act. (*Bucknill, J.*) ADELAIDE CHRISTIANA LISH *v.* DAVID LISH. **(1923) Pat. 127 : 1 P.L.R. 129 : 1923 P. 301.**

——— **Ss. 4, 18 and 19**—*Validity of marriage under Christian Marriage Act—Fraud—Consideration of.*

S. 4 of the Divorce Act does not preclude the Court from considering whether a marriage was duly solemnised under the provisions of the Christian Marriage Act and from declaring a marriage null and void on grounds other than those contained in S. 18 of the Divorce Act. No degree of deception can avail to set aside a marriage knowingly made unless the party imposed upon has been deceived as to the person and thus has given no consent at all. Fraud means fraud upon the other party to the marriage and does not include fraud upon a third party who granted the license. The word 'solemnised' in S. 5 of the Christian Marriage Act means "Celebrated" and deals with the ceremony only and the words " rules, rites, ceremonies, and customs of the church" mean only the rules, etc. as to ritual, and do not include rules or customs as to the capacity of the parties. In a suit for declaration of nullity of marriage, the question is not whether the marriage is void under the law of the church but whether it is void by the law of the country. (*Young, J.*). CONSTERDINE *v.* SMAINE. **47 I. C. 544 : 11 Bur. L. T. 69.**

——— **S. 7**—*Procedure—Decree* nisi—*Petitioner to go into the witness box.*

In all divorce cases the petitioner must come into the witness box, petitioner must be sworn, and he must prove his case because among other things, the judge has to satisfy himself whether there is any collusion between the parties and he has further to satisfy himself as to the complete truth and honesty of the petition. Where this procedure had not been followed, the High Court set aside the decree nisi. (*Mears, C. J., Walsh and Kanhaiya Lal, JJ.*) (HOWARD *v.* HOWARD. **L. R 4 A. 1 : 20 A. L. J. 853 : 44 A. 728 : 1923 All. 43 (F. B.).**

——— **S. 7**—*'For the time being,' meaning of—Validity of the Act.*

Per Crump, J. (*contra* Marten, J.)—There is the possibility of reading into S. 7 of the Divorce Act an intention on the part of Legislature to adopt whatever test the Court of Divorce in England might from time to time lay dawn upon the matter of divorce but that is a forced and unnatural construction. Also it would be necessary to omit the words 'Subject to the provisions contained in this Act.' Had the Legislature intended any such result, it would have been easy to say in express terms that the provisions of the Act must be read as subject to the rules and principles applied from time to time by the Matrimonial Courts in England. They have chosen to say precisely the contrary. Any such construction would introduce an element of uncertainty where certainty is essential. The doctrine of English Courts has varied from time to time upon this point since 1895 domicil alone is recognized as conferring jurisdiction. S. 7 is a residuary section intended to provide for any matters which by inadvertence or otherwise are not expressly dealt with in the Act. It is not unusual in statutory drafting to insert provisions of this nature *ex majore cautela* more especially where an attempt is being made to codify in this country an unfamiliar branch of English Law. The expression 'rules and principles' points rather to the rules and principles on which the Courts deal with these matrimonial cases in requiring a certain degree of evidence and other cognate matters.

Per Marten, J. :—The Indian Divorce Act, 1869 is, and always has been, within the legislative powers conferred upon the Indian legislature by the Indian Councils Act, 1861. (*Macleod, C. J., Marten and Crump, JJ.*) ALFRED WILKINSON *v.* WILKINSON. **47 Bom. 843 : 25 Bom. L. R. 945 : 1923 Bom. 321.**

——— **Ss. 7 and 57**—*Divorce — Remarriage within 6 months is void—Alimony.*

A second marriage by the successful petitioner in a suit for dissolution of marriage within six months of the date of the decree for dissolution is null and void. *Held also* that the reputed wife was not entitled to any permanent alimony. (*Sanderson, C. J., Woodroffe and Richardson, JJ.*) TURNER *v.* TURNER. **48 Cal 636 : 64 I. C. 924 : 25 C. W. N. 710 (F. B.).**

——— **Ss. 7 and 11**— *Co-respondent — Not specified—Leave of Court—English and Indian Law.*

Where a petitioner suing for a divorce could not name the alleged co-respondents (the master having issued citations) and at the hearing, the petitioner applied for leave to dispense with the co-respondents : *Held*, that the direction for such leave must be by application to the Judge on motion founded on affidavit sufficient to satisfy the Court, that petitioner was unable to find out the name of the co-respondent after reasonable efforts. The Court has no jurisdiction to entertain the petition where such leave had not been obtained. (*Fletcher, J.*) Cox *v.* Cox.

47 I. C. 510 : 45 Cal. 525.

——— **S. 7**—*Proceedings for divorce—Uncorroborated testimony—Charge of adultery against a known person—Necessity of impleading him as respondent.*

DIVORCE ACT (IV OF 1869), S. 7.

In proceedings for divorce the evidence of the husband or wife alone ought never to be accepted without corroboration either by witness or at least by strong surrounding circumstances. Where charges of adultery are made against a known person, he ought to be made a co-respondent unless the Judge should otherwise direct. (*Schwabe, C. J., Coutts Trotter and Kumaraswami Sastri, JJ.*) PENDURTI JOSEPH *v.* PENDURTI RAMAMMA. **16 L. W. 689 : (1922) M. W. N. 637 : 31 M. L. T. 416 (H. C.) : 43 M. L. J. 441 : 1923 Mad. 9 (F. B.)**

——Ss. 7 and 17—*Decree nisi for dissolution—No proof of service of petition—Confirmation by High Court—Proof of cruelty—Corroboration.*

The High Court will not confirm a decree for the dissolution of a marriage if it is not satisfied that the respondent was in fact served with a petition for divorce. It is contrary to the principles and rules on which the Court for Divorce and Matrimonial causes in England acts and gives relief, to act on the uncorroborated testimony of a petitioner either to establish adultery or cruelty. Under S. 7 of the Indian Divorce Act the courts in this country should follow the same rule. (*Schwabe, C. J., Oldfield and Phillips, JJ.*) PAYNE *v.* PAYNE. **16 L. W. 16 : 42 M. L. J. 562 : 1922 Mad. 360 (F. B.).**

——Ss. 7 and 50—*Procedure—English Law—Service of petition.*

S. 7 of the Divorce Act applies not only to the grant of relief but also to questions of procedure. Under S. 50 of the Act the manner in which service of petition is to be effected is to be regulated not by the C. P. C. but by general or special orders of the High Court. In the absence of general orders on the subject, the proper course when service cannot be effected on the respondent is to apply to the Court for a special order as to how it is to be effected. The Court will act on the principles laid down by the English decision. (*Robinson, J.*) LOW *v.* LOW. **55 I. C. 269 : 12 Bur. L. T. 199.**

——S. 7—*"Rules and principles"—Explained.*

The words "rules and principles" in S. 7 to have reference rules of *quasi* substantive rather than mere adjective law. (*Hartnoll, O. C. J. and Twomey, J.*) TUVURIAMMAL *v.* SANTIAGO. **7 Bur. L. T. 129 : 23 I. C. 242 : 7 L. B. R. 347.**

——S. 7—*Desertion—Living in separate house owing to husband's adultery.*

Desertion implies an abandonment against the wish of the person charging it. Where a woman lives with her mother on account of her husband's adultery and the husband pays her a fixed maintenance but gets a deed of relinquishment executed by her, the husband showed a clear intention to abandon the wife ; and that such abandonment is against her wish, although she keeps away from him and does not seek a return to cohabitation as long as he continued his *laison* with his mistress and had her living in the house with him. (*Fox, C.J., Hartnoll and Twomey, JJ.*) MA YIN ZA *v.* C. NASH. **5 Bur. L. T. 85 : 15 I. C. 353 : 6 L. B. R. 53.**

——S. 10—*Suit under the Act—Powers of Asst. Judge—Bombay Civil Courts Act, S. 16.*

DIVORCE ACT (IV OF 1869), S. 10.

Under S. 16 of the Bom. Civil Courts Act, the Dt. Judge cannot transfer to the Asst. Judge a suit under the Divorce Act and the Asst. Judge cannot try the suit. (*Scott, C.J., Davar and Beaman, JJ.*) FRENCH *v.* FRENCH. **39 Bom. 136 : 26 I. C. 599 : 16 Bom. L. R. 754.**

——S. 10—*Adultery—Proof—Correspondence between parties is good evidence.*

In a suit for dissolution of marriage the court may presume adultery if it is satisfied that guilty attachment subsisted between the parties and that they had opportunities to have guilty intercourse. The direct fact of adultery need not be proved. In a divorce case, the correspondence between the respondent and the co-respondent is very important evidence. (*Broadway and Abdul Raoof, JJ.*) DAVIDSON *v.* DAVIDSON. **62 I. C. 782 : 3 U. P. L. R. (Lah.) 66.**

——S. 10—*Dissolution of marriage—Change of religion and remarriage—Right of wife for dissolution.*

Under S 10, change of religion by the husband and his subsequent re-marriage entitles his first wife to dissolution of the marriage. (*White, C. J. and Ayling, J.*) NELLIAMMAL *v.* MOOKA NADAN. **14 I. C. 192.**

——S. 10—*Separation—Adultery and cruelty.*

A wife who has obtained a judicial separation on the ground of her husband's adultery is entitled to a dissolution of the marriage on proof that her husband has been guilty of adultery after the separation and that he has been guilty of cruelty to her after separation. (*Twomey, C. J., Ormond and Pratt, JJ.*) MA THIN KYU *v.* MG. BA THEIN. **45 I. C. 914 : 11 Bur. L. T. 227.**

——Ss. 10 and 22—*Repeated cruelty.*

Repeated acts of cruelty by a husband taken together, entitle the wife to a decree for divorce, though each act by itself may not be sufficient ground and no formal complaint or threat of divorce proceedings was made as regards each of them. (*Ormond, J.*) MA PAN NYUN *v.* MUNG AUNG THET. **36 I. C. 982 : 10 Bur. L. T. 228.**

——Ss. 10 and 22—*Divorce—Judicial separation—Adultery—Cruelty required for divorce.*

For a decree for divorce, adultery of the husband together with desertion without reasonable cause for two years or upwards or with such cruelty as without adultery would entitle the wife to a divorce, must be proved. The cruelty must be dangerous to life, limb or health, bodily or mentally or a reasonable apprehension of it. A single severe assault resulting from a dispute as to jewellery would not amount to such cruelty but adultery of the husband, affords ground for judicial separation. (*Fox, C.J., Twomey and Robinson, JJ.*) MACHO *v.* MAUNG SEIN. **8 L. B. R. 385 : 36 I. C. 381 : 10 Bur. L. T. 182.**

——S. 10—*Desertion—Adultery, admission of—Delay in filing petition.*

Per Hartnoll and Parlett, JJ. (*Fox, C. J.,* Diss.)—Admission in a letter from the husband of adultery is not a sufficient proof of adultery. There is no abandonment against the wish of the

DIVORCE ACT (IV OF 1869), S. 10.

wife where she herself left owing to intemperate habits of her husband. *Per Fox, C.J.*—Disinclination from religious motives cannot be regarded as sufficient excuse for not taking action for obtaining the remedy which the law provides for an injured wife and for delaying the presenting of a petition. *Per Parlett, J.*—A wife who seeks to prove desertion must give evidence of conduct on her part showing unmistakeably that such desertion was against her wish actively expressed. The husband must be proved to have wilfully absented himself from her in spite of her wish. Subsequent conduct cannot transform what was a voluntary separation into desertion by the husband. (*Fox, C. J., Hartnoll and Parlett, JJ*). GLANCY *v.* GLANCY. **31 I. C 264: 8 L. B. R. 106 (F.B.)**

———**S. 10**—*Desertion—Two years' time not fulfilled—Application premature.*

No decree can be passed on a petition for divorce made before the two years' period of desertion is over, as it is premature and without a cause of action. (*Fox, C.J., Hartnoll and Parlett, JJ.*) EVELINE MOMENT *v.* JOSEPH MOMENT. **6 Bur. L. T. 177 : 21 I. C. 230 : 7 L. B. R. 37.**

———**Ss. 12, 13 and 14**—*Divorce—Adultery—Condonation—Resumption of co-habitation—Subsequent desertion—Effect of—Petition by husband—Unreasonable delay.*

Resumption or continuance of co-habitation with complete knowledge of the wife's adultery amounts to condonation. Forgiveness to be condonation, must completely restore the offending party to the former status and must be followed by co-habitation. This is essentially the view adopted by the Legislature in S. 14 of the Divorce Act. Condonation of past matrimonial offences is however impliedly conditioned upon the future good behaviour of the offending spouse, and it follows that if after condonation the offences are repeated, the right to make the condoned offences a ground for divorce revives. . To constitute a revival of the condoned offences, the offending spouse need not however be guilty of the same character of offence as that condoned ; any misconduct is sufficient which indicated that the condonation was not accepted in good faith and upon reasonable conditions implied. Unreasonable delay to institute proceedings will generally be excused if it is really due to poverty. (*Mookerjee and Fletcher, JJ.*) CONSTANCE CATHERINE MORENO *v.* HENRY WILLIAM BUNN MORENO. **57 I. C. 216 : 31 C. L. J. 435.**

———**Ss. 12, 14 and 17** — *Dissolution of marriage*—Ex parte *decree—Duty of Court.*

A decree for dissolution of marriage cannot be legally granted merely on the ground that the respondent does not oppose the petition. The Court must satisfy itself that there was good reason for the delay in suing, and that connivance or condonation is absent. (*Le Rossignol, Broadway and Martineau, JJ.*) LEHNA MAL SADIK *v.* MUSSAMMAT HAKIM BIBI. **25 P. R. 1919: 51 I. C. 235 : 71 P. L. R. 1919 (F. B.).**

———**Ss. 14, 13 and 12**—*Condonation, what amount to—Collusion—Desertion on part of husband—Wilful neglect or misconduct.*

DIVORCE ACT (IV OF 1869), S. 15.

A mere refusal by the husband, without reasonable cause, of the matrimonial bed does not constitute desertion or such wilful neglect or misconduct as conduces to the wife's adultery and is not a sufficient ground for dissolution of marriage. Condonation is forgiveness of a conjugal offence with full knowledge of all the circumstances and is purely a question of fact. It is a blotting out of the offence imputed so as to restore the offending party to the position which he or she occupied before the commission of the offence. Mere forgiveness is not condonation ; condonation means completely restoring the offending party and must be followed by co-habitation. A collusion under S. 13 exists where the initiation of the proceedings for dissolution of marriage is procured or its conduct provided for by agreement between the spouses or their agents. (*Anderson, C. J. and Mookerjee, J.*) DE STE CROIX *v.* DE STE CROIX. **44 Cal. 1091: 41 I. C. 447: 21 C. W. N. 717.**

———**S. 14**—*Wife's adultery—Husband's adultery proved—Application dismissed.*

An application by the husband for dissolution of marriage on the ground of wife's adultery was dismissed by the Dt. Judge as the husband was found guilty of a persistent course of adultery, as there was unexplained delay before any complaint was made by the husband as regards his wife's adultery, and as both the husband and the wife had combined to withhold facts from the Court. *Held*, the High Court would not under the circumstances interfere with the decision of Dt. Judge refusing the application. (*Batchelor, A. C. J. and Shah, J.*) PALMER *v.* PALMER. **41 Bom. 36: 36 I. C. 800: 18 Bom. L. R. 818.**

———**S. 14**—*Adultery—Petitioner guilty of—Right to decree.*

A decree for divorce may be obtained even if the petitioner be guilty of adultery under peculiar circumstances, discretionary with the Court. But the Court is bound by the rules binding the English Courts under the English Divorce Act. A native Christian spouse left her husband and lived with a Muhammadan. The husband tried his best to recover her for a long time and applied for divorce. It was found that he committed adultery during marriage and the divorce proceedings. *Held*, that the circumstances being peculiar, the petitioner should get a decree in spite of his adultery and delay in taking proceedings. (*Reid, C. J. and Kensington and Rattigan, JJ.*) M. *v.* N. **70 P. R. 1911 : 12 I. C. 960 : 239 P. W. R. 1911.**

———**S. 14**—*Adultery—Confession—Collusion.*

If a Court is satisfied that there is no collusion between the parties, it may act on an uncorroborated confession of adultery by a party to the proceedings. 38 Cal 907 Foll. (*Maung Kin, J.*) SMITH *v.* MA PWA SHIN. **49 I. C. 305: 11 Bur. L. T. 197.**

———**S. 15**—*Suit for divorce—Counter-claim by husband alleging adultery on the part of wife—Jurisdiction to add foreigner as co-respondent.*

DIVORCE ACT (IV OF 1869), S. 15.

Speaking generally, a guilty party cannot obtain relief by way of judicial separation any more than she can obtain relief by way of divorce. Desertion to justify judicial separation must be a wilful absention by the husband against the wish of the wife. 13 P. D. 141; 17 B. 624 Ref. Where a wife sues her husband for divorce on the ground of his adultery it is open to the husband in his written statement to counter-petition for a divorce on the ground of his wife's adultery. It is not necessary that the husband should take an independent proceeding. Where a husband alleges adultery on the part of the wife with a foreigner, the Court has jurisdiction to add such foreigner as a co-respondent to the proceeding. 1913 P. 75, 1913 P. 271, Ref. (*Marten, J.*) ROSE HILL *v.* LUKE C. HILL. **47 Bom. 657: 25 Bom. L. R. 289. 1923 Bom. 284.**

———**Ss. 15 and 37**—*Suit for dissolution—Wife's adultery—Dismissal—Grant of alimony.*

If a husband's suit for dissolution of marriage on the ground of his wife's adultery is dismissed on the ground that the adultery alleged was not proved, the Court cannot as part of the decree in the suit grant permanent alimony to the wife. (*Krishnan and Ramesam, JJ.*) DEVASAHAYAM *v.* DEVAMONY. **46 M. 133: 17 L. W. 19: 23 M. W. N. 184: 43 M. L. J. 763: 1923 Mad. 211.**

———**S. 16**—*Decree* nisi *for divorce—Rescission of decree* nisi—*Matrimonial suit—Costs—Security for—Omission to furnish—Procedure.*

A decree *nisi* was passed *ex parte* in a suit for divorce. On an application to make the decree absolute the respondent tried to show that the petitioner had been guilty of adultery and that he was not entitled to relief. *Held*, the court is bound to inquire into the truth of the allegations and examine the evidence in support of them even though the respondent was not entitled to costs under S. 16 of the Divorce Act.

If in a matrimonial suit the husband being ordered to give security for the wife's costs and having failed to give it then, where the husband is the petitioner, his petition should be stayed and not dismissed. Where the wife is the petitioner, the husband's defence should not be struck out but he should be proceeded against for contempt if he is proved to be able to pay but contumaciously refuses to do so. (*Marten, J.*) WILHELMINA CODD *v.* BERTIE ELIJAH CODD. **47 Bom. 664: 25 Bom. L. R. 339.**

———**Ss. 16, 17 and 69**—*Reference to High Court—Effect.*

Per Wallis, C.J. and Ayling, J. (*Sadasiva Aiyar, J. dissenting*).—When in a divorce case the decree is referred to the High Court for confirmation the said Court has a jurisdiction for the purpose and it is not necessary for the said purpose that the petitioner himself should present personally before the High Court. (*Wallis, C. J., Ayling and Sadasiva Aiyar, JJ.*) GUDA WILLIAM *v.* GUDA KARUNAMMA. **29 M. L. J. 269: 29 I. C. 178: 17 M. L. T. 357 (F. B.)**

———**S. 16**—*Decree* nisi—*Power of High Court to pronounce.*

A High Court alone is competent to pronounce a decree *nisi* under S. 16 of the Divorce Act. (*Ormond, Parlett and Robinson, JJ.*) MA WAING *v.* EBRAHIM. **43 I. C, 519,**

DIVORCE ACT (IV OF 1869), S. 18.

———**S. 17**—*Scope of.*

The obvious intention of the legislature as expressed in S. 17 of the Divorce Act is that the High Court upon a reference for confirmation, should review the entire evidence and come to its own conclusion whether facts sufficient to justify a decree for dissolution of the marriage are or are not established by that evidence, (*Mears, C.J., Piggott and Walsh, JJ.*) A. A. GARLINGE *v* I. R. GARLINGE. **1922 All. 504.**

———**Ss. 17, 37 and 44**—*Court having jurisdiction to hear petition for alimony.*

It is the District Court whose order for dissolution of marriage was confirmed by the High Court, that has got jurisdiction in a petition for alimony. (*Scott, C. J. and Batchelor, J.*) MINMIE WALLACE *v.* ARTHUR WALLACE. **40 Bom. 109. 31 I. C. 331: 17 Bom. L. R. 948.**

———**Ss. 17 and 44**—*Decree* nisi—*Death of petitioner after decree—Confirmation cannot be made.*

Where a person had obtained a decree *nisi* for dissolution of marriage and custody of the children and dies before its confirmation by the High Court under S. 17 of the Divorce Act, the Court has no jurisdiction to confirm the decree for dissolution of the marriage or to make any order as regards the custody of the children. (*Stanhope* v. *Stanhope*, 11 P. D. 103, Foll. (*Sanderson, C. J., Woodroffe and Richardson, JJ.*) BUTTERFIELD *v.* BUTTERFIELD. **50 C. 153: 1923 Cal. 426.**

———**S. 17**—*Decree for dissolution of marriage—Confirmation—Notice to respondent not necessary.*

No notice to the respondent is necessary in proceedings for confirmation of a decree for dissolution of marriage. (*Scott-Smith, Le Rossignol and Abdul Raoof, JJ.*) ETHEL MABEL EMILY HARRIS *v.* C. P. HARRIS. **10 P.L.R. 1921: 59 I. C. 89: 19 P. W. R. 1921.**

———**S. 17**—*Parties—Alleged adulterer not joined as party—Court's own initiative—Amendment of petition.*

Where in divorce proceedings the petitioner charged his wife with adultery but did not mention the adulterer's name and the Judge added his name as co-respondent on his initiative, the Judge was in error in adding his name without amending the petition accordingly. (*White, C. J., Ayling and Oldfield, JJ.*) JOHN HOWE *v.* CHARLOTTE HOWE. **38 Mad. 466: 14 M. L. T. 447: 21 I. C 645: (1913) M. W. N. 983: 25 M. L. J. 594.**

———**Ss. 18 and 37**—*Decree of nullity of marriage—Marriage within six months of confirmation of decree.*

A decree of nullity must be passed when the marriage is effected within six months of the confirmation of a decree of dissolution of a former marriage of either party where the former husband or wife is living at the time of the latter marriage. (*Reid, C.J., Robertson and Kensington, JJ.*) BETERRIDGE *v.* CURRY. **29 P. R. 1913: 19 I. C. 778: 222 P. L. R. 1913.**

[**Also** (*Wallis, J.*) BATTIE *v.* BROWN, **38 I. C. 413: 38 Mad. 452**].

DIVORCE ACT (IV OF 1869), S. 19.

———S. 19—*Nullity of marriage—Hereditary syphilis—Impotency—Consent obtained by fraud.*

Where it was found that the marriage between the petitioner and the respondent was not consummated, that the respondent to the knowledge of her father had hereditary syphilis though the private parts were not affected and sexual intercourse was not impossible, that this fact was not known to the petitioner until after marriage and that the petitioner was not likely, from sexual intercourse alone, to become infected with the disease though there was a great risk of such infection, *held*, that there was no 'fraud in obtaining the consent ' within S. 19 of the Act : *held*, also that under the circumstances consummation was practically impossible, that there was impotency on the part of the respondent, and that the marriage should be annulled. (*Greaves, J.*) BIRENDRA KUMAR *v.* HEMLATA. **67 I. C. 949 : 25 C. W. N. 706.**

———S. 19—*New marriage within 6 months after the decree absolute not valid—Previous marriage—How long in force—Jurisdiction to declare—Null and void.*

Where a new marriage was solemnized within six months of a decree absolute for divorce of a party the new marriage was held to be void not on the date of the marriage but also it was held that the previous marriage was in force till then within the meaning of S. 19 (4) of the Divorce Act so as to give jurisdiction to a Court under S. 19 of the Act to pronounce a decree of nullity. (*Wallis, J.*) J. S. BATTIE *v.* G. R. BROWN. **30 I. C. 413 : 38 M. 452.**

———S. 20—*Nullity of marriage—impotence—Proof.*

In the absence of an express allegation and strict proof that the party was impotent, *i.e.*, physically unfit for consummation both at the date of marriage and at the date of the institution of the suit, a suit for declaration of nullity of a marriage on the ground of impotency is not maintainable. (*Wallis, C. J., Sadasiva Aiyar and Srinivasa Aiyangar, JJ.*) DAWSON *v.* DAWSON. **30 I. C. 565 : 29 M. L. J. 183.**

———S. 22—*Desertion—Meaning of—Abandonment.*

Desertion under the Divorce Act implies an abandonment against the wish of the person charging it but it is not a universal rule that the abandonment must be against expressed wish of that person. (*Fox, C.J., Hartnoll and Robinson, JJ.*) MA ARRAY *v.* M G.E. PO. **8 Bur. L. T. 32 : 8 L. B. R. 256 : 27 I. C. 604 : 9 Bur. L. T. 207.**

———S. 23—*Adultery of applicant—Refusal of application.*

Adultery on the part of the applicant is sufficient legal ground for rejecting an application for judicial separation though otherwise it is a fit case. (*Stanley Griffin and Tudball, JJ.*) JOHN HENRY RHINE *v.* MABEL RHINE. **33 All 500 : 9 I. C. 796 : 8 A. L. J. 318.**

———S. 31—*Delay—Meaning of.*

" Delay " used in S. 31 of the Divorce Act must be the sort of delay that would show the petitioner to have been insensible to the loss of the husband or wife as the case may be. It must be understood to be culpable delay somewhat in the nature of connivance or acquiescence. (*Fox, C. J., Hartnoll and Robinson, JJ.*) MA. ARRAY *v.* M.G. E. PO. **8 Bur. L T. 32 : 8 L. B. R. 256 : 27 I. C 604 : 9 Bur. L. T. 207.**

DIVORCE ACT (IV OF 1869), S. 38.

———S. 35—*Costs.*

Where a petition for the dissolution of marriage on the ground of adultery is made and is filed by the husband and the wife enters an appearance and denies the allegations against her, she has an absolute right to require her husband to furnish her with funds sufficient to enable her to make a full and satisfactory defence and to obtain such assistance from counsel as is reasonable under the circumstances. (*Mears, C. J., Piggott and Walsh, JJ.*) A. A. CARLINGE *v.* I. R. CARLINGE. **1922 All. 504.**

——— S. 36—*Alimony*—Pendente lite.

A Court has discretion to give alimony *pendente lite* if it thinks reasonable and just especially where the wife avers that she had been forced to prostitution by her husband. (*Pratt, J.C.*) DAN BURCHELL *v.* IVY WINIFRED BURCHELL. **49 I. C. 203 : 12 S. L R. 89.**

——— S. 37—*Decree* nisi—*Discretion.*

A decree *nisi* for divorce for adultery having been obtained against a wife, it is left to the discretion of the Court to grant alimony to her under the particular circumstances of the case. (*Walsh, J.*) W. E. MCGOWAN, *v.* J.G. MCGOWAN. **38 All. 688 : 37 I. C. 143 : 14 A. L. J. 786.**

———S. 37—*Maintenance— Power to award lump sum.*

Under S. 37 of the Divorce Act, the Court has power to make an order for payment of a lump sum for maintenance. The words " for any time not exceeding her own life" qualify "annual sum " and not " gross sum ". The word 'secure' would ordinarily include "pay". (*Scott, C.J. and Hayward, J.*) BLANCHE SOMERSET TAYLOR *v.* CHARLES GEORGE BLEACH. **39 Bom. 182 : 27 I. C. 494 : 17 Bom. L. R. 56.**

———S. 37—*Decree absolute dissolving marriage—Petition for alimony, 15 years after decree—Power of Court to grant after such delay.*

A wife whose marriage was dissolved by a decree absolute passed in the year 1905, petitioned to the Court in 1920 for grant of permanent alimony : *Held*, that the Court had no power to pass an order in her favour under S. 37 of the Act after such an unreasonable delay after the passing of the decree absolute in 1905. The words "on any decree" in S. 37 of the Act should be construed as meaning "at the same time as or after a reasonable time after the passing of the decree." Circumstances of each case will determine "what is reasonable time". (*Wallis, C. J. and Krishnan, J.*) LLOYD *v.* LLOYD. **44 Mad. 987 : 41 M. L. J. 269 : 14 L. W. 196 : (1921) M. W. N. 591.**

———S. 38—*Alimony — Date from which counted—Basis of calculation.*

Alimony should usually be allowed from the date of service of summons upon the respondent; but where no summons has been served it should be from the time the latter entered appearance.

DIVORCE ACT (IV OF 1869), S. 43.

Income-tax and insurance premia can be deducted but not the expenses of a son's education, in calculating the net income of a person for granting alimony to his wife. (*Hartnoll, C. J. and Twomey, J.*) HARDINGE *v.* H. HARDINGE.
11 I. C. 813 : 4 Bur. L. T. 176.

——S. 43—*Costs of wife's appeal against decree* nisi.

A husband may, in a proper case on the wife's application, be ordered by the appellate Court to provide for the costs of the wife's appeal against a decree *nisi* for divorce, but such a procedure should be adopted only after careful scrutiny and should be refused when facts do not justify it. (*Sanderson, C. J.*) CROIXE DE STE *v.* CROIXE PHILIP DE STE. **44 Cal. 35 : 24 C. L. J. 226 : 37 I. C. 216 : 21 C. W. N. 711.**

——S. 43—*Decree* nisi *for dissolution of marriage—Custody and maintenance of children—Order as to, nature of—Procedure.*

An order under S. 43 regarding the custody and maintenance of children, is an *ad interim* order liable to terminate upon the confirmation of decree by the High Court and hence such an order should not form part of the decree *nisi* by Dt. Judge, for dissolution of marriage. (*Rattigan, C. J., Broadway and Martineau, JJ.*) *In the matter of the* INDIAN DIVORCE ACT.
54 I. C. 943 : 142 P. R. 191 (S. B.).

——S. 57—*Decree for dissolution — Second marriage within six months—If valid.*

The second marriage of a Christian within six months of a decree *nisi* for dissolution of his first marriage is null and void and the decree of a High Court referred to in S. 57 is a decree absolute and not the decree *nisi*. (*Chamier, J.*) JACKSON *v.* JACKSON. **34 All. 203 : 13 I. C. 958 : 9 A. L. J. 108.**

——S. 57—*Decree absolute—Lapse of six months—Necessary—Remarriage when invalid.*

Sec. 57 of the Indian Divorce Act strictly prohibits a remarriage within six months after the decree absolute. (*Wallis, J.*) J. S. BATTICE *v.* G. E. BROWN. **30 I. C. 413 : 38 M. 452.**

DOCTRINE OF FACTUM VALET.

See (1) HINDU LAW—ADOPTION.
(2) HINDU LAW—MARRIAGE.

DOCUMENT.

See (1) DEED.
(2) EVIDENCE.
(3) EVIDENCE ACT.

DOCUMENTARY EVIDENCE.

See EVIDENCE ACT.

DOMICILE.

See also ALIEN.

——*Commercial domicile—Prize of war.*

Every act of the claimant at the time of the breaking of the war was consistent with the intention to retain his commercial domicile at Constantinople and inconsistent with any intention to divest himself of it. He did his best to continue the voyage to a Turkish port although he was not able to show that there was any particularly pressing commercial object in sending her to Basra, where there was no cargo engaged, where no agent had been appointed and where there was no trade to be expected, he being in the Piraeus and his ships being in the hands of the Turkish Government. *Held* the claimant had not discharged the burden of proof which lay upon him of showing that he was no longer commercially domiciled in Turkey as he had been before. The condemnation must therefore stand. (*Lord Sumner.*) SOCRATES ATYCHIDES *v.* SECY. OF STATE FOR INDIA. **1922 P. C. 371.**

DOMINANT AND SERVIENT OWNER.

See (1) EASEMENT.
(2) EASEMENTS ACT.

DONATIO MORTIS CAUSA.

See (1) HINDU LAW—GIFT.
(2) HINDU LAW—WILL.
(3) MAHOMEDAN LAW—GIFT.
(4) MAHOMEDAN LAW—WILL.
(5) TRANSFER OF PROPERTY ACT, SS. 122—128.
(6) WILL.

DONEE.

See GIFT.

DONOR AND DONEE.

See (1) EVIDENCE ACT, S. 115.
(2) HINDU LAW—GIFT.
(3) MAHOMEDAN LAW—GIFT.

DOWER.

See MAHOMEDAN LAW.

DRAIN.

See (1) EASEMENT.
(2) EASEMENTS ACT.

DRUGS.

See BOMBAY ABKARI ACT.

DUBASH.

See also CONTRACT ACT, S. 182.

——*Position of—In the Madras Presidency.*

The position of a Dubash in the Madras Presidency is much the same as that of a *banian* in Northern India. He is a sub-agent of a particular kind. 18 C. 573 (P. C.), Foll. (*Wallis, O. C. J. and Seshagiri Aiyar, J.*) SOUTH INDIAN INDUSTRIALS *v.* MINDI RAMA JOGI.
26 I. C. 822 : 27 M. L. J 501.

DUMBNESS.

See HINDU LAW—SUCCESSION.

DURESS.

See CONTRACT.
CONTRACT ACT, S. 16.

DUR PATNIDAR.

See BENGAL TENANCY ACT.

DWAYAMUSHYAYANA.

See HINDU LAW—ADOPTION.

DWIRGAMMAN CEREMONY.

See HINDU LAW—WIDOW.

DYING DECLARATION.

See EVIDENCE ACT, S. 32.

END OF VOLUME II.

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